

EXECUTIVE SUMMARY

RE: EQUALITY WORKSHOP 20 MAY 2003

REPORTS ON: (A) "SECTION 34 GROUNDS"; AND (B) WHETHER TO CRIMINALISE ACTS OF UNFAIR DISCRIMINATION

The summary will briefly highlight the background, nature and extent to which the two reports¹ have dealt with equality in light of the issues up for discussion. In doing so, the summary will take the following format:

Firstly, there will be a discussion on the philosophy and objectives around the relevant equality legislation. Thereafter there will be a discussion on the research objectives of the two reports separately. This will be followed by a brief discussion on the process or methodology involved in drafting the two reports; which will also be done separately. Finally, there will be a discussion on the findings and recommendations of the two reports.

A. PHILOSOPHY AND OBJECTIVES AROUND THE THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT – ACT 4 OF 2000 (THE "EQUALITY ACT")

Having come from a history which has been plagued by injustice, the Equality Act has been drafted with the key objective of ensuring that the right to equality is effectively promoted in South Africa. Chapter 9 of the Constitution of the Republic of South Africa² (the "Constitution"), read together with the Preamble and Founding Provisions (in Chapter 1) of the

¹ i.e. the "section 34 report" and the report which deals with whether acts of unfair discrimination should be criminalized

² Act 108 of 1996.

Constitution may be said to form the basis of South Africa's equality jurisprudence.

Generally speaking and with the exception of the employment sector to a large extent, the Equality Act aims to promote equality and prevent unfair discrimination in almost *all* sectors of South African society.³ In order to set the objectives of the Equality Act in context, a discussion of the right as it manifests itself in the Constitution is required and thus follows. This is then followed by a discussion on the objectives of the Equality Act itself.

The Constitution

The more relevant sections which form the basis of the equality jurisprudence in South Africa include the Preamble, the Founding Provisions, section 9 (the "equality clause") and section 39 (which deals with the interpretation of the Constitution).

While **the equality clause** can be said to inform the equality legislation, sections 9 (2) and 9(4) of the Constitution form the basis for the enactment of the Equality Act..

Section 9(2) reads:

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

³ Section 5 of the Equality Act, which deals with the Application of the Equality Act, reads:

"5[...] (1) This Act binds the State and all persons.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.

(3) This Act does not apply to any persons to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies."

Section 9(4) reads:

“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”⁴

While the equality clause protects the fundamental right to Equality in South Africa,

the **Preamble** of the Constitution stipulates the backdrop, nature and spirit of the Constitution as a whole, including the right to equality enshrined therein. It recognises *inter alia* the past injustices of South Africa and also regards the aims of the Constitution as being to *inter alia*:

“[I]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law;

[i]mprove the quality of life of all citizens and free the potential of each person.”

The **Founding Provisions** on the other hand state *inter alia* that South Africa’s new democracy is founded on:

“(a) [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms[...].”

Section 39 (the “Interpretation Clause”) of the Constitution deals with the manner in which the Constitution should be interpreted and states that the interpretation must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law and may consider foreign law.⁵

⁴ Section 9 (3) lists the prohibited grounds as being “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

⁵ Section 39(1)(a) of the Constitution.

Furthermore, section 39 provides that when interpreting the legislation and developing the common law or customary law, a court tribunal or forum must promote the spirit, purport and objectives of the Bill of Rights.⁶ This has thus been the basis for researching international law and foreign comparative law in the respective reports.

From the above, it is evident that the Constitution promotes a *substantive notion of equality* and not merely a *formal notion*. In other words, the notion of equality under the Constitution aims to redress past injustices and take into consideration the context in which the notion of equality is to be applied, rather than merely treating the right to equality in isolation of surrounding circumstances. This notion of equality has been noted to depart significantly from most existing constitutions in the definition of the idea, right, value and principle of equality.⁷

It is in light of the latter notion of equality that the Equality Act has been drafted.

A discussion of the objectives of the Equality Act now follows.

The Equality Act

As mentioned above, the Equality Act has been drafted chiefly in order to foster the right to equality as enshrined in the Constitution. The wording in the Equality Act explicitly recognises this fact and stipulates that it was drafted with the aim:

“[t]o give effect to section 9 read with item 23 (1) of Schedule 6 to the Constitution [...] so as to prevent and prohibit unfair discrimination and harassment; to promote equality and prevent unfair discrimination; to

⁶ Section 39(2).

⁷ SBO Gutto *Equality and Non-Discrimination in South Africa, The political economy of law and law making* (2001) 127.

prevent and prohibit hate speech; and to provide for matters connected therewith."⁸

The following sections more clearly reflect the objectives spirit and philosophy of the Equality Act: the Preamble; section 2 of the Equality Act headed "Objects of Act"; Section 3 headed "Interpretation of Act" and section 4 headed "Guiding Principles". A list of some of the more relevant provisions now follows.

The Preamble (of the Equality Act), being particularly relevant in determining what the objectives of the Equality Act actually are, suggests *inter alia* the following:

1. It refers to the past injustices of South Africa, namely that of colonialism, apartheid and patriarchy which have brought about pain and suffering to the great majority of South Africa's people. One of the objectives of the Equality Act is thus to consolidate democracy in South Africa by eradicating social and economic inequalities which plague the land.
2. It recognises that systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of South Africa's constitutional democracy.
3. It recognises that *"South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination."*

⁸ Under heading entitled "ACT".

4. It recognises that the equality clause provides for national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality and states that *“[t]his implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences.”*

5. Finally it states that : *“[t]his Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”*

Section 2 of the Equality Act, headed “Objects of Act” echoes the values stipulated in the Preamble. Some of the more relevant sub-sections, for purposes of this discussion, include sections 2 (a), (b) (i) (ii) and (iv), (c), (d) and (g), which respectively note the objects of the Equality Act to be as follows:

Section 2 (a):

“to enact legislation required by section 9 of the Constitution.”

Section 2 (b):

“to give effect to the letter and spirit of the Constitution, in particular -

- (i) the equal enjoyment of all rights and freedoms by every person;*
- (ii) the promotion of equality;*
- (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in section 9 and 10 of the Constitution [...].”*

Section 2 (d):

“to provide for procedures for the determination of circumstances under which discrimination is unfair.”

Section 2 (g):

*“to set out measures to advance persons disadvantaged by unfair **discrimination**”* (bold added).

Insofar as **section 3** of the Equality Act, which is titled “Interpretation of Act” is concerned, section 3(1) is of particular importance and reads:

“Any person applying this Act must interpret its provisions to give effect to –

- (a) the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination;*
- (b) the Preamble, the objects and guiding principles of this Act, thereby fulfilling the spirit, purport and objects of this Act.”*

Under **Section 4**, headed “Guiding Principles”, section 4(2) is of particular importance and reads:

“In the application of this Act the following should be recognised and taken into account:

- (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and*
- (b) The need to take measures at all levels to eliminate such discrimination and inequalities.”*

Having considered the philosophy, backdrop, objectives and context in which the Equality Act was drafted and subsequently enacted, a discussion of the objectives of having researched the two reports will now follow.

B. RESEARCH OBJECTIVES AROUND THE REPORTS

Broadly speaking, the two reports aimed to establish the following objectives, i.e.:

- (a) The section 34 report deals with the possible inclusion of one or more of the grounds of discrimination mentioned under section 34 of the Equality Act as “prohibited grounds” and
- (b) The report on criminalisation of unfair discrimination, as the name suggests, deals with the aspect of possible criminalisation of unfair discrimination.

This section will deal with the objectives of the two reports in more detail. First there will be a discussion on the report dealing with the section 34 grounds which will be followed by a discussion on the objectives of the report dealing with criminalisation of unfair discrimination.

1. Report on Section 34 of the Equality Act

The aim and objective of the research was to determine whether the four grounds specified in section 34 of the Equality Act namely, socio-economic status, HIV/AIDS, nationality, family status and family responsibility (the “section 34 grounds”) should be included and listed under the definition of “prohibited grounds” in section 1 of the Equality Act.⁹

⁹ It should be noted that while the grounds of “family status and family responsibility” are in fact separate, they have been dealt with under one heading in the report and will be dealt with as one ground herein.

The objective derives its mandate from section 34 of the Equality Act which provides for the possible inclusion of the section 34 grounds as “*prohibited grounds*” in section 1 of the Equality Act, after having been considered and investigated by the Equality Review Committee (the “ERC”).¹⁰

Section 34(1) of the Equality Act further states the reason for specifically regarding these grounds i.e. because of the “*overwhelming evidence of the importance, impact on society and the link to systemic disadvantage and discrimination on the [section 34 grounds...].*”¹¹

After having investigated and researched the possibility of including the section 34 grounds, the ERC is required, in accordance with section 34(1)(b) of the Equality Act, to make the necessary recommendations to the Minister of Justice and Constitutional Development.

