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REPRESENTATIONS

FROM THE
UNIVERSITY OF CAPE TOWN
CAUCUS ON LAW AND GENDER

(COLAG)

ON THE
PROMOTION OF
EQUAL OPPORTUNITIES
DRAFT BILL

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SUBMISSIONS ON THE PROMOTION OF EQUAL OPPORTUNITIES DRAFT BILL

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APPENDIX

I Draft Bill on the Promotion of Equal Opportunities

II Swedish Act Concerning Equality Between Men and Women

INTRODUCTORY COMMENTS

The memorandum to the draft Bill on the Promotion of Equal Opportunities explains that it is just one of many measures necessary to secure the equality of all in South Africa. It also emphasizes that the government is committed to the principle of equality.
It points out that this commitment is reflected in South Africaâ\200\231s accession to the four
major international conventions dealing with women and in the governmentâ\200\231s decision
to make equality the cornerstone of its proposals for a South African Bill of Rights.

Few will quarrel with the proposal that the principle of equality should be a basic value in the new dispensation in South Africa, nor with the idea that equality on the basis of sex or gender should be promoted. However, the governmentâ\200\231s decision to
introduce legislation aimed at promoting gender equality is problematic for a number of reasons.

First, South Africans must feel a sense of discomfort that the issue of sex or gender discrimination is being dealt with while no attempt is made to tackle race discrimination. Although legislation which expressly discriminates on the basis of race or colour has been el the inequalities and forms of exploitation which have

historically marked South Africa remain. To pursue equality without considering this inequality is impossible.

If political sensitivity has restrained the present government from introducing legislation dealing with the promotion of equality on the basis of race or colour, a similar sensitivity should apply in the case of sex or gender. Inequality on the basis of
sex or gender concerns South Africans of all races and is a highly political issue. Because attempts to remedy such Insqualld must draw on basic understandings of how our society should be structured, such legislation cannot be introduced unilaterally by the present government.

If enacted, the Equal Opportunities draft Bill would lay down a definition of gender discrimination and establish an institution to promote equality. Each of these actions involves making sensitive political decisions with far reaching implications. For
instance, as we indicate below (Part One: I and Part Two: II), to define discrimination in legislation is not easy and any legislative definition carries with it a particular conception of what sex or gender inequality involves. Similarly, in establishing an institution to promote equality, assumptions are made about the role and powers of such an institution, its relationship to the executive and the way in which discriminato
practices should be challenged. Each of these assumptions rests on a particular view o the relationship between law and society and the nature of gender discrimination. It does not seem appropriate for the present government to be making these decisions on its own.

A second concern is raised by the treatment of sex or gender discrimination in isolation from other forms of discrimination. This compartmentalizes the equality problems, suggesting that issues of race, gender, religion and so on are different and separate. Clearly, racial and sex or gender discrimination are not identical. Neverthel ess
the two intersect. For instance, measures taken to remedy the inequality of women might leave black women at the bottom of the pile and measures taken to address the disadvantaged position of black people might again leave black women worst off. If one looks at inequalities in South African society more broadly, recognising that it is not discrimination on the basis of race and gender alone that lead to unfair results, it is obvious that religion, physical disability or sexual orientation, for example, may compound disadvantage based on other factors and that no single factor determines any

unjust outcome. It is, therefore, inappropriate to deal with sex or gender discriminati
on
on its own. To address the problem seriously, a broader approach to equality legislatio
n
is necessary.

The above two points lead to a third. Equality legislation cannot succeed if it does not respond to the problems of disadvantaged people and if it is imposed on an unwilling population. A major part of its function is to set standards which are widely supported. The promotional meetings conducted by the Department of Justice together with the Communication Service are not a substitute for consultation, nor is the procedure of inviting submissions on the Bill.

Equality legislation will, we hope, be central to a process of addressing the inequities found in South African society. To achieve this it must be carefully drafted
.
(The present Bill was obviously hurriedly put together.) Drafting must be preceded both by a serious consideration of the demands and needs of South Africans, established by consultation with the many interested groups that would be affected, and by a careful study of the successes and failures of equality legislation in other jurisdictions.

Although we do not believe that legislation of this kind can be drafted by lawyers and bureaucrats alone, but must be the product of consultation, the comments that follow indicate concerns we have with the Bill as it stands and with the approach to equality legislation that it has chosen. We hope that they will be useful in future deb
ates
about the most appropriate form for such legislation in South Africa.

A detailed analysis of the draft Bill follows which outlines major problems, examines some of the alternatives and suggests solutions which we think should be considered. Part One outlines some of the more basic problems that are raised in drafting equality legislation. Part Two deals with what might broadly be termed â\200\230discriminatory practicesâ\200\231, including the general definition of discrim
ination, the
question of equal remuneration, victimization, sexual harassment and affirmative action. In Part Three we deal with issues relating to the scope of the draft Bill, such
as
its general ambit, exemption procedures, and genuine occupational requirement procedures. Finally, in Part Four, we consider the viability of the enforcement mechanisms proposed in the Bill.

A NOTE ON TERMINOLOGY

(i) The use of the terms male and female, rather than the more common, man and woman, seems unnecessary and conveys an unfortunately biological tone, more appropriate in discussing animal habits. We suggest that the terms men and women are no less accurate and would be more appropriate.

The use of the concept of â\200\230equal opportunitiesâ\200\231 in the title of the Bil
l is
unfortunate. It suggests a limited approach to equality, involving merely formal leveling of the playing fields. This is, in fact, not in keeping with the scope of the Bill itself which, in referring expressly to special measures in the case o
pregnancy, for instance, is concerned with more than â\200\230equal opportunitiesâ\200
\231. For
this reason and others set out in Part Two, we think that a title such as Promotion of Equality Bill, should be considered.

We suggest that explanatory material for any future Bills should be sensitive to the fact that institutionalized discrimination against women has led to a hierarchical relationship between women and men. It is generally assumed that men ought to be used as the standard against which women are measured. For instance, paragraph 3 of the memorandum emphasizes that women differ from men. We have no difficulty with this point except insofar as it conceals the fact that the difference does not lie in women but between women and men. Men differ as much from women as do women from men. A shift of emphasis in such passages is important to confirm our commitment to securing real equality. Similarly, it is inappropriate to assert womenâ\200\231s alleged â\200\230dualistic (si c) role as an
economically productive member of society and as a motherâ\200\231 in a memorandum. The division of labour along these stereotyped lines is controversial and this passage seems to assume that, finally, it is natural for women to be left carrying the full burden of childrearing. This is unacceptable.

THE PROMOTION OF EQUALITY

I. APPROACHES TO SECURING EQUALITY THROUGH LEGISLATION

The central problem with the draft bill is that it relies exclusively on a ban on discrimination in order to promote equality. Essentially therefore, its strategy for dealing with disadvantage is negative and defensive. This strategy is the hallmark of an approach to equality which rests on the assumption that a merely formal understanding of equality is enough to ensure an equal distribution of benefits among all members of a society. Formal equality assumes that all people enjoy a substantive equality and that disadvantage exists only as a surface aberration engrafted on to an otherwise equal and just social order. All jurisdictions have found it difficult to draft anti-discrimination legislation which is both fair and effective and, while it is true that the complexity of the enterprise has resulted in disagreements and in very different approaches, there is a general consensus that a wholly negative approach does not take matters very far. There are many reasons why such an essentially defensive method of approaching womenâ\200\231s oppression is, at best, insufficient and at worst, dangerous.

1. Formal equality consists of treating similarly those who are in similar situations. As such, its focus is directed unequivocally at the individual and ignores the fact that women suffer disadvantage as a group and not on the basis of traits which are individual to them. Even though the inclusion of the concept of indirect discrimination in the draft Bill goes some way towards addressing this problem, the law is still conceived as a shield behind which to hide from aggression, rather than a sword with which to challenge apathy.

2, Formal equality ignores the social landscape against which individual discrimination occurs. It assumes that the people to whom it applies are an homogeneous group with the same opportunities and responsibilities. For example, the directly discriminatory provision in SA labour legislation before 1983 did not allow women to perform night work unless special ministerial dispensation had been granted. This provision was removed in 1983. However, no account was taken of the fact that night work often raises particular problems for women. For instance, travelling at night, when transport is scarce, raises special dangers for women who are more vulnerable to violence than are men. Thus, the apparent â\200\230equalityâ\200\231 of the 1983 amendment does not ensure real equality of working conditions for men and women, but leaves women in a position which might well be worse than before the amendment. There are examples in abundance to illustrate this point, but the issue is really very simple: formal equality is not enough to achieve real equality for women and men and

can be dangerous in that it masks the substantive inequality behind a facade of neutral and often meaningless â\200\230rightsâ\200\231.

3. A pervasive problem of formal equality provisions and hence of an exclusive reliance on anti-discrimination law is its reliance on a male comparator. Equality presupposes something which one wants to be equal to and this inevitably results in the average middle-class white male with little domestic responsibility being constituted a s

the prototype human being against which all others must be measured. In practice, â\200\230penalties for divergence from the norm fall disproportionately on womenâ\200\231!

6) The problem most often cited in this regard is that of discriminating against regnant women. Courts in other jurisdictions whose concepts of equality are

irrevocably committed to the existence of a male comparator have struggled to accept that discrimination on the basis of pregnancy constitutes discrimination on the basis of sex, as employers have been able to claim that they would not treat a pregnant man any differently. Even though the draft Bill deals explicitly with pregnancy, the narrow approach adopted by courts in Britain and the United States should alert us to the very limited notion of equality which this comparative technique provides.

Furthermore, even criteria which might appear to be gender-neutral often defer de facto to a male norm in the name of objectivity. In Rummler,? the court was asked to determine whether a job classification based on criteria of muscular effort and heaviness of work contravened the principle of equal pay. The complainant asked the court to use the female physique as the starting point from which to define â\200\230heavyâ\200\231, but the court declined to do so, holding instead
that this would itself constitute discrimination and that the appropriate question to ask was whether or not the work was â\200\230by natureâ\200\231 heavy, using an â\200\230objectively
measureableâ\200\231 expenditure of effort. The male norm is here overtly equated with objectivity and it is disturbing, to say the least, to consider the extent to which this colonisation of objectivity might operate at less discernible levels in the processes of comparison.

II. SOME PROPOSALS

The criticisms above are only brief sketches of some of the problems which attach to narrow conceptions of equality. Without delving further into the (very substantial) critiques of facial equality, we would recommend the adoption of a more positive and dynamic approach which emphasizes giving a substantive content to the notion of equality and which relegates anti-discrimination jurisprudence to the position of simply
one of the many tools with which to achieve this.

What we would regard as an ideal equality bill is one which focuses on the concept of equality rather than on the concept of discrimination. The bill would begin by imposing positive obligations on employers and other appropriate bodies to remedy inequalities in their establishments. In this way, the overriding objective of achieving
equality would be the clear policy of the bill and the anti-discrimination provisions would quite rightly be seen as merely one of the ways to achieve this. The anti-discrimination provisions would then no longer be subject to criticisms about the inherent difficulty of proof, the indivualisation of disadvantage etc because they would
be only one aspect of a multi-faceted strategy which would deal directly with the challenge of formulating an equality standard which was not merely rhetorical, but which had the capacity to make a real difference to womenâ\200\231s lives.

We annex a copy of the Swedish Act Concerning Equality Between Men and Women 1991:433 as a suggested model of how such legislation could be framed. Note that the Swedish legislation is concerned only with employment. As we suggest below,

1 Sandra Fredman â\200\230European Community Discrimination Law: A Critiqueâ\200\231 (1
992)
211LJ 119 at 121.
Case 235/84 [1986] ECR 2101; see also Fredman op cit at 123.

this is too limited an ambit for South African purposes. The model would therefore require extension to other spheres.

The Swedish model imposes an obligation upon employers to promote equality in working life. The legislation requires employers to draw up a plan of action annually. This plan sets out what measures the employer intends to take to meet its legislative obligations. What is particularly significant about the Swedish legislation is its broad commitment to promoting equality and its recognition that = provisions, for instance, offer just one, less important, device for pursuing this commitment.

The drafting of specific clauses to give expression to the meaningful commitment to equality suggested here will be a complex and difficult venture. Extensive research is necessary and it is absolutely impossible in the time available either to conduct the necessary research or give the matter the thoughtful and intensive attention it requires. A serious consideration of the most appropriate enforcement mechanisms for this approach is also needed, but again, it is too extensive a project to complete within the space of a few weeks.

