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**CONFIDENTIAL**  
**THIS REPORT IS EMBARGOED UNTIL 12H00**  
**ON TUESDAY 1 JUNE 1993**

**FINAL REPORT TO THE NEGOTIATING COUNCIL OF  
TECHNICAL COMMITTEE NO. 7, THE COMMITTEE DEALING  
WITH THE REPEAL OR AMENDMENT OF DISCRIMATORY  
LEGISLATION OR LEGISLATION IMPEDING FREE POLITICAL  
ACTIVITY**

The Negotiating Council, at its meeting on Tuesday 18 May, mandated the above Technical Committee to identify, within two weeks, those laws which are discriminatory and inhibit free political activity and which should, accordingly, be repealed. In addition the Technical Committee was mandated to draft a "higher code" along the lines suggested in its First Report, together with suggestions for the appropriate implementation mechanisms.

In this Report the following issues will be considered.

1. Discriminatory laws which constitute the foundations of political apartheid.
2. Discriminatory laws which flow from the above laws.
3. Laws which are inherently discriminatory.
4. Laws which may impede free and fair elections.
5. A proposed "higher code" designed to ensure free and fair elections. This section will deal with the code, mechanisms for its enforcement, remedies and sanctions for violation of the code.

Before embarking upon this study it is necessary first to provide a framework indicating what the Committee understands by discriminatory laws and laws that may impede free and fair elections. The term "South Africa" is also one that requires clarification.

**(a) Discriminatory Laws**

Racial discrimination is defined by the International Convention on the Elimination of All Forms of Race Discrimination of 1965 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 (article 1).'

The Convention on the Elimination of All Forms of Discrimination against Women of 1979 contains a similar definition. It defines discrimination against women, as:

'any distinction, exclusion, or restriction made on the basis of sex which has the effect of or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field' (article 1).

In this Report discrimination will therefore be viewed as the unequal allocation of rights and freedoms on the basis of race, ethnic origin, colour, gender, age, disability, religion, creed, conscience, political opinion, or sexual orientation. For historical reasons the emphasis will fall on discrimination on grounds of race and gender.

Both the above International Conventions recognize the need for affirmative action and do not regard such action as discriminatory.

The Committee also takes the view that the provision of separate facilities or opportunities, in accordance with the "separate but equal" doctrine, constitutes discrimination. The Committee agrees with the decision of the US Supreme Court in **Brown v Board of Education 347 US 483 (1954)** that separate facilities etc are inherently unequal.

#### **(b) Laws that may impede free and fair elections**

Laws that may impede free and fair elections include any law that may

- \* deny or interfere with the right to vote
- \* deny the equality of treatment of voters in the whole election process from the time of qualification as a voter to the casting of the ballot
- \* prevent the free exercise of freedom of speech, expression or access to information
- \* deny political parties equal access to voters, to venues for meetings, to the media, to funding resources etc



- \* interfere with the freedoms of association and assembly (including the right to demonstrate)
- \* interfere with or deny freedom of the press or media
- \* prevent an election from being conducted in accordance with uniform rules for the whole country
- \* deny the right to stand for election
- \* deny the right to vote freely without fear of victimization
- \* deny the right of political parties to canvass voters.

(c) South Africa

It is not the function of this committee to pronounce on the statehood of the TBVC states. The fact that the TBVC states are all represented in the Negotiating Council does, however, indicate that this body seeks to find a solution for South Africa within its boundaries of 1910. For this reason South Africa is understood to mean the territory of South Africa within its boundaries of 1910.

**1. DISCRIMINATORY LAWS CONSTITUTING THE FOUNDATIONS OF APARTHEID**

ACT/ORDINANCE NUMBER	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
110 of 1983	Republic of South Africa Constitution Act	Provides for the present racially based three Houses of Parliament with exclusion of blacks.
100 of 1976	Status of Transkei Act	Grants independence to Transkei and thus creates a separate territory/state for an ethnic group.
89 of 1977	Status of Bophuthatswana Act	Grants independence to Bophuthatswana and thus creates a separate territory/state for an ethnic group.
107 of 1979	Status of Venda Act	Grants independence to Venda and thus creates a separate territory/state for an ethnic group.
110 of 1981	Status of Ciskei Act	Grants independence to Ciskei and thus creates a separate territory/state for an ethnic group.
8 of 1978	Bophuthatswana Border Extension Act	Expansion of Borders of Bophuthatswana.
2 of 1980	Borders of Particular States Extension Act	Expansion of borders of TBVC states.
38 of 1927	Black Administration Act	Provides for the Administration of Black affairs and designates the State President as Supreme Chief of all blacks in the RSA.
68 of 1951	Black Authorities Act	Provides for the establishment of certain black authorities and defines their functions.
26 of 1970	National States Citizenship Act	Provides for citizenship of self-governing black territories.



21 of 1977	Self-governing Territories Constitution Act	Provides for the establishment of legislative assemblies and executive councils in the self-governing territories. The self governing territories were created by way of proclamations, which provide for ethnic-based citizenship. See attached list (Annexure A), for relevant proclamations.
102 of 1982	Black Local Authorities Act	Provides for the establishment of local committees, village councils and town councils for black persons. Qualification of voters racially based.
45 of 1979	Electoral Act	Blacks excluded from electoral process.
117 of 1979	Local Government Bodies Franchise Act	Voting rights limited to persons registered as voters in respect of a House of Parliament
8 of 1962	Local Government Ordinance (Orange Free State)	Racial disqualifications regarding the right to vote or to become a councillor.
20 of 1974	Municipal Ordinance (Cape)	Racial disqualifications in respect of voters, representatives of voters and councillors.
18 of 1976	Divisional Councils Ordinance (Cape)	Racial disqualifications in respect of voters, representatives and councillors.
25 of 1974	Local Authorities Ordinance (Natal)	Racially Based
18 of 1976	Durban Extended Powers Consolidated Ordinance (Natal)	Racially based (group areas mentioned).
17 of 1939	Local Government Ordinance (Transvaal)	Racially based.

16 of 1970	Municipal Election Ordinance (Transvaal)	Racially based
4 of 1984	Coloured and Indian management Committees Ordinance (Transvaal)	Racially based.
22 of 1962	Local Government (Extension of Powers) Ordinance (Transvaal)	Racially based.
46 of 1959	Representation between the Republic of South Africa and Self-Governing Territories Act	Although repealed in part, it still forms the legislative cornerstone of the self-governing territories.
86 of 1988	Promotion of Constitutional Development Act	Although not implemented it is a constitutional law premised on apartheid.
73 of 1986	Restoration of South African Citizenship Act	Fails to restore citizenship to all South Africans deprived of South African citizenship due to creation of TBVC states.
80 of 1986	Joint Executive Authority for Kwazulu and Natal Act	Partnership between self-governing territory and Natal.



**2. DISCRIMINATORY LAWS WHICH FLOW FROM THE LAWS  
CONSTITUTING THE FOUNDATIONS OF APARTHEID**

ACT NUMBER	SHORT TITLE
39 of 1976	National Education Policy Act
70 of 1988	Education Affairs Act (House of Assembly)
47 OF 1963	Coloured Persons Education Act
3 of 1987	Development Act (House of Representatives)
61 of 1965	Indians Education Act
12 of 1968	Indians Advanced Technical Education Act
4 of 1987	Housing Development Act (House of Delegates)
27 of 1951	Black Building Workers Act
90 of 1979	Education and Training Act
27 of 1981	Technikons (Education and Training) Act
91 of 1984	University Staff (Education and Training) Act
104 of 1987	Community Welfare Act (House of Representatives)
81 of 1976	Aged Persons Act (particularly section 23)
44 of 1957	Defence Act (compulsory military service for whites only)

There are furthermore still laws of provincial and local authorities that discriminate on grounds of race in the field of health, pensions etc.

It has been suggested that this Committee should consider reparations for harm caused by discriminatory laws (submission of Mr A Rajbansi). This seems to go beyond our mandate.

### 3. LAWS WHICH DISCRIMINATE ON GROUNDS OF SEX AND RELIGION

#### Sex

ACT NUMBER	SHORT TITLE
44 OF 1949	Citizenship Act
73 of 1986	Restoration of South African Citizenship Act (Section 5)
72 of 1986	Identification Act (Sections 43 and 44)
96 of 1991	Aliens Control Act (Section 28)

See Government Gazette No 14591 of 19 February 1993 which lists a number of discriminatory statutes (Annexure B).

A number of customary law systems discriminate against women. This Committee does not believe that discriminatory laws of such a kind fall within its jurisdiction since they do not interfere with free and fair elections.

The minority status of women under customary law encourages a climate of thought that such women are subject not only to the guardianship but also to the political direction of their husbands.

Many of the obstacles that prevent the political participation of women are not found in existing laws, but in practices and attitudes of husbands, employers, civic leaders and politicians.

Particularly important here is the access of women to canvassing, political information, voter education and voting. Domestic workers and farm workers are particularly vulnerable. Women, who bear the double burden of work and housework, are also prevented from attending meetings etc.

#### Religion

Laws governing Sunday observance discriminate against non-Christians.



#### 4. LAWS WHICH MAY IMPEDE FREE AND FAIR ELECTIONS

4.1 Every city and town in South Africa has by-laws regulating the holding of public meetings, demonstrations, processions, etc. Obviously it is beyond the resources of this Committee to identify all these laws and to consider the extent to which they may impede free and fair elections. Their validity must be measured against the standards contained in the attached Higher Code. After the adoption of such a code they should automatically become null and void to the extent that they violate this code. See for example:

- \* Standard street and Miscellaneous By-Laws of Transvaal Administration Notice 36 B of 14 March 1973
- \* By-Laws relating to Streets and Street Collections GN R2606 of 2 December 1983 (99 8990), in respect of black Local Authorities.

4.2 Some self-governing territories have enacted laws dealing with public safety, public peace, order, or good government which impose serious restrictions on freedom of political activity and freedom of speech in the territory. They are permitted to enact such legislation in terms of section 21A of Schedule I of the Self-Governing Territories Constitution Act 21 of 1971. Such legislation must be strictly scrutinized to ensure that it complies with the standards contained in the attached Code. After the adoption of the Higher Code legislation which violates the Code should automatically be null and void.

The following are examples of legislation from the self-governing territories which should be repealed:

##### Lebowa

Public Service Amendment Act of 1984 amending section 25A of Act 2 of 1972 which denies the political freedoms of civil servants.

##### KwaNdebele

The KwaNdebele Public Safety Act 5 of 1987.

##### KwaZulu

KwaZulu Black Administration Amendment Act 26 of 1988 dealing with the movement of black persons at the instance of the executive.

## 4.3

The laws of the TBVC states governing public safety and the conduct of elections require special scrutiny.

ACT ORDINANCE NUMBER	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
30 of 1977	Public Security Act (Transkei)	Based on the following Acts of the RSA that have since been repealed: (a) Suppression of Communism Act, 1950 (b) Unlawful Organizations Act, 1960 (c) Section 22 of the General Law Amendment Act, 1962 (Sabotage) (d) Terrorism Act, 1967 (e) Certain provisions of the Riotous Assemblies Act, 1956 The Act consequently provides for a prohibition on organizations and publications; restriction of persons; prohibition on gatherings; detention without trial; and further provides for wide discretionary emergency powers.
32 of 1979	Internal Security Act (Bophuthatswana) As amended by Acts 39 of 1985, 5 of 1986, 13 of 1986, 2 of 1988.	Provides for a prohibition on organizations, publications and gatherings; the restriction of persons; detention without trial and wide discretionary powers.
13 of 1982	National Security Act (Ciskei) As amended by Acts 35 of 1983, 33 of 1985, 4 of 1991 and Security Amendment Decree 1992	Resembles the Internal Security Act, 1982 of the RSA and provides for a prohibition on organizations, publications and gatherings; detention without trial and wide discretionary emergency powers.
13 of 1985	Maintenance of Law and Order Act (Venda)	A replica of the Internal Security Act, 1982 of the RSA before its amendment in 1991.
40 of 1985	Bophuthatswana Security Clearance Act	
1 of 1988	Republic of Bophutatswana constitution Amendment Act	



## 4.4

South Africa

Obviously South Africa will require security laws during the election period. Such laws should not, however, place arbitrary powers in the executive authority. The South African Internal Security Act 74 of 1982 as amended by the Internal Security Amendment Act 138 of 1991 is a much better model than the laws of the TBVC states. Nevertheless it has certain shortcomings.

The following laws should be repealed or substantially amended:

ACT NUMBER	SHORT TITLE	REASON FOR REPEAL OR AMENDMENT
3 of 1953	Public Safety Act	Grants unfettered powers to State President and Minister of Law and order to declare a state of emergency or an unrest area respectively and to promulgate emergency regulations or regulations in an unrest area. Jurisdiction of the courts ousted to a great extent.
74 of 1982	Internal Security Act	Empowers Minister of Law and Order to declare certain organizations unlawful and further provides for detention without trial; a prohibition on gatherings and offences regarding organized resistance against laws of the RSA.
67 of 1976	Parliamentary Internal Security Commission Act	Establishes a Parliamentary Internal Security Commission.
52 of 1973	Gatherings and Demonstrations in the Vicinity of Parliament Act	Prohibits demonstrations in the vicinity of Parliament.
71 of 1982	Demonstrations in or near Court Buildings Prohibition Act	Prohibits demonstrations in or in the vicinity of court buildings.
103 of 1992	Gatherings or Demonstrations in or near the Union Buildings Act	Prohibits demonstrations at the Union Buildings.

31 of 1974	Affected Organizations Act	Empowers the State President to declare certain organizations to be affected organizations whereupon such organizations are prohibited from receiving funds from abroad.
42 of 1974	Publications Act	Section 47(2) permits the banning of publications deemed to be prejudicial to the safety of the state, the general welfare, peace and social order.
26 of 1989	Disclosure of Foreign Funding Act	Regulates the disclosure of the receipt of money form outside the RSA by or for certain organizations or persons.
51 of 1968	Prohibition of Foreign Financing of Political Parties Act	Prohibits the receipt by political parties of financial assistance from abroad.



## 5. THE "HIGHER CODE"

### 5.1 Why this Code?

This committee has been instructed to prepare and submit two documents:

5.1.1 A list containing some of the most important discriminatory laws (see I - IV)

5.1.2 A Code which can serve as a "higher law" to be used for judging all Acts that may impede free and fair elections. This Code is not another Electoral Act. It has to be far more and quite different - a supreme law to be applied by properly equipped structures in order to ensure that any Act impeding free and fair elections can be judged and an adequate and swift remedy be made available. The need for a separate Electoral Act will remain, albeit a new or updated one.

The following exposition will explain the purpose, content and operation of the proposed Code. In certain areas these proposals could overlap with the work of other Technical Committees - like the one on an Independent Electoral Commission. Such areas will become clearer when reports from the various Committees are available. Joint tasks may then be undertaken if necessary.

At this stage it is however clear that this proposal for an Election Code has a focus of its own:

5.1.2.1 To provide for principles, mechanisms and remedies to ensure that actions in terms of existing legislation (original and subordinate) and by existing authorities (of various governments and tiers) are judged uniformly. Its purpose is not so much to provide for the technical means of conducting and monitoring the first democratic election and the campaigning preceding it but rather to deal with the myriad of existing laws that could impinge upon free and fair elections. It is not possible in the time available to identify all such laws and to have them repealed or amended by the various legislators.

### 5.2 Purpose

The ultimate objective is to achieve free and fair elections in South Africa as a whole when the first democratic elections are held.

South Africans have to avoid at all costs a situation where such an election will not qualify as free and fair. If the result of the election is not accepted, peace and democracy will suffer irreparable damage. We have to avoid the "Angolan Spectre".

The objective of free and fair elections in a democratic society also becomes the basic criterion for determining whether any particular action is to be declared invalid or its perpetration prevented. The detailed criteria of the Code that follow are all related to this basic objective. It is the ultimate criterion and guiding principle for subsequent rulings.



### 5.3 Method

This code will be implemented in terms of the following framework:

**5.3.1 A set of Criteria.** It will consist of all those principles associated with the type of behaviour which is to be expected in a democratic society and which qualify as participation in the process of free and fair elections.

These criteria will provide the yardstick for the proposed Tribunal to apply in coming to its decisions. These criteria seek to achieve free and fair elections in a democratic society.

The criteria are formulated in a positive manner. They indicate what South Africa should be free to do when participating in democratic elections. They are not formulated by providing descriptions of prohibited behaviour (like in a Penal Code).

It is believed that in this manner the Tribunal will be able to judge more effectively whether activities claimed to be impeding free and fair elections should be disqualified. These principles provide the yardstick against which to measure such behaviour. This approach is akin to the implementation of a typical bill of rights. They will also be "supreme" in nature. In order to be valid behaviour, the standards contained in such principles are to be complied with.

Such principles function as typical judicial standards. Concepts such as "in free and democratic society" (of the European Convention for the Protection of Human Rights and Fundamental Freedoms), proportionality and fairness are inherent in these principles. They refer to certain well known human rights and freedoms contained in international instruments and the constitutions of democratic societies. When they have to be applied by the Tribunal, recourse could be had to the jurisprudence of courts and other bodies well-versed in the enforcement of such concepts. In giving judgement the Tribunal will often have to balance the claims of an individual or a political party. A typical limitation clause approach will therefore be adopted -as is usual when a bill of rights is enforced through a court of law.

**5.3.2 Mechanisms.** The above mentioned principles will have to be effective in securing the rights and freedoms associated with free and fair elections in a democratic society. They must therefore be enforced (and remedies provided for when necessary) by properly equipped bodies. A special Tribunal will be proposed, (performing the judicial function) as well as other organs more of a political nature. They should all be adequately empowered.

**5.3.3 Remedies.** Violations of the Code will have to be declared invalid and other appropriate relief should be provided for. In certain cases it may be sufficient to provide for administrative procedures aimed at correcting wrong practices, or to achieve the desired result through legislation.