Section 13 (2) of the Equality Act read with section 9 (5) of the Constitution elaborates on the effect of listing a ground as a prohibited ground. Section 13 of the Equality Act deals with burden of proof, while section 9 (5) of the Constitution states that “discrimination on one or more of the [prohibited] grounds listed in subsection (3) is unfair unless it is established that it is fair.

Furthermore, a look into the case of *Harksen v Lane NO*¹² reveals the manner in which the burden of proof plays itself out in cases when a ground is listed and unlisted as a prohibited ground.

The effect of specifically including or listing a ground as a “prohibited ground” is that it will impact on the burden of proof which is required to

¹⁰ Sections 34 (1) and 34 (1) (a) of the Equality Act.

¹¹ Section 34 (1) of the Equality Act.

¹² 1998 (1) SA 300 (CC).

prove unfair discrimination based on that particular ground. In a nutshell, listing will have the effect of making it easier for a victim/s of unfair discrimination based on such ground and/or grounds to prove a case of unfair discrimination than would be the case had the ground been unlisted. Listing a ground is thus advantageous to those groups which are disadvantaged since it would be easier for them to prove the case if the ground is listed than if it were unlisted. Thus, "listing" of the grounds, from the latter perspective can be seen to be in conformity with the objectives of the equality legislation mentioned above. These issues (i.e. pertaining to burden of proof) are elaborated in greater depth in Chapter 2 of the Report (on the section 34 grounds) and will thus not be dealt with in detail here.

Other implications of listing the section 34 grounds as a prohibited ground apart from the abovementioned "legal" implication, include some of the following, which are more "substantive" in nature, namely:

- (a) Requiring Parliament, the provincial legislatures and/or other governmental departments to amend certain laws which unfairly discriminate against people on the basis of such grounds;
- (b) Compelling courts to amend the common law in instances where it conflicts with the systemic discrimination based on the latter grounds; or perhaps even
- (c) Compelling the private sector at large (including the employment sector) to incorporate its values in its day to day dealings with each other.

2. Report on whether acts of unfair discrimination should be criminalised

The Equality Act depends primarily on civil law and remedies for its enforcement. In order to aim to address the concern of unfair discriminatory practices which continue to plague our society and because of the perceived failure of civil remedies to effectively deal with

cases of unfair discrimination, the ERC has been called upon to conduct research pertaining to the possible criminalizing of unfair discrimination.

It is thus in connection with the latter concern, as well as the provision entrenched in section 7(2) of the Constitution, that the Minister of Justice and Constitutional Development has subsequently ordered an inquiry into the possibility of whether acts all acts amounting to unfair discrimination should be criminalised.

Furthermore, section 33(1)(c) of the Equality Act requires the Equality Review Committee to *“submit regular reports to the Minister on the operation of the Act, addressing whether the objectives of the Act and the Constitution have been achieved and must make recommendations on any necessary amendments to the Act to improve its operations [...]”*

This section can be seen as providing the legal basis for the ERC to research the possible criminalisation of acts of unfair discrimination.

In addressing the above, the report seeks to determine the adequacy and efficiency of the civil justice system under which the Equality Act will operate.

Furthermore, the report aims to ascertain the views of the general public and academics with respect to the idea of criminalisation of acts of unfair discrimination.

The report also aims to determine the approaches followed by other countries insofar as criminalizing the relevant conduct and to determine the success or failure rates in such countries respectively.

Finally, recommendations are made which outlines the outcome of the entire research. Suggestions are then made regarding the desirability or otherwise of criminalizing unfair discriminatory conduct in South Africa.

C. PROCESS OF RESEARCH FOR THE TWO REPORTS

1. Section 34 Report

The research was essentially conducted in two stages, namely:

- (a) The investigative stage, where essential data was collected and an analysis thereof took place.
- (b) The report writing stage, where the information gathered in the first stage was put together.

With the guidance of various experts in the field and with the guidance and assistance from the Head of the Research Department at the Human Rights Commission, the researchers dealt with individual aspects of the report, namely the individual grounds separately, which was all eventually collated by the researchers to form the final report.

Insofar as the investigative component is concerned, research involved analysing the South African Constitution, legislation and common law. An analysis of public international law, regional human rights law as well as foreign comparative law was conducted.

Insofar as the report-writing component is concerned, it was agreed that each ground would be dealt with separately in different chapters. Each Chapter (relating to the grounds), it was agreed, would take a set and specified format, namely:

- (a) There would first be a discussion on the nature of unfair discrimination based on the ground in question, with a discussion on the nature and impact thereof on the vulnerable and marginalized sections of South African society.

- (b) The above would then be followed by a comparative analysis on how other jurisdictions dealt with or addressed issues of unfair discrimination pertaining to the particular ground in question.
- (c) After having considered the above, the findings would inform the implications for inclusion or non-inclusion.
- (d) The recommendations for inclusion and/or non-inclusion would then follow.

It was also after the first workshop which took place during October 2001 that amendments to the report have been factored in, i.e. insofar as was deemed appropriate after having analysed comments made at the workshop further.

2. Report on whether acts of unfair discrimination should be criminalised

As with the report on the section 34 grounds, the process was divided into two main components, namely:

- (a) The investigative component where essential data was collected and analysed for purposes of preparing the report and
- (b) The report-writing component which involved putting together all the information which had been collected and analysed, along with conclusions and recommendations which were made.

Insofar as the investigative component was concerned, the material was investigated in four basic stages, i.e.:

- (i) An analysis and interpretation of domestic legislation and case law. This was aimed at familiarising those doing the research with the existing position to assess indeed whether there is a need to criminalize acts of unfair discrimination.
- (ii) An examination of writings of contemporary experts on the subject of unfair discriminatory conduct and their views on criminalisation, as well as other discussions on the subject. The

aim was to find out the general feeling amongst South Africans about the idea of criminalizing acts of unfair discrimination.

- (iii) A comparative analysis of foreign and international law on the subject of criminalisation of unfair discrimination was made. This process involved examining and contrasting legislation, case law, journal articles and practices of a select number of countries that have already covered a lot of ground in terms of criminalisation of unfair discrimination.
- (iv) Finally, proper recommendations were made, which were based on the outcome and findings of the analysis of the data collected.

As regards the report-writing component, once the investigative aspect of the research was completed, the report followed the basic pattern in which the research had been conducted in and analysed. The report thus outlines the following in greater detail:

- (i) The determination of the adequacy and efficiency of the civil justice system in so far as rooting out acts of unfair discrimination is concerned.
- (ii) Review of literature and debates on criminalisation of acts of unfair discrimination.
- (iii) A comparative analysis of acts of unfair discrimination.
- (iv) A comparative analysis of how other countries has dealt with the same problem.
- (v) Finally, the recommendations.

D. FINDINGS AND RECOMMENDATIONS IN THE TWO REPORTS

1. Section 34 Report

As mentioned above, each ground was dealt with under a separate chapter. Chapter 3 deals with “socio-economic status”, Chapter 4 with “nationality”, Chapter 5 with “HIV/AIDS” and Chapter 6 with “family status and family responsibility”. The findings and recommendations for each of the chapters will now be dealt with separately.

a. Socio-economic status

Socio-economic status is dealt with in Chapter 3 of the report. The Equality Act defines socio-economic status as *“a social and economic condition or perceived condition of a person who is disadvantaged by poverty, low unemployment status, or lack of or low-level educational qualifications.”*¹³ The findings and recommendations in the report will now be discussed.

(i) Nature of Unfair Discrimination

Insofar as the nature of unfair discrimination based on socio-economic status is concerned, the following findings were made.

A major form of unfair discrimination against people or groups was found to be a limited access to socio-economic rights.

Inequality in South Africa was reported to be amongst the highest in the world. The unemployment rate amongst many South Africans was also reported to be very high, with many who were found to live below the poverty line. The inequalities are reportedly felt to be predominantly in the “African” race group, then in the “Coloured” group, followed by the “Indian” and then the “White” group respectively. Such inequalities

¹³ Section 1(viii) of the Equality Act.

seriously undermine the Constitution's aim of creating a more egalitarian society.

The abovementioned inequalities are exacerbated by deep and systemic patterns of inequality in access to resources such as land and housing. For example, tenants are more easily susceptible to discrimination based on their low socio-economic status than would otherwise be. The requirement by landlords sometimes of credit checks, credit references lengthy history grants etc undermine the substantive right to equality which the poor have already been subjected to in South Africa. This is made worse by the fact that many of the poor are uneducated and do not have proper access to legal protection and justice.

Policy, especially in the banking sector also tends to effect access to certain services by the poor, for example unaffordable amounts for deposit fees for the provision of basic services are sometimes required. The specific banking policy termed "red-lining" by banks is be referred to here, i.e. where banks take certain specific factors such as education, age and low income for example into consideration before extending mortgage loans to an applicant. This practice unfairly discriminates against a large section of South African society which often live in poverty and do not qualify for loans due to their low socio-economic statuses.