I. THE NECESSITY FOR ANTI-DISCRIMINATION PROVISIONS

Even though we regard provisions which outlaw discrimination generally as absolutely essential for achieving equality, we also recognise the importance of an anti-discrimination provision which will form a minimum floor of equal treatment. However, in defining discrimination, we ought to be mindful of the type of criticisms sketched in Part Two above which highlight the limitations of this approach. These insights make it essential that the provision which defines discrimination does so rigorously in order to avoid as far as possible the evasion of the spirit, if not the letter, of the statute. We suggest the following amendments as a possible way of achieving this, but again we stress that the very short time available to us in which to prepare these proposals has not permitted the thorough research and consideration of the issues which is necessary.

II. THE DEFINITION

A DIRECT DISCRIMINATION

The billâ\200\231s definition of what constitutes discrimination on the basis of sex, pregnancy and marital status represents in some respects an advance on the definitions found in the legislation of other jurisdictions, but there are components of the definition whic

h
are cause for serious concern.

A1 Causation

The most obviously deficient aspect of the bill is the use of the qualifier â\200\230so lelyâ\200\231 in all three definitions. The implication is that a complainant will have to prove not merely that her/his sex/marital status/pregnancy is a substantial, or even the dominant activating cause for the treatment by the discriminator, but that there was in fact no other reason for such treatment. It would be ludicrously easy for alleged discriminator s to defend themselves against a charge of discrimination, in that the existence of any other reason, no matter how trivial, would justify a decision or practice which was de facto discriminatory in every other way. Even if other pressing considerations motivated the less favourable treatment, it is the crux of anti-discrimination law that it is wholly unacceptable that a personâ\200\231s sex/marital status/pregnancy should form part of the decision at all.3

Furthermore, in our opinion, amendments to the definition ought to go beyond the mere removal of â\200\230solelyâ\200\231 in order to avoid protracted legal argumen ts about causation, which might well defeat the efficacy of the statute. A: the incorporation of a provision along the lines of section 8 of the Australian Sex Discrimination Act of 1984 which provides that:

â\200\230A reference in subsections 5(1), 6(1) or 7(1) to the doing of an act by reason of a particular matter includes a reference to the doing of such an act by reason of two or more matters that include the particular matter, whether or not the

particular matter is the dominant or substantial reason for the doing of the act.â\200 \231

We have attempted to provide a clearer formulation of the principle contained in section II: D below.

A2 â\200\230on the ground of a quality which is generally attributed to femalesâ\200 \231

The inclusion of this phrase in the definition is an advance on legislation in the Unit ed Kingdom and the United States of America. In both of these jurisdictions, it has been left to the courts to reach the conclusion that direct discrimination also takes place when stereotyped assumptions about characteristics of the sexes are employed.â\200\231

These courts have gone one step further and have held that discrimination may occur even where stereotyped assumptions are generally true. In City of Los Angeles Department of Water & Power v Manhart,Â® emphasis was placed upon the fact that one is focusing on the individual when one compares, not on the class of persons. The latter insight should also be embodied in legislation, to avoid the necessity of leaving it to the

3 This is leaving aside for the moment the crucial issue of affirmative action programmes.

4, See Owen & Briggs v James [1982] ICR 618, 623, 625-6 (complainant must show that sex was a substantial or important reason)
See, for example, Skyrail Oceanic Limited v Coleman [1981] ICR 864 (employer found to have committed unlawful sex discrimination by sacking a female employee because it assumed that her husband, and not her, was the famil breadwinner). See Pannick D Sex Discrimination (1984) at 35ff. See also Ciy 0 Los Angeles Department of Water and Power v Manhart 435 US 702 (1978), which was the seminal decision accepting this view.
Op cit (unlawful sex discrimination to require female employees to pay higher contributions to pension fund than male employees because of the cd that

women as a class tend to live longer than men).

tortuous, Sapiens and expensive processes of judicial development. Again, the Australian definition provides a model by referring not only to:

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved personâ\200\231

but also to:

â\200\230(b) a characteristic that appertains generally to persons of the sex of the aggrieved personâ\200\231.

B INDIRECT DISCRIMINATION

It is a commendable feature of the Bill that it recognises the concept of indirect discrimination, rather than leaving this central doctrine to the process of judicial exposition, as has been the case in some other Jr iictons e concept of indirect discrimination is an explicit recognition of the limits of formal equality and goes som e way towards providing an expanded notion of what equality means. Nevertheless, we feel that the wording in the draft Bill is fundamentally flawed in several respects. Th e following is an initial attempt to point out some of the problems and pose possible solutions in order to ensure that the inclusion of the doctrine of indirect discriminat ion in the draft Bill is not merely empty rhetoric.

B.1 â\200\230requirement or conditionâ\200\231

British courts have stressed that this phrase should be interpreted widely so as to be given a meanin consistent with the elimination of the mischief at which the subsection was aimedÂ® and have been prepared to regard â\200\230a practiceâ\200\231 which has a d isparate impact on women and is unjustifiable as unlawful discrimination. Pannick comments as follows: â\200\230Parliament intended ... to prohibit discriminatory practices having a disparate impact on women. It is unfortunate that it did not say so in clear terms rather than us e the words "requirement or condition" * This phrase would be clearer and more effective if worded in the following way:

â\200\230imposes any requirement or condition, or institutes or maintains any practice which...â\200\231

B.2 the problem of proof

Nicola Lacey remarks that â\200\230it is widely accepted that plaintiffs bringing discr imination cases encounter grave difficulties of proofâ\200\231.1Â® In cases alleging direct discr imination, complainants find it very difficult to prove the â\200\230groundâ\200\231 of the defend antâ\200\231s action and, in indirect discrimination cases, there are almost insurmountable technical difficulties i n identifying relevant pools for comparison, and gathering adequate statistics. Conducting such research is also notoriously expensive and it is anomalous that the group of people who have been identified as disadvantaged (and this must mean

7. See Sydney J Key â\200\230Sex-Based Pension Plans in Perspective: City of Los Angele s, Department of Water & Power v Manhartâ\200\231 (1979) 2 Harvard Womenâ\200\231s Law Jou rnal

8. Clarke v Eley (IMI) Kynoch Ltd [1983] ICR 165, 171; Steel v Union of Post Office Workers [1978] ICR 181, 188.

9. Op cit at 42.

10. Nicola Lacey â\200\230Legislation Against Sex Discrimination: Questions from a Feminist Perspectiveâ\200\231 (1987) 14 Journal of Law and Society 411.

inevitably that they are economically disadvantaged) should have to bear the costs of such research. Nine times out of ten they will not be able to afford the process of producing sufficient proof and the machinery of the law will grind to an ignominious

alt before it has properly started. Of course, this is part of a larger problem concerning the accessibility of the legal system to women (particularly non-middle clas s
women) which merits the kind of serious and urgent attention excluded by a hasty exercise of this kind. Nevertheless, a small amendment to the draft Bill might render some assistance in this regard. We think that the following definition of indirect discrimination should be considered:

... a person discriminates against a person on the ground of sex if such person -

imposes ony! requirement or condition, or institutes or maintains any practice

whic
i) has an unfavourable effect on the complainant, and

a cannot be shown to have this unfavourable effect on a similar proportion of persons of the opposite sex as it does on persons of the sex of the complainant. [Alternative: â\200\230cannot be shown to have no direct or indirect connection with the sex of the complainant] and

(iii) cannot be shown to be essential irrespective of the sex of the complainant.

Formulating the clause in this way has the advantage of requiring alleged discriminator s
rather than victims to bear the costs of producing the necessary statistical proof to justify unfavourable treatment.

B.3 â\200\230which cannot be reasonably justifiedâ\200\231

The English Act allows a discriminator to show that the discrimination practised is â\200\230justifiableâ\200\231 irrespective of the sex or marital status of the victim. Unfortunately, the
courts have not been very rigorous in their application of this standard: it has been h eld
that the practice need not be absolutely essential and, indeed, that it need not even b e
â\200\230necessary for the good of his (sic) businessâ\200\231. All that is required is that the reasons
advanced for discriminating are such that they would be acceptable to right-thinking people as sound and acceptable reasons.

It is submitted that this understanding of justification is absolutely untenable. In the United States, one must point to an â\200\230irresistible demandâ\200\231 from busi ness or some
other necessity to justify discrimination. Furthermore, the Employment Appeal Tribunal in Britain has emphasised that the complex issue of justifiability ought not t o
be left to industrial tribunals, but that an authoritative statement is needed as to ho w to
balance the discriminatory effect of a requirement or practice against justifications f or
it. In making indirect discrimination unlawful, the intention is precisely to deal with practices which are long-standing and have been applied without regard to their disparate impact on women and without consideration of alternative means to achieve the same object.

For these reasons we think that the clause would be more likely to achieve its purpose if it read as follows:

â\200\230which cannot be shown to be essential irrespective of the sex, marital status

or
pregnancy of the aggrieved personâ\200\231.

A.

B.4 which is to her detriment because she cannot comply with itâ\200\231

The phrase â\200\230because she cannot comply with itâ\200\231 should be deleted becaus
e it does not
make sense when referring to a ngics and is in any event legally tautologous, as the
establishment by an applicant of the existence of detriment does not require any furthe
r
proof of harm.

We think, however, that the entire phrase should be deleted. Discrimination against
someone on the basis of sex, marital status or pregnancy may safely be assumed to be a
harmful practice per se and the requirement of proving such harm introduces
unnecessary technicalities and restricts locus standi in a way which would hamper the
efficacy of the bill. Furthermore, experience in other jurisdictions points to problems
 of
proof as the single most problematic factor in bringing sex discrimination claims.

C EQUAL REMUNERATION FOR WORK OF EQUAL VALUE

1 The existence of the clause requiring pay equity as a separate entity, distinct
from the discrimination clause, is problematic for a number of reasons, not the least o
f
which is the fact that it implies that this form of discrimination is in some way diffe
rent
to any other form. We recommend that the provision relating to pay equity form part of
the general prohibition on discrimination, rather than exist as a separate clause, for
the
following reasons:

>i) There is no logical or conceptual reason why the clause requiring equal
remuneration for work of equal value should exist separately from the general
prohibition on discrimination. The failure to pay equal remuneration for work
of equal value is merely one instance of the broader evil of discrimination.

(ii) It seems likely that the drafters of this clause might have been influenced by the
separation of equal pay legislation from other anti-discrimination legislation in
both Britain and the United States of America. However, there are only
historical reasons for this separation: both jurisdictions had Equal Pay Acts long
before general anti-discriminatory legislation had been introduced. Notably,
Australia has no separate equal pay prohibition.

(iii) A considerable body of comparative jurisprudence exists which deals with
Sscrtmrinsion remuneration. We think that the inclusion of the â\200\230equal payâ\200
\231
provision in the general prohibition will allow courts to look to a well-developed
body of principles in other jurisdictions which can only enrich a developing
general discrimination jurisprudence in South Africa.

2. It is universally recognised among writers in this area that the crucial problem in
enforcing pay equity 1s that the disadvantage that women experience extends far beyond
the simple situation where a woman performs the same hs as a man, but is paid less.
Discrimination typically operates at a less obvious, but more pervasive level - especia
lly
in the context of job evaluation. Our society generally regards certain jobs (such as
nursing, secretarial work, child-care work, domestic work, etc) or certain types of ski
lls
(such as communication skills, empathetic skills, domestic skills) as â\200\230feminine
â\200\231 or
â\200\230womenâ\200\231s workâ\200\231. This has two consequences:

(i) As result of the social structure of work and working skills and the subtle
pressures of stereotyping, these kinds of jobs or jobs which require these kinds of
skills are typically marked by a high concentration of women workers.

(i)

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Because â\200\230womenâ\200\231s workâ\200\231 is undervalued and seen as less importan
t or less taxing

than â\200\230menâ\200\231sâ\200\231 work, these occupations are invariably extremely b
adly paid in
comparison to occupations which might involve equivalent amounts of skill,
danger, effort and experience, but which are typically regarded as â\200\230maleâ\200
\231
occupations.

For these reasons, it is to be welcomed that the draft Bill does not refer to â\200\230
the same
workâ\200\231, but rather to â\200\230work of the same valueâ\200\231. Although we supp
ort this approach, we
would prefer the more widely used â\200\230work of equal valueâ\200\231.