## 5.4 Criteria

In expanding on 5.3.1 the following criteria (principles) for participation in free and fair elections will apply:

**5.4.1 Uniformity of application.** The same principles should apply in the whole of the country.

**5.4.2 The freedom to form political parties, to belong to them and to stand as candidates.** This is part of what is also included under freedom of association. This is a central concept and will have to be expanded in order to include:

**5.4.2.1** Freedom from intimidation. (This will have implications also for private behaviour. This Code will in certain circumstances be enforceable against individuals or private organizations too.)

**5.4.2.2** The right to qualify and timeously "register" as voter.

**5.4.2.3** The right to a secret ballot and to cast a vote freely and without fear of victimization. (This aspect is usually dealt with in an Electoral Act.)

**5.4.2.4** Right to canvassing. (Of both parties and their members.)

**5.4.2.5** Equal opportunity to receive funding.

**5.4.3 Freedom of assembly.** Here the access to suitable venues must be included. In this country such venues are sometimes privately owned. It may require rulings on insurance against damage or paying for the use of facilities, which will have to be done without causing discrimination. Who gives permission for the use of such facilities?

**5.4.4 Freedom of expression and thought.**

**5.4.4.1** To include freedom of petition and peaceful demonstration.

**5.4.4.2** Access to information.

**5.4.4.3** Freedom of the press

**5.4.4.4** Special protection of journalists.

**5.4.4.5** Access to the media (State and private?).

**5.4.5 Equality.** No political party or person should be discriminated against in the enjoyment of any of the above-mentioned freedoms. Women are in a special position and particular care should be taken to prevent gender discrimination.

**5.4.6**      **Limitation.** Such rights and freedoms are not absolute in nature. Their exercise may be limited in order to protect the rights of others, the public order and safety. Only those limitations necessary in a democratic society should be permitted. Limitations should not negate the essence of these freedoms and rights and they should be to an ascertainable extent be prescribed by law. In this regard the various "security laws" of South Africa require careful scrutiny. A power to limit is not a power to take away, it is in itself also a limited power which has to comply with certain standards in order to be valid. These freedoms have to be balanced against the grounds permitting limitation. This is to be done by a judicial process (Tribunal) while applying such standards as proportionality and reasonableness.

**5.4.7**      **Derogation.** In times of emergency threatening the life of the nation. Who should proclaim an emergency? Should certain rights be non-derogable? See further 5.5.4 hereunder.

## **5.5**      **Mechanisms**

**5.5.1**      In deciding on the nature and powers of the mechanisms necessary for implementing and enforcing these freedoms, the following are to be considered:

- \*            Uniformity
- \*            Expeditionousness
- \*            Effectiveness
- \*            Fairness
- \*            Clarity
- \*            Accessibility

**5.5.2**      It is proposed that judicial and representative structures are established.

**5.5.3**      **Judicial.** Should include an Ombud and a Tribunal with the typical functions usually associated with each. Both central and regional offices will be required. Appeal to be provided for?

**5.5.4**      **Representative control.** To be undertaken by something like the Electoral Commission (area of another Technical Committee) which will form part of a Transitional Executive Council (TEC). Will involve tasks such as passing, amending and repealing laws together with existing legislative structures in a manner to be



worked out. The declaration of an emergency, derogation of rights and freedoms and the limitations upon their exercise to be done here.

The adoption of this Code itself will have to entail broader involvement and be cleared through the negotiating structures.

- 5.5.5** The appointment of those people to serve on these bodies deserves careful attention. (See further infra.) It might be necessary to construct the judicial machinery on the same basis as that of the industrial court, with an appeal body included.

## **5.6**      Remedies

### **5.6.1**      Access

- 5.6.1.1** It should be possible for political parties, NGO's and individuals to bring their cases before the Tribunal. Locus standi requirements should be flexible enough in order to permit the achievement of the original objective of free and fair elections.

Access to the Ombud should be even easier. Informal administrative procedures should suffice.

- 5.6.1.2** The procedure for bringing applications or laying complaints should be informal. Complaints by lay people should be the general rule. Where necessary assistance in bringing cases should be provided. The office of the Ombud should be involved in this. This might call for a specialised department.

- 5.6.1.3** Costs should not hinder the bringing of applications.

### **5.6.2**      Sanctions

All sanctions and remedies necessary in order to ensure effective participation in free and fair elections should be available. These may differ - depending on the nature of the body (electoral commission, tribunal, ombud) involved.

#### **5.6.2.1**      Nullity of legislation

Should the Electoral Commission be empowered to perform a political control function with respect to existing legislation? The need for new legislation could involve other legislative structures as well.

The Tribunal will perform a judicial control function when it too should be able to declare legislation on certain provisions of laws to be in

conflict with the criteria laid down by the code. Actions taken in terms of such provisions will therefore be invalid.

These powers flow from the supreme nature of the Code. The concept of the sovereignty of Parliament will obviously not apply with respect to the Tribunal. A testing right should be part and parcel of the powers of the Tribunal.

The Tribunal will be an independent institution, staffed by experts. It will therefore enjoy the esteem necessary for creating acceptance of rulings and legitimacy.

Nullity will prevent repetition.

#### **5.6.2.2 Specific performance**

To be ordered by the Tribunal. The ombud should also be able to achieve specific relief through negotiations, mediation, and, if necessary, by seeking judicial involvement by the Tribunal.

#### **5.6.2.3 Interdicts - if the usual legal requirements are met.**

#### **5.6.2.4 Nullity of executive acts.**

#### **5.6.2.5 Contempt - necessary when rulings are not respected. It may require fines by the Tribunal.**

#### **5.6.2.6 Damages.**

### **5.6.3 Execution**

It will probably be necessary to include in the Code a set of principles on procedure and execution. One possible means of enforcement could be through the Registrar of the Supreme Court - as is done with respect to the Industrial Court. Another possibility is simply to give the Tribunal the required powers and status. If this is not acceptable, the ordinary courts could become involved in the execution and enforcement of procedures. Involving the ordinary courts might cause a delay and increase costs. This may frustrate the objective of cheap and expeditious remedies.

## **5.7 Implementation**

This proposal has some far reaching and new consequences. Because it will play such an important role during the transition to a new dispensation it should be debated and adopted through the negotiating structures.

The early implementation of this proposal will provide an opportunity to conduct election



campaigns and the election itself in terms of clear and precise guidelines. This is of particular importance in South Africa because we have no experience of such an election. The majority of the population have never voted. The present violence requires effective and adequate structures.

It will be necessary to implement this proposal as a matter of urgency. Electioneering will probably start once an election date is announced.

The implementation of and actual practice of this Code will also provide a useful learning experience. This code will for all practical purposes function as a typical bill of rights - albeit that it would only focus on those rights and freedoms associated with free and fair elections in a democratic society. When the (interim) constitution becomes operative and its bill of rights has to be implemented, some valuable expertise will then be available. The public will then be accustomed to the idea and the practice.

## **5.8        Staffing**

Who will serve on the various bodies proposed? The bulk of the members should not come from the present judges. They have no experience of a supreme constitution and the different approach involved in giving effect to human rights and freedoms. The existing courts also do not enjoy the required legitimacy - although some of the judges (and practising lawyers) will be quite suitable and effective in these positions. Legal academics might also be a useful pool from where to make amendments, as well as those lawyers actually involved in human rights work and organisations. This method of appointment should be legitimate. This requires involvement of the negotiating structures.

The majority of the appointees should be South Africans.

The election Tribunals shall have all the powers provided for in this code and those necessary in order to give effect to the purposes and objectives of this code.

## **5.9        Further steps to be taken**

As indicated in the introductory section of section 5 it will be necessary to create mechanisms for the enforcement of this Code. Suggestions have been made in paragraphs 5.5 to 5.8 as to how this may be achieved. This committee has not drafted a complete "technical" code on this subject as this matter seems to us to fall in the jurisdiction of the Committees on the Independent Electoral Commission and the Transitional Executive Council (TEC).

We have, however, included an example of how such a Code could be formulated. This deals with the principles and main machinery only. Other aspects such as the remedies, sanctions, enforcement, execution, implementation and staffing will still have to be dealt with. Our explanatory document on the content of the code (5.1 - 5.8) is complete insofar as it describes all the aspects to be dealt with in the final Code. Should our assistance in the preparation of the final document be required, we are prepared to comply.

We also attach a number of submissions received from parties to the negotiating process.



## **5.10      Draft Code**

### **5.10.1      Title: Election Code**

The Election Code is to provide for the principles to govern the democratic process of free and fair elections (for a Constituent Assembly/Legislature to be held in 1994) and to provide for the implementation and enforcement of such a Code.

### **5.10.2      Implementation of Election Principles**

The rights and freedoms enshrined in this Code shall be respected and upheld by the Executive, Legislature, Judiciary and all organs of the Government and its agencies, including the structures established in terms of the Multiparty Negotiations and where applicable to them, by all natural and legal persons and associations of persons and shall be enforceable by the Election Tribunal and Election Ombud in the manner hereinafter prescribed.

### **5.10.3      Election Principles**

The elections for a Constituent Assembly/Legislature are to be democratic, free and fair.

**5.10.3.1**    These elections are to take place in terms of the same uniform principles and criteria to be applied in the whole of South Africa as it existed in 1910.

#### **5.10.3.2    Participation in Elections:**

**5.10.3.2.1** Every South African national, 18 years of age, shall be entitled to be registered timeously as a voter and to participate in the elections for a Constituent Assembly/Legislature.

**5.10.3.2.2** Every South African, ? years of age (the Committee feels that this decision should be left to the Negotiating Council), shall be entitled to stand as a candidate in these elections.

**5.10.3.2.3** All South Africans shall have the right to participate in all peaceful political activity, free from any form of intimidation, associated with democratic, free and fair elections.

**5.10.3.2.4** All South Africans shall have the right to cast their vote in secret and free from victimization and undue influence.

**5.10.3.2.5** The right to vote and to stand as a candidate may be qualified by law on grounds of infirmity or on such grounds as are necessary in a democratic society.



#### **5.10.4 Political parties**

**5.10.4.1** All South Africans have the right to form and join political parties.

**5.10.4.2** All political parties are to be registered, subject to such requirements prescribed by law as are necessary in a democratic society.

**5.10.4.3** Political parties and their members shall be entitled to canvass for and solicit the support of voters peacefully, subject to such qualifications prescribed by law as are necessary in a democratic society.<sup>1</sup>

#### **5.10.5 Assembly**

All South Africans have the right to assemble peacefully and without arms and to have access to venues suitable for political meetings as are necessary for democratic elections.

#### **5.10.6 Expression**

**5.10.6.1** All South Africans have the right to freedom of speech and expression, which shall include freedom of the press and of other media. For the purpose of conducting democratic, free and fair elections, this right shall include the freedom to submit petitions and of peaceful demonstration.

**5.10.6.2** Freedom of expression also requires access to such information and to the media as is required for participating in democratic, free and fair elections.

**5.10.6.3** Freedom of the press requires the protection of the gathering of information by journalists as required for the purpose of conducting democratic, free and fair elections.

#### **5.10.7 Movement**

All South Africans shall have the right to move freely throughout the whole of South Africa in so far as it is necessary for the purpose of conducting and participating in free and fair elections.

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<sup>1</sup> The references to "prescribed by law" will in the majority of instances refer to the Electoral Act which will contain provisions on, for example, the periods when opinion polls will be prohibited. The existing Electoral Act will have to be scrutinized and updated. It does e.g. not provide for proportional representation.

### **5.10.8 Equality**

- 5.10.8.1** No person or political party should be discriminated against on the grounds of race, gender, colour, ethnic origin, religion, creed, political belief or economic or social status.
- 5.10.8.2** These rights and freedoms should apply equally in all regions and societies of South Africa.
- 5.10.8.3** Special care is to be taken in order to ensure the full participation of women in the elections.

### **5.10.9 Restrictions**

- 5.10.9.1** The rights and freedoms referred to in this Code shall be subject to such reasonable qualifications and restrictions prescribed by law as are necessary for the purpose of conducting and participating in democratic, free and fair elections and are required in the interest of public order, national security, the rights of others or in relation to contempt of court and of the Election Tribunal, defamation or incitement to an offence.
- 5.10.9.2** Restrictions permitted under this Code shall not be used for any purpose other than that for which they have expressly or by necessary implication been authorized.
- 5.10.9.3** Any law providing for regulating or restricting the rights and freedoms granted by this Code shall:
  - (a) be of a general nature
  - (b) not negate the essential content of such a right or freedom
  - (c) specify to an ascertainable extent the scope of such a restriction or qualification
  - (d) identify the provision in the Code on which such restriction or qualification is based.

### **5.10.10 Derogation**

- 5.10.10.1** If, during the period up to the establishment of the Interim Government of National Unity, there is a threat to the life of the South African nation justifying the declaration of a state of emergency, the State President, on the advice of the T E C, may by proclamation in the Government Gazette, declare a state of national emergency for the duration of such an emergency.



**5.10.10.2** Such a proclamation may enact the measures necessary for the protection of the life of the nation or public safety.

**5.10.10.3** Such measures may suspend, for the duration of the declared emergency, the operation of the provisions of this code provided that no derogation of provision 8 will be permissible.

**5.10.10.4** Such a declaration may apply to the whole of the country or only to a part thereof.

**5.10.11 Supervision by the Transitional Executive Council (TEC)** (see ANC Submission, p. 22)

**5.10.11.1** During the duration of the state of emergency the State President shall report to the Transitional Executive Council (TEC) at intervals not longer than one month on the effects of the emergency measures and on the need for their continued existence.

**5.10.11.2** The TEC shall promptly consider these reports and may revoke the declaration of an emergency or restrict the area of its operation.

**5.10.11.3** During the duration of the state of emergency the TEC may not be abolished.

**5.10.11.4** The Election Tribunal may decide on the existence of conditions threatening the life of the nation and its continued existence.<sup>2</sup>

**5.10.12 Election Tribunal**

**5.10.12.1** There shall be an Election Tribunal and ten Regional Election Tribunals, which will be independent and which will be subject to this Code only.

**5.10.12.2** The Election Tribunal shall act as forum of final decision with respect to the final implementation of this code and shall enforce the principles contained therein.

**5.10.12.3** The Regional Election Tribunals will act as forums of first instance with respect to the implementation of this code and shall enforce the principles contained therein.

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<sup>2</sup>

If any of the other Technical Committees propose structures to be established for the period until the adoption of a new constitution or interim constitution providing for measures and structures controlling states of emergency, this part of the code should be harmonized with such other provisions, provided they are comprehensive and effective in securing the holding of democratic, free and fair elections.

**5.10.13 Election Ombud**

**5.10.13.1** There shall be an Election Ombud and ten regional offices of the Election Ombud which shall be independent en which shall be subject to this code only.

**5.10.13.2** The election Ombud shall exercise all the functions conferred upon it by this code.



## ANNEXURE A

The following proclamations create self-governing territories. They provide for ethnic-based citizenship.

- (a) Lebowa: Procs R224 and R225, GG 3666 of 29 September 1972 (Reg Gaz 1762).
- (b) Gazankulu: Procs R14 and R15, GG 3772 of January 1973 (Reg Gaz 1735).
- (c) Qwaqua: Proc R203, GG 4461 of 25 October 1974 (Reg Gaz 2060).
- (d) KwaZulu: Proc R11, GG 5387 of 28 January 1977 (Reg Gaz 2417) read with Proc R70 GG 3436 of the 30 March 1972 (Reg Gaz 1594).
- (e) KwaNdebele: Proc R205, GG 6661 of 14 September 1979; Proc R60 GG 7499 of 20 March 1981; Proc R114, GG 9303 (RegGaz 3721).
- (f) KaNgwane: Proc R2104 of 16 September 1977 and Proc 12 of 18 July 1986.

**ANNEXURE B**





REPUBLIC OF SOUTH AFRICA  
REPUBLIEK VAN SUID-AFRIKA

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**GENERAL NOTICES**

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**NOTICE 158 OF 1993****DEPARTMENT OF JUSTICE  
EXPLANATORY MEMORANDUM****DRAFT BILL ON THE ABOLITION OF DISCRIMINATION  
AGAINST WOMEN****INTRODUCTION**

1. The Government has recently, on behalf of South Africa, signed a number of important international conventions regarding women. One of these conventions was the Convention on the Elimination of All Forms of Discrimination against Women. This commitment to the ideals embodied in the conventions forms part of a comprehensive programme to abolish all forms of discrimination against women and to promote gender equality. In order to give effect to the contents of the convention an inquiry was conducted under the guidance of the Minister of Justice into remaining forms of statutory and common law discrimination against women. With this a start has been made to purge the statute book of provisions that are contrary to the principles contained in a charter of fundamental rights and especially the principle of equality that provides that there should be no discrimination between persons on the basis of gender. This Bill, which has now been published for comment, is aimed at the elimination of remaining discriminatory provisions against women.

2. The clauses of the Bill are explained with reference to the main features of the Bill.

3. Several discriminatory aspects that need rectification in respect of married women, namely taxation, medical and pension schemes and subsidies, are not addressed in the draft Bill. The reason for this is that the adjustment of these matters is comprehensive and have far reaching implications that require in-depth study. The Government is of the view that these matters require thorough attention.

4. It should be emphasized that the draft Bill is published for comment only and the provisions thereof should not be regarded as final proposals. Comment may be submitted to the Director-General, Department of Justice, Private Bag X81, Pretoria, 0001. The closing date for comments is 31 March 1993.

**DIRECTION THAT WOMEN MAY NOT BE PRESENT AT COURT PROCEEDINGS**

1. Clause 2 amends section 5 of the Magistrates' Courts Act, 1944. The said section 5 provides that a court may, in the interest of good order and public decency, order that women, minors or the public may not be present at a civil trial. The reference to women arises from a school of thought aimed at the protection of, what is believed to be, the frail nature of women, where necessary, against the repulsiveness of the world. Section 5 is now amended by deleting the reference to women. The public may, in general, still be ordered not to be present, making a specific reference to women unnecessary and discriminating.