Other areas where unfair discrimination based on low socio-economic status is felt, include the education sector, health sector and other areas in the social services sector such as food, water, housing, electricity and social security. The report elaborates on unfair discrimination in these areas in greater detail and for brevity will not be delved into here.

One of the decisions referred to was the landmark Constitutional case which deals with socio-economic rights, namely *The Government of the Republic of South Africa and Others v Grootboom*.¹⁴

The *Grootboom case* illustrated the desperation of thousands of people living in deplorable conditions and the obligation of the state to provide access to housing, health-care, sufficient food and water and social security to those unable to support themselves and their dependants. The court held that the state has a duty to take positive measures to ensure to meet the needs of those who live in extreme poverty or are homeless or living in intolerable housing. The duty upon the state to ensure that socio-economic rights are realised is however not absolute. The *Grootboom decision* places the duty on the state to do so within its best available resources. Furthermore, the court held that the rights should be interpreted with reference to the specific South African social and historical context that was spelt out in a previous case of *Soobramoney v Minister of health, KwaZulu Natal*.¹⁵

It should be noted that socio-economic rights are not only enforceable against the state, but in terms of South African Constitutional law, rights in the Bill of Rights also apply horizontally i.e. between private parties themselves. This strengthens the position which people who are unlawfully deprived of socio-economic rights have in South Africa.

Thus, while the Constitution protects those who are deprived of socio-economic rights to a large extent, the inclusion of socio-economic status as a listed ground will seek to ensure that those discriminated on the basis of their low socio-economic status will have an easier task of ensuring that they are protected. Given the fact they generally come from previously disadvantaged backgrounds and taking into consideration the

¹⁴ 2001 (1) SA 46 (CC).

¹⁵ 1998 (SA) 765 (CC).

objectives of the Equality Legislation discussed above, it will only make sense to include the grounds as a listed ground.

(ii) International Law

While international human rights instruments do not specifically include socio-economic status as a ground of unfair discrimination, several instruments list grounds that could be viewed as prohibiting unfair discrimination on the basis of socio-economic status.

For example, the Article 2 of the Universal Declaration of Human Rights and Article 2(1) of the International Covenant on Civil and Political Rights (“ICCPR”) have equality provisions which list “social origin, property, birth or other status” as grounds upon which discrimination is prohibited. It is alleged that “other status” can be read to prohibit discrimination on the basis of socio-economic status.

Furthermore, article 26 of the ICCPR requires the law of member states to prohibit any discrimination and to guarantee all persons equal and effective protection against discrimination on a number of grounds, which include “national or social origin, property, birth or other status.” This can be said to be aim to protect discrimination against people with a low socio-economic status. It has been noted that “the distinguishing qualities of birth, property and social origin relate to the prohibition of discrimination on the basis of status or class.”¹⁶

The Convention on the Elimination of Discrimination Against Women (“CEDAW”) also includes a number of socio-economic rights and protects the right of non-discrimination in relation to these rights.

¹⁶ S Liebenberg “The inclusion of ‘Socio-Economic Status/Condition’ as a ‘Prohibited Ground of Discrimination’ in the Equality Legislation: Unpublished Paper submitted to the Equality Legislation Drafting Unit” (Dec 1998) paragraph 93.

The Vienna Declaration affirms in article 25 that *“extreme poverty and social exclusion constitutes a violation of human dignity”*, therefore excluding people with low socio-economic status from social services is regarded a violation of their inherent right to dignity.

Regional instruments such as the African Charter, the American Convention on Human Rights, the European Convention on Human Rights and the revised European Social Charter can all be said to promote equality and prohibit discrimination on issues pertaining to low socio-economic status.

For example, Article 2 of the African Charter prohibits discrimination on the grounds of *“national and social origin, fortune, birth or other status”*, while Article 1 of the American Convention prohibits discrimination on the basis of economic status for example.

(iii) Foreign Jurisdictions

The law of Canada was looked at. Certain provinces in Canada have addressed the issue of protecting people with a low socio-economic status by including grounds such as *“social condition”*, *“source of income”* and *“receipt of public assistance”* in their human rights legislation.

For example, the Province of Quebec provides: *“every person has the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on [...] social condition.”*

Section 5(1) of the Nova Scotia Human Rights Act and section 9(2)(j) of the Manitoba Human Rights Code prohibits discrimination on the basis of *“source of income”*.

Section 2(1) of the Ontario Human Rights Code also provides for protection from discrimination based on “receipt of public assistance”, but only in relation to accommodation.

An important decision includes the Newfoundland case of *Drouin v Whitton*¹⁷ dealt with the issue of discrimination based on “social condition”. According to the Law of Human Rights¹⁸ the term social condition refers to a place which an individual holds in society, it is determined by many elements including family background, employment, physical disability, absence of resources and family origins. Should discrimination be based on any one of the elements which defines a person’s social condition, then there will be discrimination on the basis of social condition.

In brief, the applicant, one Ms Drouin, attempted to rent an apartment from the appellant. The appellant, one of the landlords, refused to rent because, as he explained, his decision was not based on the fact that Ms Drouin was a welfare recipient but that, on the of the rapid assessment, he was convinced that Ms Drouin would not be able to meet her monthly payments.

The Court of Appeal found that the refusal to rent to Ms Drouin was based on a superficial assessment of her ability to pay the rent. Had the appellants taken time to make some enquiries, they would have found that Ms Drouin had never been in default in her monthly payments even though her previous rent was similar to that requested by the appellants. The court found that the appellants had indirectly discriminated against the applicant because of her social condition, which was a violation of the Quebec Charter of Human Rights and Freedoms (“QCHRF”). The court

¹⁷ 1993, C.H.R.R. Vol, 20, Dec 45 D/349 Par 1-31.

¹⁸ August 1999.

also found that it was contrary to the QCHR to refuse to rent to the poor and in particular those whose main source of income is welfare.

(iv) Implications for Inclusion and/or Non Inclusion

There are arguments for inclusion and non-inclusion.

1. The listing of socio-economic status as a prohibited ground may possibly have a negative effect on confidence in the country's economy. For example, businesses will be barred from undertaking certain practices which were previously permitted and which they deem to be essential to a profitable business, thus resulting in a lack of confidence in the business industry. This may effectively discourage both local and foreign investment due to a perception that doing business in this country is not profitable. Despite this view it is argued that since not every business act is prohibited by inclusion of socio-economic status and furthermore, the abovementioned concern is but speculation taking into account fairness and reasonableness. It would be in the interests of fairness and reasonableness to incorporate it as a listed ground under the circumstances.
2. There is the opinion that it is not necessary to include socio-economic status as a separate ground and that current listed grounds may well cover the ambit which socio-economic status does, such as social origin, birth, gender, sex and pregnancy. Nevertheless, the inclusion of the ground would create certainty in cases where the ground does overlap with other grounds and since many other grounds overlap with one another, it is anticipated that the listing of separate ground of socio-economic status is not unwarranted by the latter argument.

3. There is the expectation that by listing the ground, there would be added pressure on limited state resources and a backlog of cases. However it should be born in mind that the creation of separate Equality Courts, which the Equality Act does do, can be regarded as a “solution” to the anticipated problem of backlog of cases. Furthermore, the state would not be expected to provide for the ground to the best of its available resources, hence the added pressure on limited state resources should not be looked at as a major concern and it may well be treated as other socio-economic rights enshrined in the Constitution are.

(v) Recommendations

1. Given the issue of onus of proof i.e. that it is more difficult to prove a case if it is unlisted than if it listed and bearing in mind that those who are disadvantaged on the bases of socio-economic status come from disadvantaged backgrounds in many instances, it is recommended that the ground be included.
2. Given the large extent in which the banking sector influences society and the fact that a huge part of society is effected by banking policy, for example red-lining, it is recommended that the ground be included.
3. It is argued further that in order to ensure that equal access to Constitutional rights are availed to all in society that the inclusion of socio-economic status as a listed prohibited ground would serve to foster the objects of this end. It will strive to ensure that the realisation of socio-economic rights as well as other Constitutional rights are fostered in South Africa. This can only but promote equal access to justice in all sectors of South African society.

4. The inclusion of the ground will be in conformity with current legal jurisprudence, such as the cases of *Grootboom* and *Soobramoney* referred to above. These cases arguably favour the inclusion of socio-economic status as a listed ground.
5. The inclusion will also be in conformity with international legal jurisprudence referred to in the report, namely international law as well as foreign comparative law. It is thus recommended that the ground be included.

b. Nationality

Nationality is dealt with in Chapter 4 of the report. The Equality Act defines nationality as *“ethnic or national origin and includes practices associated with xenophobia (the fear or hatred of foreigners) and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship”*.¹⁹

(i) Nature of Unfair Discrimination

The common ground for unfair discrimination of non-nationals often arise from the perception that needs of a country’s citizens should take priority and that any admission of foreigners into South Africa’s borders should not impact adversely on the country’s citizens socially, economically and politically.

Unfair discrimination is reported to occur in the health sector, employment sector, education sector and housing sector to name but a few.