However, there are aspects of the draft clause which are cause for grave concern
and which exacerbate the problems sketched above:

(i) Firstly, the provision does not lay down any guidelines to assist courts in
determining what constitutes work of equal value. Performing the kind of
job evaluation which the provision calls for is a complex and technical
task which calls for developed industrial and sociological skills. The
courts lack this expertise and would not be the appropriate bodies to
adjudicate on the matter without any further guidance. Inevitably, parties
to equal pay litigation call on professional job evaluation bodies for

wy ultimately, it will be up to courts/tribunals to reach final
verdicts. For this reason, we feel it is essential to provide some guidance
concerning the elements of a job a court might look at in deciding what is

a suitable comparator. A formulation similar to that in our draft clause

2(2)(c), which draws from the labour legislation of countries such as

Canada, France, Ireland and the United Kingdom, needs to be

However, the particular application of such legislation to

South African circumstances needs to be considered more carefully than

is possible in the hasty process which has marked the drafting of these

su

(ii) The draft clause in the Bill limits the scope of the comparison which can
be made to those employees who are employed by the same employer.
The disastrous nature of this limitation cannot be over-emphasized. It
holds the real danger that the bill will be completely ineffective as it will
only apply to the â\200\230obviousâ\200\231 situation referred to above and will not de
al
with what is in fact the real problem: the fact that women are crowded
into low-paid jobs traditionally regarded as â\200\230womanâ\200\231sâ\200\231 work and
 that there
is usually no suitable male comparator in the same undertaking whose
wages may be compared with those received by women.

The formulation for comparison which we suggest below comes from sections
3(2) and 5(3) of the 1975 Netherlands Equal Wages for Women and Men Act and
allows comparisons to be made across undertakings within the same sector. The
requirement that â\200\230{a)ccount shall be taken of general differences in the wage
structures of the undertakings concernedâ\200\231 protects the (usually small) business
which cannot afford to pay wages which would be on a par with bigger, richer

3
assistance,
inserted.
missions.
businesses to any of its workers.
11.

ILO: General Survey by the Committee of Experts on the Application of Conventions and Recommendations Equal Remuneration (1986) at 28-45.

˜ SUMMARY OF PROPOSALS FOR A DEFINITION OF DISCRIMINATION: A TENTATIVE REDRAFTING

For the purposes of this Act, a person discriminates against another person (â\200\230the complainantâ\200\231) on the ground of sex if he or she treats the complainant less favourably on the basis of

a the complainantâ\200\231s sex;
a quality that appertains generally to persons of the sex of the complainant; or
(c) aquality which is generally attributed to persons of the sex of the complainant

For the purposes of subsection (1), unfavourable treatment occurs where a person

(a) treats the complainant less favourably than a person of the opposite sex would be treated in comparable circumstances;
fails to afford the complainant any benefit or opportunity over which the person has control; or
(c) imposes any requirement or condition or institutes any practice which
i) has an unfavourable effect on the complainant, and
ii) cannot be shown to have this unfavourable effect on a similar proportion of persons of the opposite sex as it does on persons of the sex of the complainant. [Alternative: â\200\231cannot be shown to have AOYrecy or indirect connection with the sex of the complainantâ\200\231] an
(iii) cannot be shown to be essential irrespective of the sex of the complainant.

For the purposes of (2)(b), a failure to afford a benefit or opportunity shall include a failure to pay equal remuneration to persons of the sex of the complainant who perform work which is comparable to that performed by persons of the opposite sex.

In determining what constitutes work of comparable worth, where no work of equal or approximately equal value is done by a worker of the opposite sex in the undertaking where the complainant is employed, the basis of comparison shall be the wage that a worker of the opposite sex normally receives in another undertaking, for work of equal value or, in the absence of such work, work of approximate value. Account shall be taken of general differences in the wage structures of the undertakings concerned.

In determining what constitutes work of comparable worth, regard shall be had to the following factors:

i) the level of qualification required;

if) the amount of skill and experience needed;

iii) the hours of work and amount of effort required;

iv) efficiency;

v) the amount of responsibility entrusted to the worker;
vi) the seniority of the worker;

vil) the conditions under which such work is performed; and
viii) any other relevant factors.

˜(d) Where a term in a contract is held to be in contravention of this section, such term shall be deemed to have been adjusted so as to comply with the provisions of this Act.

It shall not be a defence to a claim of unlawful discrimination under this Act that the aggrieved personâ\200\231s sex, marital status or pregnancy was not the dominant or the substantial cause of the discrimination.

Subsections (1),(2), (3) and (4) apply mutatis mutandis to discrimination against someone on the basis of that personâ\200\231s marital status or pregnancy.

[Alternative: â\200\230Any reference in this section to a personâ\200\231s sex shall be taken also
to refer to that personâ\200\231s marital status or pregnancyâ\200\231)

III SEXUAL HARASSMENT?

Sexual harassment is an abuse of power which exploits menâ\200\231s sexual dominance an d
disempowers women. The implications of sexual harassment - loss of confidence, silencing, humiliation, intimidation - are unacceptable in a democratic community which is based on equal respect and dignity for all its members. We therefore welcome the inclusion in this draft Bill of a clause concerned with sexual harassment.

However, both the definition of sexual harassment in clause 14 and the scope of its application are problematic for reasons we set out below. We also discuss briefly whether clause 14 represents the best strategic response to sexual harassment.

A WORDING OF CLAUSE 14

A.1 Definition of Sexual Harassment

There already exists a remedy for workplace harassment under the Labour Relations Act. The courts have shown themselves willing to take a broad view of what may amount to sexual harassment for the purposes of this legislation: any unwanted sexual behaviour or comment which has a negative effect on the recipient, ranging from innuendo, inappropriate gestures, suggestions or hints, or fondling without consent or by force, to its worst form, namely rape.!3

Clause 14 contains a definition of sexual harassment which is potentially narrower. This is regrettable, since it is presumably intended that clause 14 should in future supply the meaning of sexual harassment in cases currently falling under the Labour Relations Act.

Clause 14 appears to be based on 5.28 of the Australian Sex Discrimination Act 1984. It defines sexual harassment as:

â\200\230any conduct where a person makes an unwelcome sexual suggestion to another person, or makes an unwelcome request for a sexual favour to another person, or engages in any other unwelcome conduct of a sexual nature in relation to another person, in circumstances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or her -

(a) in any application for employment or a position with an employer or for admission to an educational institution; or

See Nicola Lacey Sexual Harassment and Legal Strategy, for a valuable discussion much of which has been incorporated into this comment.
Jv M (1989) 10 ILJ 755, 757.

˜(b) in the continuation or the circumstances of his or her employment with an

employer or of his or her studies at an educational institution.â\200\231

This definition is satisfactory in so far as:

it covers a wide range of behaviour(â\200\230any conduct of a sexual natureâ\200\231)

it focuses on the â\200\230unwelcomeâ\200\231 nature of the behaviour as the core eleme
nt in
sexual harassment

it does not require a comparison to be made between the posinon of the person claiming sexual harassment and the position of a person of the opposite sex, as would be required if the harm were framed in terms of sex discrimination (see further, Part B (iii))

it refers to harassment of both men and women. Despite the clear predominance of sexual harassment of women by men, we think it must be conceded that women may be perpetrators of sexual harassment, where their position in other power hierarchies (such as class or race) in relation to another woman or to a less powerful man, negates or reverses the usual sexual order.

However, we regard the following as potentially too restrictive:

A2

the requirement that the claimant must have reasonable grounds to believe that the rejection of the conduct may prejudice him or her. This allows scope for the argument that the claimant should have known better than to take the conduct seriously which is likely to be evaluated according to male norms of what women should expect rather than focusing on whether the claimant did actually suffer a loss of dignity.

the requirement that there should be a rejection of the conduct which may prejudice the claimant. This has the effect of focusing clause 14 on â\200\230quid pro quoâ\200\231 harassment. The clause does not cover the problem of â\200\230environmenta lâ\200\231
harassment, ie where the conduct simply makes it very unpleasant for the claimant to live, work or study in a particular place, without threatening her or him with any tangible loss. The word circumstances in s.14(4)(b) may be intended to allude to environmental harassment but, if so, it does not do so with sufficient clarity.

conduct of a sexual nature. We prefer the phrase used in the current EEC definition of sexual harassment: â\200\230unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men ...â\200\231. This includes those acts of harassment which are not explicitly sexual (eg sexist jokes). Furthermore, it emphasizes that what is really objectionable about sexual harassment is that it is an abuse of power and a failure to show equal respect for

all people.
Scope of Application
Clause 14 has a wider application than the existing Labour Relations remedy. It

covers sexual harassment

by employer to employee
by one employee to another employee of the same employer

by employer to applicant for employment

_ by employee to applicant for employment by the same employer

by member of academic staff to student or to applicant for admission to study

It therefore provides a new remedy to classes of employees outside the Labour Relations Act, to job applicants and to students. However,

(a) where workplace harassment takes place between employees, clause 14 does not clearly place responsibility on the employer as well as on the harassing employee; and

(b) it provides no remedy for sexual harassment in the contexts of education and employment, where such harassment is

- by one student to another

- by clients or customers, or employees of other organisations, or any other persons with whom an employee has to deal in the course of her or his work; and

it provides no remedy for sexual harassment in places outside of employment and education, eg in shops, on public transport and in recreational areas, where personal freedom may also be substantially interfered with by intimidating or offensive behaviour.

We argue below that the anti-discrimination provisions in clauses 2 to 4 of the draft Bill should apply also in relation to the provision of goods, services, facilitie s and
premises to the public or a section of the public. Clause 14 should have the same scope.

B WHETHER CLAUSE 14 IS THE RIGHT STRATEGY
We welcome the prohibition of sexual harassment in clause 14, because:

i) It would directly empower individual women, enabling them to assert their interests and claim legal recognition for the wrongs which they have suffered.

ii) It is appropriate to avoid criminalising sexual harassment. (Criminalisation of forms of sexual harassment which fall short of assault might well prompt a significant backlash which could be counter-productive.)

However, we would add the following:

Individual enforcement proses general problems. In Britain, the difficulties of obtaining adequate legal advice and representation, together with problems of proof and low awards of damages, have made litigation of sexual harassment claims very often an intimidating, stressful and disappointing experience. Collective remedies are needed. It is therefore very important that Clause 14 is accompanied by provision for an enforcement agency, and that this agency is poms and eked (See discussion of Equal Opportunities Commission in art Four.

The relationship between sexual harassment and other types of harassment, especially racial, needs to be considered.

As the Industrial Court did in J v M (1989) 10 ILJ 755, 758E.

_ Other types of response to sexual harassment can and should accompany a direct civil law remedy, eg.

- sexual harassment should be a consideration in reforming crimes such as assault and rape to focus on coercion and intimidation rather than on consent and awareness of its absence

more regulatory responsibility should be placed on institutions such as employers, civil service departments and educational establishments, for example by requiring them to draw up workplace codes of practice.

CONCLUSION

The following clause is an example of one which would address the concerns we have raised. It also has the advantage of being clearer than the current proposal:

â\200\23014(1) No person shall sexually harass another person in relation to employment, education or the provision of goods, services, facilities or premises to the public or a section of the public.

(2) A complaint of sexual harassment may be brought against -
(a) the person to whose conduct the complaint relates, and

(b) any other person or body who may reasonable be expected to control the conduct of the person to whose conduct the complaint relates.

(3) For the purposes of this section sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men. This can include unwelcome physical, verbal or non-verbal conduct when -

(a) the recipient of the conduct believes that the rejection of the conduct may prejudice her or him in obtaining any benefit or advancement, or

(b) the conduct creates for the recipient a hostile, intimidating or offensive environment.â\200\231

The individual civil remedy in clause 14 needs to be accompanied by the establishment of a strong enforcement agency, as well as by other legal and non-legal strategies against sexual harassment.

IV. PROHIBITION ON VICTIMIZATION

POSITIONING OF THE CLAUSE

A clause which prohibits victimization is a crucial component of legislation such as this. It seems strange, therefore, that it is tacked on at the end of the bill under the section entitled â\200\230miscellaneous provisionsâ\200\231. Structurally and conceptually, the prohibition on victimization belongs rather to that section of the bill which wl to promote equality by means of prohibiting discrimination. Essentially, victimization is a form of discrimination and we recommend that the clause be inserted directly after the sexual harassment clause (s14).

_ AMBIT OF THE CLAUSE

The major weakness in the draft clause is that it protects only employees. It is surely anomalous, for example, that students at educational institutions who avail themselves of their rights under the Bill may be victimized with impunity,

but employees may not.

DEFINING VICTIMIZATION

The clause needs to emphasize that victimization might occur in many different ways and will often not be overt (eg a deduction in salary or demotion) but might consist of subtle ways of humiliating or prejudicing a complainant.

The following is a possible reformulation which might be used:

(1) A person shall not commit an act of victimization against another person.

(2) For the purposes of subsection (1), a person shall be taken to commit an act of victimization against another person if the first-mentioned person subjects, or threatens to subject, the other person to any detriment because of the fact, or because the first-mentioned person suspects or believes, whether or not the suspicion or belief is justified or correct, that the other person -

(a) has lodged a complaint or intends to lodge a
with the Commission, or has supplied the or
Commission with any information;

(b) has laid or intends to lay a matter under sect
Ombudsman Act (Act No. 118 of 1979) with

complaint under section 28
intends to supply the

ion 4(1)(c) of the
the Ombudsman;

(Â¢c) has applied or intends to apply to the Industrial Court to declare any

conduct of that person in terms of section 15
ractice; or

to be an unfair labour

(d) as applied or intends to apply to a court of law for relief with regard to

any matter covered by this Act.