2. A similar reference to women in section 78 of the First Schedule to the Defence Act, 1957, is likewise amended by clause 13.

**CITIZENSHIP, CONTROL OF ALIENS AND IDENTIFICATION**

1. The South African Citizenship Act, 1949, the Identification Act, 1986, the Restoration of South African Citizenship Act, 1986, and the Control of Aliens Act, 1991, contain provisions that result in prejudice to women, and sometimes also to men, regarding the acquisition of citizenship, the inclusion in the population register and the acquisition of the right to enter and reside in the Republic. These provisions are outdated and are amended to conform to the present views regarding gender equality.

2. Clause 4 is an example of the nature of the amendments that are being effected. Clause 4 amends section 3(2) of the South African Citizenship Act, 1949. This section provides that all persons born after 1949-09-02 in the then Union, may claim South African citizenship by reason of birth, provided that—

- (i) the father or mother was a South African citizen by birth; or
- (ii) the father had lawful permanent residence.



such a document as a witness. In view of the fact that women are granted the same contractual capacity as a man, this section is repealed.

### PERFORMING HIGH RISK AND UNDERGROUND WORK

Clause 34 amends section 14 of the Occupational Diseases in Mines and Industries Act, 1973. The said section, as well as section 32 of the Minerals Act, 1991, which is amended by clause 48, respectively provides for a prohibition on women to perform high risk work at a controlled mine or industry and to perform underground work in a mine. The object of these sections is to protect women against exploitation or the performance of demanding work in view of their physical and psychological attributes. By the repeal of this provision, women and employers are given the choice to freely decide whether they want to perform such work or, in the case of employers, whether they would want to employ such persons. The proposed clauses 34 and 48 respectively, abolish these prohibitions. The provision is included in the draft Bill for the purposes of debate. It does not denote Government policy on the matter.

### AGE OF RETIREMENT

Clauses 37 and 36 amend section 13 and 21 of the Education and Training Act, 1979. The said sections regulate the retirement age of a teacher in permanent employment. A distinction is made between the retirement ages of men and women (65 years in the case of a man and 60 years in the case of a woman). As the retirement age of men is higher than that of women, it may sometimes be experienced as being discriminatory and consequently as being an unfair distinction. The said clauses amend sections 13 and 21 by introducing a general retirement age of 65 years for all teachers.

### CONFINEMENT

Clause 39 amends section 17 of the Basic Conditions of Employment Act, 1983. Section 17 provides that a female employee shall not be required or permitted to work during the period commencing four weeks prior to the expected date of her confinement and ending eight weeks after the date of her confinement, in cases where the Act is applicable. Clause 39 deletes the words "or permitted". The result of this amendment is that a woman may not be required to work during the period referred to, but may elect whether she wants to work during that period.

### MARITAL POWER

1. The retention of the marital power discriminates against women and is not compatible with the principle of equality which the Government is striving to achieve. The marital power has already been abolished by the Matrimonial Affairs Act, 1984, in respect of marriages entered into after 1 November 1984. The aforementioned Act resulted from the report by the Law Commission regarding, *inter alia*, the status of married women.

2. The marital power is the power of the husband to administer his wife's property, to enter into contracts on her behalf and to sue or be sued in legal proceedings on her behalf. Section 11 of the Matrimonial Affairs Act, 1984, is substituted by clause 41 which abolishes the marital power the husband has over the person and property of his wife in terms of the common law, in respect of all marriages where it still exists. In the light of the present proposals to bring about equality in the status of men and women the question arises whether it is not altogether untenable for the law to protect the marital power of the husband in those instances where it still exists. The marital power also militates against the content of the conventions relating to women, which *inter alia* aims at achieving equality of status between men and women. The retention of the marital power will, in the light of the acceptance of the conventions, be wholly untenable.

3. The complete abolition of the marital power will not result in the wife binding the common estate by incurring debts or entering into contracts without the consent of her husband. A person married in community of property will



have to obtain the consent of the other spouse in many instances where legal acts involve the interests of the common estate.

4. Since women under marital power often require the assistance of their husbands in the performance of legal acts, the abolition of the marital power will result in a number of consequential amendments. Clauses 1, 3, 8, 9, 22, 24, 27, 28, 31, 32, 33, 38, 40 and 47 amend those sections where effect is given to the marital power. The marital power is now abolished completely so that men and women now have equal powers in regard to their assets and contractual capacity.

#### **GUARDIANSHIP**

1. The provision regarding guardianship in clause 51 is a substantive one. In terms of the common law the father of a minor child born of a marriage is the natural guardian of such child. This has been embodied in legislation so that the father remains the natural guardian in such circumstances unless the Court orders otherwise. The legal position as it stands at present may, however, give rise to unfairness. In addition, in the light of the equal status afforded to both men and women, the mother should have the same rights as the father in respect of a minor child born from a marriage. Clause 51 therefore amends the common law position by providing that both parents of a minor child have and are entitled to the guardianship and custody of a minor child born from a marriage for as long as the marriage subsists, unless a court orders otherwise.

2. Clauses 10, 23 and 42 are consequential amendments in the light of clause 51.

#### **CONTRACTUAL CAPACITY AND CAPACITY TO LITIGATE**

Clause 52 is a substantive provision whereby a woman, irrespective of her marital status has the capacity to perform any legal act and has the capacity to litigate in a court of law in respect of any matter. This clause gives effect to the principle of full equality between men and women.



## GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

— Words underlined with a solid line indicate insertions in existing enactments.

## DRAFT BILL

To abolish remaining statutory discrimination against women; and to provide for matters connected therewith.

**B**E IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Amendment of section 17 of Act 47 of 1937, as substituted by section 29 of Act 88 of 1984 and amended by section 1 of Act 75 of 1987

1. Section 17 of the Deeds Registries Act, 1937, is hereby amended by the substitution for subsection (6) of the following subsection: 5

“(6) A **[women married out of community of property, or]** person married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by his or her **[husband]** spouse in executing any deed or other document required or permitted to be registered in any deeds registry or required or permitted to be produced in connection with any such deed or document, **[unless the marital power has been excluded or]** unless the assistance of the **[husband]** spouse is in terms of this Act or any other grounds deemed by the registrar to be unnecessary.”. 10

Amendment of section 5 of Act 32 of 1944, as amended by section 6 of Act 40 of 1952 15 and section 1 of Act 91 of 1977

2. Section 5 of the Magistrates' Courts Act, 1944, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exception as the court may direct) **[females or]** minors or the public generally shall not be permitted to be present thereat.”. 20

Amendment of section 111 of Act 32 of 1944, as amended by section 10 of Act 63 of 1976

3. Section 111 of the Magistrates' Courts Act, 1944, is hereby amended by the deletion of subsection (4). 25

**[(4) If an unmarried woman is summoned for a contractual debt and is thereafter married in community of property or if a married woman is summoned for such a debt and it subsequently appears that she was married in**



community of property, the court may at any time, on application, before or after judgment is given, substitute the husband of such woman for such woman as defendant or judgment debtor.]

Amendment of section 3 of Act 44 of 1949, as amended by section 3 of Act 64 of 1961, section 1 of Act 95 of 1981 and section 1 of Act 70 of 1991

4. Section 3 of the South African Citizenship Act, 1949, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) No person shall be a South African citizen by virtue of subsection (1) if, at the time of his birth—

- (a) **[his father]** one of his parents—
  - (i) was a person enjoying diplomatic immunity in the Union in terms of any law relating to diplomatic privileges, or was a career representative of the government of another country, or was a person employed in the embassy or legation of such a government or in the office of such a career representative, or was a member of the household or a servant of any such person; and
  - (ii) was not a South African citizen or had not been lawfully admitted to the Union for permanent residence therein, and his **[mother]** other parent was not a South African citizen; or
- (b) **[his father]** one of his parents was an enemy alien and the birth occurred at a place under occupation by the enemy and his **[mother]** other parent was not a South African citizen; or
- (c) **[his father]** one of his parents was an enemy alien without the right of permanent residence in the Union and was interned or detained in custody in the Union and his **[mother]** other parent was not a South African citizen; or
- (d) **[his father]** one of his parents was a prohibited person or had no right of permanent residence in the Union under the law then in force in the Union and his **[mother]** other parent was not a South African citizen.”.

Amendment of section 4 of Act 44 of 1949, as amended by section 4 of Act 64 of 1961

5. Section 4 of the South African Citizenship Act, 1949, is hereby amended by the substitution in paragraph (b) of subsection (1) of the words preceding subparagraph (i) of the following words:

“(b) section 5 or 6 a South African citizen, and whose father or mother was at the time of such person's birth—”.

Amendment of section 10 of Act 44 of 1949, as amended by section 9 of Act 64 of 1961, section 20 of Act 69 of 1962, section 3 of Act 23 of 1964 and section 2 of Act 95 of 1981

6. Section 10 of the South African Citizenship Act, 1949, is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection:
 

“(2) Any period during which an applicant for naturalization has been employed outside the Union in the service of the Government of the Union (otherwise than as a person engaged locally) or on a ship or aircraft or a public means of transport registered or licensed in and operating from the Union, and any period during which a **[woman]** person who is an applicant for naturalization has been resident outside the Union with his wife or with her husband while the latter was so employed, shall, for the purposes of subsection (1), be regarded as a period of residence or ordinary residence in the Union and for such purposes the Minister may, in his discretion, regard as a period of residence or ordinary residence in the Union any period during which an applicant for naturalization has been employed outside the Union on a ship, aircraft or public means of transport operating from the Union, and any period during which a **[woman]** person who is an applicant for naturalization has been resident outside the Union with his



- wife or with her husband while the latter was so employed, notwithstanding the fact that such ship, aircraft or public means of transport was not registered or licensed in the Union.”; and
- (b) by the substitution for subsection (6) of the following subsection: 5
- “(6) The Minister may, notwithstanding the provisions of subsection (1), upon application in the prescribed form, grant a certificate of naturalization as a South African citizen to a **[woman]** person who is an alien and who satisfies the Minister that—
- (a) he is the husband or widower of, or in the case of a woman, she is the wife or widow of a South African citizen and he or she has been 10  
lawfully admitted to the Union for permanent residence therein and has resided in the Union for a period of not less than two years immediately preceding the date of his or her application and after the date of his or her marriage to such citizen; or
- (b) he is the husband of, or in the case of a woman, she is the wife of a 15  
South African citizen, he or she has in terms of any law relating to immigration obtained permission to enter the Union for permanent residence therein and he or she has resided with his wife or her husband in the Union or, while he or she was employed in the service of the Government of the Union, outside the Union for a period of not 20  
less than two years.”.

**Amendment of section 17 of Act 44 of 1949, as amended by section 12 of Act 64 of 1961 and section 4 of Act 23 of 1964**

7. Section 17 of the South African Citizenship Act, 1949, is hereby amended—
- (a) by the substitution for paragraph (c) of subsection (1) of the following 25  
paragraph:
- “(c) in the case of **[a]** the husband, wife or minor child of a person referred to in paragraph (a) or (b), such husband, wife or child so resides with such person; or”; and
- (c) by the substitution for paragraph (d) of subsection (1) of the following 30  
paragraph:
- “(d) in the case of the husband, wife or minor child of a person who is a South African citizen by birth or descent, such husband, wife or child so resides with such person; or”.

**Amendment of section 1 of Act 37 of 1953, as amended by section 31 of Act 93 of 1962 35**

8. Section 1 of the Matrimonial Affairs Act, 1953, is hereby amended by the deletion of subsection (4).

**[(4) A wife may make an application under subsection (2), and any application to a judge in connection therewith, and may appear in any proceedings under subsection (3), without the assistance of her husband.]** 40

**Amendment of section 2 of Act 37 of 1953, as amended by section 1 of Act 13 of 1966**

9. Section 2 of the Matrimonial Affairs Act, 1953, is hereby amended—
- (a) by the substitution for paragraph (a) of subsection (5) of the following paragraph:
- “(a) A married woman**[, whether under the marital power or not,]** may be 45  
a depositor in any account in a deposit-taking institution as defined in section 1 of the Deposit-taking Institution Act, 1990, and may **[without the consent or assistance of her husband]** execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against and generally deal with her deposit in such account and enjoy 50  
all the privileges and be liable to all the obligations attaching to depositors in any such account in such banking institution**[: Provided that a married woman who is under the marital power, may not, without the consent of her husband overdraw on a current account in**



which she is a depositor in such a banking institution to an amount exceeding the total amount of the deposits standing to her credit in any account in such banking institution]."; and

(b) by the deletion of subsection (6).

[(6) Every wife shall be entitled, without the assistance of her husband— 5

- (a) to receive or sue for remuneration due from her employer for services rendered by her;
- (b) to receive or sue for any compensation, deposit, dividend or proceeds referred to in paragraph (b), (c) or (d) of subsection (1);
- (c) to take out an insurance policy for the purpose of providing for the education or advancement of her child, and to receive or sue for any amount payable in terms of any such policy; and 10
- (d) to institute legal proceedings in connection with any share, policy, tool or implement referred to in subsection (1) which has been alienated or pledged or any right thereunder which has been dealt with without her consent, or in connection with any attachment or sale in contravention of subsection (3), or for the purpose of obtaining an order under subsection (4) or to protect herself against any act by her husband which is or would be unlawful in terms of subsection (1), or in conflict with an order under 20 subsection (4).]

Amendment of section 5 of Act 37 of 1953, as amended by section 2 of Act 13 of 1966 and section 16 of Act 70 of 1979

10. Section 5 of the Matrimonial Affairs Act, 1953, is hereby amended—

(a) by the substitution for paragraph (b) of subsection (3) of the following 25 paragraph:

"(b) the **[father] parent** of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or the Divorce Act, 1979, **[or upon whom a children's court has not conferred to exclusive right to exercise any parental powers in regard to the minor,]** shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor in any other manner than to act jointly with the **[mother] other parent.**"; 30

(b) by the substitution for subsection (4) of the following subsection:

"(4) Both parents of a minor (whether or not one of the parents in any proceedings has been granted the sole custody of the minor) shall consent to the marriage of the minor, unless one of the parents has been granted sole guardianship of the minor."; and 35

(c) by the deletion of subsection (7).

[(7) A wife may make any application referred to in this section, and any application to a court in connection therewith, without the assistance of her husband.] 40

Repeal of section 21A of Act 39 of 1954, as inserted by section 6 of Act 51 of 1973 and amended by section 11 of Act 30 of 1988

11. Section 21A of the Boxing and Wrestling Control Act, 1954, is hereby repealed 45

"[Prohibition in respect of females

21A. (1) No female shall take part in any tournament as a boxer or a wrestler.

(2) No person shall—

- (a) hold or assist in holding any tournament in which any female takes part as a boxer or wrestler; 50
- (b) negotiate with any female with a view to procuring her services as a boxer or wrestler at any tournament.

(3) In the application of this section, "tournament" in relation to a wrestler shall *mutatis mutandis* bear the meaning ascribed thereto in section 1 in relation to a boxer.] 55



**Amendment of section 3 of Act 23 of 1957**

12. Section 3 of the Sexual Offences Act, 1957, is hereby amended by the substitution for paragraph (g) of the following paragraph:

“(g) any person whose **[wife]** spouse keeps or resides in or manages or assists in the management of a brothel unless **[he]** such person proves that he or she was ignorant thereof or that he or she lives apart from **[her]** the said spouse and did not receive the whole or any share of the moneys taken therein.”.

**Amendment of section 78 of the First Schedule of Act 44 of 1957**

13. Section 78 of the First Schedule of the Defence Act, 1957, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) Whenever it appears to a convening authority or a court martial that, in the interests of good order or public morals or the administration of justice or for reasons of security, a trial ought not to be conducted or continued in open court, the convening authority or the court martial may at any time either before the commencement or during the course of the trial, order that persons other than the accused, his counsel and the necessary court officials, **[or females,]** juveniles or other classes of persons, shall not be permitted to be present at the trial.”.

**Repeal of section 11 of Ordinance 5 of 1957 (OFS)**

14. Section 11 of the Ordinance on Hospital Officials' Pensions, 1957, is hereby repealed.

**[Benefits to female member who marries]**

11. A member who is a female with at least five years' pensionable service, and who, before attaining her pensionable age, is discharged on account of her marriage or retires voluntarily as an officer in contemplation of marriage and marries within three months after such retirement, shall be entitled to an amount equal to twice her own contributions.]

Amendment of section 12 of Act 8 of 1959, as amended by section 4 of Act 75 of 1965, section 10 of Act 62 of 1966, section 2 of Act 9 of 1971, section 3 of Act 58 of 1978, section 5 of Act 104 of 1983 and section 4 of Act 92 of 1990

15. Section 12 of the Prisons Act, 1959, is hereby amended by the deletion of subsection 5.

[(5) A woman member of the Prisons Service who marries shall be deemed to have retired voluntarily from the service of the Prisons Service in contemplation of marriage with effect from the date of her marriage, or if she discharged her duties on that day, with effect from the day following the date of her marriage, unless the Commissioner approves that she be retained in the service of the Prisons Service.]

Amendment of regulation 8 of the Prisons Regulations promulgated by Government Notice No. R.2080 of 1965, as amended

16. Regulation 8 of the Prisons Regulations, 1965, is hereby amended—

- (a) by the deletion of subparagraph (iv) of paragraph (b) of subregulation (1);
- (b) by the deletion of subparagraph (iv) of paragraph (d) of subregulation (1); and
- (c) by the substitution for subregulation (2) of the following subregulation:

**“Commissioner may waive qualification**

(2) Notwithstanding subregulation (1) but subject to section 12(1) of the Act, the Commissioner may in his discretion in exceptional circumstances, waive any or all requirements of subregulation (1)(a)(i), (ii), (iii) and (vi) in the case of a White male applicant, subregulation (1)(a)(i) and (vi) and (1)(b)(ii) and (iii) **[and (iv)]** in the case of a White female applicant,



subregulation (1)(a)(i) and (iii) and (1)(c)(ii), (iii) and (iv) in the case of a Non-White male applicant, and subregulation (1)(a)(i) and (1)(d)(ii), (iii), (iv), (v) and (vi) in the case of a Non-White female applicant.”