In the health sector, patients who are non-nationals have reportedly been left unattended to or kept waiting. Furthermore, cases have been reported where children were denied birth certificates in hospitals because

¹⁹ Section 1(xvii) of the Equality Act.

of their non-national status, which is clearly an infringement of section 28(1) for the Constitution which reads that *“every child has the right to a name and nationality.”*

Furthermore, the *Batho Pele* policy, which is a policy formulated by the Department of Public Service, is worded in such a way that it excludes non-citizens as it clearly states that access to public health services is the rightful expectation of all citizens especially those previously disadvantaged. It is thus argued that failure to effectively seem to address interests of non-nationals results in unfair discrimination. Nevertheless, the counter argument is that the policy document can be seen as being reasonable, and justifiable in the circumstances and thus fall within the scope of the section 36(1) (i.e. the limitations clause) in the Constitution.

Unfair discrimination also occurs in the employment sector. For example, section 22 of the Constitution dealing with freedom of trade, occupation and profession arguably amounts to unfair discrimination as it applies only to citizens. Also, non-nationals find it difficult to secure employment, even when they are qualified.

The education sector is another area where unfair discrimination occurs reportedly occurs. Questions are being asked whether it is wise to grant subsidies to non-national students while South African students experience financial difficulties. Nevertheless, this too may fall within the ambit of the limitations clause.

The housing sector is another area where discrimination occurs. An example includes instances where one has to be a South African citizen or be in possession of a permanent resident permit in order to qualify for a housing subsidy.

Another area where discrimination is reported to occur is in the area of immigration. Section 14(1) of the *Immigration Bill*²⁰ arguably discriminates unfairly against non-nationals who do not possess exceptional skills and qualifications. The latter section provides that “[...] a permit may be issued by the Department to an individual of exceptional skills or qualifications and those members of his or her immediate family determined by the Department under the circumstances or by regulation.” The report discusses this issue in more detail.

One of the cases referred to was the landmark Constitutional Court decision of *Larbi-Ordam and Others v Member of the Executive Council for Education (North-West Province) and Another*²¹ which dealt with non-nationals in the employment sector was referred to. In this case, foreign teachers who were permanent South African residents were served with notices in terms of legislation to the effect that their services might be terminated in the event of their posts being filled by South African citizens. While the aggrieved applicants raised the claim of unfair discrimination under the interim Constitution, the respondents argued that the decision was justifiable since they lacked sufficient funds to pay salaries of all teachers and that it was difficult to accommodate newly qualified South African teachers. Thus they argued that citizens had a right to be given priority over non-citizens.

The court found in favour of the non-nationals, holding that the legislation had the potential to impair the fundamental human dignity of non-citizens hit by the regulation. It held further that it made little sense to permit people to stay permanently in a country but then exclude them from the job they are qualified to perform. The court therefore held that there should be no distinction between South African citizens and permanent residents when it comes to reducing unemployment.

²⁰ Introduced in the National Assembly as a section 75 Bill; draft Bill in Government Gazette No. 22439 of 29 June 2001.

²¹ 1997 (12) BCLR 1655 (CC).

While another decision was also referred to, namely *Minister of Health and Another v Maliszewski and Others*,²² the latter case found that while there existed discrimination against foreign doctors with foreign qualifications who had all acquired permanent residency and citizenship in South Africa, that such discrimination was held to be fair under the circumstances.

In the cases referred to in the report, neither actually went so far as to rule that nationality is a prohibited ground. Perhaps if section 34(2)(c) was in place at the time, South Africa may have had a decision recognising nationality as a prohibited ground or even a recognition of a qualified nationality ground, incorporating permanent residents and refugees only.

(ii) International Law

There are various international instruments which deal with the principle of non-discrimination and equality insofar as non-nationals are concerned. Generally, non-nationals are dealt with under the grounds of national or social origin or ethnic origin.

The following international instruments include some of the more noteworthy ones referred to in the report and deal with discrimination against non-nationals of a country.

The Universal Declaration of Human Rights, article 2(1) of which prohibits discrimination on the basis of amongst other grounds, national or social origin.

The International Convention on The Elimination of All Forms of Racial Discrimination, which deals with eliminating racial discrimination goes as

²² South African Supreme Court of Appeal, case number 624/98 (unreported).

far as to include national origin under the definition of race discrimination.

Article 1 defines racial discrimination, part of which states:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin [...].”

Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on the basis of, amongst other grounds, national or social origin.

The International Covenant on Economic, Social and Cultural Rights, under article 2(3) addresses the question of how states should guarantee economic rights to non-nationals. Article 2(3) seeks to strike a balance between the need to respect human rights in so far as the treatment of non-nationals is concerned on the one hand and the availability of resources to cater for both the citizens of these countries and non-nationals residing in them. The latter article provides:

“[D]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.”

Article 8(1)(c) of The Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live specifies certain rights to be enjoyed by non-nationals i.e. health protection, medical care, social security, education, rest and leisure, provided that “undue strain is not placed on the resources of the State”.

Article 2 of the African Charter on Human and People’s Rights prohibits distinction on the basis of national or social origin. Article 28 refers to the treatment of non-nationals in host countries. It provides that:

“[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

While not referring to nationality as a ground per se, the above provision arguably promotes the principle of human rights and non-discrimination, which every individual has a duty to uphold.

The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa²³ provides, in Article IV for member states to:

“[u]ndertake to apply the provision of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.”

(iii) Foreign Comparative Law

The countries referred to include Canada, the United States of America and Botswana.

Canada

Article 15 of the Canadian Charter of Human Rights and Freedoms²⁴ deals with equality and non-discrimination. Article 15(1) lists “national or ethnic origin” as a listed ground.

Furthermore, the Canadian Human Rights Act²⁵ lists “national or ethnic origin” as a prohibited ground upon which an employer or provider of services may not discriminate against.

Furthermore, in the states of the North West Territories and Saskatchewan, “nationality” is listed as a prohibited ground.

The particularly relevant case of *Law Society of British Columbia et al v Andrews et al*²⁶ was referred to where the Supreme Court of Canada addressed the issue of discrimination against non-citizens. In this case,

²³ Concluded by the Organisation of African Unity at Addis Ababa, Ethiopia on 10 September 1969.

²⁴ Enacted as Schedule B to the Constitution Act, 1982 79.

²⁵ R.S.C. 1985, c. H-6, s.5.

²⁶ 56 D.L.R. 4th, 1.

the respondent was a British national who was permanently resident in Canada. The respondent did not have Canadian citizenship but was fully qualified to practice law in British Columbia. Section 2 of the Barristers and Solicitors Act²⁷ provided that only citizens of Canada could enter the legal profession. The respondent, Andrews brought an action for a declaration that section 42 violates section 1 of the Canadian Charter of Human Rights.

While the court held that in certain instances discrimination was justifiable, it found that in this particular case, discrimination was unfair. The court found thus found in favour of the respondent holding that: *"[...] [a] rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class, [...] it also discriminates against them on the grounds of their personal characteristics i.e. their non-citizen status."*²⁸

The United States of America ("US")

From a Constitutional perspective, the Privileges and Immunities Clause or the Fourteenth Amendment of the Constitution of the US is relevant to matters affecting non-citizens and their rights under the Constitution. It reads:

"[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the law."

²⁷ R.S.B.C. 1979, c.26.

²⁸ Ibid 32.

In *Yick Wo v Hopkins*,²⁹ the US Supreme Court interpreted the Fourteenth Amendment as applying to both aliens and citizens alike.

The case of *Plyer v Doe*³⁰ dealt with a Texas statute which withheld from local school districts any funds for the education of children who were not "legally admitted" into the United States and which authorised local school districts to deny the enrolment of such children. The court applied *inter alia* the Fourteenth Amendment and found the statute to be discriminatory and unconstitutional, since it imposed a lifetime hardship on a discrete class of children not accountable for their disabling status.

The last case to be dealt with under the US is that of *Graham, Commissioner, Department of Public Welfare of Arizona v Richardson et al*³¹ where the issue was the denial of welfare benefits to resident non-nationals or to nationals who have not resided in the US for a specified number of years i.e. 15 years. Certain legislation stipulated that a person shall not be entitled to general assistance if he is not a citizen of the US or has not resided in the US for 15 years. The court found in favour of the respondents and upheld the motion for summary judgement on the equal protection grounds.

Botswana

The important case of *Dow v Attorney General of Botswana*³² dealt with the situation where a Botswana woman was married to a USA citizen. The applicant had a child born out of wedlock in 1979 and two more children were born of the marriage in 1985 and 1987. The new Citizenship Act provided that a person shall be a Botswana citizen by birth and descent if "(a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana."

²⁹ 118 U.S. 356 (1886).

³⁰ 457 U.S. 202 (1982).

³¹ 403 U.S. 365; 1971 U.S. LEXIS 28.

³² (1998) B.L.R. 119.