In the determination of what constitutes â\200\230detrimentâ\200\231 for the purposes o
f
subsection (2), regard shall be had not only to tangible loss, but also to factors such as diminution of status, loss of prestige, unfavourable distribution of work

load, the exclusion of persons from opportunities to

demonstrate their merit or

from decision-making bodies, loss of prestige, and diminution of status.

See the further discussion in Part Four, V.

V. AFFIRMATIVE ACTION PROVISION

Clause 32(d) permits special measures which further the â\200\230development and

advancement of femalesâ\200\231. This is an important provision in

discrimination legislation as

it ensures that programmes which respond to the disadvantaged position of women are not challenged on the basis that they fail to treat women and men in an even-handed

way. However, we suggest that the wording should be chan

directly the idea that such programme would provide equal

ged both to convey more
ity between men and women

and would not itself constitute a form of discrimination, and to avoid the (surely unintended) condescending tone of phrases such as â\200\230to enable them to realize th eir

natural talentsâ\200\231.

Because the subject of this subclause is, in fact, the promotion of equality (and not as the draft Bill suggests an exception to non-discrimination provisions), it should be placed either in that part of the legislation which expresses a general commitment to achieving equality or in the section in which discrimination is defined.

The following wording is possible:
Measures intended to achieve sexual equality

This Act shall not affect any special measures taken to ensure the substantial equality of women and men.

˜ THESCOPEOFTHEBILL

I. THE PRINCIPLE OF BROAD APPLICATION

The draft Bill seeks to prohibit discrimination by –

employers against employees and applicants for employment (clauses 5 & 6), employment agencies (clause 7),

partnerships against partners and applicants for partnerships (clause 8),

trade unions, employersâ\200\231 associations, pension funds, medical aid schemes, friendly societies (clause 10),

occupational controlling bodies (clause 11),

educational institutions against students or scholars at the institutions and applicants to such institutions (clause 12),

the state, statutory authorities, local authorities or other persons exercising a power in terms of permit, licence, registration, approval, concession, benefit of grant (clause 13).

In short, the Bill proposes to prohibit discrimination in the spheres of work, education and the bureaucracy. The ambit of the Bill, compared to sex discrimination legislation in many other countries, is therefore very narrow. For example, it would not prohibit banks from requiring wives to obtain the consent of their husbands prior to opening bank accounts, nor prevent bars from refusing admission to women, nor prohibit single-sex sports or cultural associations, nor prevent landlords from excluding women tenants. It is not clear from the memorandum why the drafters chose to limit the Bill in this way.

It is true that, traditionally, the equality provisions in Bills of Rights have operated only between individuals and the State (vertically) and not between individuals (including companies) and other individuals (horizontally). The equality clause in a Bill of Rights therefore does not necessarily prohibit employers or private schools from discriminating on the grounds of sex. Similarly, it will not necessarily prevent landlords or banks from imposing conditions on potential tenants or customers

that discriminate on the grounds of race or sex. Whether Bills of Rights should not operate horizontally is a matter of controversy. These arguments do not apply to

15. On the ambiguous nature of clause 13, see discussion below.

ordinary legislation, however, and there is no doubt that legislation can and usually does operate horizontally. Thus, in promoting this Bill, the Minister of Justice has pointed out that it will supplement an equality provision in a Bill of Rights by extending the scope of the principle of equality to relations between individuals.

A reason for the limited scope of the Bill may lie in the draftersâ\200\231 reluctance to interfere in what is traditionally known as the private as opposed to the public sphere. The concept of a private sphere which should be kept free from state interference is to be found in may liberal theories about law. Although the liberal aspiration towards a general increase in privacy in the sense of personal freedom is a political goal which we share, we would nevertheless argue that it is wrong simply to identify privacy with an absence of state intervention. Personal freedom is shaped by the state -- whether and how the state reacts to the thief, the squatter, the tenant who has not paid rent, the child-abuser, the practising homosexual, or the man who has intercourse with a fifteen-year old girl. The absence of law is as significant in normative terms as its presence and does not automatically result in greater personal freedom. Indeed for the property owner or the woman threatened with rape, it is the presence of law which creates privacy.

The argument that a particular sphere of activity is â\200\230privateâ\200\231 and therefore should remain unregulated nevertheless continues to be used as a reason for not legislating in a particular area. The effect of such a decision is to choose to maintain the status quo.

We would argue therefore that there are no arguments of principle which suggest that the scope of the draft Bill should be as constrained as it is. In addition, as we have mentioned, most foreign systems which have introduced sex discrimination legislation have sought to make give it a broader scope than that envisaged in the present draft.

In the short time that we have had to respond to this Bill, we have concluded that there are four possibilities:

(a) First, to extend the prohibition on discrimination to all institutions and persons who are receiving financial benefits from the state (the â\200\230accommodationsâ\200\231 approach of the American Civil Rights Act);

to extend the prohibition on discrimination to those who provide goods, services or facilities to members of the public or a section of the public (the approach of the British Sex Discrimination Act, 1975);

(c) to adopt (b) and extend the prohibition on discrimination to private clubs who have more than a certain number of members (the approach of the British Race Relations Act, 1976);

(d) to extend the scope of the Act to all relationships, including familial relationships.

We would suggest that we (c) should be adopted. The American approach

(a) has led to a complex and confusing jurisprudence which it would be unfortunate to replicate. Moreover, that approach developed in the context of the specific constraints of the constitutional structure of the United States. In addition, as our discussion above suggests, there is no reason to distinguish between those institutions and individuals who receive financial benefits from the state and those who do not.

_ The approach in the British Sex Discrimination Act (b) appears to us to be too

narrow. The ritish courts have interpreted â\200\230section of the publicâ\200\231 narr
owly to exclude

rivate clubs.’Â® There seems to us to be no good reason to exclude large private clubs

om the ambit of the Act. In response to the judicial interpretation of the British
legislation, the British parliament amended the Race Relations Act in 1976 to increase
the scope of that legislation.â\200\235 / Section 25 of the Race Relations Act now proh
ibits
discrimination on the grounds of race by any associations whether or not the associatio
n
is incorporated, and whether or not its purpose is profit, if it has more than 25 membe
rs
and admission to membership is regulated by a constitution.

With the short time at our disposal, we have been unable to find a legal system
which has legislation adopting the fourth approach above. We think that such an
approach may be too ambitious and is unlikely to succeed. One of the reasons, and
perhaps the most compelling, for the reluctance of law to coerce particular forms of

ehaviour in intimate relationships is its inability to affect such relationships. Proba
bly
the best way to eliminate parental discrimination against daughters in relation to
education for example is not by using legislation but by changing social attitudes.
Legislation is at best a blunt instrument for such a task, and may often result in
negative, unforeseen and undesired, consequences.

II. THE MEANING OF CLAUSE 13

We think that clause 13, read with the definitions section, is at present ambiguous.
Clause 13 provides that:

â\200\230No person who has a discretionary power in respect of an executive act
shall in the exercise of such power discriminate against a person on the
ground of sex, marital status or pregnancy.â\200\231

â\200\230Executive actâ\200\231 is defined in clause 1 as meaning:

(a) any authorization which is granted to a person under any law,
including any permit, licence, registration, approval, permission,
concession, benefit or grant provided for in terms of a law; or

(b) any bursary, loan, subsidy or financial allocation granted to a
person by the State, a statutory council or a local authority.â\200\231

It is not clear what this means. The Memorandum to the draft Bill does not
afford any assistance. It may be that this an attempt to incorporate a provision simila
r
to the accommodations approach found in the American legislation. If so, it is an
inadequate attempt to do so, and would require much more careful drafting. Even more
importantly, the American legislation is not appropriate as we discuss in section I abo
ve
-- it is simply too complicated and confusing, and is the product of a very specific le

gal
and constitutional history.

On the other hand, the clause may fp be seeking to govern executive action

by state institutions. If this is the case, it should say so.

16. Dockers Labour Club and Institute Ltd v Race Relations Boards [1976] AC 285 (HL) and Charter v Race Relations Board [1973] AC 868 (HL). See David Pannick, Sex Discrimination Law (1986) at 71-74.

The Race Relations Act had used similar wording to the Sex Discrimination Act, and was the Act which had been narrowly interpreted by the courts initially.

If the clause is enacted as it stands at present, it will only lead to costly and lengthy litigation about its precise ambit. This should be avoided. We would recommend that the clause and the definition of â\200\230executive actâ\200\231 be redrafted to clarify the approach.

III. GENUINE OCCUPATIONAL REQUIREMENT

Clause 9 of the draft Bill grants the Minister of Justice the power to determine for which types of work, employment and positions covered by clauses 5(3), 7(2) and 8(3) sex may be regarded as a genuine occupational requirement.

It is widely accepted that, in certain limited instances, sex might be a genuine consideration in an employment relationship. For example, nobody would argue that a director ought to be denied the freedom to cast a man in the role of King Lear. However, a large number of occupations and activities are traditionally regarded as being the sole domain of one of the sexes only. This is invariably the result of entrenched prejudices based on sexual stereotyping and has resulted in a sexual division in the labour market which is, to say the least, iniquitous. It is precisely this kind of discrimination which the draft Bill purports to remedy and indeed, in clause 2 (the definition of discrimination) there 1s some recognition of the discriminatory nature of presenting unfounded stereotypes as â\200\230naturalâ\200\231 or â\200\230essentialâ\200\231.!8

The genuine occupational requirement (â\200\230GORâ\200\231) exemption is open to abuse and has the potential to undermine the equality aspirations of the bill by allowing stereotypes to override the general prohibition on discrimination. It is therefore imperative that GORâ\200\231s be construed narrowly and applied with rigorous attention to the overall policy of the bill which is to secure equality.

Various approaches for defining what a genuine occupational requirement is have been suggested:

>i) The Act could itself supply a list of occupations or positions for which sex is a GOR (â\200\230legislative listingâ\200\231).

(ii) It could delegate to an administrative official the task of identifying a list of occupations or positions for which sex might be regarded as a genuine occupational requirement ("ministerial listingâ\200\231).

(iii) The Act could contain an open-textured definition of GOR and leave it up to the courts and individual litigants to create a body of jurisprudence which interprets the definition and applies it to concrete situations.

We do not think that any one of these alternatives is entirely satisfactory in itself and we are furthermore convinced that the approach adopted in the bill, ministerial listing, is the worst possible solution to the issue. Arguments in support of this opinion are set out below. We would recommend, as a more rational alternative, the formulation of a narrowly-defined closed list in the statute itself with the additional right for an employer to approach the EOC to have sex declared to be a GOR for a particular occupation or type of activity.

18. In terms of clause 2, discrimination occurs when a woman is treated less favourably than a man because of â\200\230a quality which is generally attributed to femalesâ\200\231.

A LISTING
A.1 Listing in General

(i) The limited value of listin 1

Listing has the single benefit of making it unnecessary for an employer 9 to secure exemption from the provisions of the Act. However, it is appropriate to create predetermined exemption categories only where individualised classification would be inappropriate and where there is clear proof of the GOR in question.

(ii) Listing reflects existing practice

There is a danger that, instead of identifying genuine sex-based occupations, listing w ill
merely perpetuate existing discriminatory practices. What is considered to be a genuine occupational requirement will change as society changes. For much of this century, for instance, women were excluded from a wide range of jobs. Women are now found in virtually all occupations. Lists, however, will preserve certain areas for men or
women alone and are likely to change more slowly than social attitudes. Thus, although progressive list may encourage change of attitudes, a list which lags behind social attitudes may hinder the promotion of equality in the workplace.

(iii) Listing likely to be a historical and unnecessarily generalised

The listing process generalises, without reference to the socio-economic conditions within which a particular activity takes place?! and this leads to unnecessarily broad exemptions from anti-discrimination measures.

It is difficult to be precise in listing, a quasi-legislative act. If a category of activity were widely defined, it is likely to be adverse to the general interests of th e
disadvantaged (for instance a list might cover all police officers, rather than only, a nd
more appropriately, emergency firefighters). This absence of precision creates opportunities for evasion. It follows that listing may perpetuate discrimination and frustrate the establishment of equity.

We would argue that, in all but a few cases, enquiry into a purported GOR and the needs of an undertaking, calls for judicial or quasi-judicial investigation, not administrative or quasi-legislative determination.