Amendment of section 5 of Act 63 of 1962, as amended by section 2 of Act 30 of 1972, section 11 of Act 70 of 1974, section 10 of Act 4 of 1976, section 2 of Act 115 of 1977, section 7 of Act 102 of 1983 and section 2 of Act 29 of 1987 5

17. Section 5 of the Sorghum Beer Act, 1962, is hereby amended—

- (a) by the deletion of the expression “(4)” in paragraph (b) of subsection (1C); and
- (b) by the deletion of subsection (4). 10

[(4) A local authority may with the approval of the Minister determine that the whole or any part of the site or premises referred to in subsection (2) shall be a site or premises on or in which no female person shall at any time be, save when specially authorized thereto by the officer in charge of such site or premises: Provided that a description of any such site or premises or such part of any such site or premises restricted in respect of female persons shall be conspicuously displayed or notified on or in such site or premises.] 15

Amendment of section 16 of Act 63 of 1962, as amended by section 93 of Act 42 of 1964, section 19 of Act 98 of 1965, section 5 of Act 30 of 1972 and section 23 of Act 62 of 1973 20

18. Section 16 of the Sorghum Beer Act, 1962, is hereby amended by the deletion of paragraph (c) of subsection (1).

- [(c) is a female and who while knowing that she is not entitled to do so, enters or remains on or in any site or premises or part of any site or premises restricted in respect of female persons in terms of subsection (4) of section 5 without the permission of the officer in charge of such site or premises;] 25

Amendment of section 6bis of Act 74 of 1962, as amended by section 4 of Act 12 of 1965, section 2 of Act 83 of 1969, section 24 of Act 62 of 1973 and section 3 of Act 4 of 1982

19. Section 6bis of the Aviation Act, 1962, is hereby amended by the deletion of subsection (5). 30

[(5) Where the premises referred to in subsection (3) are, or any portion of such premises is, situated within an area designated for the entry and departure of international air traffic at the aerodrome in question, the Minister, in the exercise of his powers under subsection (1)(a), or any person to whom permission to sell liquor on those premises was granted in terms of subsection (1)(b) and who has been authorized thereto by the Minister, may, subject, in the case of such a person, to such conditions as the Minister may impose when granting the authority or as may be prescribed— 35

- (a) in such premises or in the portion thereof situated within such area, as the case may be, sell or supply liquor to any person who is not a white person; 40
- (b) notwithstanding the provisions of sections 70 and 73 of the Liquor Act, 1977, permit any female of or above the age of eighteen years to be in any restricted portion of those premises situated within such area.]

Amendment of section 22 of Act 74 of 1962, as amended by section 5 of Act 12 of 1965, section 3 of Act 83 of 1969, section 25 of Act 62 of 1973, section 7 of Act 4 of 1982 and section 2 of Act 1 of 1984 45

20. Section 22 of the Aviation Act, 1962, is hereby amended by the deletion of subparagraph (vi)ter of paragraph (e) of subsection (1).



**[(vi)ter the conditions subject to which any female may in terms of paragraph (a)(ii) of section 6bis(5) be permitted to be in any restricted portion of premises referred to in that paragraph;]**

#### **Amendment of section 15 of Act 47 of 1963**

21. Section 15 of the Coloured Persons Education Act, 1963, is hereby amended 5  
by the deletion of paragraph (g) of subsection (1).  
**[(g) in the case of a female, if she marries.]**

#### **Repeal of section 17 of Act 66 of 1965**

22. Section 17 of the Administration of Estates Act, 1965, is hereby repealed. 10  
**[Letters of executorship to women**  
17. Letters of executorship may be granted to a woman, but shall not, without the consent in writing of her husband, be granted to a married woman, unless the marital power of the husband has been excluded.]

#### **Amendment of section 72 of Act 66 of 1965, as amended by section 7 of Act 54 of 1970 and section 17 of Act 70 of 1979** 15

23. Section 72 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subparagraph (i) of paragraph (a) of subsection (1) of the following subsection:  
“(i) by the **[father] parent** of a legitimate minor, who has not been deprived, as a result of an order under subsection (1) of the said section 5 **[of subsection 20**  
**(1) of the said section 4]** or the Divorce Act, 1979, of the guardianship of such minor**], or under section 60 of the Children’s Act, 1960 (Act No. 33 of 1960), or section 58 of the Children’s Ordinance, 1961 (Ordinance No. 31 of 1961), of the territory, of his parental powers over him]; or”.**

#### **Substitution of section 85 of Act 66 of 1965** 25

24. The following section is hereby substituted for section 85 of the Administration of Estates Act, 1965:

##### **“Application of certain sections to tutors and curators**

85. Sections **[17,] 24, 26, 28 and 36, subsection (2) of section 42, sections 46 and 48, subsection (2) of section 49 and sections 52, 53, 54 and 30**  
56 shall *mutatis mutandis* apply with reference to tutors and curators:  
Provided that—

- (a) any reference in any of the said sections to a will shall, for the purposes of its application under this section, include a reference to any written instrument by which the tutor or curator 35  
concerned has been nominated**]; and**
- (b) notwithstanding the provisions of section 17 as so applied, letters of curatorship may be granted to a married woman as curatrix of her husband or his property, without his consent].”.

#### **Amendment of regulation 19 of Chapter III of the General Regulations for the South African Defence Force and the Reserve, published by Government Notice R.1204 of 5 August 1966, as amended** 40

25. Regulation 19 of Chapter III of the General Regulation for the South African Defence Force and the Reserve, 1966, is hereby amended by the deletion of subregulation (2). 45

**[(2) The services of a female officer of the Permanent Force shall be terminated if—**

- (a) she elects to terminate her services for the purpose of marriage on the day preceding the date of her marriage;



- (b) she has in the opinion of the Surgeon-General or an officer designated by him for the purpose, become unfit for uniformed service owing to her pregnancy.]

Repeal of regulation 20 of Chapter III of the General Regulations for the South African Defence Force and the Reserve, published by Government Notice R.1204 of 5 August 1966, as amended

26. Regulation 20 of Chapter III of the General Regulations for the South African Defence Force and Reserve, 1966, is hereby repealed.

[Continuation of service of female officers of the Permanent Force who marry

20. (1) A female officer of the Permanent Force shall give written notice of her intention to marry and shall simultaneously inform her officer commanding whether she wishes to continue her service in the Permanent Force in a permanent or temporary capacity after her marriage.

(2) A female officer of the Permanent Force who wishes to continue serving in terms of her existing appointment after her marriage may do so and any vacation leave to her credit or leave without pay not exceeding thirty days may be granted to her for the purpose of her marriage.

(3) The services of a female officer of the Permanent Force who does not wish to continue her service in the Permanent Force after her marriage or who is serving in a permanent capacity, and wishes to be reappointed in a temporary capacity after her marriage, shall be terminated in terms of regulation 19(2)(a) of this chapter.]

Amendment of section 16 of Act 16 of 1967, as substituted by section 6 of Act 14 of 1991

27. Section 16 of the Mining Titles Registration Act, 1967, is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) A **[woman married out of community of property, or] person** married in terms of a marriage the legal consequences of which are governed by the law of any other country, shall be assisted by **his or her [husband] spouse** in executing any deed or other document required or permitted to be registered in the Mining Titles Office or required or permitted to be produced in connection with any such deed or document, **[unless the marital power has been excluded or]** unless the assistance of the **[husband] other spouse** is in terms of this Act or on other grounds deemed by the registrar to be unnecessary.”

Amendment of section 30 of Act 16 of 1967

28. Section 30 of the Mining Titles Registration Act, 1967, is hereby substituted for the following section:

“Endorsement of deed to reflect the change of status of a person

30. When rights are or a bond is registered in the name of—

- (a) a **[woman] person** who since the registration was effected has been married either in or out of community of property or has been married and whose marriage is governed by the law of any country other than the Republic **[or South-West Africa]**; or
- (b) a **[woman] person** who at the date of the registration was married out of community of property or whose marriage was at that date governed by the law of any country other than the Republic **[or South-West Africa]** and who has since been widowed or divorced,

the registrar may on written application by such **[woman] person** (assisted where necessary by **[her husband] such person's spouse**) and on production of the relevant deed or, where there are two or more interdependent deeds, of all such deeds, and of proof to his satisfaction



of the change in [her] such person's status, record the change on such deed or deeds and in the registers."

#### Amendment of section 38 of Act 16 of 1967

29. Section 38 of the Mining Titles Registration Act, 1967, is hereby amended by the substitution for subsection (4) of the following subsection: 5

- "(4) The provisions of this section shall not apply if the mortgaged rights are to be transferred or ceded—
- (a) to a person who would not himself be competent to mortgage them; or
  - (b) to two or more persons, unless they take transfer or cession of the rights in undivided shares and renounce in the written consent referred to in subsection (1) the exception *de duobus vel pluribus reis debendi* [; or 10
  - (c) to a woman unless in the said written consent she renounces any special legal exceptions which she would otherwise be entitled to raise]."

#### Repeal of section 60 of Act 16 of 1967

30. Section 60 of the Mining Titles Act, 1967, is hereby repealed. 15

##### [Women witnesses of deeds

60. Any female person who would, if she were a male person, be competent to witness any document intended for registration or filing or production in the Mining Titles Office, shall be competent to witness any such document, and any such document which was witnessed before the commencement of this Act by a female person, shall be as valid as if she had been a male person.] 20

#### Amendment of section 3 of Act 68 of 1969

31. Section 3 of the Prescription Act, 1969, is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph: 25

- "(a) the person against whom the prescription is running is a minor or is insane, [or is a woman whose separate property is controlled by her husband by virtue of his marital power,] or is a person under curatorship, or is prevented by superior force from interrupting the running of prescription as contemplated in section 4; or"

#### Amendment of section 216 of Act 61 of 1973, as substituted by section 15 of Act 59 of 1978 and amended by section 15 of Act 83 of 1981, section 10 of Act 70 of 1984 and section 8 of Act 18 of 1990

32. Section 216 of the Companies Act, 1973, is hereby amended by the substitution for subsection (3) of the following subsection:

- "(3) In respect of any of the matters referred to in section 211(1) the return referred to in subsection (2) shall contain a statement, signed by a director, a secretary who is a body corporate or an officer of the company, that— 35
- (a) the consent, referred to in section 211, of the director or officer in respect of whom particulars are reflected in such return, has been obtained on a duly completed and signed prescribed form; and 40
  - (b) any person appointed as director or officer of the company, is not disqualified under section 218 or 219; and
  - (c) the written consent under section 218(1)(b) of the husband of any woman appointed as a director of the company has been obtained on the prescribed form]."

#### Amendment of section 218 of Act 61 of 1973, as substituted by section 17 of Act 59 of 1978

33. Section 218 of the Companies Act, 1973, is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

- "(b) a minor or any other person under legal disability [save a married woman 50



subject to the marital power of her husband whose written consent to her appointment as a director has, on the form referred to in section 211(1)(a), been lodged with the company];”.

#### Substitution of section 14 of Act 78 of 1973

34. Section 14 of the Occupational Diseases in Mines and Works Act, 1973, is hereby substituted for the following section: 5

##### “Performance of risk work by youths

14. [(1) Save as provided in subsection (2),] No [male] person under the age of sixteen years [and no female] shall perform risk work at a controlled mine or a controlled works, and no owner of such a mine or works or person in control of such a mine or works or any part thereof or contractor shall knowingly permit any [male] person under the age of sixteen years [or any female] to perform risk work at such mine or works. 10

[(2) The Minister may, after consultation with the Government Mining Engineer and subject to such conditions as the Minister may determine, authorize an owner of a controlled mine or a controlled works to employ a female in risk work at that mine or works.]” 15

#### Amendment of section 1 of Act 80 of 1976

35. Section 1 of the Rent Control Act, 1976, is hereby amended by the substitution for paragraph (a) of the definition of “lessee” of the following paragraph: 20

“(a) a sublessee and the widower or widow or divorced or deserted [wife] spouse of a lessee or sublessee who was living with [him] the lessee at the time of [his] the lessee’s death, divorce or desertion;”.

#### Amendment of section 13 of Act 90 of 1979, as amended by section 5 of Act 52 of 1980

36. Section 13 of the Education and Training Act, 1979, is hereby amended by the substitution for subsection (6) of the following subsection: 25

“(6) The services of a teacher who is employed in a permanent capacity in a post in respect of which a subsidy is paid by the State at a State-aided school, shall be deemed to have been terminated by the governing body with effect from the date on which he attains the age prescribed as his pensionable age by or under any pension law which applies to him, or, in the case of a teacher whose pensionable age is not so prescribed, with effect from the first day of the month following the month in which he reaches the age of 65 years[, in the case of a male, and 60 years, in the case of a female]: Provided that such teacher may thereafter, subject to the provisions of subsection (1)(b), be appointed on a temporary basis.”. 30 35

#### Amendment of section 21 of Act 90 of 1979, as amended by section 9 of Act 52 of 1980 and section 9 of Act 95 of 1987

37. Section 21 of the Education and Training Act, 1979, is hereby amended by the substitution for subsection (7) of the following subsection: 40

“(7) The services of a teacher appointed in a permanent capacity at a public school, shall be deemed to have been terminated by the Department with effect from the date on which he attains the age prescribed as his pensionable age by or under any pension law which applies to him or, in the case of a teacher whose pensionable age is not so prescribed, with effect from the first day of the month following the month in which he reaches the age of 65 years[, in the case of a 45



male, or 60 years, in the case of female]: Provided that such teacher may thereafter be appointed on a temporary basis.”.

Amendment of section 108 of Act 91 of 1981, as amended by section 15 of Act 42 of 1985

38. Section 108 of the Co-operatives Act, 1981, is hereby amended by the deletion of paragraph (c) of subsection (1). 5

[(d) if such person is a married woman under the marital power of her husband (unless her husband's written consent to her appointment as a director has been lodged with the co-operative);]

Amendment of section 17 of Act 3 of 1983 10

39. Section 17 of the Basic Conditions of Employment Act, 1983, is hereby amended by the substitution for paragraph (b) of the following paragraph:

“(b) require [or permit] any female employee to work during the period commencing four weeks prior to the expected date of her confinement and ending eight weeks after the date of her confinement.”. 15

Amendment of section 33 of Act 61 of 1984

40. Section 33 of the Small Claims Court Act, 1984, is hereby amended by the deletion of subsection 4.

[(4) If an unmarried woman is summoned for a debt based on contract and is thereafter married in community of property, or if a married woman is summoned for such a debt and it subsequently appears that she was married in community of property, the court may at any time, on application, before or after judgement, substitute the husband of that woman as defendant or judgment debtor.] 20

Substitution of section 11 of Act 88 of 1984 25

41. The following section is hereby substituted for section 11 of the Matrimonial Property Act, 1984:

“Abolition of marital power

11. (1) The martial power which a husband has under the common law over the person and property of his wife is hereby abolished in respect of all marriages to which it still applies. 30

(2) The abolition of the marital power does not affect the enforcement of any agreement which has been concluded before the commencement of the Abolition of Discrimination against Women Act, 1993.”.

Repeal of section 13 of Act 88 of 1984 35

42. Section 13 of the Matrimonial Property Act, 1984, is hereby repealed.

[Savings

13. The provisions of this Chapter do not affect the law relating to the position of the husband as head of the family or the law relating to domicile and guardianship.] 40

Amendment of section 1 of Act 72 of 1986

43. Section 1 of the Identification Act, 1986, is hereby amended by the substitution for paragraph (d) of subsection (2) of the following paragraph:

“(d) a person domiciled in the Republic who is in the service of the State or of a statutory body as defined in section 1(1) of the Exchequer and Audit Act, 1975 (Act No. 66 of 1975), or of an institution or a body contemplated in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961), and performs any functions outside the Republic or has been seconded to the service of the government of any other country (and the [wife] spouse or child of any such person who resides with him), shall, while 50



he is engaged in such service and during a period of two months thereafter, be deemed to be the place where the head office of the State department or administration on the establishment of which he occupies a post, or the head office of the statutory body concerned or of the institution or body concerned, as the case may be, is situated, or, if he expressly so requests, the place where any dwelling of which he is the registered owner is situated;". 5

#### Amendment of section 4 of Act 72 of 1986

44. Section 4 of the Identification Act, 1986, is hereby amended by the substitution for paragraph (b) of the following paragraph: 10

"(b) all persons domiciled in the Republic who are in the employ of the State, a statutory body as defined in section 1(1) of the Exchequer and Audit Act, 1975 (Act No. 66 of 1975), or an institution or body referred to in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961), and perform functions outside the Republic or have been seconded to the service of the government of another country, including the **[wife] spouse** or child of such person who resides with him; and" 15

#### Amendment of section 4 of Act 73 of 1986

45. Section 4 of the Restoration of South African Citizenship Act, 1986, is hereby amended by the substitution for subsection (2) of the following subsection: 20

"(2) Any period during which a person applying for registration as a South African citizen has been employed outside the Republic in the service of the Government of the Republic or on a ship or aircraft or any public means of transport registered or licensed in and operating from the Republic, and any period during which **[a woman] the spouse of a person** so applying has been resident outside the Republic with his or her **[husband] spouse** while the latter was so employed, shall, for the purposes of subsection (1), be regarded as a period of permanent residence in the Republic, and for such purposes the Director-General may, in his discretion, regard as a period of permanent residence in the Republic any period during which an applicant for registration as a South African citizen has been employed outside the Republic on a ship, aircraft or public means of transport operating from the Republic, and any period during which **[a woman] the spouse of a person** so applying has been resident outside the Republic with his or her **[husband] spouse** while the latter was so employed notwithstanding the fact that such ship, aircraft or public means of transport was not registered or licensed in the Republic." 25 30 35

#### Amendment of section 5 of Act 73 of 1986

46. Section 5 of the Restoration of South African Citizenship Act, 1986, is hereby amended by the substitution for subsection (2) of the following subsection: 40

"(2) The Director-General may, notwithstanding the provisions of subsection (1), on written application grant a certificate of naturalization as a South African citizen to a **[woman] person** who in terms of an Act specified in the Schedule is a citizen of an independent state and who convinces the Director-General that he or she— 45

(a) is the **[wife] spouse or widower** or widow of a South African citizen; and 45

(b) is lawfully and permanently resident in the Republic and has been so resident for a continuous period of not less than two years immediately preceding **[her] the** application and after **[her] the person's** marriage to such citizen." 50

#### Amendment of section 27 of the Natal Code of Zulu Law, published by Proclamation R.151 of 9 October 1987

47. Section 27 of the Natal Code of Zulu Law, 1987, is hereby amended by the deletion of subsection (3).



**[(3) A married woman shall be under the marital power of her husband: Provided that the marital power of the husband in a civil marriage out of community of property may be excluded by an antenuptial contract.]**

#### **Substitution of section 32 of Act 50 of 1991**

48. The following section is hereby substituted for section 32 of the Minerals Act, 1991:

##### **"Prohibition on underground work by certain juveniles**

32. [(1)] No person under the age of 16 years shall work underground in a mine, and nobody shall cause or permit any such person so to work." 10

[(2) No female shall work underground in a mine, and nobody shall cause or permit any such female so to work except—

- (a) females holding positions of management and who do not perform manual work;
- (b) females employed in health or welfare services; 15
- (c) females who in the course of their studies have to spend a period underground in a mine for training or research purposes; or
- (d) any other females who may occasionally have to go underground in a mine for the purposes of a non-manual occupation.]