According to the definition, the applicant's last the two children were not Botswana citizens because their father was a non-citizen of Botswana. Because of the nationality status of the father, it was argued that the children were denied rights accruing to Botswana citizens and that the act was unfair. The court found in favour of the applicant, declaring the citizenship laws prohibiting a Botswana woman from passing citizenship to her children if married to a non-citizen spouse, as unconstitutional.

(iv) Implications

The implications for inclusion and/or non-inclusion are as follows:

1. There may be an assumption that listing "nationality" as a prohibited ground will put non-citizens on the same level as citizens, at least from a legal perspective and that non-citizens will have the rights as citizens do. This is however not the case as can be seen from the definition of nationality which states that *"[...] it does not include rights and obligations associated with citizenship."*
2. The inclusion will also have the legal effect of listing a ground as a prohibited ground as discussed above under the heading "Research Objectives of the Report" above. This will aim to protect the interest of many claimants, especially the interests of those who come from disadvantaged backgrounds, in that it will promote equality and a climate where substantive equality is strived for in South Africa.
3. The inclusion of "nationality" as a listed ground may have the effect of the state or other bodies having to decide how to use to their resources in cases where there appears to a clash or conflict between national interests on the one hand and the interest of non-nationals on the other. Here the courts, legislature, relevant body etc may be required to do a balancing act determining what the best solutions are under any given set of circumstances.

4. As a result of the above, legislation and policy may have to be changed in order to conform with the inclusion of the ground, for example under the Pensions Act, in cases where the issue of access to health care services comes into play and government's child maintenance schemes to name but some. But here again, as mentioned in point 3 above, the relevant body, policy etc may have to determine the best and most reasonable objectives under the circumstances before it, which is in accordance with the limitations clause in the Constitution.
5. It is hoped that by including "nationality" as a ground, it will have a resultant effect on the social attitudes of South Africans in the broader context toward non-nationals.
6. It is argued that listing will not have an effect on political rights or other areas where non-nationals are excluded, the reason being that nationality is not equated to citizenship.

(v) Recommendations

1. It is argued that especially due to the high incidences of violence resulting from xenophobia and because of other forms of discrimination against non-nationals, the political choice would favour inclusion of the ground.
2. Since the courts have not particularly decided upon whether the ground of nationality has a place in South African law per se, but since decisions seem to argue in favour of treating non-nationals fairly, it is recommended that the ground be included. This will create certainty insofar as the current position which non-nationals hold in South African legal jurisprudence, for example the approach which the courts have taken in cases like *Larbi Odam*.
3. While some have recommended that the ground not be included as it is implicitly covered by the already listed ground of "ethnic or social origin", it is argued that this may have the effect of classifying non-nationals as along ethnic lines or social groupings,

with the likelihood of treating them differently. It is argued that this approach does not conform to equality principles and that inclusion will create certainty in those cases where nationality seems to overlap with other grounds or even where other grounds do not cover the notion of nationality.

4. Finally, since non-nationals have been awarded different statuses on South Africa, for example refugees have a different status to other non-nationals, it is recommended that the possibility of having a qualified definition of nationality which makes a distinction between different categories of nationalities be looked into as a possible alternative to the current one. Those non-nationals that the ground in the Equality Act seeks to address are arguably those non-nationals who will be permanent resident refugees.

c. HIV/AIDS Status

This is dealt with under Chapter 5 of the report. The Equality Act defines HIV/AIDS status as including the: *“actual or perceived presence in a person’s body of the Human Immunodeficiency Virus (HIV) or symptoms of Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status.”*

(i) Nature of Unfair Discrimination

The AIDS Law Project has found that unfair discrimination is reported to occur in the following sectors amongst others, i.e. health, insurance, government departments and private sector.

Furthermore, other research has found issues such as race, gender, economic status, education and access to information and geographic location to compound and precipitate discrimination based against HIV/AIDS status. In South Africa, the epidemic is often located within

the poor, and we have often heard, perhaps in discussion or in the media, about the link between socio-economic rights and HIV/AIDS.

The sources of discrimination based on HIV/AIDS have been classified under three main categories i.e. individual, structural and institutional.

The individual category involves discrimination on an intimate level in the personal relationships that people living with HIV/AIDS have with others. The structural category involves cases where discrimination is built into structures of society and in the ways that societies function and organise, for example the position of women in some societies. The institutional category includes situations where discrimination within specific institutions in society, where certain people are given preference over others. Some areas include the employment sector, insurance benefits, certain medical aid provisions and unequal protection under the law.

The employment sector remains an area where unfair discrimination based on HIV/AIDS status occurs. For example, despite the right to privacy, very few work places have put mechanisms in place to allow HIV positive employees or employees living with AIDS to disclose their status safely.

Furthermore, pre-employment testing still appears to be practiced despite its prohibition under the Employment Equity Act.

Another area where discrimination occurs on the basis of HIV/AIDS is the health sector. Sometimes medical personal fail to adequately deal with HIV positive patients or patients living with AIDS due to fear of contracting the disease, which may be unwarranted in instances.

Discrimination also occurs in prisons where tests have been conducted on prisoners without their consent or even prior counselling. Furthermore, those found to be HIV positive or having the disease have been discriminated against by other prisoners and amongst the warders

themselves who have been reported to single out and demote AIDS prisoners and also treat them unfairly, for example by not ensuring their receipt of proper medical assistance.

Another area of concern is the insurance industry. It has been difficult for people with HIV/AIDS to obtain medical insurance or life cover. This also has a knock on effect in instances for example where people with HIV/AIDS apply for mortgage bonds or wish to buy property, since in such cases banks sometimes require an applicant to be covered.

Furthermore, exclusion clauses in insurance policies, which range from a complete exclusion of liability if the insured was infected at the time of death (regardless of the cause of death) to a partial acceptance of liability, has been regarded as amounting to unfair discrimination.

There are certain instances where legislation has prohibited discrimination against people with HIV/AIDS. Some examples include: the exclusion of people with HIV/AIDS from medical coverage has now been prohibited by legislation; statutes and policies which explicitly prohibit forms of unfair discrimination on the basis of HIV/AIDS and compulsory testing in the employment sector such as The Health Professionals Council of South Africa which has accepted guidelines that assist health care workers in the management of patients with HIV/AIDS; in the education sector, the National Department of Education has a policy that prohibits unfair discrimination on the basis of HIV/AIDS against learners, students and educators, by providing a framework for the management of HIV/AIDS in schools and tertiary institutions.

While these provisions all seek to eradicate unfair discrimination in their respective spheres, they do not go so far as to prohibit unfair discrimination "outright" as it were, as would be the case if the ground was listed in the Equality Act.

(ii) International Law

The key human rights conventions do not prohibit discrimination against HIV/AIDS per se, but include other rights such as the right to health care and access to health care which may be seen as covering people living with HIV/AIDS. CEDAW, the ICESCR and the CRC for example all cover the issue of health.

Furthermore, the International Guidelines on HIV/AIDS and Human Rights³³ provides a framework for member states of the United Nations Organisation in which to design appropriate programmes and policies. These guidelines emphasis the need for states to ensure that their respective programmes and policies protect and promote human rights of people living with HIV/AIDS. Guidleline 5 is particularly important as it provides that legislative measures be taken to ensure that the rights of people living with HIV/AIDS are protected.

SADC has also unanimously approved a regional code on HIV/AIDS and Employment. It states inter alia that: “[...] *employees with HIV/AIDS should be treated in the same way as any other employee with a life threatening illness.*”

(iii) Foreign Jurisdictions

In many instances, foreign jurisdictions have dealt with HIV/AIDS under the ground of disability. The jurisdictions referred to include the USA, Australia and Canada.

The US

Unfair discrimination based on HIV/AIDS is dealt with under the Americans with Disabilities Act,³⁴ which was enacted in 1990. Although the Act does not list HIV/AIDS as a ground, cases pertaining to the latter

³³ UNCHR Resolution 1997/33, UN Doc. E/CN.4/1997/150 (1997).

³⁴ 1990, USCs 12102-12213.

are dealt with as a disability. The Act extends to employment, public entities and public accommodation.

The case of *Chalk v United States District Court Central District of California*³⁵ is particularly relevant and dealt with a teacher who was HIV positive and who was transferred from an administrative position for fear of spreading the illness by casual contact with other students. The US Court of Appeals found that the conduct constituted an act of discrimination and ordered the teacher's return to the classroom. The court concluded that reasonable medical evidence indicated that there was no significant risk of spreading the illness by casual contact with students. The teacher was allowed to continue his duties.

Australia

The Disability Discrimination Act 1992 makes it unlawful to discriminate on the grounds of disability in the areas of employment, education, access to premises, the provision of goods, services and facilities and accommodation. The definition of "disability" in terms of the Act includes "*the presence, in the body, of organisms that cause illness or are capable of causing illness.*"

The case of *Commonwealth of Australia v The Human Rights Equal Opportunity Commission and X*³⁶ was referred to where the Federal Court of Australia found the exclusion of a recruit with HIV from the military service constituted discrimination on the basis of disability. The court found that there might be some cases when a person with HIV could be restricted from specific employment positions, but that in the present case the prerequisite was discriminatory.