19. Unless the context expressly or by necessary implication denotes otherwise, the â\200\230employerâ\200\231 is used generically throughout this memorandum, to include a ll
Pirons and bodies subject to the jurisdiction of the Act.

itzpatrick â\200\230Equality in Occupational Pensions - the New Frontiers after Barberâ\200\231(1991) 54 Modern Law Review 271.(The use of young, beautiful female sales staff to entice male customers cannot be construed as a legitimate business interest in a society committed to gender equality.)
21. It may be that what is â\200\230of the essenceâ\200\231 of one business may not be critical to

another.

20.

(iv) Blanket exclusions may be in breach of a Bill of Rights

Lists of whole categories of activity, whether in legislation or by the Minister, could be struck down as an unnecessary fetter on the principle of equality enshrined in a Bill of Rights.22 In Johnston v RUC, the European Court of Justice held that blanket exclusions from the principle of equality would not be justified, even when relating to sensitive areas such as prisons and the police.

A.2 Ministerial Listing in the Draft Bill

The GOR exception creates a tension between fairness on the one hand and commercial rationale or economic viability on the other; the draft seeks harmonisation of these conflicting principles by giving the Minister the authority (in cl 9) to determine situations in which sex is a GOR. There are a number of specific problems with this approach, besides those inherent in any listing which we have described above.

(i) Absence of statutory guidelines for GOR
The Bill draws the Minister’s powers extremely widely, excluding categories of work

rather than specific activities. JFxperience in other Junsdietions has shown that a GOR

should be construed narrowlyâ\200\234â\204¢ and it is regrettab Â§ that clause 9 establishes no

guidelines for the exercise of ministerial discretion.

(ii) Listing unduly fetters the judicial discretion of the industrial court, the EOC and the
NMC

As discrimination in employment is deemed to be an unfair labour practice, listing will constitute an inappropriate constraint on the capacity of those bodies especially charged with the task of guiding social reconstruction.

If it is thought advisable to retain the listing option outside legislation, serious consideration should be given to granting authority to list to the Equal Opportunities Commission, rather than to the Minister. The Commission is designed to have the requisite expertise to grant exemption in a coherent, legitimate fashion, untrammelled by particular vested interests.

B AN OPEN-TEXTURED DEFINITION

The obvious alternative to one or another form of listing is to provide an open-textured definition of GOR in legislation, leaving a tribunal or the EOC to establish whether an exception to the non-discrimination principle is justified in any particular case. However, criteria usually used to establish GORs refer to a pestienia range of physiological and supposedly psychological characteristics of men and women (for instance â\200\230inherent physical characteristicsâ\200\231, and â\200\230privacyâ\200\231). An examination of the ways in
which just some of these criteria are used suggests that they are open to abuse.

22. Although the government proposals for a Bill of Rights suggest that it should apply to a limited area of government activity only, other proposals and international opinion suggest that this would be too restrictive and that the Bill should apply to relationships between private Dariiss and all legislation.

23. Johnston v Royal Ulster Constabulary [1986] ECR 1651.

24. Paul N. Cox Eplovment Discrimination Garland Publishing New York, 1989.

25. Defrenne v SABENA [1976] ECR 455, at 472, ground 12, The European Court of Justice ruled that the objectives of the relevant European Commission policy on equality are social and economic. The same presumably would apply here.

* inherent physical characteristics

It is generally considered unremarkable and permissible to â\200\230exclude activities or occupations which obviously fall outside the scope of sex discrimination, such as actors, tenors, models and wet nursesâ\200\231.26 In the airline industry it was once thought only women should be employed as flight stewards because qualities of care and compassion were deemed peculiarly female and men were thought incapable of comforting nervous passengers. It is now trite that this belief is not founded on any objectively determinable criteria.

* privacy

The traditional exclusion of men (or women) from certain activities on the grounds of privacy is usually based on notions of sexual privacy but this exclusion may rest on spurious grounds, particularly in the realm of health care. For example, male nurses may be excluded from employment in a maternity hospital on the grounds that their employment would constitute an invasion of the privacy of female patients, yet there is nothing exceptional in male gynaecologists.

* authenticity

It is considered unexceptional to require male actors to play male roles, yet it now seems that some of Hugh Hefnerâ\200\231s bunny girls were in fact men and South African advertisers of womenâ\200\231s hosiery have used the legs of male models to display stockings. It follows that the test may not be inherent authenticity, but the appearance of authenticity.

An open-textured definition, which leaves the specifics in the hands of the courts, is likely to be interpreted uncritically with reference to traditional criteria such as the above. Courts which lack expertise or a sensitive understanding of sexual stereotyping will in all likelihood use these criteria liberally. It is therefore essential that the statute establish much narrower parameters than a general definition could.

C Proposals

Taking account of the problems that we have raised in connection both with a listing approach and the alternative of an open-textured statutory definition, we think that it might be possible to establish a compromise position: the legislation could contain a narrowly-drafted list, and be supplemented by a procedure in terms of which the EOC can consider applications for exemption from the provisions of the legislation on the basis that they are justified by the employment situation.

We think that there are only four, narrow circumstances in which sex may be (but will not inevitably be) considered a GOR and would word that part of the clause as follows:

Sex may, but will not necessarily be, a genuine occupational requirement when:
(a) the duties of the position involve performing in a dramatic performance

or other entertainment in a role that, for reasons of authenticity, is required to be performed by a person of the relevant sex;

Chris Docksey "The Principle of Equality between Women and Men as a Fundamental Right under Community Lawâ\200\231 (1991) 20 Industrial Law Journal(UK) 258 at 268.

Diaz v Pan American World Airways, Inc 442 F.2d 1273 (9th Cir1981).
Fesel v Masonic Home of Delaware Inc. 447 F.Supp 1346 (D.Del 1978).

˜(b) the duties of the position need to be performed by a person of the

relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;

(Â¢) the duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex; or

(d) the occupant of the position is Panis to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex.

(Because, even in these situations, the sex of a person might not be a GOR, we state expressly that they are situations in which sex may, but will not necessarily be a GOR.)

In case there is an occupation for which sex is a GOR, but which is not immediately apparent and which has not been included in the legislative list, we suggest that an employer (or other party covered by the Act) have the opportunity to approach the EOC in advance for a declaration that sex is a GOR in a specific occupation or type of activity. The EOC, as a specialist body specifically constituted to deal with sexual inequality, is uniquely qualified to exercise this discretionary power. Indeed, it is entirely anomalous that the Minister exercise this discretion when an institution such as
an Equality Commission exists. To ensure that the EOC is mindful of its role in challenging practices that perpetuate stereotypes and to enable meaningful review of EOC decisions in this regard, the GOR clause should also contain a direction to the EOC to exercise its authority to grant exemptions on the basis of GOR only when the sex is a determining factor and when no alternatives are available.

IV. EXEMPTIONS AND EXCLUSIONS

A â\200\230PERMISSIBLE DISCRIMINATIONâ\200\231 (Clause 32)

The draft Bill includes a clause headed â\200\230permissible discrimination in favour o f womenâ\200\231.
Although, according to its heading, clause 32 is intended to â\200\230favourâ\200\231 w omen, the clause
itself does not articulate such a purpose. Instead it lists circumstances in which diff erent
treatment of men and women ry permissible. A clause incorporating the gist of sub-clause (d) is, in our opinion, the only necessary provision in this regard.

A.1 Sub-clauses (a) - (c)

(a) Sub-clause (a)

Sub-clause (a) seems to be an attempt to allow different treatment of men and women when physical differences justify it. This apparently supplements the notion of â\200 \230genuine
occupational requirementsâ\200\231 found in clauses 5(3), 7(2) and 8(3). The clause is broad and
vague, providing no clear indication of the circumstances in which it might apply. Furthermore, its suggestion that there are a variety of circumstances in which physical differences might â\200\230permit discriminationâ\200\231 potentially undermines the ai m of the Bill.
Traditionally, claims that physical differences between women and men are relevant to the kind of work each group should do have trapped women in badly paid and under-rated occupations. Such claims cannot be substantiated and the implication in this clause that they might be is unacceptable. Enactment of such a provision would simply

allow a variety of discriminatory practices which entrench stereotyped views of gender roles to persist.

Moreover, the list of situations in which permissible discrimination may be found suggests that such practices might vary across society. The implication is that while it might be a rule of practice in one place to limit womenâ\200\231s participation in an activity on the basis of some perceived physical characteristic, elsewhere the limitation would not exist. This is absurd.

These comments apply equally to cl 24(3) and cl 25(3), both of which impose unacceptable limits on the power of the proposed Commission. In the main part of these two clauses the Commission is authorised to examine discriminatory laws (cl 24) and discriminatory practices (cl 25). Neither clause enables the Commission to do anything other than consider the reasonableness of laws or practices which distinguish between women and men and to make proposals to the Minister. Although the wording is ambiguous, in each case subclause a) seems to intend to exclude laws and practices involving physical attributes from inquiry. However, because many discriminatory legal distinctions will be justified by alleged physical differences, this limit on the Commissionâ\200\231s authority will open the way to technical and generally unproductive inquiries into whether or not a law or practice is really based on distinct physical attributes. There seems to be no reason why all laws and practices should not be subject to fering for reasonableness by the Commission and the sub-clauses should be scrapped.

(ii) Sub-clause (b)

Sub-clause (b) allows military service to be performed by men only. There seems to be no reason to maintain this archaic division of labour and the clause should be removed. There are a number of reasons for requiring both men and women to do military service. Perhaps the most important in the context of legislation committed to achieving equality between men and women is that retaining military service as an all-male job entrenches the notion that there are aspects of public life not suitable for women and from which women need to be sheltered. A commitment to equality between men and women does not mean that women and men should be treated identically in all circumstances but a blanket statement that military service may required of men alone is unacceptable.

(iii) Sub-clause (c)

Sub-clause (cÂ¢) is superfluous. Clause 2(2) which defines discrimination against men states
â\200\230Provided that any special treatment of women with reference to pregnancy or childbirth shall not be taken into consideration for the purpose of this subsection.â\200\231

This deals adequately with the subject of clause 32(c) and clause 32(c) should accordingly be scrapped.

A2 Sub-clause (d)

Sub-clause (d) permits special measures which further the â\200\230development and advancement of femalesâ\200\231. Because this is a matter directly related to an understanding of equality and discrimination, we deal with it in the section on discriminatory practices above (A: V).

B RELIGIOUS RIGHTS (Clause 33)

Clause 33 refers to â\200\230religious rightsâ\200\231. It is presumably intended to protect the practice of a religious group which permits only men to take religious office, for instance. Whether such a practice can be described as a religious â\200\230rightâ\200\231 must be debatable. Moreover, it is unacceptable to permit discrimination within religious sects while society is committed to equality between women and men. Although we realize that this is a sensitive issue, we think that this clause should be deleted.

C THE MINISTERâ\200\231S POWER TO ISSUE EXEMPTIONS (Clause 31)

Clause 31 of the Bill gives the Minister of Justice sweeping powers to exempt people and organisations from its provisions. The provision in its present form is unacceptable. It is rendered all the more objectionable by the Memorandum which suggests that exemptions will be widely granted to permit the â\200\230gradualâ\200\231 phasing-in of the legislation (p 8). We would observe that the unfair labour practice definition in the Labour Relations Act has effectively outlawed discrimination on the grounds of sex against employees covered by that Act for the past ten years. The scope of the draft Bill, as we have already indicated, is lamentably narrow and we cannot accept that it is necessary to have a â\200\230gradualâ\200\231 phasing-in of the legislation. If for a moment one were to concede this point, however, we would argue that the period of phasing-in should be specifically stated in the Bill. For example, it might stipulate two years as is done in clause 6 in the context of equal pay, and as the Canadians did in respect of the equality clause, in their Charter of Rights and Freedoms. The period for phasing-in should be determined openly and clearly by Parliament, and not be left to the Minister to determine partially through a process of individual exemptions.

It may well be that if the Bill were to have the wider scope we suggest (at Part 3: I above) a system of exemptions would be required. In this case, we think that the Australian model should be considered. In terms of the Australian Sex Discrimination Act 1984, the Humapg Rights and Equal Opportunities Commission is given the power to grant exemptions,â\200\234â\200\235 but the Commission is required within one months of granting an exemption to publish in the Gazette the reasons for the granting of the exemption, together with its findings of fact in that regard. The grant of the exemption is reviewable by the Administrative Appeals Tribunal.

We emphasise that there is no reason for a system of exemptions in the legislation as it stands now. Exemptions could be justified only if the scope of the legislation is substantially extended. However, if a system of exemptions is used, the power to grant exemptions should not be given to the Minister of Justice, but should be given to the Commission which should be required to publish the reasons for the grant of the exemption in each case. In addition, as we have no administrative appeals tribunal, we would suggest that the grant of an exemption should be reviewable by the special tribunal we propose be established to deal with discrimination.