#### **Amendment of section 28 of Act 96 of 1991**

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49. Section 28 of the Aliens Control Act, 1991, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) If the Minister is satisfied that any alien who desires to enter the Republic, is a distinguished visitor who has no intention to reside permanently in the Republic, he may permit the said alien, his **[wife,]** or her spouse, a dependent child of his or hers and any alien who is in his or her employ and a member of his or her household to enter the Republic without holding any temporary residence permit under this Act." 25

#### **Amendment of section 31 of Act 96 of 1991**

50. Section 31 of the Aliens Control Act, 1991, is hereby amended— 30

- (a) by the substitution for subparagraph (iv) of paragraph (d) of subsection (1) of the following subparagraph:

"(iv) in the case of the **[wife]** spouse or dependent child of a person referred to in paragraph (i), (ii) or (iii), such **[wife]** spouse or child was so resident with such person;" 35

- (b) by the substitution for subparagraph (v) of paragraph (d) of subsection (1) of the following subparagraph:

"(v) in the case of the **[wife]** spouse or dependent child of a person who is a South African citizen, such **[wife]** spouse or child was so resident with such person; or" 40

#### **Guardianship and custody of a minor**

51. During the duration of a marriage, both parents of a minor born from the marriage, may dispose of and are entitled to guardianship and custody of the minor.

#### **Capacity of women to act and to appear in court**

52. Notwithstanding her marital status a woman has— 45

- (a) the capacity to contract any legal act; and

(b) the capacity to appear before a court in any matter.

**Short title and commencement**

53. (1) This Act shall be called the Abolition of Discrimination against Women Act, 1993, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

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## NOTICE 159 OF 1993

## DEPARTMENT OF JUSTICE

## EXPLANATORY MEMORANDUM

DRAFT BILL ON THE PREVENTION OF DOMESTIC VIOLENCE,  
1993

## INTRODUCTION

1. Acts of violence within the family occur to an increasing extent amongst all population groups. Statistics show that the victims of domestic violence are mostly women and children. Although persons who commit these acts are criminally liable for their deeds offenders are seldom charged, mainly because family members are reluctant to testify against them. Furthermore, existing civil procedures to obtain court interdicts against offenders are cumbersome, unpractical and expensive and can in any event only be issued by the Supreme Court. Practical problems are also experienced with the enforcement of interdicts. The purpose of this draft bill, which is published for general information and comments, is to make a simpler, shorter and more effective procedure possible. A new, more effective system may contribute to a strategy to deal with domestic violence outside the criminal courts in order to maintain family unity.

2. An important provision which is proposed is to provide for conditional warrants of arrest of marriage partners against whom interdicts are issued. Such warrants are to be executed if an offending marriage partner disregards or is about to disregard the interdict issued against him. The purpose of the provision is aimed at preventive action in order to prevent family tragedies.

3. The proposed legislation is in accordance with statutory measures in other countries, and also with the spirit and purport of the proposed Charter of Fundamental Rights which is now being promoted by the Government.

4. A further matter addressed in the proposed draft Bill is rape by a husband of his lawful wife. The present legal position in South African law is that a husband, in terms of a rule of the common law, cannot be convicted of rape of his wife. In 1989 legislation was passed on recommendation of the South African Law Commission which provided that whenever a man has been convicted of assault on his wife and, but for the existence of the marriage between them, could have been convicted of rape, the fact of the rape must be regarded by the court as an aggravating circumstance at the passing of sentence (Criminal Law and Criminal Procedure Act Amendment Act, 1989). There are serious doubts today against the common law rule that a man cannot be convicted of rape of his lawful wife. In Britain, and also in a recent court decision in the Ciskei, it was ruled that a man can in fact be convicted of rape of his lawful wife. Consequently the common law position is adjusted in the draft bill, the effect of which will be that a man will be liable for conviction of rape of his wife in cases where the marriage relationship has broken down and the parties are no longer living together in the same home.

5. The timeous seizure of a fire arm in a case where a marriage partner uses it to threaten family members may contribute to the prevention of domestic violence and family tragedies. The Arms and Ammunition Act, 1969, already comprehensively provides for the seizure of fire arms by the police where such fire arms are used by persons to threaten others. The Act confers powers on police officers to declare persons unfit to have fire arms in their possession and to seize any fire arm in such a person's possession without a warrant. Steps under the said Act are contemplated to ensure that also magistrates are empowered to authorize the seizure of fire arms to prevent domestic violence.

6. This draft bill is published for comments. Comments may be addressed to: The Director-General, Department of Justice, Private Bag X81, Pretoria, 0001. The closing date for comments is 31 March 1993.



**CLAUSE 1**

1. In this clause the "matrimonial home" is defined as the home or place of residence where the parties to a marriage usually live together or have lived together.

2. The clause further provides that for the purposes of the proposed Act a man and a woman who are living with each other, or who have lived with each other, as husband and wife as if they were married, shall be deemed to be parties to a marriage. The effect of this provision is that the legal remedies provided for in the proposed legislation will also be available to couples who live or have lived together as husband and wife.

**CLAUSE 2**

1. Clause 2 provides for a court of law to issue certain interdicts. A court is expressly given the power in the case of violence or threats of violence or with respect to residence in the matrimonial home to issue interdicts.

2. Both magistrate's courts and the Supreme Court may issue such interdicts. Interdicts may be issued either temporarily or permanently.

**CLAUSE 3**

1. Clause 3 provides that whenever a court has issued or intends to issue an interdict under clause 2 and it appears that the person against whom the interdict was or is to be issued would probably disregard it, a provisional warrant of arrest may be issued against such person. If the person against whom the warrant was issued, should later disregard a provision of the interdict or should commit an act which indicates that he is about to disregard the interdict, the warrant of arrest may be executed by any peace officer. A person so arrested will not be released for a period of 24 hours unless the court, or a judge or magistrate in chambers, orders otherwise.

2. A person thus arrested may obviously be charged for the commission of an offence under clause 7 in appropriate cases.

**CLAUSE 4**

Clause 4 grants jurisdiction to a magistrate's court to issue an interdict or warrant for which this draft bill makes provision.

**CLAUSE 5**

1. Clause 5 re-enacts section 1 of the Criminal Law and Criminal Procedure Act Amendment Act, 1989, which provides that whenever a man is convicted of assault on his wife and could have been convicted for rape if it were not for the existence of the marriage, the court shall regard the fact of the rape as an aggravating circumstance at the passing of sentence. The clause further provides that the provisions thereof shall not apply in the case where the man may be convicted for rape of his lawful wife in terms of clause 6.

2. This clause confirms the existing position in connection with rape within the marriage subject to the exception provided for in clause 6.

**CLAUSE 6**

1. Clause 6 amends the rule that a man cannot be convicted for rape of his lawful wife in those cases where the man and his wife during the commission of the act no longer lived in the same home due to the break-down of their marriage relationship.

2. Thus, where a man rapes his wife in circumstances where they no longer live together in the same home due to the break-down of their marriage relationship, he will in future be liable to be convicted for rape.



**CLAUSE 7**

Clause 7 provides that a person who disregards the terms of an interdict issued by a court under clause 2, shall be guilty of an offence and on conviction be liable to a penalty not exceeding R2 000 or to imprisonment not exceeding 6 months or to both.

**CLAUSE 8**

Clause 8 authorizes the Minister of Justice to make regulations to prescribe a speedy and simple procedure whereby an application in terms of this Bill may be heard as well as any other matter with regard to which the Minister deems it necessary or expedient to make regulations for the purpose of attaining the object of the proposed Act. The object of this clause is to provide speedy relief to the victims of domestic violence.

**CLAUSE 9**

Clause 9 repeals the Criminal Law and the Criminal Procedure Act Amendment Act, 1989, which is re-enacted in clause 5.

# DRAFT BILL

To provide for certain interdicts in cases of domestic violence and warrants of arrest in connection therewith; to provide that a husband in certain circumstances can be found guilty of rape of his wife; and to re-enact certain provisions relating to rape in marriage; and to provide for matters connected therewith.

**B**E IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

## Definitions

1. (1) In this Act, unless the context otherwise indicates, "matrimonial home" means the home or place of residence where the parties to a marriage usually live together or have lived together. 5

(2) For the purposes of the provisions of this Act, excluding sections 5 and 6, a man and a woman who are living with each other, or have lived with each other, as husband and wife as if they were married shall be deemed to be parties to a marriage.

## Jurisdiction of a court of law to grant certain interdicts

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2. A court of law may on application by a party to a marriage (hereinafter called the applicant) in appropriate circumstances grant an interdict against the other party to the marriage in terms of which such other party is ordered—

- (a) not to assault the applicant, or not to subject the applicant to any other form of physical violence or to threats of physical violence; 15
- (b) not to assault a child living with the parties or living with one of the parties, or not to subject such child to any other form of physical violence or to threats of physical violence;
- (c) not to enter the matrimonial home or a specified part of the matrimonial home or a specified area in which the matrimonial home is situated or any other place of residence of the applicant; or 20
- (d) to allow the applicant, or any child usually living in the matrimonial home, entry into and to live in the matrimonial home or a specified part of the matrimonial home.

## Arrest for breach of interdict

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3. (1) Where a court of law has granted an interdict under section 2 against a party to a marriage, or intends to grant such an interdict, and evidence is laid before the court that a real danger exists that such party will probably disregard the interdict, or a provision thereof, the court may, to ensure proper compliance with the interdict, issue a conditional warrant of arrest against such other party. 30

(2) A conditional warrant of arrest issued under subsection (1), may be summarily executed by any peace officer if the said party commits an act which reasonably



justifies an inference that such party has disregarded, or is about to disregard, the interdict, or a provision thereof.

(3) Notwithstanding anything to the contrary contained in any law a person arrested in terms of a warrant under subsection (1), shall not be released before the expiration of 24 hours after the arrest unless a court of law, or a judge or magistrate in chambers, orders otherwise. 5

#### **Jurisdiction of magistrates' courts**

4. A magistrate's court shall have jurisdiction to grant an interdict or to issue a warrant which this Act provides for.

#### **Assault of wife by her husband which constitutes rape**

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5. (1) Whenever a man has been convicted of assault in any form on his lawful wife and could, but for the existence of the marriage between them at the time of the commission of the crime, have been convicted of rape, the fact that he could have been convicted of rape had he not been married to his wife, shall be regarded by the court as an aggravating circumstance at the passing of sentence. 15

(2) Subsection (1) shall not apply in the case where a man is convicted of rape of his lawful wife in terms of section 6.

#### **Rape of wife by her husband where they are not living together as husband and wife**

6. The rule that a man cannot be convicted of rape of his lawful wife, shall not apply where the man and his wife because of the break-down of the marriage relationship between them no longer lived together in the same home when the act was committed. 20

#### **Offences and penalties**

7. A person who disregards an order granted by a court of law under section 2 shall be guilty of an offence and upon conviction be liable to a penalty not exceeding R2 000 or to imprisonment for a period not exceeding six months or both such penalty and such imprisonment. 25

#### **Regulations**

8. Notwithstanding anything to the contrary contained in any law the Minister of Justice may make regulations in order to— 30

- (a) prescribe a speedy and simple procedure whereby an application in terms of this Act may be heard;
- (b) generally, for the purpose of attaining the object of this Act prescribe any other matter.

#### **Repeal of Act 39 of 1989**

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9. The Criminal Law and the Criminal Procedure Act Amendment Act, 1989, is hereby repealed.

#### **Short title and commencement**

10. This Act shall be called the Prevention of Domestic Violence Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*. 40



**NOTICE 160 OF 1993**  
**DEPARTMENT OF JUSTICE**  
**EXPLANATORY MEMORANDUM**  
**DRAFT BILL ON THE PROMOTION OF EQUAL**  
**OPPORTUNITIES, 1993**

**INTRODUCTION**

1. South Africa is on the threshold of a new dispensation in which there will be equality between persons and respect for the human dignity of all its citizens. Equality can be given effect to in various ways, for example, by implementing a charter of fundamental rights, subscribing to international conventions and introducing specific legislation. Equality guarantees persons the right that they will not be discriminated against on the ground of race, colour, language, sex, religion, ethnic origin, social class, birth, political or other convictions, or disabilities or other natural characteristics. This principle is the corner stone of the Government's proposed Charter of Fundamental Rights which was published for information on 2 February 1993. Equality between men and women is thus about to be guaranteed as a fundamental right.

2. The mere removal of inequalities between men and women without taking into consideration the differences between them may, however, lead to further discrimination. The fact that women differ from men biologically call for special measures which take into account the distinctive qualities of women. It requires that a woman be accommodated in order to enable her to fulfil her dualistic role as economic productive member in society and as mother, without being discriminated against. It is important that equality does not remain hollow words, but that in time real and effective equality between the sexes will materialize.

3. Although much has been done in recent years to promote equality between men and women, historical discrimination caused backlogs which will have to be addressed. The Government realize the need to protect women against discrimination and to promote equal opportunities between men and women. For this reason the Government has subscribed to four major international conventions regarding women. For the same reason the Government is now publishing this proposed draft bill for comment.

4. The purpose of the proposed draft bill is to prohibit discrimination on the ground of sex, marital status and pregnancy and to promote equality and equal opportunities between men and women. The essence of the draft bill is the establishment of an Equal Opportunities Commission to promote equality and equal opportunities between men and women. The draft bill is divided into three chapters in which provision is made for the prohibition of discrimination, the promotion of equal opportunities and provisions dealing with related miscellaneous matters. The proposed bill will be administered by the Minister of Justice because it deals primarily with legal reform and is not limited to the labour field. The principles on which the proposed legislation is based have already been implemented in some western countries.

5. Why is special legislation regarded necessary to give expression to the equality clause in a charter of fundamental rights? A charter of fundamental rights, firstly, contains only the basic rights which are guaranteed to individuals. The substantive regulation of rights is effected by legislation. Secondly, a charter primarily regulates relations between the State and the individual. The State is prohibited to infringe on the fundamental rights as contained in the charter. An equality clause therefore prohibits the State to discriminate against a person on the ground of sex or to make laws which permits discrimination. Sex discrimination, however, also occurs extensively in the private sector. It is therefore necessary that the prohibition of sex discrimination not only applies to the legal relations between the State and the individual, but also to the legal relations among individuals *inter se*. The proposed legislation provides for this.

6. The prohibition of discrimination in the work place and in the other circumstances specified in the draft bill, will have far reaching effects. For this



reason the legislation will not be implemented over night. The legislation contemplates to be phased in gradually in order that the provisions thereof will not apply to all persons, employers and organisations with immediate effect. Exclusions and exemptions will initially have to be granted on a fairly wide scale, which will in time be systematically withdrawn as and when the parties concerned are ready.

7. The purpose of the publication of this draft bill is to provide interested parties the opportunity to contribute to the project to promote women's rights. Any constructive proposals will be welcomed. The closing date for comments is 31 March 1993. Comments may be forwarded to the Director-general, Department of Justice, Private Bag X81, Pretoria, 0001.

#### **DISCRIMINATION ON THE GROUND OF SEX, MARITAL STATUS AND PREGNANCY**

1. Clauses 2, 3 and 4 define discrimination on the ground of sex, marital status and pregnancy. The definitions entail that a person discriminates against a man or a woman if a man or woman is prejudiced in the prescribed circumstances solely on the ground of his or her sex, or solely on the ground of his or her marital status or solely on the ground, in the case of a woman, of her pregnancy.

2. The marital status of a person is defined as follows in clause 1:

"marital status" means the status of—

- (a) being single;
- (b) being married;
- (c) being married but not living together with the other spouse as husband and wife;
- (d) being divorced; or
- (e) living together with a person of the opposite sex as husband and wife as if married.

#### **PROHIBITION OF DISCRIMINATION**

1. Clauses 5, 7, 8, 10, 11, 12 and 13 prohibit particular persons and institutions to discriminate against other persons on the ground of sex, marital status or pregnancy. The prohibition applies to employers, employment agencies, partnerships, registered societies, occupational controlling bodies and educational institutions and in respect of executive acts. All these terms are defined in clause 1 of the bill. The acts in respect of which discrimination is prohibited are also specified. For example an employer may not discriminate with regard to work offered by him.