Canada

³⁵ 840 F. 2d701 (CA9, 1988).

³⁶ No Qg 115 of 1995, 1996 Australia Fed Ct (Lexis 859).

All Canadian jurisdictions regard HIV/AIDS as a “disability” or “handicap” in their human rights statutes. The Canadian approach with respect to HIV/AIDS status may be said to be progressive in that not only are the people with HIV/AIDS protected, but so are their relatives or persons closely associated with them.

One of the landmark decisions dealt with in the report is the case of *Thwaites v Canada (Armed Forces)*.³⁷ as a result of his change in status after a medical review, Thwaites was discharged from the armed forces because of his positive HIV status. The Tribunal held that whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that a risk is based on the most authoritative and up-to-date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalisations.

In the case of *Biggs and Cole v Hudson*³⁸, the Canadian Human Rights Commission held *inter alia* that the following persons may be protected under the term *physical disability*: people who are HIV positive; those who are diagnosed as having or are perceived to have AIDS; those who belong to groups widely regarded as especially being vulnerable to HIV infection but who are not HIV-positive or whose status is unknown and those who associate with people who belong to such groups or who are HIV-positive.

(iv) Implications

Implications for inclusion and/or non-inclusion are as follows:

1. A major concern has come from the insurance industry which believes that they will be adversely affected by inclusion if HIV/AIDS as a listed ground. The fear seems to be that an

³⁷ (1993) 19 CHRR D/259 at para 106.

³⁸ (1988) 9 D/5391 at para 40353.

insurmountable number of claims from society at large and perhaps the undue requirement to pay huge sums to people with HIV/AIDS may cripple the insurance industry. Nevertheless, some insurance companies have already demonstrated that it is possible to strike a compromise between their interests and the interests of disadvantaged people living with HIV/AIDS. For example a kind of policy which recognises the fact that insurance companies provide limited coverage for people who are HIV positive but who do not yet show signs of AIDS.

2. There is also the concern regarding the impact which HIV/AIDS would have on the health sector insofar as resources are concerned i.e. should the ground is listed i.e. hospitals may be pressured to treat patients with HIV/AIDS despite the possible lack of limited available resources. Despite this argument, it should be noted that the enforcement of the right can be limited if it reasonable and justifiable to do so in terms of the section 14(1) of the Equality Act. The limitations clause in the Constitution has a similar implication.
3. It is hoped that listing will change the sometimes unreasonable and unwarranted negative attitudes of society toward people living with HIV/AIDS and that it will serve to address the (sometimes unreasonable) stigma attached to the disease in society.

(v) Recommendations

1. Due to the high numbers of HIV/AIDS sufferers in South African society and in Africa as a whole, HIV/AIDS has received much attention in the international arena as well as the national arena. Together with the latter reason and in keeping with the approach by the United Nations Organisation that states have to take measures to address HIV/AIDS issues, the inclusion of HIV/AIDS is recommended.

2. Given the high incidence of HIV/AIDS cases in South Africa and also for other reasons, such as creating certainty in the law, the low socio-economic statuses of many South Africans living with HIV/AIDS etc, it is recommended that the ground of “disability” should not be “expected” to protect discrimination against people living with HIV/AIDS as has been done in other countries mentioned in the report. The courts may for example differ in their approaches as to whether certain stages of the illness in fact amounts to a disability. This uncertainty may arguably not protect victims of unfair discrimination as effectively as would be the case if the ground was listed.

d. Family Status and Family Responsibility

The grounds of family status and family responsibility have been dealt with under chapter 6 of the report. They are defined in the Equality Act as follows:

“family responsibility means responsibility in relation to a complainants spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support.”

“family status includes membership in a family and the social, cultural and legal rights and expectations associated with such status.”

(i) Nature of Unfair Discrimination

Family Status

Unfair discrimination is found in the social sphere, economic sphere and is also based on culture or religion. For example children being ridiculed at schools for living with “parents” who are homosexual, or children from poor families are denied access to education in certain schools or tertiary institutions simply because they cannot afford the fees or where a child from a particular religious or cultural familial background is not admitted

into an education institution on the basis of that particular familial background. Furthermore, a non-nuclear family,³⁹ being untraditional, my experience even more hardship and discrimination as compared to nuclear families.

Other areas where unfair discrimination based on family status include:

- (a) Lifestyle and religious conduct, for example where a teacher is dismissed from employment for being involved in a relationship which is inconsistent with the morals of a particular school.
- (b) Conflict of interest between spouse and employer, for example where an employee's spouse gets employed at a competitive firm to the one in which the other spouse is employed at, causing the dismissal of the other spouse on the apparent basis of conflict of interest.
- (c) Anti-nepotism cases i.e. where an employer favours employment opportunities to his for her family over and above others who are not family members.
- (d) Rental and housing accommodation, for example rental policies which provide for adults only, thus discriminating against families where there are children, or policies which restrict accommodation units to only single family residence for example.
- (e) Immigration, for example citizenship of children who come from families who are non-nationals.
- (f) Family benefits, pension funds, maintenance claims, medical aid schemes, insurance income tax for example where

³⁹ i.e. families which do not conform to the typical "Western" notion of a family and as such does not include a "normal" family as it were. A nuclear family constitutes of a father, mother, possibly children if applicable and also includes adopted children if applicable. Anon-nuclear family does not comply with this notion and may include extended family members or a single parent household and even perhaps same sex partners.

benefits accrue to only certain types of families or dependants.

- (g) Private clubs for example where there exists differentiation on the basis of family status as to who is permitted as members or regarding members benefits and fees.
- (h) Access to children and adoption, for example where the law grants access to children to divorced or separated parents on the basis of what a traditional notion of what a family entails, or on the basis of the traditional role of spouses within a family.
- (i) Education sphere, for example where there is little or no provision for students with children in the tertiary sector.

The case of *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs*⁴⁰ was referred to where the applicants sought for an order *inter alia* declaring section 25 of the Aliens Control Act 96 of 1991 unconstitutional the basis that it discriminated against partners in a same sex life partnership. A section of the Act provided for an exemption from certain other provisions in the Act, the exemption having only applied to a spouse of a person who was permanently and lawfully resident in South Africa. The latter exemption was sought to be discriminatory against same-sex partners, since the Act did not provide for them. Although the court dealt with issue under the ground of sexual orientation, it also made the distinction between the definitions of a family in South African law, stating that there is still no appropriate recognition in our law of the same sex life partnership as a relationship to meet the needs of its partners. Thus while same sex couples have certain rights and duties, they do not have the same status as people involved in a heterosexual marital relationship. Thus, this case dealt with unfair discrimination based on family status, but perhaps in the absence of the listing as the ground, the court did not specifically use the latter ground in order to decide the case.

⁴⁰ 2000 (2) SA 1 CC.

The case of *Langemaat v Minister of Safety and Security*⁴¹ was also discussed. A medical aid scheme, which defined a “*dependant*” as “*the legal spouse or widow or widower or a dependant child*” was challenged as being unconstitutional as it failed to adequately provide for same-sex couples. The court found under the circumstances that a duty existed between same sex couples and found in favour of the applicant.

Although the issue was dealt with under the grounds of sexual orientation and marital status, it recognises that the status of family in South Africa has changed and that rights and duties are changing as well.

The resultant impact of unfair discrimination on the basis of family status upon people from disadvantaged backgrounds is worse since in such cases lack of access to justice facilities, lack of education and so forth stand as major obstacles in ensuring that their right to equality is fully “realised”.

It should be noted that while the notion of family status is broad, it is interlinked with the notion of family responsibility and sometimes these grounds overlap.

Family Responsibility

Unfair discrimination based on family responsibility reportedly occurs in situations where people with family responsibilities are placed in a precarious position of having to attend to their family responsibilities on the one hand and being able to attend to other duties on the other, such as having a full time career for example. The traditional role of women in society i.e. as carer and nurturer has meant that issues pertaining to the notion of family responsibility (i.e. as defined in the Equality Act) generally affect women. However, the definition does not preclude males, since

⁴¹ 1998 (3) SA 312 (T).

single parent households (where the parent is the father or male) or extended families may allow males to fall under the definition as well.

Unfair discrimination occurs in other workplace and other sectors as well, such as the social sphere, for example where certain responsibilities afforded to women arguably effect upon their social lives and thus arguably isolating them from being “active citizens”.⁴²

Another possible example includes the situation where a person nursing a sick spouse who cannot be left unattended may be unable to present him or herself at a government’s office to collect a pension payout.

Cases such as the allocation of social welfare grants where such grants may exclude or provide for heavier burdens on non-biological parents are also arguably discriminatory on the basis of family responsibility as they fail to take into account the family responsibility of such parents.