29. Section 44.
30. Section 46.
31. Section 45.

PART FOUR:
ENFORCEMENT MECHANISMS

The enforcement provisions of equality legislation are crucial; unless comprehensive, accessible and legitimate mechanisms are provided the legislation may be completely ineffective. The enforcement measures contained in the draft Bill are neither comprehensive nor accessible as we describe below. As important however, is the fact that, due to the government's failure to consult, the mechanisms will be seen as illegitimate. Even if the problems below are remedied, it will be impossible to grant legitimacy to the enforcement mechanisms unless a comprehensive programme of

consultation is undertaken prior to the legislation being presented to parliament.

The Bill provides for four primary methods of enforcement: by the Industrial Court through its unfair labour practice jurisdiction; by the ordinary courts in a rang e of different circumstances; by an Assistant Ombudsman who is to be appointed in terms of the Bill; and by the Equal Opportunities Commission. Each of these will be discussed separately.

I. THE ROLE OF THE INDUSTRIAL COURT

Clause 15 of the Bill provides that, â\200\230for the purpose of the Labour Relations A ctâ\200\231, a range of conduct prohibited by the Bill will be deemed to be â\200\230unfair labour pra cticesâ\200\231 and this conduct may presumably be determined by the industrial court in terms of its powers set out in section 17(11) of the Labour Relations Act, 28 of 1956. There are great difficulties with clause 15: Driers of principle, which are problems with the rol e given to the industrial court by the draft Bill, and technical problems, which are problems with the Bill as it presently stands which require attention prior to enactmen t, even if the problems of principle are ignored.

* Problems of principle:

* The appropriate forum for anti-discrimination cases;

* Should anti-discrimination cases be preceded by compulsory conciliation?

* Technical problems:

* What does â\200\230for the purposes of the Labour Relations Actâ\200\231 mean?

* The need for amendment to the Labour Relations Act definition of â\200\230employeeâ\200\231;

* The need for a new head of jurisdiction for the industrial court;

* The need for a new institution to handle pre-trial conciliation;

* The need to provide for adequate forms of relief.

Each of these will be discussed separately. However, it is necessary to note at the out set
that the following conduct is deemed to be an unfair labour practice by clause 15:

1. Discrimination by employers in relation to the appointment of employees, and more specifically, in relation to the â\200\230offeringâ\200\231 of positions, arrangements to recruit or select
employees, advertisements for employment, and the conditions on which employment is offered (clause 5(1)).

2. Discrimination by employers in relation to remuneration and other service benefits, promotion opportunities, training, transfer of staff, reduction or dismissal of staff, or
general working condition (clause 5(2)).

3. Discrimination by employers in affording employees who are performing work of equal value different benefits solely on the ground of sex (clause 6).

4. Discrimination by employment agencies in regard to the advertisement of employment or the placing of candidates (clause 7).

5. Discrimination by partnerships with regard to recruiting partners (clause 8(1)).

6. Discrimination by partnerships with regard to benefits offered to partners, includin g
training and working conditions and benefits on dissolution (clause 8(2)).

7. Discrimination by trade unions, employersâ\200\231 associations, pension funds, medi cal aid
schemes and friendly societies against members with regard to the provision of benefits or conditions of membership (clause 10).

8. Discrimination by occupational controlling bodies with regard to benefits and conditions of registration of members of the body (clause 11).

9. Discrimination by educational institutions with regard to the admission of students to
such institutions or with regard to the education provided, with the exclusion of singl e-
sex educational establishments (clause 12).

10. Discrimination by the state, statutory councils, local authorities or other persons exercising a power in terms of a permit, licence, registration, approval, concession, benefit or grant in the exercise of any authority (clause 13).

11. Sexual harassment by employers, fellow employees, or members of the staff at an educational institution of people applying for employment or admission as students or of people who are employed or studying already (clause 14).

As presently constituted the industrial court has jurisdiction only over disputes concerning the employment relationship between employers and employees. Many of the forms of discrimination referred to above have little or nothing to do with an employment relationship. Clauses 5, 6 and 14 (employment discrimination, equal pay and sexual harassment) are clearly directed at the employment relationship, but clauses 7, 8, 10 and 11 (discrimination by employment agencies, partnerships, trade unions, employers associations, pension funds, medical aid societies and occupational controlling bodies) are only indirectly concerned with the employment relationship. Clauses 11 and 12 (discrimination by educational institutions and executive acts) are not related to employment at all.

A PROBLEMS OF PRINCIPLE

These problems concern the principle contained in clause 15 of adopting the industrial court (and, implicitly, its procedures) as the major adjudicative institution in the Bill.

A.1 The Appropriate Forum For Discrimination Claims

The industrial court does not seem to be the logical forum for enforcing anti-discrimination legislation in all the areas referred to in the draft Bill. In establishing an appropriate forum for enforcement there are a range of possibilities:

(a) the magistratesâ\200\231 courts could be given jurisdiction over all discrimination cases;

(b) the industrial court could be used for employment-related claims and the ordinary courts for other claims (as happens in Britain where jurisdiction is divided between the Industrial Tribunals and the County Courts);

(c) a specialist â\200\230Equal Opportunity Courtâ\200\231 could be established with exclusive jurisdiction to hear all non-employment-related discrimination claims and concurrent jurisdiction with the industrial court to hear all employment-related discrimination claims;

(d) the industrial court could hear all claims (the present proposal); or

(e) a specialist tribunal could be established with jurisdiction over all discrimination claims thus removing the industrial courtâ\200\231s jurisdiction to hear discrimination claims.

We think that option (c) is the best for three reasons: a specialist tribunal could be staffed by members who have expertise in discrimination law; special procedures could be developed to facilitate the bringing and proof of discrimination cases; and jurisdictional confusion could be limited by providing for concurrency between the specialist tribunal and the industrial court in employment-related matters.

A.1.1 Expertise

In a major study of the role of industrial tribunals in enforcing sex discrimination legislation in Britain, Leonard concludes that one of the two os preventing the proper adjudication of sex discrimination claims was the tribunal membersâ\200\231 lack of expertise 1n the legislation.â\200\235â\200\234 This conclusion has been supported by a range of other commentators, including the Equal Opportunities Commission itself.â\200\235˜ Leonard recommended that either specialists in discrimination be appointed to the industrial tribunal to hear sex discrimination cases, or that a specialist tribunal be established.

In South Africa at present, neither magistrates nor industrial court members have special expertise in sex discrimination. They would require training if their

32. Alice M Leonard Judging Inequality: The Effectiveness of the Industrial Tribunal System in Sex Discrimination and Equal Pay Cases (1987: Cobden Trust, London) at 137. The other problem was lack of legal representation.

33. See Equal Opportunities Commission report Legislating for Change (1986) paras 2.14 and 2.21, David Pannick, Sex Discrimination Law (1985: Clarendon Press, Oxford) at 312, considers that training is necessary, but he does not favour the

establishment of a specialist tribunal because of the difficulty of establishing criteria for appointment, and because of the small caseload such a court would carry.

jurisdiction were to be extended. This would create particular problems in magistratesâ\200\231 courts: not all magistrates could go on training courses, and so selected magistrates would have to be trained and then sex discrimination cases steered to them. Administrative difficulties are likely to arise in this process. Such difficulties would be less severe in the case of industrial courts where there are fewer members and where less litigation takes place.

The need for expertise would therefore suggest that an independent equal opportunities tribunal should be set up to deal with discrimination cases (such a tribunal could be responsible for discrimination on other grounds if further legislation is introduced). Members of an equal opportunities tribunal could be chosen from those with expertise in discrimination and, if necessary, they could be provided with training in discrimination law. Initially, such a tribunal could be staffed by a handful of members and the court could operate as a circu gourt to ensure that it was accessible. A light caseload would not, as Pannick suggests,â\200\235 undermine the viability of such a tribunal. It could, like the industrial court, be staffed by part-time members.

If concurrent jurisdiction over employment-related discrimination claims were adopted, part-time members with special expertise could serve as additional members of the industrial court as well.

A.1.2 Procedures

It is beyond the scope of this memorandum to discuss the procedures that should be adopted to process sex discrimination claims before a court, particularly as the draft Bill makes no suggestion as to the appropriate procedures beyond its implied adoption of the industrial court procedures (in clause 15). We think, however, that three important issues should be borne in mind: the procedures should be different to and simpler than those employed before the ordinary civil courts; there should be provision for state-funded legal representation of indigent applicants (and it should be noted that the present means test set by the Legal Aid Boardâ\200\235Â® in terms of the Legal Aid Act excludes many people who are unable to afford to hire a lawyer from obtaining legal Fepressmaony; and the need to develop a procedure for group complaints such as the class action.

Both the industrial court and the Enis: industrial tribunals use simpler

procedures than those ordinarily employed by the civil courts. However, in Britain sex discrimination claims not related to employment come before the county courts which have ordinary rules of civil procedure. The Equal Opportunities Commission has noted that one of the contributing factors to the paucity of sex-discrimination Gases before those courts arises from the complexity of the civil procedures involved.â\200\235 It seems therefore that simpler procedures are essential.

Ibid.

Section 17(bA) of the Labour Relations Act makes provision for the appointment of additional members who are generally part-time appointments.

At Dresen the means test is R1000 per household per month plus an additional R500 per month for each household member. A single mother with two children earning more than R2500 per month would therefore not qualify for legal aid. Such a woman would not be able to afford the costs of an opposed trial which would almost certainly be more than R7 000.

Equal Opportunities Commission Legislating for Change (1986) Para 4.2.12.

_ On the other hand, simpler procedures do not mean that the provision of state-funded legal representation should be dispensed with, as it has been in Britain. There seems to be a strong correlation between legal represegtation and success in sex-discrimination cases before the industrial tribunals in Britain.â\200\235â\200\235 There has been no similar analysis of the industrial court in South Africa, but anecdotal evidence would suggest that represented applicants are more likely to be successful in the industrial court than unrepresented applicants.

Thirdly, we would suggest that consideration be given to the introduction of a

procedural device which would facilitate litigation by groups. Our present rules of

rocedure regarding the joinder of parties are restrictive both in the ordinary courts and in the industrial court. Indirect discrimination by definition is concerned with conduct affecting groups and a device spch as the American â\200\230class actionâ\200\231 may well facilitate indirect discrimination claims.â\200\235 Pannick is of the view that the need for the class action may be less where an Equal Opportunities Commission has the power to litigate in its own name (see discussion below). However, we doubt that giving the Commission such a power would replace the need for a class action.

A.1.3 Concurrency of Jurisdiction

The industrial court already has a gljscrimination jurisdiction in terms of its power to determine unfair labour practices.â\200\235 * There are two reasons why it would be unfortunate to remove this jurisdiction from the industrial court. First, it would give rise to jurisdictional confusion, parties may go to the industrial court with a discrimination claim and find themselves defeated there because they have chosen the wrong forum. (It will also enable respondents to take technical defences concerning the appropriateness of the forum.) Secondly, many claims before the industrial court arise out of complex patterns of behaviour in which discrimination (so far, more often race than sex) is a factor. For example, applicants may point to discrimination as one factor proving the unlawfulness of a dismissal, where other factors may include procedural unfairness, lack of a substantive reason etc. It would be inappropriate to deprive the industrial court of its power not only to take such factors into account, but also to provide remedies for discrimination in such cases.

The first argument against concurrency of jurisdiction is that it will give rise to forum-shopping. This may be so, but it may be possible to limit this by providing similar procedures in both courts, rights of appeal from both courts in discrimination cases to the same court of appeal, and possibly by appointing common personnel to the two forums on a part-time basis as suggested above. We think that the risk of forum-shopping does not create as great a barrier to the promotion of equal opportunities as

38. See Leonard above at 10.

39. See Leonard’s study p 89. She found that where complainants were represented by lawyers they had a 46% success rate, but where they represented themselves they had only a 23% success rate. In addition, she found that in all cases she monitored between 1980 and 1982, only 50% of complainants were represented by lawyers, whereas 90% of respondents were.

40. Rule 23 of the Federal Rules of Procedure. For a general discussion se â\200\230Developments in the Law -- Class Actionsâ\200\231 (1976) 89 Harvard Law Review 1328, and in the context of discrimination law see George Rutherglen â\200\230Title VII CLass

Actionsâ\200\231 (1980) 47 Univ of Chicago Law Review 688.

41. See, for example, SACWU v Sentrachem (1988) 9 ILJ 410 concerning race discrimination, but remarkably few cases concerning discrimination (whether race or sex) have come before the industrial court.

would the grant of exclusive jurisdiction to a tribunal other than the industrial court
,
with the attendant difficulties of drawing boundaries between overlapping areas.