2. The prohibition to discriminate against a person on the ground of marital status will have the effect that an employer may not follow a policy of, for example, only appointing single persons or of not appointing divorced persons.

3. The prohibition to discriminate against a woman on the ground of pregnancy aims at protecting pregnant women against discrimination especially in the work situation. An employer who dismisses a pregnant woman or pays her less solely because of her pregnancy will contravene the prohibition.

4. The prohibition of sex discrimination, however, does not apply in cases where the gender of a person is a genuine occupational requirement. It is stipulated in clause 9 that the Minister of Justice may by notice in the Gazette determine circumstances where gender is an occupational requirement.

5. Discrimination in contravention of the proposed legislation will not be a criminal offence. A person prejudiced by such discrimination will, however, have certain legal remedies at his or her disposal, for example, by laying charges with the Equal Opportunities Commission and the Ombudsman. Discrimination will further be deemed to be an unfair labour practice for purposes of the Industrial Court.

6. It must be stressed that the prohibition in the bill against discrimination on the ground of gender, marital status and pregnancy has been formulated in wide



terms. The proposed legislation will no doubt affect areas where it cannot be implemented immediately. The *modus operandi* is to initially grant exemptions to the prohibition rather extensively and then, in time, to systematically withdraw the exemptions until the prohibition is generally in force. The idea is to phase out discrimination in an orderly fashion.

### EQUAL PAY FOR EQUAL WORK

1. Provision is made in clause 6 that employees of different gender employed by the same employer should receive equal pay for the performance of the same work or work of the same value. Where an employee thus performs the same work or work of the same value than another employee and the first-mentioned employee's contract of employment is less favourable than that of the last-mentioned employee, the less favourable contract of employment will in terms of the bill be deemed to be adjusted so that it is not less favourable.

2. This provision, by virtue of the drastic nature thereof, will for a period of two years after the bill becomes law, not apply to contracts of employment that existed at the time the bill becomes law. The purpose is to give employers the opportunity to adapt to the proposed legislation.

### SEXUAL HARASSMENT

1. Clause 14 of the Bill deals with sexual harassment in the workplace and in educational institutions. The proposed clause prohibits in the first instance the sexual harassment of an employee or prospective employee by an employer or by an employee employed by the same employer. In the second instance the clause prohibits sexual harassment of a pupil or student or prospective pupil or student by a member of the staff of an educational institution.

2. Sexual harassment is defined as follows:

"any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her—

- (a) in any application for employment or a position with an employer or for admission to an educational institution; or
- (b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution."

3. A contravention of the provisions against sexual harassment will be deemed an unfair labour practice justiciable by the Industrial Court. Such behaviour may, however, as a result of it being declared unlawful, also lend to civil claims.

### EQUAL OPPORTUNITIES COMMISSION

1. An Equal Opportunities Commission is proposed in terms of clause 17 of the Bill. This Commission will be similar to commissions for equal opportunities which already function in countries such as Britain and Australia. The object of the Commission is the elimination of discrimination on the ground of gender, marital status and pregnancy and the advancement of equal opportunities between men and women.

2. The activities, composition and functioning of the Commission are set out in clauses 19 to 30. The Commission will consist of five members appointed by the State President. The State President may consult specific organisations when appointing members. The chairperson of the Commission will be designated by the State President. Members occupy their offices for a maximum of 5 years, but may be reappointed after the expiration of their term.

3. The Commission will be competent to investigate any discriminatory legal provision, including provisions of the common law. If the Commission finds that



a specific provision constitutes an unreasonable distinction between males and females, the Commission may make proposals regarding the amendment or repeal thereof. The Commission may further also investigate general discriminatory practices, especially in the labour field, and submit proposals for the elimination thereof to the Minister.

4. In terms of clause 27 the Commission may draft a code of conduct regarding the identification and elimination of discriminatory practices, the creation of measures aimed at gender equality, care centres for children and special treatment of pregnant women. The code would not be binding, but the Minister may declare specific provisions thereof to be binding.

5. Finally, the Commission may in terms of clause 28 assist prejudiced persons regarding the remedies available to them. The Commission may order any person responsible for such prejudice to submit a report in connection therewith to the Commission. An omission by a person to comply with such an order will constitute an offence and will be punishable with a fine not exceeding R5 000 or imprisonment not exceeding six months.

### EXEMPTIONS

Provision is made in clause 31 for the responsible Minister to grant exemptions. The exemptions may be amended or revoked. The reason for this is, as already mentioned, that the proposed bill will have a very wide application and may have drastic implications. The provisions of the bill will therefore not at once, but gradually, be phased in. The exemption clause makes a phased introduction possible.

### PERMISSIBLE DISCRIMINATION IN FAVOUR OF WOMEN AND WITHIN RELIGIOUS ASSOCIATIONS

1. Because of the biological composition of women it is sometimes necessary to introduce special measures aimed at the protection of women. It is further necessary that opportunities be granted to enable women to overcome historical backlogs which resulted from discrimination in the past. In order to give effect to this, clause 32 provides that discrimination in favour of women will be permissible in the following cases:

- (i) the protection of women as a result of their physical nature;
- (ii) the performance of military service;
- (iii) special treatment regarding pregnancy; and
- (iv) special measures aimed at the development and advancement of women.

2. Clause 33 allows discrimination within a religious association on the basis of their religious beliefs provided it is applied *bona fide*. The reason for this is to allow persons freedom of choice and not to be prescriptive when it comes to the religion of persons.

### PROHIBITION OF VICTIMIZATION

1. In order to prevent that an employer prejudices an employee who in terms of this draft bill seeks to enforce his or her rights, victimization of the employee is prohibited.

2. An employer who contravenes this provision, will be guilty of an offence and liable on conviction to a penalty not exceeding R5 000 or to imprisonment for a period not exceeding six months.

### ASSISTANT-OMBUDSMAN

Clause 36 provides for the appointment of an Assistant-ombudsman with the insertion of section 2A in the Ombudsman Act, 1979 (Act No. 118 of 1979). The Assistant-ombudsman will specifically be tasked with matters where the State discriminates unlawfully against a person on the ground of sex, marital status or pregnancy.



## DRAFT BILL

To prohibit discrimination on the ground of sex, marital status and pregnancy; to promote equality and equal opportunities between males and females; and for this purpose to establish an Equal Opportunities Commission; and to provide for matters connected therewith.

**B**E IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

### Definitions

1. In this Act, unless the context otherwise indicates—

“advertisement” means any notice or invitation to the public or to any section of the public, irrespective of the medium used to communicate such notice or invitation and irrespective of the form or method in which such notice or invitation is communicated, and “advertise” has a corresponding meaning;

“Commission” means the Equal Opportunities Commission established by section 17;

“educational institution” means any educational institution—

- (a) which is managed or operated by the State or with the aid of state funds;
- (b) established or registered by or under any law; or
- (c) of which the standard of education or training which is provided there, is determined or controlled by or under any law;

“employee” means a person who is in the employment of or who works for an employer and receives a reward or is entitled to receive a reward or who works under the direction or supervision of an employer;

“employer” means—

- (a) a person who employs another person or provides such person with employment and rewards or expressly or tacitly undertakes to reward such person; or
- (b) a person who intends to become an employer within the meaning of paragraph (a);

“executive act” means—

- (a) any authorization which is granted to a person under any law, including any permit, licence, registration, approval, permission, concession, benefit or grant provided for in terms of a law; or
- (b) any bursary, loan, subsidy or financial allocation granted to a person by the State, a statutory council or a local authority;

“local authority” means—

- (a) an institution or a body contemplated in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961);
- (b) a local authority as defined in section 1(1) of the Black Local Authorities Act, 1982 (Act No. 102 of 1982);
- (c) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act No. 109 of 1985);



- (d) a board of management as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987);
  - (e) a local council established under section 2 of the Local Councils Act (House of Assembly), 1987 (Act No. 94 of 1987); or
  - (f) any other institution established by law which the Minister by notice in the *Gazette* declares to be a local authority for purposes of this Act: 5
- "marital status" means the status of—
- (a) being single;
  - (b) being married;
  - (c) being married but not living together with the other spouse as husband and wife: 10
  - (d) being divorced; or
  - (e) living together with a person of the opposite sex as husband and wife as if married:
- "Minister" means the Minister of Justice: 15
- "occupational controlling body" means any body, board, association or organization, whether or not established or recognized by law, which exercises control by way of membership, registration or any other system over the practice by persons of a particular profession, occupation, craft or trade:
- "partnership" means also a partnership yet to be established: 20
- "registered association" means—
- (a) a trade union registered under the Labour Relations Act, 1956 (Act No. 28 of 1956);
  - (b) an employers' organization registered under the Labour Relations Act, 1956: 25
  - (c) a pension fund organization registered under the Pension Funds Act, 1956 (Act No. 24 of 1956);
  - (d) a friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956);
  - (e) a medical scheme registered under the Medical Schemes Act, 1967 (Act No. 72 of 1967): 30

## CHAPTER I

### PROHIBITION OF DISCRIMINATION

#### Discrimination on the ground of sex

2. (1) In any of the circumstances specified in sections 5, 7, 8 and 10 to 13, a person discriminates against a female on the ground of sex if such a person— 35
- (a) treats the female less favourable, solely on the ground of her sex or on the ground a quality which is generally attributed to females, than that person treats or would treat a male;
  - (b) refuses or deliberately fails to afford the female, solely on the ground of her sex or on the ground of a quality which is generally attributed to females, any benefit or opportunity over which such a person has control; or
  - (c) imposes a requirement or condition with regard to the female which such person imposes or would impose equally with regard to a male, but— 40
    - (i) which is such that the females who can comply with it are considerably less in proportion to the proportion of males who can comply with it;
    - (ii) which cannot be reasonably justified irrespective of the sex of the person to whom it is applied; and
    - (iii) which is to her detriment because she cannot comply with it.
- (2) In any of the circumstances specified in sections 5, 7, 8 and 10 to 13, a person discriminates against a male on the ground of sex if such a person— 50
- (a) treats the male less favourable, solely on the ground of his sex or on the ground of a quality which is generally attributed to males, than such a person treats or would treat a female;
  - (b) refuses or deliberately fails to afford the male, solely on the ground of his sex or solely on the ground of a quality which is generally attributed 55



to males, any benefit or opportunity over which such a person has control; or

- (c) imposes a requirement or condition with regard to the male which such person imposes or would impose equally with regard to a female, but—
  - (i) which is such that the males who can comply with it are considerably less in proportion to the proportion of females who can comply with it; 5
  - (ii) which cannot be reasonably justified irrespective of the sex of the person to whom it is applied; and
  - (iii) which is to his detriment because he cannot comply with it:

Provided that any special treatment of women with reference to pregnancy or childbirth shall not be taken into consideration for the purpose of this subsection. 10

#### **Discrimination on the ground of marital status**

3. In any of the circumstances specified in sections 5, 7, 8 and 10 to 13, a person discriminates against another person on the ground of marital status if the first-mentioned person— 15

- (a) treats the other person less favourable, solely on the ground of his or her marital status or solely on the ground of a quality which is generally attributed to persons with the marital status of such other person, than the said first-mentioned person treats he would treat a person with another marital status: 20
- (b) refuses or deliberately fails to afford the other person, solely on the ground of his or her marital status or solely on the ground of a quality which is generally attributed to persons with the marital status of such other person, any benefit or opportunity over which the said first-mentioned person has control; or 25
- (c) imposes a requirement or condition with regard to the other person which the said first-mentioned person imposes or would impose equally with regard to a person with another marital status, but—
  - (i) which is such that persons with a marital status similar to that of such other person who can comply with it, are considerably less in proportion to the proportion of persons with another marital status who can comply with it; 30
  - (ii) which cannot be reasonably justified irrespective of the marital status of the person to whom it is applied; and
  - (iii) which is to such other person's detriment because he or she cannot comply with it. 35

#### **Discrimination on the ground of pregnancy**

4. In any of the circumstances specified in sections 5, 7, 8 and 10 to 13, a person discriminates against a female on the ground of pregnancy if such a person—

- (a) treats the female less favourable, solely on the ground of her pregnancy or solely on the ground of a quality which is generally attributed to pregnant females, than such a person treats or would treat a female who is not pregnant; 40
- (b) refuses or deliberately fails to afford the female, solely on the ground of her pregnancy or solely on the ground of a quality which is generally attributed to pregnant females, any benefit or opportunity over which such a person has control; 45
- (c) imposes a requirement or condition with regard to the female which such a person imposes or would impose equally with regard to a female who is not pregnant, but— 50
  - (i) which is such that pregnant females who can comply with it are considerably less in proportion to the proportion of females who are not pregnant who can comply with it;
  - (ii) which cannot be reasonably justified irrespective whether the female to whom it is applied is pregnant or not; and 55



**Prohibition of discrimination by partnerships**

8. (1) No partnership shall with regard to—
- (a) any position as a partner in the partnership which is offered by the partnership;
  - (b) any arrangements made by the partnership to invite persons or to recruit or select candidates for a position as partner; 5
  - (c) any advertisement in which the partnership advertises a position as partner; or
  - (d) the conditions, including the remuneration and other partnership benefits, on which the partnership offers the position. 10
- discriminate against a person on the ground of sex, marital status or pregnancy.
- (2) No partnership shall with regard to—
- (a) the benefits or profit-sharing by partners in the partnership;
  - (b) training or any other benefits, facilities or services;
  - (c) the dissolution of a partnership against a partner; or 15
  - (d) general working conditions.
- discriminate against a partner in the partnership on the ground of sex, marital status or pregnancy.
- (3) Subsections (1) and (2) shall, in so far as they prohibit discrimination on the ground of sex, not apply with regard to a position as partner where the sex of the 20 partner is a genuine occupational requirement for the relevant position.

**Work, employment and positions where sex is an occupational requirement**

9. The Minister may, without derogating from the generality of section 5(3), 7(2) and 8(3), by notice in the *Gazette* specify the types of work, employment and positions which for the purposes of those sections shall be regarded as employment 25 and positions in respect of which the sex of a person is a genuine occupational requirement.

**Prohibition of discrimination by registered societies**

10. (1) No registered society shall with regard to the admission, or the conditions of admission, of persons as members of the society discriminate against a person on 30 the ground of sex, marital status or pregnancy.
- (2) No registered society shall with regard to—
- (a) the benefits, facilities or services which it offers its members;
  - (b) the conditions of membership or the variation of the conditions of membership; or 35
  - (c) the renewal, extension, withdrawal or suspension of membership.
- discriminate against a member of the society on the ground of sex, marital status or pregnancy.

**Prohibition of discrimination by occupational controlling bodies**

11. (1) No occupational controlling body shall with regard to the admission or 40 conditions of admission of persons to the profession, occupation, craft or trade which is controlled by the occupational controlling body, discriminate against a person on the ground of sex, marital status or pregnancy.
- (2) No occupational controlling body shall with regard to—
- (a) the benefits, facilities or services which it offers to persons who have been 45 admitted to the profession, occupation, craft or trade;
  - (b) the conditions of any registration, admission or recognition of such persons, or the variation of such conditions;
  - (c) the renewal, extension, withdrawal or suspension of any such registration, admission or recognition. 50
- discriminate against a person who practise such profession, occupation, craft or trade on the ground of sex, marital status or pregnancy.
- (3) Subsections (1) and (2) shall, in so far as they prohibit discrimination on the ground of sex, not apply with regard to the participation in a competitive sport or



sport activity in which males and females do not as a rule compete with each other on the ground of physical attributes.

#### Prohibition of discrimination by educational institutions

12. (1) No educational institution shall with regard to—

- (a) the admission of persons to or the expulsion of persons from such an institution; or
- (b) the education or training which is provided at such an institution.

discriminate against a person on the ground of sex, marital status or pregnancy.

(2) Subsection (1) shall not prevent—

- (a) an educational institution which is managed exclusively or mainly for pupils or students of a particular sex to refuse the application of a person of the opposite sex for admission to the institution; or
- (b) separate living quarters for males and females who receive education or training at such an institution.

#### Prohibition of discrimination in respect of executive acts

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13. No person who has a discretionary power in respect of an executive act shall in the exercise of such power discriminate against a person on the ground of sex, marital status or pregnancy.

#### Sexual harassment

14. (1) No employer shall sexually harass an employee in his or her employment or a person who applies for employment or a position with him or her.

(2) No employee of an employer shall sexually harass another employee in the service of such an employer or a person who applies for employment or a position with such employer.

(3) No member of the staff of an educational institution shall sexually harass a pupil or student at such institution or a person who applies for admission as a pupil or student at such institution.

(4) For the purpose of this section sexual harassment means any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her—

- (a) in any application for employment or a position with an employer or for admission to an educational institution; or
- (b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution.

#### Jurisdiction of Industrial Court

15. For the purpose of the Labour Relations Act, 1956 (Act No. 28 of 1956), a contravention of sections 5, 6, 7, 8, 10, 11, 12, 13 or 14 of this Act shall be deemed to be an unfair labour practice.

#### Certain agreements invalid

16. (1) Subject to the other provisions of this Act or any exclusion or exemption under section 31, no agreement, whether in writing or verbally and whether concluded before or after the commencement of this Act, shall be valid in so far as it is contrary to a provision of this Act.

(2) Subsection (1) shall for a period of two years after the commencement of this section not apply to agreements existing at such commencement.



## CHAPTER II

### PROMOTION OF EQUAL OPPORTUNITIES

#### Equal Opportunities Commission

17. Hereby is established a Commission to be known as the Equal Opportunities Commission.

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#### Objects of Commission

18. The objects of the Commission shall be to promote the elimination of discrimination on the ground of sex, marital status and pregnancy and the creation of equal opportunities between males and females.

#### Functions of Commission

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19. (1) In order to achieve the objects of section 18, the Commission may, in addition to that which the Commission shall or may do in terms of the other provisions of this Act—

- (a) gather and process information on any matter to which this Act applies;
- (b) undertake studies and surveys on such a matter;
- (c) make recommendations on such a matter to any relevant authority;
- (d) draw up and disseminate information documents on such a matter;
- (e) draw up and promote draft legislation on such a matter.