The issue of responsibility amongst members belonging to same-sex couples also comes into play i.e. whether they are protected by the definition of family responsibility. One is referred to the *Langemaat case* mentioned above as well as the case of *Satchwell v The President of the Republic of South Africa and Others*⁴³, where the court recognised that, although same sex cohabitation does not constitute a marriage or spousal relationship, that there is some legal recognition thereof, hence recognising that same sex relationships do involve and incorporate some form of familial responsibilities.

⁴² Many cases of unfair discrimination based on the ground of family responsibility are related to employment sector and since the Employment Equity Act lists it as a ground, it was not particularly dealt with in the report.

⁴³ 2001 TPD.

Issues such as poverty, lack of access to socio-economic rights etc are but some issues which can be said to adversely affect people who are discriminated against on the basis of family responsibility.

The important Constitutional Court decision of *President of South Africa and Another v Hugo*⁴⁴ was referred to. In this case, an application was brought to the court to render the Presidential Act 17 of 1994 (which provided that all mothers in prison with children under the age of 12 years old would be granted a remission of the remainder of their sentences) unconstitutional. The applicant was a prisoner who was a widower father of a son under the age of 12 years. The application succeeded in the *court a quo*. On appeal however, the Constitutional Court found against the applicant and found that although there was discrimination against fathers in a similar position, that such discrimination was *fair* under the circumstances.

The court recognised the child rearing responsibilities which females had in society. The court further emphasised the view that women have been discriminated on a systemic basis in society due to their family responsibilities, which men generally were not subjected to. After taking into consideration *inter alia* the purpose of prohibiting unfair discrimination i.e. to avoid discrimination against disadvantaged groups as well as to establish dignity amongst all in society, irrespective of the group one belongs to, the court found that the discrimination was fair under the circumstances.

From the cases referred to above, it is evident that although the courts have recognised that family status and family responsibility should be considered in the determination of discrimination, the courts did not go so far as to recognise these grounds explicitly. While these grounds have been referred to in legal jurisprudence, they have thus not been

⁴⁴ 1997 (6) BCLR 708 CC.

specifically entrenched in South African law, although they have arguably been promoted.

(ii) International Law

International law has generally not specifically listed the two grounds (i.e. family status and family responsibility), but has dealt with them indirectly, for example by dealing with the family as a unit, women's family responsibilities and the rights of children.

In the employment sector, many ILO Conventions have dealt with family responsibility as a ground when seeking to protect vulnerable groups such as single mothers and married women. Many of these conventions are regarded as customary international law while South Africa has also signed and ratified some of them.

Article 10 of the ICESCR deals with the notion of the family and states that marriage must be entered into with the free consent of the intending spouses. Article 10(2) deals with the protection of mothers while article 10(3) deals with the protection and assistance to be taken on behalf of all children and young persons without discrimination for reasons of parentage or other conditions. These provisions can be seen to promote the inclusion of family status and responsibility as listed grounds in that they protect the role of women, mothers and children.

Paragraph 4 of the UN General Assembly's General Comments⁴⁵ on the ICCPR provides that state parties should take all steps necessary to put an end to discriminatory actions both in the public and private sector which impair the enjoyment of rights. This includes the role of women in society and impacts on the notion of family responsibilities insofar as women's role in society is concerned.

⁴⁵ UN General Assembly General Comment 28 (29/03/2000), CCPR/C/21/Rev.1/Add.10, CCPR (unedited version).

Furthermore, it provides that “[t]o fulfil their obligations under [Article 23(4) of the ICCPR], states must ensure that the matrimonial regime contains equal rights and obligations for both spouses, with regard to the custody and care of children, the children’s religious and moral education, the capacity to transmit to children the parent’s nationality.

The European Social Charter provides for a number of specific rights for women, namely equal remuneration, protection of mothers and working women and the social and economic protection of women and children. The Additional Protocol of 1998 included the right to equal opportunities and treatment with regard to employment and careers, without discrimination based on sex. While this provision is related to sex equality, it may be construed as promoting the argument for including family responsibility as a ground i.e. so as to promote the rights of women disadvantaged because of their family responsibilities.

In the 4th European Ministerial Conference on Equality between Women and Men in November 2000, the Action Plan called for governments to *inter alia* enforce women’s equal rights, support provision for child care, adopt adequate paternal and maternal leave schemes, prohibit references to pregnancy in recruitment procedures, adopt laws and incentives to encourage equal sharing of parental responsibilities between women and men such as flexible working patterns and encourage and encourage firms to view men’s role as fathers as positive in working terms.

(iii) Foreign Jurisdictions

The jurisdictions of Canada and Australia were referred to.

Canada

In Canada, various codes prohibit discrimination based on “family status”. The courts have interpreted unfair discrimination based on family responsibility to be covered by the definition of family status.

However, the definitions of family status vary, for example in Ontario and Nova Scotia, family status is defined as *“the status of being in a parent and child relationship”*, while in Alberta, it is defined more broadly as *“the status of being related to another person by blood, marriage or adoption.”*

The Saskatchewan definition seems closest to the one in South Africa’s Equality Act. It defines family status as meaning:

“[...] the status of being in a parent and child relationship and, for the purposes of this clause: (i) ‘child’ means son, daughter, stepson, stepdaughter, adopted child and person to whom another stands in place of a parent;

(ii) ‘parent’ means father, mother, stepfather, stepmother, adoptive parent and person who stands in place of a parent to another person.”

Furthermore, section 3(1) of the Canadian Human Rights Act protects “family status” as a prohibited ground.

Canadian legislation also protects people from discrimination based on family status. For example, the Alberta Human Rights, Citizenship and Multiculturalism Act makes it illegal to discriminate against anyone on the basis of their family status, marital status or source of income. The law goes as far as to make it illegal to advertise an employment position that states a preference, limitation or specification, which discriminates on the basis of marital status or family status.

Much of the case law pertains to discrimination in the employment sector, for example the case of *Quebec (Commission des droits de la personne) v de Petite-Riviere-Saint-Francois (Municipalite)* ⁴⁶ where an employer assumed that the complainant would be less available because she was a mother, when the requirements were not established by the employer or her availability verified. A successful ground of discrimination was established on the basis of sex and civil status in the absence of the ground of family status under the Quebec Code. (See the report for further and perhaps more concise examples.)

Australia

The Sex Discrimination Act (SDA) protects people from discrimination based on family responsibility in the employment sector. While same sex relationships are not in themselves protected by the SDA, the possible relationship with same sex relationships may have with regards to any dependant child is.

Family responsibility is also listed as a ground in various other legislation, for example, section 6(1) of the Equal Opportunity Act of 1984 (Victoria) and sections 7(1)(e) and 8(1) of Discrimination Act of 1994 (ACT).

The case of *Hickie v Hunt* was referred to where the complainant complained that failure to renew her contract of employment after having returned from maternity leave discriminated against her on the basis of her sex. Although she was still employed part-time while on "leave", much of the work was handed over to another employee and the employer did not maintain her practice in her absence. The employer thus did not seek to renew the contract upon her arrival.

The Commission held in favour of the applicant stating that: "*working full time had therefore become a requirement of the job, which indirectly*

⁴⁶ (1994), 19 CHRRD/189.

discriminated against the employee on the basis of sex, because this requirement was one with which a substantially higher proportion of men could comply." Here again, it is evident that family status and responsibility is dealt with by using another ground i.e. that of "sex".

(iv) Implications

1. Listing will impact upon the burden of proof in cases where the issue appears before the court and make it easier for claimants to prove their case. This is especially noteworthy as it takes into account disadvantaged backgrounds which claimants may possibly come from.
2. Given the relationship between the Equality Act and the Employment Equity Act, it is argued that the listing of the two grounds will ensure that those *parties* and *areas* which are not covered by the Employment Equity Act, are covered by the Equality Act. Furthermore, since the Employment Equity Act only lists family responsibility as a ground and not family status, it is anticipated that the listing of family status in the Equality Act will create a greater scope for discrimination based on these grounds (in the employment sector) to be protected. Such claims may however have to be brought in the Equality Courts and not the Labour Courts.
3. Listing may promote the implementation of or changing of policies (including medical aid schemes, pension schemes etc) to accommodate for the respective grounds. Certain policies in the property sector, for example ensuring that rent agreements which discriminate on the basis of family status, will hopefully also be addressed.
4. Coupled with children's rights in section 28 of the Constitution, it is anticipated that the implementation of policies which

accommodate working parents, for example by providing child care facilities to ensure that children are cared for, be pursued.

(v) Recommendations

1. While family responsibility and family status are two separate grounds, they are interrelated and together cover a broad spectrum. While it can be argued that some of the areas which the two grounds cover can also be dealt with under other grounds like sex, gender, marital status, sexual orientation etc, there are cases where the grounds are not covered by other grounds. It is recommended that the ground be listed to “enforce” the application of other such grounds. Furthermore, listing will create certainty regarding the applicability of these two grounds in particular by the courts as well as to create certainty in cases where the other grounds do not cover these two grounds.
2. Since the definition of family status is rather broad, it is recommended that the definition stipulate more clearly which members make up a family. This will serve to give the courts certainty in addressing issues which may otherwise be left undecided. One refers to the definition of the family in terms of the Saskatchewan Human Rights Code in Canada mentioned in this paper and the report.