A second problem that may be raised about our suggestion is the difficulty of distinguishing between employment-related and non-employment-related discrimination claims. We think that this difficulty is met to some extent by establish ing concurrency of jurisdiction between the two forums rather than exclusive jurisdiction. Nevertheless if the industrial court were not to have jurisdiction over all claims some criterion for determining whether a claim is employment-related would have to be set.

We think that all employer-employee claims should be dealt with by the industrial court (clauses 5,6 and 14). In addition, claims concerning partnerships, employment agencies, occupational controlling bodies, trade unions, employers associations, pension funds and medical aid schemes (clauses 7, 8, part of 10, and 11) should also be considered employment-related, so that they may be dealt with by the industrial court or the specialist tribunal. This mirrors the situation in Britain wher e the industrial tribunals have jurisdiction over such matters.#2 Claims concerning education and administrative action are not employment-related and so the specialist tribunal should have exclusive jurisdiction over them. In addition, if our suggestion concerning the scope of the legislation in Part Three: I above is adopted, claims concerning the provision of goods and service to sectors of the public should also be the exclusive concern of a specialist tribunal.

A.2 The Desirability of Compulsory Conciliation

No dispute may be finally determined by the industrial court without being referred to conciliation process unless both parties agree to bypass such a process.*3 If the draft Billâ\200\231s proposal to give the industrial court jurisdiction to determine discrimi nation through its unfair labour practice jurisdiction were adopted, all discrimination cases would have to be processed through a compulsory conciliation phase before coming to court. (On the technical difficulties of establishing an appropriate forum, see below.) However, we are not convinced that compulsory conciliation prior to litigation on the issue of discrimination is a good idea, particularly where there is no automatic right of legal aid for indigent complainants. Where litigants have unequal financial resources, and where the burden of the litigation is on the weaker party, conciliation may well result in unfairness. We would prefer voluntary conciliation procedures to be available to parties. It may be possible to give some reward to attempted conciliation Fehoson earlier position on the trial roll, but more coercive conditions should be avoided.

Sections 62 and 63 of Sex Discrimination Act 1975.

Section 46(9)(a) of the Labour Relations Act read with section 46(9)(d).

See Owen Fiss â\200\230Against Settlementâ\200\231 (1984) 93 Yale Law Journal 1073; C Menkel-Meadow â\200\230For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conferenceâ\200\231 (1985) 33 UCLA LR 488; in the context of women and wife abuse, see Lisa G Lerman â\200\230Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Womenâ\200\231 7 (1984) Harvard Womenâ\200\231s Law Journal 57; T Grillo â\200\230The Mediation alternative: Pr ocess Dangers for Womenâ\200\231 (1991) 100 Yale LJ 1545; and M Thornton â\200\230Equivocatio n or Conciliation: Resolution of Discrimination Complaints in Australiaâ\200\231 (1989) 52 Modern LR 733.

B TECHNICAL PROBLEMS

The following are technical problems with the draft Bill as it presently stands. Unless these problems are addressed prior to enactment, the Bill will give rise to lengthy, unproductive litigation which will almost certainly bring it into disrepute.

B.1 The meaning of â\200\230for the purpose of the Labour Relations Actâ\200\231

Clause 15 seems to suggest that all conduct referred to in clause 15 (see list in C: I above) will be deemed to be an unfair labour practice and that accordingly the industrial court will be the proper forum for relief of discrimination. However the phrase, â\200\230for the purpose of the Labour Relations Actâ\200\231 is unclear: the p urpose of the
Labour Relations Act as presently framed is clearly to regulate the relationships between employers and employees, and between trade unions and employersâ\200\231 associations. If the phrase suggests that the listed conduct can constitute unfair labo ur
practices only in order to further the purposes of the Labour Relations Act, then it is employment-related discrimination alone which will be enforceable by the industrial court. However, as the Act does not provide for any other tribunal or court to enforce non-employment-related discrimination, it seems to be the intention that the industrial court should hear all discrimination claims under its unfair labour practice jurisdicti on.
The memorandum to the draft Bill does not provide any assistance. It merely states that â\200\230Discrimination will further be deemed to be an unfair labour practice for purposes
of the industrial courtâ\200\231(p 5).

Although, we have assumed that clause 15 gives the industrial court jurisdiction to hea r
claims concerning all the listed forms of discrimination, it is by no means clear and m ust
be clarified.

B.2 Definition of Employee

At presets the unfair labour practice definition contained in section 1 of the Labour Relations Act (the LRA) protects only employees who are in employment or who have been recently dismissed. It does not cover applicants for employment. In addition, the L
R A does not protect certain categories of employees such as domestic workers, farmworkers, employees of the state, and university lecturers.#S The LRA would have to be amended to avoid lengthy litigation concerning the Juristierlon of the industrial court to hear discrimination cases concerning applicants for employment, employees outside of the LRA sectors, and non-employees. Even if our proposal that the industrial court have jurisdiction over employment-related matters only is adopted, an amendment would be necessary to cover job applicants, independent contractors,

partners, and employees in non-LRA sectors.
B.3 Inapplicability of unfair labour practice law to non-employment disputes

If the proposal that the industrial court should hear all discrimination cases is maintained, we would suggest that a new jurisdictional head be included in section 17(11) of the LRA to give the industrial court jurisdiction to hear non-employment-related claims in terms of the Promotion of Equal Opportunities Act. We would argue that the industrial courtâ\200\231s existing unfair labour discrimination jurisdiction should be
maintained for employment-related discrimination cases (those under clauses 5, 6 and 14) for the reasons given above. This would still necessitate amendment of the definition of â\200\230employeeâ\200\231.

45. Section 2(2) of the Labour Relations Act.

" If the industrial court were to be given a new equal opportunities jurisdiction, it must be made clear that that jurisdiction is not in terms of the unfair labour practice definition but is an entirely separate ground of jurisdiction governed by the Promotion of Equal Opportunities Bill. Unless this is done, there will inevitably be confusion, a nd
litigation, around the question of how non-employees are to be woven into the unfair labour practice definition and procedures which are entirely based on the employment relationship. The use of the word â\200\230deemâ\200\231 in clause 15 is not sufficient to avoid these
difficulties.

The draft Bill (and the Industrial Court rules) will then have to be expanded to provid e
for procedures to be followed in discrimination cases unrelated to employment.

B.4 An Institution for Conciliation

The industrial court has exclusive jurisdiction to â\200\230determineâ\200\231 unfair l abour practices.
But the industrial court cannot be approached by complainants until certain preliminary procedures have been followed. These procedures (set out in sections 27A and 35 of the LRA) require conciliation of the unfair labour practice dispute by industrial councils and conciliation boards. These institutions are structured with union and management membership and are accordingly appropriate for employment-related disputes. At present, an employee who complains of discrimination could follow these

rocedures and seek relief from the industrial court in terms of the existing unfair abour practice definition. Although, as we argue above, we do not think that discrimination claims should be subject to compulsory conciliation, from a technical point of view the procedures set out in ss 27A and 35 of the LRA are not unsuitable for discrimination claims arising under clauses 5, 6 and 24 of the draft Bill (insofar as t hese
clauses relate to employees or prospective employees).

If the Bill is to be enacted as it stands, some institution to conciliate claims of discrimination by employment agencies (clause 7), partnerships (clause 8), occupational controlling bodies (clause 11), registered societies (clause 10), educational instituti ons
(clause 12) and bureaucrats (clause 13) would have to be established. The National Manpower Commission is considering the possibility of establishing a national conciliation commission with an obligation to provide conciliation of all disputes prio r
to their being referred to court.* Such a commission may well be able to deal with conciliation in discrimination claims concerning these clauses. Alternatively, the LRA will have to be amended to make clear that conciliation is not required in these cases.

B.5 Remedies

The industrial court has wide powers to give relief for unfair labour practices in term s
of section 46(9) of the LRA. ft is given the power to â\200\230determine the dispute as it may
deem reasonable, including but not limited to the ordering of reinstatement or compensationâ\200\231, although it may only provide a maximum of six monthsâ\200\231 re trospective
reinstatement, its power to award compensation seems unlimited.4â\200\235 Unlike the Br itish
industrial tribunals which do not exercise their power to reinstate often, the industri al
court orders reinstatement regularly -- indeed, it may be considered the â\200\230ordin aryâ\200\231
remedy for dismissals. There is no doubt that an employee dismissed on the ground of sex discrimination would be entitled, and would be likely, to be reinstated.

46. See â\200\230Proposals for the Consolidation of the Labour Relations Actâ\200\231 a working
document prepared by a technical sub-committee of the NMC, 30 March 1990.

47. Section 4609)(0).

48. Sentraalwes (Ko-op) Bpk v FAWU (1990) 11 ILJ 977 (LAC) at 994E

"It is more difficult to determine the type of compensation the industrial court would order for discrimination. At present compensation is generally expressed in the equivalent of monthly wages. A dismissed employee who is not reinstated might, for example, be awarded the equivalent of three monthsâ\200\231 wages in compensation. This approach will often not be appropriate for discrimination cases. The industrial tribunals in Britain have been criticised for their failure to give adequate compensation for discrimination.Â® The industrial tribunals are limited to an award of 8 000 pounds, while the county courts appear to have unlimited jurisdiction Leonard has shown that of 99 tribunal awards recorded between 1976 and 1983. the median amount of compensation was just under 300 pounds.5! One of the criticisms of the British industrial tribunals has been their failure to develop coherent heads of damages. This should have been remedied by the appellate courts, but it has not been. It may be that a clear categorisation of heads of damages should be provided in the Act, or in the rules of court.52 Consideration should be given in particular to the question of whether exemplary damages should be awarded.

II. ENFORCEMENT THROUGH EXISTING FORUMS

A EQUAL PAY AND CONTRACTUAL CLAIMSâ\200\231

Clause 6 of the Act provides that where an employee (A) is paid less than a co-employee (B) â\200\230solely on the grounds of sexâ\200\231 then Aâ\200\231s contract of employment â\200\230shall be deemed to have been adjustedâ\200\231 so that A is not paid less than B. This provision has two consequences: firstly, it gives rise to a contractual claim for equal pay; and secondly it indicates that a court should order an employer to pay to a successful equal-pay plaintiff

the difference in wages between the plaintiff and that of the comparator for the period that the differential has been in operation. (This claim would presumably be subject to the finatons imposed by the Prescription Act 1969, ie for a maximum period of three years.

We assume that in creating contractual liability the drafters intended equal pay claims to be enforceable through the ordinary civil courts (the Memorandum does not make this clear). There are two difficulties with this idea: a technical difficulty arising out of the courtsâ\200\231 interpretation of section 30 of the Basic Conditions of Employment Act 3 of 1983 (the BCEA), and one of principle concerning the appropriateness of ordinary courts to hear equal pay claims.

See K Oâ\200\231Donovan and E Szyszczak Equality and Sex Discrimination Law (1988: Basil Blackwell, Oxford) at 222.

See Pannick at 89 - 90.

Leonard The First Eight Years (1986: Manchester, EOC) at 49, cited in Oâ\200\231Donovan and Szyszczak at 222.

See for example the heads of damages for personal injury claims which are set out in URC1S of the Supreme Court Rules.

A.1 Section 30(3) of the BCEA

Section 30(3) provides that no employee may use civil proceedings to recovergnoney that an employer is obliged to pay her in terms of certain specified provisionsâ\204¢- of the Act, without first obtaining a certificate of nolle prosequi. The certificate needs to be issued because employers are liable criminally for failure to pay money due in terms of the BCEA. The difficulty with section 30(3) is that very few prosscuiions take place and many employees remain unpaid. Moreover, the scope of section 30(3) is much wider that it seems on first reading. In Tshehla v Group Five Projects (Pty) Ltdâ\200\235" Harms J held that section 30(3) covered all contractual obligations owed by an employer to an employee. This approach would therefore cover the amounts deemed due by clause 6 for those employees covered by the BCEA. The nolle prosequi requirement in the BCEA has been criticised for limiting an employeeâ\200\231s right to approach a court to recover wages. Clause 6 would therefore not facilitate the recovery of wages due as Deriops its drafters thought it would unless section 30(3) is expressly stated not to apply in this context.

A.2 The Appropriate Forum for Equal Pay Claims

In addition to the question of enforcement through the civil courts, however, a contravention of clause 6 is deemed to be an unfair labour practice in terms of clause 15. Clause 6 therefore can be enforced by the industrial court through its unfair labour practice jurisdiction. For the reasons expressed in section I: A above we think that it is appropriate for the industrial court to determine issues relating to equal pay. As with other discrimination cases, it has been shown that equal pay cases give rise to complex legal and factual issues which require considerable expertise. It is unlikely that magistrates would be able to develop that expertise easily. The industrial court which has been created as a specialist employment court is more suited to dealing with equal pay claims. We would suggest therefore that the deeming provisions in clause 6 be abandoned. On the other hand, in line with our comments in section I:B:5 above regarding the heads of damages, we think that it should be made clear in the Bill that in determining compensation the

industrial court should seek to compensate employees who make successful equal pay claims retrospectively .