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(2) The work incidental to the functions of the Commission shall be performed by officials in the service of the Department of Justice designated for that purpose by the Director-General of that Department.

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#### Constitution of Commission

20. (1) The Commission shall consist of five members appointed by the State President on the ground of their special knowledge or experience and dedication to the object for which the Commission is established in terms of this Act.

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(2) The State President may when appointing the members of the Commission under subsection (1), consult any organization which strives for equality and equal opportunities between males and females.

(3) At least one of the members of the Commission shall be appointed in a full-time capacity.

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#### Chairperson

21. (1) The State President shall designate a member of the Commission as chairperson of the Commission.

(2) A member of the Commission who has been designated as chairperson shall hold office as chairperson for as long as he or she continues to be a member.

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(3) Whenever the chairperson is absent or not able to perform his or her functions as chairperson, or whenever the designation of a chairperson is pending, the Minister may designate any member of the Commission to act as chairperson during the absence or inability of the chairperson, or until a chairman has been designated, as the case may be.

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#### Period of office and remuneration

22. (1) A member of the Commission shall be appointed for a period determined by the State President at the time of the member's appointment, but not exceeding five years.

(2) A person whose period of office as a member of the Commission has expired, may be reappointed.

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(3) A member of the Commission may be paid from moneys allocated by Parliament for this purpose, such allowances (including remuneration in the case of



a full-time member), which the Minister, with the approval of the Minister of Finance, may determine.

#### Meetings

23. (1) A meeting of the Commission shall be held at such time and place determined by the chairperson. 5
- (2) The majority of the members of the Commission shall form a quorum for a meeting of the Commission.
- (3) The decision of the majority of the members of the Commission present at a meeting of the Commission, shall constitute a decision of the Commission, and in the event of an equality of votes on any matter the chairperson of the Commission shall, 10 in addition to a deliberative vote, also have a casting vote.
- (4) In this section "chairperson" includes a member of the Commission designated under section 21(3).

#### Discriminatory laws

24. (1) The Commission may inquire into a provision of any law, including a 15 provision of the common law, which distinguishes between males and females, or has a different effect in its application between males and females, with a view to establishing the possible unreasonableness of such a distinction or effect.
- (2) If the Commission finds that the provision concerned constitutes an unreasonable distinction between males and females or has an unreasonable effect with 20 respect to either males or females, the Commission may submit proposals for the amendment or repeal of the provision, together with a report of the Commission's inquiry, to the Minister.
- (3) Subsection (1) shall not affect any provision which on the ground of physical attributes, other than mere strength or stamina, applies differently to males and 25 females or applies only to males or only to females.

#### Discriminatory practices

25. (1) The Commission may inquire into any arrangement, custom, condition or circumstance which is generally applied or in force with regard to any matter and which distinguishes between males and females, or which has a different effect on 30 males and females, with a view to establishing the possible unreasonableness of such a distinction or effect.
- (2) If the Commission finds that the arrangement, custom, condition or circumstance concerned constitutes an unreasonable distinction between males and females or has an unreasonable effect with respect to either males or females, the 35 Commission may submit proposals (including legislative proposals) for the elimination of such unreasonable distinction or effect, together with a report of its inquiry, to the Minister.
- (3) Subsection (1) shall not affect any arrangement, custom, condition or circumstance which on the ground of physical attributes, other than mere strength or 40 stamina, or on the ground of the religious rights of a religious group, applies differently to males and females or applies only to males or only to females.

#### Commission's power to conduct inquiries

26. (1) The Commission shall for the purposes of an inquiry under section 24 or 25 have the same powers as the South African Law Commission under the South 45 African Law Commission Act, 1973 (Act No. 19 of 1973).
- (2) The Commission may undertake any inquiry under sections 24 or 25 in conjunction with the South African Law Commission, and the South African Law Commission may undertake any such inquiry on behalf of the Commission if 50 requested thereto by the Minister.

#### Code of Conduct

27. (1) The Commission may draft a code of conduct, which shall not be inconsistent with this Act, with regard to the following matters:
- (a) the identification of arrangements, customs, conditions and circumstances



which in practice differentiate or may differentiate unreasonably between males and females or which have or may have an unreasonable effect on either males or females;

- (b) the elimination of such arrangements, customs, conditions or circumstances or of any unreasonable distinction or effect which such arrangements, customs, conditions or circumstances may have; 5
  - (c) the creation of special measures directed towards establishing equality between males and females, with due regard to the interests of other persons; 10
  - (d) care centres for children of working parents; 10
  - (e) the treatment of female employees with regard to pregnancy and childbirth, including maternity benefits; 10
  - (f) in general the promotion of equality and equal opportunities between males and females. 10
- (2) The Commission shall submit to the Minister a code drawn up under subsection (1) for his approval. 15
- (3) The Minister may publish the code in the *Gazette* with such amendments as the Minister may think fit, or without amendments.
- (4)(a) A code published under subsection (3), may be amended from time to time.
- (b) For the purposes of such an amendment subsections (1), (2) and (3) shall apply *mutatis mutandis*. 20
- (5)(a) A provision of the code shall not be binding, except where, and to the extent to which, the Minister declares it binding by notice in the *Gazette*.
- (b) When the Minister declares a provision of the code binding, the Minister may determine that any contravention of or any failure to comply with such a provision shall be an offence. 25

#### Complaints with regard to contraventions

28. (1) The Commission may with regard to any alleged contravention of a provision of this Act which is brought to the notice of the Commission, take such steps which it may regard as necessary under the circumstances, including— 30
- (a) the giving of legal and other advice to any person who has been prejudiced because of the contravention; 30
  - (b) the lodging of a complaint on behalf of the prejudiced person with the Ombudsman in terms of the Ombudsman Act, 1979 (Act No. 118 of 1979), in so far as such contravention falls within the jurisdiction of the Ombudsman; 35
  - (c) the lodging of a complaint on behalf the prejudiced person with the Industrial Court, referred to in section 17 of the Labour Relations Act, 1956 (Act No. 28 of 1956), in so far as such contravention falls within the jurisdiction of the Industrial Court; or 40
  - (d) the submission of representations on behalf of the prejudiced person to any person who is responsible for the contravention or has control over its rectification. 40
- (2) For the purposes of section (1) the Commission may order any person who is responsible for the alleged contravention of a provision of this Act to submit to it within a fixed period a report in writing on the circumstances regarding the alleged offence. 45

#### Annual report

29. The Commission shall within six months after the expiry of each year submit to the Minister in both official languages a report regarding its activities during that year. 50

#### Submission of certain reports and proposals of the Commission to Parliament

30. Copies of—
- (a) an annual report of the Commission submitted to the Minister in terms of section 29; and 55
  - (b) any reports and proposals of the Commission submitted to the Minister in terms of section 24 or 25, 55
- shall be tabled by the Minister in Parliament within 14 days after its receipt, if



Parliament is then in ordinary session, or, if Parliament is not then in ordinary session, within 14 days after the commencement of the next ordinary session.

### CHAPTER III MISCELLANEOUS PROVISIONS

#### Exclusions and exemptions

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31. (1) The Minister may by notice in the *Gazette*, on the conditions and subject to the qualifications determined by the Minister, exclude from the operation of one or more of or all the provisions of this Act—

- (a) any industry, profession, occupation, craft or trade;
- (b) any person or institution or category of persons or institutions;
- (c) any agreement or category of agreements;
- (d) any category of employment or positions; or
- (e) any category of executive acts.

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(2) The Minister may exempt any person in writing, on the conditions and subject to the qualifications determined by him, from the operation of one or more of or all the provisions of this Act.

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(3) The Minister may at any time—

- (a) amend or revoke a notice issued under subsection (1) by notice in the *Gazette*;
- (b) amend or revoke an exemption granted under subsection (2) by written notice to the exempted person.

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#### Permissible discrimination in favour of females

32. This Act shall not affect—

- (a) a provision of any law, the common law or the law of indigenous groups, a provision of any agreement or the domestic rules of any society or organization, or any rule of practice, custom or understanding aimed at protecting or treating differently any particular female or females, or any particular category of females, or females in general, for reasons inherent to the physical nature of the female;
- (b) the performance of military service in so far as it is only required of males;
- (c) any special treatment which a female receives because of pregnancy or childbirth or recovery after childbirth; or
- (d) any special measures of which the sole purpose is the furthering of the development and advancement of females to enable them to realize their natural talents and potential in equality with males.

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#### Permissible discrimination on the ground of religious rights

33. This Act shall not affect the *bona fide* application by a religious association, society or organization of the religious rights of that association, society or organization.

#### Prohibition of victimization

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34. An employer shall not dismiss an employee from his or her employment, or reduce the scale of the employee's remuneration, or alter the terms or conditions of the employee's employment to terms and conditions which are less favourable, or alter the employee's position in relation to other employees in the service of such an employer to the employee's detriment, because of the fact, or because such employer suspects or believes, whether or not the suspicion or belief is justified or correct, that the said employee—

- (a) has lodged a complaint or intends to lodge a complaint under section 28 with the Commission, or has supplied or intends to supply the Commission with any information in connection with such an employee's employment with that employer;

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- (b) has laid or intends to lay a matter under section 4(1)(c) of the Ombudsman Act, 1979 (Act No. 118 of 1979), with the Ombudsman;
- (c) has applied or intends to apply to the Industrial Court to declare any conduct of that employer in terms of section 15 to be a unfair labour practice; or
- (d) has applied or intends to apply to a court of law for relief with regard to the said employee's employment with that employer.

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#### Offences and penalties

##### 35. Any person who—

- (a) contravenes or fails to comply with a provision of the code referred to in section 27(5)(b);
  - (b) fails to comply with an order under section 28(2);
  - (c) contravenes a provision of section 34;
  - (d) furnishes information or makes a statement to the Commission which is false in a material respect knowing it to be false.
- shall be guilty of an offence and on conviction be liable to a penalty not exceeding R5 000 or to imprisonment for a period not exceeding six months.

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#### Insertion of section 2A in Act 118 of 1979

36. The following section is hereby inserted in the Ombudsman Act, 1979, after section 2:

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##### **"Appointment, conditions of service and functions of Assistant Ombudsman"**

2A. (1) The State President shall appoint, in a full-time or part-time capacity, a person as an Assistant Ombudsman.

(2) The provisions of section 2 shall apply *mutatis mutandis* in respect of the Assistant Ombudsman.

(3) The Assistant Ombudsman shall, subject to the control and directions of the Ombudsman, deal in the name of the Ombudsman with matters brought before the Ombudsman under section 4(1)(e)."

#### Amendment of section 4 of Act 118 of 1979, as amended by section 3 of Act 55 of 1983 and section 3 of Act 104 of 1991

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37. Section 4 of the Ombudsman Act, 1979, is hereby amended by the addition after paragraph (d) of subsection (1) of the following paragraph:

- "(e) he has been discriminated against in an unlawful manner by the State or an institution, body, society or organization referred to in the definition of 'public moneys' on the ground of sex, marital status or pregnancy within the meaning of the Promotion of Equal Opportunities Act, 1993, and that he has suffered serious prejudice or account of such discrimination,".

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#### Act binds State

38. This Act shall bind the State.

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#### Short title and commencement

39. (1) This Act shall be called the Promotion of Equal Opportunities Act, 1993, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.

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## ANNEXURE C

The following parties have made submissions to the Committee and these submissions are herewith included in the report:

- \* Transkei Government
- \* National Peoples Party
- \* United Peoples Front
- \* African National Congress
- \* Inkhata Freedom Party
- \* Inyandza National Movement



**(C) AMENDMENT OR REPEAL OF LEGISLATION IMPEDING FREE POLITICAL  
ACTIVITY AS WELL AS DISCRIMINATORY LEGISLATION:**

1. We undertake to offer the Technical Subcommittee our fullest support and co-operation.
2. You will be notified of the name of the officer from our Department of Justice who will work with you, in due course. Please notify us of the day and date on which the Technical Subcommittee will confer with him/her on this matter. Refer all enquiries to Z. Titus who can be contacted through Dr Eloff's office. In the meantime copies of the appropriate legislation as well as a list thereof will be made. We have an updated index covering subordinate and primary legislation introduced in Transkei after 1963. There are also a number of pre-1976 South African laws applicable in Transkei. Reference will also be made thereto. We are also compiling a list of the laws falling within the purview of the laws under consideration but which have otherwise been repealed or amended. We would welcome a comprehensive list of the laws the subcommittee has already identified in respect of the other States and homelands.
3. A practising attorney will work with the officer from the Department of Justice on this matter. We feel that someone from outside of Government will provide the team with the fair balance required in tackling a matter of this nature.

4. Finally, a circular letter will be sent to all organisations in Transkei requesting them to contribute to this exercise. This is being done in order to ensure that there will be no queries with regard to our handling of this matter.

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*Repeal*

19 May 1993

Dr.T. Eloff  
Administration  
Multi Party Negotiation Process  
World Trade Centre

Dear Dr. Eloff

Technical Committee on the repeal or amendment of legislation  
imposing free political activity and discriminatory legislation.

The N.P.P.'s comments on the First Report of the Committee

In addition to the repeal or the amendment of such legislation  
a process should commence in order to restore the rights of  
those who have suffered as a result of such legislation.

The Acts that repealed the Group Areas Act and The Population  
Registration Act should be examined.

In respect of those who have lost their properties because  
of Racially-Based Legislation the Government should arrange  
for the affected persons to either get their properties back  
or be provided with suitable alternative premises not at  
market value.

The Technical Committee also dealt with the Freedom of the  
Press and the question of Free access to information.

In this respect the Committee also referred (paragraph 5.4)  
to the actions of Government bodies and also private individuals  
or groups.

The Code should also deal with the rights of journalists  
reporting on any movement without hindrance from his/her  
superiors and also such rights must not be interfered with  
by any individual or organisation that may want to coerce  
journalist how to think and what to write .



With Kind Regards

*A. Rajbansi*  
A. Rajbansi

UPF'S SUBMISSION TO THE TECHNICAL COMMITTEE  
ON THE AMENDMENT OR REPEAL OF DISCRIMINATORY LEGISLATION

1. LOCAL GOVERNMENT BODIES FRANCHISE ACT 117 OF 1984

There is no shred of doubt that this Act is cast in the same racial mould as the Constitution Act itself is. It is actually crystallization at local level of that which is envisaged by the constitution. For as long as this law remains on the statute book, it would not be possible for other races to participate in the local elections in such areas except those that are specifically mentioned in the Act. On the other hand the Black Local Authorities Act is designed to deal exclusively with Blacks within their own areas. This sound very much like the American pipe-dream of "separate but equal" philosophy.

In the kind of a situation created by this Act, it would not be possible to speak of a climate where free political activity can take place. This Act puts shackles on people on racial lines. It has to go before one could create an ideal climate for free political activity. The same point still holds good in respect of the Black Local Authorities Act.

2. ELECTORAL ACT 45 OF 1979

This Act extends the rights to vote to persons who are either White, Coloured or Indian in term of section 52 of the Constitution Act (Act 110 of 1983). Free political activity presupposes that a person should have the right to vote for an candidate of his choice. With this Act firmly in place, the Black people would not have such a right. How does one then exercise his democratic right to elect the government of his own choice if the very fundamental right to vote for such



-2-

a right. How does one then exercise his democratic right to elect the government of his own choice if the very fundamental right to vote for such government is denied him by legislation.

3. REFERENDUMS ACT 108 OF 1983

There is presently much talk about a referendum being held with a view to testing the views of the people of South Africa before a transition into the new South Africa. In terms of this Act only the views of Whites, Coloureds and Indians may be tested and known. Blacks cannot lawfully participate in this kind of a referendum because for purposes of this Act they do not qualify as 'voters'.

4. SOCIAL PENSIONS

The tenets of justice would dictate that there be one act dealing with the aspect of social pensions without referring to a particular class of persons or a specified population group. However our Act empowers the Minister to issue a proclamation relating to a particular population. This would obviously tempt the Minister to issue proclamations designed to treat people unequally. This is the position as regards the benefits to which people belonging to different race are entitled ~~and~~ and the yardstick is the colour of their skin.

These acts should be repealed.

5. PREVENTION OF ILLEGAL SQUATTING ACT 52 OF 1951

It is a notorious fact that the policy of the Government in the past has been that Blacks were so journeymen in the urban areas and therefore the policy was that they would remain

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there for as long as they were working. As a result there was no clear and permanent arrangement for the provision of housing for blacks. Hence the problems of squatting are mostly confined to Black communities.

If the policy has now changed and it is accepted that Blacks are in cities to stay, then this Act will fall into desuetude and there is no reason for its continued existence. Besides the harsh manner in which the "squatters" were treated cannot be countenanced by any society claiming to be civilized.

6. EDUCATIONAL POLICY

A plethora of laws are in place to regulate education issues of the numerous departments of education. The problem with these laws is that they were purposely made to disadvantage other races educationally.

It has now become urgent and imperative that these discriminatory laws be removed so that all the people in this country should have the right to the same educational opportunities. There should be only one system of education. This will ensure that the same quality and the standard of education will be maintained.

7. BLACK ADMINISTRATION ACT 38 OF 1927

This ACT was an ideal instrument in the hands of the Government to control the Black people in this country and their traditional institutions such as bogosi. Since the new policy is that all people should be equal in the eyes of the law, then there is no reason why there should still be acts controlling only lives of certain races. Such laws have no place in the new South Africa because they would go against the of equality.



-4-

8. SELF-GOVERNING TERRITORIES CONSTITUTION ACT (ACT 21 OF 1971)

This is undoubtedly the foundation upon which separate development is built. It is the instrument by which the Government would extend the 'vote' to the voteless and voiceless Blacks. They were to be developed into independent nations. There was no hope for most of these enclaves because they could never be economically viable - they had to be sustained financially by the Central Government in order to survive.