2. Report on whether acts of unfair discrimination should be criminalized.

The findings and recommendations in the report are discussed hereunder.

(i) South African Legal framework

Insofar as South Africa’s domestic law is concerned, the Constitution and the Equality Act form the basis of the legal framework on equality.

While section 9 of the Constitution does not itself render acts of unfair discrimination criminal, it does leave room for the possible enactment of legislation to criminalise such acts. Section 9(4) makes it compulsory for national legislation to be enacted to prevent unfair discrimination based on the prohibited grounds and as such, this can be read to include acts of unfair discrimination.

Section 10(2) of the Equality Act specifically provides for the possibility of instituting criminal proceedings against persons who unfairly discriminate against others by publishing, advocating, propagating or communicating hate speech. According to the latter section, criminal proceedings should be instituted in terms of the common law or relevant legislation.

Section 21(2)(n) of the Equality Act provides that the Equality Court is authorised to make an order to *inter alia* submit a matter to the DPP for possible institution of public proceedings.

While the above sections of the Equality Act provide do criminalise acts of unfair discrimination to an extent, it should be noted that such order to criminalise must be instituted in terms of the common law or relevant legislation.

The final section of the Equality Act dealing with the criminal aspect of unfair discrimination includes section 30(3) which empowers the Minister of Justice and Constitutional Development to make a regulation which provides that a person who acts in contravention of provisions of the Act is guilty of an offence and liable to a fine or imprisonment for a period not exceeding 12 months. These regulations have however not been made to date insofar as the criminalisation aspect is concerned.

Given the above, it is noted that criminalisation of unfair discrimination relies almost entirely on the civil justice system. Various problems with the latter system have been identified. These include the following:

The Human Rights Commission and Legal Aid Board which have been delegated the task of assisting complainants and taking their grievances to court have always complained about problems such as insufficient funding and being understaffed, which limits their ability to function effectively.

Another problem is that the latter bodies are found predominantly in urban areas, which does not effectively deal with the problem of people in rural areas.

Furthermore, the problem of access to justice comes into play. Generally, civil cases can only be instituted by the victim and in many instances, claimants are poor and cannot afford to institute legal proceedings. This results in many such cases being abandoned completely.

Another weakness of the civil justice system is that it provides for individuals to decide whether or not to take a matter to court or not and this ignores the fact that certain violations affect not only the individual but also the state and national interests, which tend may thus get ignored in the process.

(ii) International and Foreign Comparative Analysis

Several international instruments were analysed as well as foreign jurisdictions.

In respect of the research pertaining to international instruments, the following were looked into.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) calls for criminalisation of unfair discrimination of certain grounds. Section 4 of CEDAW requires state parties to declare hate speech and acts of violence emanating from racial hatred as criminal offences.

The Convention on the Elimination of Discrimination Against Women (CEDAW) which seeks to protect women against unfair discrimination stops short of providing for criminalisation of unfair discrimination. Nevertheless, it creates provisions which can be interpreted so widely as to accommodate a variety of measures aimed at eliminating unfair discrimination, including criminalisation.

The countries looked at include the United States of America ("US"), England, Australia, Canada and the Netherlands. Some of the findings include the following.

In the US, laws pertaining to unfair discrimination are particularly liberal. Section 242 of the Code criminalizes certain acts of unfair discrimination, such as a denial of any rights, privileges or amenities which are protected by the Constitution or other laws of the United States of America. The Code however generally concentrates on acts which have a severe effect on human life and/or national security.

The Civil Rights Act of 1964 on the other hand does not criminalise acts of unfair discrimination but entitles victims of unfair discrimination to institute civil proceedings. It also makes it possible for the state to institute such proceedings on behalf of a claimant under certain circumstances, like where the issues involved effect the public interest.

In England, the *Disability Discrimination Act of 1995*, the *Race Relations Act 1976*, *Public Order Act 1986*, *Criminal and Disorder Act 1988* and

the *Sex Discrimination Act 1975* deal with discrimination based on disability, race and sex respectively.

The *Disability Discrimination Act* criminalizes the failure to effectively accommodate for the transportation needs of disabled persons. Section 32(1) and section 40(1) give the Secretary of State the power to make regulations aimed at ensuring the safety, accessibility and comfort of taxis and public service vehicles used by disabled persons. In terms of sections 32(4) and 40(3) and (4), failure to comply with the regulations so made constitutes an offence and renders the offender liable for a prescribed fine.

The *Race Relations Act* criminalizes racially aggravated circumstances. Examples of such offences include racially based assault and racially aggravated public offences.

The *Public Order Act* renders as a criminal offence all uses of language or written material, distribution, broadcast, recordings of shows, plays or programmes with the aim of stirring up racial hatred, or which is likely to stir up racial hatred.

The *Criminal Disorder Act* introduces a number of "racially aggravated offences" which include racially aggravated assaults, racially aggravated criminal damage, racially aggravated public offences and racially aggravated harassment.

The case of *R v Saunders* (CACD 2000) which deals with racially aggravated offences was referred to. In this case the court held that the fact an offence has aggravated features could have the effect of increasing sentencing by up to two years. This would be so even if the result would be to turn an uncustodial sentence into a custodial one.

Australian law has some extensive legislation devoted to equality and unfair discrimination issues. One of the more pertinent Acts in the context of the topic under discussion is the *Discrimination Act 1991*. The Act renders unlawful discrimination in some areas as well as in the provision of specified services. It specifically criminalizes certain acts of public incitement of hatred towards other persons on the ground of race. Incitement to racial vilification and hatred has also been criminalized in selected federal states in Australia, such as New South Wales, Western Australia, Queensland and the Australian Capital Territory.

While Canada has legislation aimed at addressing the problem of unfair discrimination, none of the statutes have been found to criminalise acts of unfair discrimination and thus the Canadian situation will not be discussed here.

In the Netherlands, the *Criminal Code of 1971* penalises racial insult, incitement to xenophobia and discrimination on the grounds of race as well as publication and dissemination of these notions. It is also a criminal offence to take part in or support, in any way, activities that discriminate against people on racial grounds or to exercise discrimination in the public service or in the practice of a profession or trade.

While there exists criminalisation of unfair discrimination in the Netherlands, it has been suggested civil law in the Netherlands yields better results as compared to criminal law and administrative law. While this may not necessarily be the case in South Africa, the latter experience may nevertheless be used as a guide when determining whether or not to criminalise unfair discrimination.

(iii) Implications

An argument against criminalisation has been raised being that criminalisation will require victims of unfair discrimination to report their

complaints to the police as their first point of call. The concern is more a practical one in that many of the police still maintain apartheid practices and ways of thinking and would simply treat such "offences" lightly and may not even follow up on them.

Nevertheless, it has been proposed that along with the magistrates, clerks of the court and other officials whose training is contemplated, provision should also be made for training the police.

There is also the concern that the police may not be able to enforce such criminal acts if they are to be criminalised. It has been argued that in order for criminalisation to be effective, it should be dependant on two criteria i.e. there should be a broad societal consensus to condemn certain behaviour and there should be legal provision sufficiently effective to enforce it.

There also seems to the argument that criminalisation is unnecessary because the existing dispensation is sufficiently equipped to protect equality rights. This view however seems to neglect to look into whether the existing laws work as well in practice as they appear on paper. An example would be that the poor may not have sufficient access to justice despite the fact that the laws may be in place.

A problem pertaining to the cost implications which the state will have to bare in the event that acts of unfair discrimination have been criminalized has also been raised. It has been suggested however that unfair discrimination is but one of the problems which the state has to deal with and the competition for state resources are quite vigorous. Thus, if acts of unfair discrimination are criminalized, it should be done on such a way as to maximise results at the least cost.

(iv) Recommendations

In light of the findings, the following recommendations were made:

6. That acts of unfair discrimination be criminalized, but only those which the police are in a position to enforce and those whose enforcement would not be unreasonable. For example, the reasonableness for punishing a spaza shop owner for not providing a ramp for disabled people is questionable. The effect restricting which is criminalized in this way would have the effect of maintaining the moral authority of the law and at the same time reducing the burden on State resources and on the police in terms of their workload. It would also ensure that the legislation does not become unreasonably oppressive.
7. It is recommended further that in the event that acts of unfair discrimination are criminalized, the police should be included among the officials who are being targeted for training for the implementation of the Equality Act.
8. Should criminalisation be implemented, it is recommended that vigorous efforts be undertaken to ensure that the relevant legislation is effectively disseminated to all parts of the country including the rural areas where acts of unfair discrimination are most severe and people have limited access to information. Steps must also be taken to educate people about the content of this legislation.