

# **Research on the PEPUDA Equality Legislation Project 20 May 2003**



# Research Objectives

- To conduct on behalf of the Equality Review Committee on the following:
  - \* Possible inclusion of section 34 grounds as prohibited grounds in terms of s 1 of PEPUDA
  - \* Whether acts of Unfair Discrimination should be criminalized

# Research Methodology

- The desktop based research was conducted in the following manner:
  - \* Investigative stage (data collection and analysis)
  - \* Report writing
  - \* National workshop in October 2001 to discuss the draft report
  - \* Final report (with updates) submitted to the Equality Review Committee

# Research Methodology (Section 34 Report)

- In writing the report, each Chapter took the following format:
  - \* Discussion on nature of unfair discrimination
  - \* International law analysis
  - \* Foreign comparative law analysis
  - \* Implications for inclusion and/or non-inclusion
  - \* Recommendations

# Research Methodology (Report on whether to criminalize acts of unfair discrimination)

- The report outlines the following in more detail:
  - \* Determination of the adequacy and efficiency of the civil justice system re unfair discrimination
  - \* Review of literature
  - \* Public international law analysis
  - \* Foreign comparative law analysis
  - \* Recommendations

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (findings)
  - \* Nature of Unfair Discrimination
    - limited access to socio-economic rights
    - banking policies can unfairly discriminate (especially against the already disadvantaged) e.g. “red-lining”

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (findings)
  - \* Nature of Unfair Discrimination
    - unfair discrimination in the education, health, social services sectors
    - unfair discrimination re access to land and housing

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (findings)
  - \* International Law
    - provides for protection of related grounds e.g. “national and social origin, property birth or other status” (Art 2 of African Charter)

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (findings)
  - \* Foreign Comparative Law
    - Canada:  
recognizes “social condition”, “source of income” and “receipt of public assistance” under various Codes

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (recommendations)
  - \* burden of proof “lighter” if ground is listed (easier for disadvantaged to prove their case)
  - \* unfair banking policies to be addressed e.g. red-lining
  - \* equal access to justice for all

# Findings and Recommendations

- Section 34 ground: Socio-economic Status (recommendations)
  - \* inclusion in conformity with current national legal jurisprudence
  - \* inclusion also in conformity with international jurisprudence

# Findings and Recommendations

- Section 34 ground: Nationality (findings)
  - \* Nature of Unfair Discrimination
    - unfair discrimination in the health sector, public services (e.g. Batho Pele policy), education sector, housing sector, immigration and employment

# Findings and Recommendations

- Section 34 ground: Nationality (findings)
  - \* International Law
    - non-nationals usually protected under the grounds of national or social origin or ethnic origin
    - OAU Convention lists “nationality” as a ground for the protection of refugees

# Findings and Recommendations

- Section 34 ground: Nationality (findings)
  - \* Foreign Comparative Law
    - Canada generally lists national or ethnic origin as a ground (although nationality has been listed in instances e.g. in Saskatchewan)

# Findings and Recommendations

- Section 34 ground: Nationality (findings)
  - \* Foreign Comparative Law
    - USA protects non-nationals
    - Botswana protects non-nationals (e.g. Unity Dow case)

# Findings and Recommendations

- Section 34 ground: Nationality (recommendations)
  - \* xenophobia and related tensions to be addressed
  - \* listing in conformity with current national legal jurisprudence
  - \* create certainty regarding status of non-nationals

# Findings and Recommendations

- Section 34 ground: Nationality (recommendations)
  - \* different statuses of a “national”, thus possibly qualify the definition of who a national is

# Findings and Recommendations

- Section 34 ground: HIV/AIDS (findings)
  - \* Nature of Unfair Discrimination
    - found in health sector, insurance, government departments, prisons, private sector

# Findings and Recommendations

- Section 34 ground: HIV/AIDS (findings)
  - \* International Law
    - generally protected under health or health care
    - International Guidelines on HIV/AIDS and Human Rights
    - SADC approved regional code

# Findings and Recommendations

- Section 34 ground: HIV/AIDS (findings)
  - \* Foreign Comparative Law
    - generally treat HIV/AIDS under the ground of “disability”  
e.g. USA, Australia and Canada

# Findings and Recommendations

- Section 34 ground: HIV/AIDS (recommendations)
  - \* in conformity with international approach to list
  - \* in conformity with national legal approach to list
  - \* creates certainty to list (as opposed to leaving courts to decide on the ground of disability)

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* Nature of Unfair Discrimination (family status)
    - unfair discrimination felt in social sphere, economic sphere and cultural sphere
    - non-nuclear families are at a disadvantage

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* (family status)
    - other areas of discrimination include; anti-nepotism cases, rental and housing accommodation, immigration, family benefits, pension funds, medical aid schemes, private clubs and education

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* Nature of unfair discrimination (family responsibility)
  - \* generally felt amongst women due to the “traditional” role of women in society
  - \* includes male responsibilities as well, e.g. single parent households

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* (family responsibility)
    - areas where discrimination is felt include social sphere, employment sphere, rent and housing policies etc

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* International Law
    - family responsibilities dealt with in various ILO Conventions
    - other documents deal with the rights of families e.g. ICESCR and ICCPR

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* International Law
    - sexual equality (women) in various instruments, conventions etc also promote the goals of family responsibility and status

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (findings)
  - \* Foreign Jurisdictions
    - Canada list “family status” although definitions differ
    - Australia list “family responsibility” – related to employment sector

# Findings and Recommendations

- Section 34 ground: Family Status and Responsibility (recommendations)
  - \* listing to create certainty
  - \* listing to “bolster” other grounds like marital status, sex, gender
  - \* possibly - definition of “family status” can be more explicit in determining which parties are covered to create certainty

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* South African Legal Framework
    - section 9(4) of the Constitution makes it compulsory to enact national legislation (leaves room for criminalisation)

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* South African Legal Framework
    - section 10(2), 21(2)(n) and 30(3) of Equality Act may be applicable

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* South African Legal Framework
    - insufficient funds and understaffed (e.g. SAHRC, Legal Aid Board and Gender Commission)

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* South African Legal Framework
    - access to justice by impoverished can be problematic

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* South African Legal Framework
    - proceedings in Equality Act provide for already existing remedies

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* Public International Law
    - CERD – makes certain acts criminal
    - CEDAW – makes provision for measures to curb discrimination (can be read to include criminalisation)

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* Foreign Comparative Law
    - USA – Code (criminalises certain acts of unfair discrimination)

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* Foreign Comparative Law
    - England – various legislative provisions criminalise certain discriminatory acts based on disability, race and sex

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* Foreign Comparative Law
    - Australia creates criminal offences of certain acts e.g. public incitement to hatred on the ground of race, racial vilification.

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be Criminalized (findings)
  - \* Foreign Comparative Law
    - Netherlands penalises racial insult, incitement to xenophobia and racial discrimination as a whole

# Findings and Recommendations


- Whether acts of Unfair Discrimination should be criminalized (recommendations)
  - \* argue for enforcement – but only of those which are reasonable and which the police can enforce
  - \* police should be suitably trained to deal with handling such cases

# Findings and Recommendations

- Whether acts of Unfair Discrimination should be criminalized (recommendations)
  - \* efforts must be taken to ensure that legislation effectively governs the entire country

# Conclusion





**Thank You:  
[www.sahrc.org.za](http://www.sahrc.org.za)**