Reality has now dawned and it has been realised that this system cannot be sustained forever because it was prohibitively expensive to maintain.

Reality would dictate that as this law was founded on apartheid, it should go when apartheid goes.

At this stage the self-governing territories have original powers to legislate on certain scheduled matters. In those instances where the legislative Assemblies have such powers, not even RSA parliament legislation can apply in these self-governing territories. Therefore, this piece of legislation should go so that there could be uniformity and certainty in our law.

9. CONSTITUTION ACT 110 OF 1983

This is the basis of the tricameral parliament which despite all opposition from Black communities, was bulldozed into existence in 1983. There were hundreds of casualties as a result of the introduction of this Act. Even to this day the effect hereof are still felt. One can hardly speak of a climate conducive to free political activity for as long as this Act remains on the statute book.

-5-

10. CONCLUSION

In a nutshell we are on all fours with the view expressed that all the acts referred to are discriminating on the basis of race. Some of these laws are so cruel that they dehumanised people and made them lose their self-esteem and self-esteem and self-respect. One need only think of the notorious migratory labour system that was designed to tear families asunder. The clear manifestations of the psychological effect that this system has had on our people is still with us.

There is no room for discriminatory laws in a new South Africa.



UNITED PEOPLE'S FRONT SUBMISSION TO THE TECHNICAL COMMITTEE  
ON THE AMENDMENT OR REPEAL OF DISCRIMINATORY LEGISLATION

ADDENDUM:

The UPF is of the opinion that in view of the possibility that other administrations might be reluctant to disclose all discriminatory legislation operative within their jurisdictions, it would be wise if the technical committee were to invite members of the public to make representations on the legislation that in their respective opinions, inhabit free political activity within their respective areas.

This will, in the UPF's view, act to counter the possibility referred to above.

## **Submission by the African National Congress**

# **To the Technical Committee on the Repeal of Discriminatory Legislation**

**19 May, 1993**

These representations are done in line with the call by the Multiparty Negotiating Process for various political parties to make submissions to be considered by the various technical committees in order to prepare for their discussion and negotiation by the Negotiation council. Our submissions are based on the ANC Women's League submissions to Codesa and those decisions of the Gender Advisory Committee.

### **A. CONSTITUTIONAL MATTERS**

#### **1. Constitutional Principles**

- 1.1 South Africa will be a united, sovereign state in which all will enjoy a common South African citizenship.
- 1.2 South Africa will be a democratic, non-racial and non-sexist country.
- 1.3 The constitution shall be the supreme law.
- 1.4 There shall be a justiciable Bill/Charter of Fundamental Rights, which will spell out fundamental and socio-economic rights of all citizens and how state policies will ensure their implementation.
- 1.5 There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.
- 1.6 There will be a legal system that guarantees the equality of all before the law.
- 1.7 There will be representative and accountable government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.
- 1.8 The diversity of languages, cultures and religions will be acknowledged subject to principles of equality, democracy, non-sexism and non-racialism.
- 1.9 All will enjoy universally accepted human right, freedoms and civil liberties including freedom of religion, speech and assembly which will be guaranteed by an entrenchment of a justiciable bill of fundamental rights subject to the principle of equality, democracy, non-sexism and non-racialism.
- 1.10 The **government** shall be structured at national, regional and local level. At each level there shall be democratic representation.
- 1.11 The Bill of Rights shall guarantee just property rights (Provided that legislation shall in the public interest, authorise expropriation against payment of reasonable compensation which shall, in the event of a dispute, be determined by a court of law).
- 1.12 The constitution shall define a suitable role for traditional leaders consistent with the objectives of a united, non-racial, non-sexist and democratic South Africa.



Other issues to be looked at:

- \* Notion of the family
- \* regressing historical racial and gender imbalances
- \* charter for women's rights, to form part of the Bill of Fundamental Rights, which among other things will deal with abortion, privacy, the family, women and child protection, diverse cultural practices, etc.
- \* the rights of the disabled people

## **2. Constituent Assembly/Constitution making Body**

- 2.1 This must be a democratically elected body.
- 2.2 When drawing up electoral procedures, methods should be sought to encourage full participation of women. This should apply to both encouraging women to exercise their political rights to campaign and stand for elections and to vote. These provisions would include, among others, education programmes, elimination of sexual harassment, drawing up of electoral lists and giving women exposure in the media.
- 2.3 All parties should include a proportion of women in their electoral lists. It is essential that women are evenly distributed within the lists, to ensure their inclusion in the elected body.
- 2.4 Among the subcommittees to be formed there should be a gender sub-committee to monitor and raise gender issues in the drafting of the constitution and bill of rights.

## **B. TRANSITIONAL EXECUTIVE COUNCIL AND ITS SUB-COUNCILS AND COMMISSIONS**

1. Women should be included in the TEC and its sub-councils in addition there should be a gender commission. This will be in pursuant of the principles of a non-racial, democratic and non-sexist South Africa. We recognise that the noble ideal of a non-sexist state will not be realised if the TEC stage of the transition does not have women represented in all structures as an appropriate structure to level the playing fields with regard to gender. The establishment of a gender commission will **enhance** women's participation in all the transitional structures.

### **1.1 Status of the gender commission**

- \* It should be an independent commission of a specialised nature, enjoying the same status as the other TEC Commission.

### **1.2 Composition of the commission**

- \* It should be composed of 7(seven) to 11(eleven) gender specialists

### **1.3 Functions/Powers of the Gender Commission**



- \* It should ensure gender sensitisation of the TEC and its Sub-councils.
- \* It should scrutinise all recommendations from the sub-councils and come up with gender perspective of these.
- \* It shall also make an input into legislation pertaining to the reform and repealing of law and administrative procedures that impinge on the rights of women.

### 1.3 Relations with other transitional structures

- a. Independent Electoral Commission: One of the tasks of the IEC would be to set out rules that would enable maximum participation in the first non-racial elections. We believe that such rules should ensure that women participate effectively in elections. Special procedures will have to be drawn so as to realise this goal. The commission will be in the best position of defining enabling legislation for women's maximum participation.

The following are examples of these functions. There is the need to be sensitive to women's situations such as the double burden of women which is employment and family management. Accordingly, electoral procedures should conform to the times when women are most available. Another is that of general illiteracy amongst women. Voter education should be tailored to suit women too. There are current indications that women under tribal authorities, in the farms and those in domestic service are denied the right to organise meetings or to attend meetings. The probability is that intimidation would increase during elections. There is therefore the need for educational material to be produced informing the populace and women on rights to vote. There is also need to repeal by-laws which restrict access to farm workers. Educational material directed to chiefs and employees should be produced.

- b. Media: currently there is a move towards setting up a media board. The drafting of guidelines for fair usage of the electronic media during the transitional period dominates the media discourse. The gender commission will make appropriate recommendations in this regard. The media personnel as relating to the board should **include** women. The commission will also define in terms of the gender **perspective** what fair coverage implies. These factors should apply to the print media **as well**.

### REPEAL OF GENDER DISCRIMINATORY LEGISLATION

In its report to CODESA 2 the Gender Advisory Committee called for the "repeal of all legislation in South Africa and the TBVC states which discriminates on the basis of race, creed, or gender which circumscribe and impede free political, economic and social activity." It suggested that "this be attended to by a general law asserting certain basic civil and political rights, combined with an omnibus law repealing all legislation in accordance with a schedule of Acts to be provided."



The identification of such legislation is obviously a very involved task which might take a long time. It also has a danger of leaving some laws and thus not being able to repeal them. It will seem a practical way of dealing with this will be to enact an omnibus law which will automatically outlaw all discriminatory legislation which will impede political activity and to set up an enforcement mechanism which will be accessible to all citizens without going through long court procedures.

C. LAW REFORM FOR THE FREE AND FAIR PARTICIPATION OF WOMEN

CITIZENSHIP:

1. The South African Citizenship Act of 1949 contains many clauses which are discriminatory to women. It also includes clauses which may prove problematic to returning exiles and their families. This memorandum will only focus on the gender implications of the act. Some of the discriminatory consequences of these clauses relate to the law of domicile and the fact that the wife has always followed the domicile of her husband. These will doubtless be removed once the 1992 Domicile Act is proclaimed.

The following commentary on the act must be read with the act.

- 1.1 Section one deals with definitions. This requires amendment in the following manner:
  - 1.1.1 the definition of "father" should be rendered redundant; and
  - 1.1.2 the definition of "responsible parent" must apply equally to the mother or father of a minor.
- 1.2 Citizenship by Birth: persons born in SA before 1949 (section 2) Section 13 appears to protect the position of married women in this section.
- 1.3 Citizenship by Birth: Persons born outside of SA who qualify for citizenship by birth ( section 4(1)(b)) This section only confers the status of citizenship by birth on children of SA fathers working outside SA. This must be amended to include the children of SA mothers working outside SA.
- 1.4 Citizenship by descent - Persons born outside SA before 1949 (section 5) This generally only allows for citizenship through the male line and must be amended.
- 1.5 Citizenship by descent - persons born outside SA after 1949 (section 6) Section 6 (1)(a) has different requirements according to whether the mother or father is a SA citizen. This distinction should be removed.
- 1.6 Citizenship by Naturalisation (section 10)



- 1.6.1 Section 10(2) makes allowances for the wives to qualify for permanent residence outside of the country in certain circumstances, but not for husbands. In other words the spouse of a man receives benefits that are denied the spouse of a woman.
- 1.6.2 Section 10(4) requires application by a "responsible parent" or "guardian". These are overwhelmingly fathers and not mothers. Thus women will generally not be able to apply on behalf of their children.
- 1.6.3 Section 10(4) bis only applies to the male line.
- 1.6.4 Section 10(6) provides special dispensations for wives and widows of SA citizens, but not for husbands and widowers.
- 1.7 Permanent residence and ordinary residence  
These are important requirements for the acquisition of citizenship by naturalisation. One has to be lawfully admitted for the purpose of permanent residence, and to be ordinarily resident and physically resident for certain periods before qualifying for citizenship by naturalisation. This means that any discrimination in that acquisition of permanent and ordinary residence has to be considered. These are discussed in respect of the Aliens Act no 1 of 1937 below.
- 1.8 Problems of Proof Insofar as many people do not have papers of any kind, proof of birth, marriage and residence will be difficult.
- 2. The Aliens Act no 1 of 1937
  - 2.1 Section 4 sets out the requirements for permanent residence. The following provision discriminates against women:
    - 2.1.1 Section 4(3)(e) allows the wife, children and dependants of a qualified man to qualify for permanent residence; but does not extend the same benefits to the husband, children and dependents of a qualified woman.
  - 2.2 Section 12 sets out the exceptions to the section 2 requirement of permanent residence permits. Insofar as section 12 (1)(a) bases an exception on the acquisition of a lawful domicile prior to 1937, this may discriminate against married women who follow the domicile of their husband.
- 3. The Restoration of South African Citizenship Act no 73 of 1986 provides for the restoration of SA citizenship to TBVC citizens. Insofar as this depends on actual



application and residence qualifications, many people may be discriminated against. Careful attention should be paid to the position of all TBVC residents.

#### 4. SECURITY OF EMPLOYMENT FOR PUBLIC SERVANTS

##### A. TEACHERS:

1. Women teachers are subjected to gender discrimination in the law and in the practices of the teaching profession. Legal discrimination against women (organised on a racial basis) means that they receive few or no maternity rights, and different pension, medical aid and housing subsidy benefits. The forms of indirect discrimination include unequal pay, unequal division of labour, gendered teacher training, sexual harassment and the allocation of "feminine" tasks within schools such as "pouring the tea".
2. Teachers are presently excluded from the Labour Relations Act and from the current initiative to draw up a Public Service Labour Relations Act. Teachers accordingly have no rights of freedom of association, collective bargaining and dispute resolution. Teachers in state schools have no recourse to the courts (civil or labour) in respect of "unfair labour practices".
3. In relation to job security, the rights of a woman to retain her permanent status as a teacher after marriage is not always guaranteed. If an unmarried woman falls pregnant, this is regarded as "misconduct" and she is dismissed. Teachers generally are also restricted in their political participation:

- 3.1 The Indians Education Act and Coloured Persons Education Act describes the following as "misconduct" which can lead to a disciplinary hearing: If a teacher "makes use of his position in the

department to promote or to prejudice the interests of any political party, or presides or speaks at any public or political meeting, or draws up or publishes or causes to be published, any writing or delivers a public speech to promote or to prejudice the interests of any political party" (S16(ga) in both acts).

- 3.2 The Education Affairs Act (House of Assembly) sets out the position on civil and political rights of teachers in section 96 of the act. It allows a teacher to be a member of and in the management of a political party but states that he or she may not act politically in a manner which "may embarrass the department", act as a chairperson of a public meeting, publish in his or her name a document to further or prejudice a political party or use his or her position as a teacher to promote a political party.

- 3.3 Regulation 15 of the 1981 regulations in terms of the Education and Training Act provide that a teacher cannot use his or her position to promote the interests of a political party/organisation; publish a paper or



express him or herself in the press or in a public meeting on political matters. A teacher also not circulate documents relating to elections or work in respect of an election in a school, on school premises or at a school function.

B. POLICE:

The Police Act does not appear to contain any discrimination in respect of job security. If there is such discrimination, it is likely to be found in the regulations made in terms of the act. I was unable to track these down due to time restraints.

There are restrictions on the political involvement of the police but they are appropriate to the role of the police.

C. PUBLIC SERVICE:

There is no overt discrimination in the Public Service Act in respect of political freedom and job security. It may well be present in the regulations and practices of the public service.

The restrictions on political involvement appear to be appropriate to the role and position of public servants.

D. NURSES:

The situation of male and female nurses has also to be looked at. The Nurses Act restrict them from political participation and are not covered by the Labour Relations Act.

E. DOMESTIC AND FARMWORKERS: There is need to focus on these two groups - whose political participation is restricted by by-laws and other measures.

CITIZENSHIP:

5. TBVC citizenship: do women have lesser rights of citizenship than men?

In each case citizenship of the particular "independent state" is governed by the "constitution" act and a citizenship act.

5.1 Bophuthatswana: The Bophuthatswana Constitution act provides for citizenship as follows (sec. 80):

2.1.1 All Batswana defined by an act of parliament

2.1.2 All persons legally domiciled for at least 5 years (this was automatic until 1978 when application had to be made). This is a problem in so



far as women follow the domicile of their husband

2.1.3 Anyone else who applies and is accepted as a citizen

The Bop Citizenship Act is discriminatory. Persons born outside of Bop can only qualify for citizenship through the male line. This affects citizenship by birth and descent. The provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights and privileges to men and the dependants of men.

- 5.2 **Ciskei:** The Ciskei Constitution act states that citizenship shall be obtained by birth, descent and naturalisation on such conditions as may be determined by an act of parliament.

The Ciskei Citizenship Act grants citizenship to persons born outside of the Ciskei only through the male line. the provisions regulating the acquisition of citizenship by registration or naturalisation grant greater rights and privileges to men and thne dependants of men.

- 5.3 **Venda:** The Venda Constitution Act regulates citizenship and appears to allow citizenship to follwon either parent. The only discriminatory rule appears to apply to citizenship by registration / naturalisation which is dependent on 5 years domicile.

- 5.4 **Transkei:** I have been unable to track down the Transkei Constitution and Citizenship Act. It is probable that gender discrimination occurs in a similar maner to the other independent states.

*"Democracy means freedom to choose"*



# INKATHA

Inkatha Freedom Party

IQembu leNkatha Yenkululeko

MULTIPARTY NEGOTIATION PROCESS  
TECHNICAL SUBCOMMITTEE #6  
ON THE AMENDMENT OR REPEAL OF  
LEGISLATION IMPENDING FREE POLITICAL ACTIVITY  
AND DISCRIMINATORY LEGISLATION

FIRST POSITION PAPER  
OF THE INKATHA FREEDOM PARTY

WORLD TRADE CENTRE : 18 MAY 1993

All legislation impeding free political activity and discriminatory legislation should be amended or repealed immediately. This exercise needs to be preceded by the determination of applicable reference concepts. In fact this exercise amounts to a comparison between existing legislation and given concepts of political freedom and lack of discrimination. The preliminary threshold issue of what is discrimination and what is political freedom needs to be resolved. The IFP proposes that the Technical Sub-Committee reviews the existing legislation against the parameters of the Bill of Rights set forth in the Constitution of the State of KwaZulu/Natal and recommends the repeal of all the legislation which would not allow the free exercise of any of the rights set forth in such a Constitution.

Special attention should be given to those rights and considerations which are immediately related to the political presence of segments of society in the political process leading to elections and therefore special attention should be given to the rights of the victims of apartheid, women, the disabled and other groups which require special protection.

The IFP fear that any possible listing of legislation which carries with itself the potential for discrimination any impairment of free political activity would not be either exhaustive nor comprehensive. Therefore, rather than listing specific segments of legislation which ought to be repelled, the IFP finds it more appropriate to suggest the modus operandi of this technical sub-committee so as to ensure that this technical sub-committee will be able to identify any relevant piece of legislation to be amended or repelled.

Once this technical sub-committee has agreed on the reference parameter to be used to determine what needs to be amended or repelled --which we suggest to the Constitution of the State

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of KwaZulu/Natal-- it would be advisable that this technical sub-committee opens its door to receive the grievances of social and cultural formations throughout South Africa.

In fact, the type of work that the committee is going to undertake is substantially no different to a process of constitutional adjudication. In this respect it might be useful that the sub-committee forward a request letter to the judicial authorities of South Africa, requesting them to indicate what legislation would appear to be discriminatory or otherwise not in compliance with the preagreed parameter with relation to cases of controversy before them. The sub-committee should also open itself to the direct access of social and cultural formations in the country.

This exercise would be valuable to set the initial parameters for a future constitutional jurisprudence of a new South Africa. In this respect it would be advisable that this committee motivates all its recommendations on the basis of explicit constitutional principles rooted in acceptable and recognised principles of modern constitutionalism and human right protection.

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