B DELICTUAL LIABILITY AND THE BILL: SEXUAL HARASSMENT

The memorandum to the draft Bill suggests that, in the case of sexual harassment, the provisions of the Bill may lead to civil claims. There has been some suggestion by academic writers that sexual harassment may give rise to a delictual claim in terms of the actio injuriarumÂ® although there has been no reported litigation in the civil courts under such a head.> The Bilas drafted would not undermine the possibility of the development of delictual liability for sexual harassment.

53, Section Dx: 1003), 11(1), 11(2), 11(3), 11(4), 12(3), 12(4), 13(1), 14(1), 1 ,orl ;

54. 1988 (4) SA 110 (T). This interpretation of section 30(3) was recently reaffirmed by the Supreme Court in Willows v National Industrial Commercial Workers how 1991 (12) ILJ 1250 (D).

55. see Lisa Dancaster â\200\230Sexual Harassment in the Workplaceâ\200\231 (1991) 12Industrial

Law Journal 499.

56. It seems clear from Jv M (1989) 10 ILJ 755.

C Judicial Review on the Ground of Discrimination

Clause 13 of the Bill prohibits those who have discretionary powers to perform executive acts from discriminating against people. Any discriminatory administrative action would be subject to judicial review unless there was an explicit legislative bas is authorising the discrimination. Whether discrimination constitutes evidence of gross unreasonablgness is something which South African law has never assertively establishedâ\200\235 and to that extent clause 13 is welcome.

Particularly because judicial review is available ony in the Supreme Court, we do agree that breaches of clause 13 should also give rise to claims of discrimination before a specialist tribunal.

III. ASSISTANT-OMBUDSMAN

A TITLE OF â\200\230OMBUDSMANâ\200\231

Although etymologically the term â\200\230ombudsmanâ\200\231 is not a reference to the male gender, it nevertheless contains a sense of masculinity which is inappropriate in a statute seekin g to further the equality of women. It will inevitably be seen as another example of masculine hegemony in the heart of the law seeking to promote womenâ\200\231s interests . For this reason, we recommend that it be avoided. It is difficult to find a simple alternat ive, particularly as the South African legislature has already (and only recently) adopted t he term. It is often suggested that â\200\230ombudâ\200\231 or â\200\230ombudspersonâ\200 \231 should be used to avoid the male connotations of â\200\230ombudsmanâ\200\231, but we would prefer the use of a self -explanatory title such as Equality Complaints Commissioner. The term â\200\230ombudsmanâ\200\231 ma y be thought to carry an internationally understood meaning, however, it is not a meaning with which many South Africans will be familiar, and it seems more sensible to adopt a title that conveys meaning in itself. There would be no reason why the assistant â\200\230ombudsmanâ\200\231 should not be called the Equality Complaints Commissioner a nd be given the necessary powers in terms of the Ombudsman Act, 119 of 1979.

B POWERS AND FUNCTIONS OF THE PROPOSED â\200\230ASSISTANT OMBUDSMANâ\200\231

Clause 36 of the draft Bill provides for the establishment of the office of Assistant â\200\230Ombudsmanâ\200\231 by amending the Ombudsman Act, 118 of 1979. The functions o f the assistant â\200\230ombudsmanâ\200\231 are set out in clause 37 which proposes that the assistant â\200\230ombudsmanâ\200\231 be entitled to take steps to investigate a claim of discrim ination by a State official if that person can show that she has suffered serious prejudice on account of such discrimination. The requirement of prejudice clearly limits the role of the â\200\230om budsmanâ\200\231 unnecessarily.

The assistant â\200\230ombudsmanâ\200\231 is primarily responsible for the enforcement of
clause 13 of the draft Bill -- the prohibition on discrimination by people â\200\230who have
discretionary power in respect of executive actsâ\200\231 As the Bill is presently formulated,
clause 13 will also be enforceable by the industrial court and a breach of it will almost
certainly give rise to judicial review in the Supreme Court.

57. See, for example, R v Padsha 1923 AD 299, but see the grounds of
unreasonableness listed in the famous English case of e v Johnson which
have been accepted in our law.

" The assistant â\200\230ombudsmanâ\200\231, like the â\200\230ombudsmanâ\200\231, will only have powers to
make recommendations to the Minister of Justice and parliament in the light of his or her investigations, and no power to remedy discrimination directly. The â\200\230ombudsmanâ\200\231sâ\200\231
role need not be so limited, For example, in Sweden, the Equal Opportunities Ombudsman, although given no adjudicative powers (these are reserved for the courts and the Equal Opportunities Commission), is given extensive powers to litigate on behalf of aggrieved citizens and to bring cases to the Equal Opportunities Commission for determination.â\200\235Â® The powers of the assistant â\200\230ombudsmanâ\200\231 should include the right
to Sovigh an aggrieved person to prosecute a claim of discrimination before a specialist
tribuna

IV. EQUAL OPPORTUNITIES COMMISSION

One of the most important provisions of the Bill is the proposed establishment of an Equal Opportunities Commission. The Commission is the lynchpin of the Bill, and its powers and structure will be central to the success of the initiative. An Equality Act will work only if it harnesses the forces in civil society that are sympathetic to its ppess, As stated above, the failure to consult fully on the provisions of the draft Bill

ave seriously compromised the possibility of doing this. Nowhere is co-operation more necessary than in the constitution and operation of the Commission. Decisions about an Equal Opportunities Commission cannot be taken hastily and the comments that follow should be understood as preliminary observations and subject to the need for full and proper consultations with all interested organisations and individuals.

Whether the Commission will play an active role in combating discrimination depends on the powers it is given and the people that are appointed to it. On neither count are we confident that the Commission as proposed in the Bill will be successful.

A NAME OF COMMISSION

As discussed above, we think that such a commission should not be called an Equal Opportunities Commission, but an Equality Commission or Anti-discrimination Commission.

B POWERS OF THE COMMISSION
The draft Bill proposes that the powers of the commission be the following:

1. to submit a proposal to the Minister of Justice for the amendment or repeal of any legal provision (including a common law rule) arrangement, custom or circumstance which distinguishes between men and women or which has different impacts on men and women once the Commission has established through an inquiry that the distinction or impact is unreasonable (clauses 24 and 25);

58. See sections 30-56 of the Swedish Act concerning Equality between Men and Women 1992, and the Ordinance with Instructions for the Equal Opportunities Ombudsman SFS 1991:1438.

59. For such investigation, the Commission shall have the power the SA Law Commission has under the SA Law Commission Act 19 of 1973 (clause 26).

2. to draft and submit to the Minister of Justice for approval a code of conduct concerning the identification and elimination of discriminatory arrangements, customs, conditions and circumstances; the creation of special measures to establish equali between men and women, child-care centres for the children of working parents; the treatment of women employees with regard to pregnancy and childbirth; and generally the promotion of equality between men and women (clause 27).

3. to give legal or other advice to any person prejudiced by an alleged contravention o
f
the Promotion of Equal Opportunities Act (clause 28(1)(a));

4. to lodge a complaint regarding the alleged breach of the Promotion of Equal Opportunities Act (a) with the industrial court â\200\230insofar as such contravention falls
within the jurisdiction of the industrial courtâ\200\231 (clause 28(1)(c)); or (b) with
 the assistant
â\200\230ombudsmanâ\200\231 (clause 28 (1)(b);

5. to submit representations on behalf of the prejudiced person to any person responsible for the contravention of the Promotion of Equal Opportunities Act or a person who has control over its rectification (clause 28 (1)(d));

6. to require a person responsible for the breach of the Promotion of Equal Opportunities Act to submit a written report to it on the circumstances regarding the alleged contravention (clause 28(2)).

B.1 General comments

A review of the use of Equal Opportunity Commissions internationally suggests that there are, broadly speaking, two models of Commission. The first casts the Commission not as an adjudicative agency in its own right, but as an institution concerned with th
e
achievement of the broad purposes of equality legislation: such Commissions are given

owers to commission and conduct research on gender equality; to undertake investigations into specific examples of discrimination; to litigate on their own behal
f to
seek court orders outlawing specific types of discrimination; to assist grievants to br
ing
complaints or to litigate; and in certain circumstances to issue restraining orders to prevent continuing discrimination. The British Equal Opportunities Commission and the jmerican Equal Employment Opportunities Commission are examples of this model.

A second model is provided by the Swedish Equal Opportunities Commission and the Australian Human Rights and Equal Opportunities Commission. Under this model, two institutions are established to deal with the promotion of equality, a Commission and an Ombud or Commissioner who is independent of the Commission. The Commission has power to adjudicate complaints brought before it, while the Commissioner or Ombud has the investigative and litigious powers granted to Commissions under the first model. (This Commissioner should not be confused with the Assistant Ombudsman provided for in the draft Bill whose powers are merely to investigate allegations of discrimination by state agencies.) The second model does not exclude the possibility of a specialist tribunal, as the adjudicatory powers given to t
he
Commission relate to broader equality obligations imposed and not to individual discrimination claims.

60. The Minister may amend the Code as he thinks fit and then publish it. The Code shall not be binding unless the Minister declares it to be (clause 27(3) and

(4).

˜The draft Bill adopts the first model but, even so, the Commission is given far too few powers to carry out its stated object of promoting the elimination of discrimination (clause 18). While we agree that the powers given to it are important, they are often curtailed unnecessarily (see further discussion below), and the real ifficatty is that powers that should have been given to the Commission and which are usually granted to institutions dedicated to achieving the broad purposes of equality legislation have not been granted to it: the Commission is not empowered to issue non-discrimination notices or interdicts to prevent discrimination;$! nor may it institute proceedings on its own behalf;62 nor is it empowered to undertake or assist in research;83 nor is it empowered to undertake active public campaigns to further the purpose of the legislation. Tne Commission ought to be given all these powers and in particular, we think that it ought to be given the power to litigate on its own behalf where it considers discrimination is taking place.

However, it is our sense that it may be a mistake to adopt the British and American model. The two-institution models adopted in a oh and Australia ma well be more effective than the British and American model, but we have not had time fully to investigate this. If they are shown to be more effective, then the powers give n to
the Commission would have to be recast in the light of the establishment of a second institution along the lines described above.

B.2 Comments on specific powers

* Power to make recommendations concerning discriminatory laws, customs and practices
The powers referred to in clauses 24 and 25 merely permit the Commission to make recommendations to the Minister of Justice. It is understandable that the Commission should make recommendations regarding proposed changes to the existing law as clauses 24 and 25 require. We think however that the Commissionâ\200\231s reports shoul d be
made public, by publication in the Gazette. (See our discussion of sub-clauses 24(3) an d
25(3) in Part Three A:1:1 above.)

* Power to issue non-binding code (clause 27)

It does not seem appropriate that the Commission is required to report to the Minister in order to bring into operation a non-binding Code of Conduct (clause 27). If the Minister wishes to give legal effect to any of the provisions of the Code it would be possible to do so by introducing legislation or promulgating binding regulations. Comparative research on the British Equal Opportunities Commission and the American Equal Employment Opportunities Commission suggests that a Commission charged with promoting anti-discrimination legislation should be given extensive powers to further its aims.Â®* The power to issue non-binding codes of conduct seems consisten t
with such a purpose and it is a power given both to the British EOC and the American EEOC,

61. See sections 67 - 71 of the British Sex Discrimination Act 1975.

62. Cf sections 72 -3 of the British Sex Discrimination Act 1975; and Title VII, S 706(f)(1) 42 USC 2000e-5(f)(1) (1982). According to the US legislation the EEOC may only sue non-governmental organisations, the Attorney-General has the power to sue governmental organisations.

63. Cf section 54 of the British Sex Discrimination Act 1975; and 42 USC 2000e-i(e)(S) (1982). po

64. See Elizabeth Meehan Womenâ\200\231s Rights at Work: Campaigns and Policy in Britai n
and the United States (1985: Macmillan, Basingstoke) Chapters 4 and 3.

65. In the UK governed by sS6A of the Sex Discrimination Act; in the USA by Title

VII, s713(a), 42 USC S 2000e-12(c) (1982); see also the discussion in Paul Cox Employment Discrimination (1991) at para 21.29.

We agree that there is no need for the code to be directly enforceable. Experience in Britain where the Advisory, Arbitration and Conciliation Service was given power to issue non-binding codes on labour relations matters shows that such codes can play in an important role in forming public opinion and developing a normative environment for the promotion of particular social goals.6â\200\231 The ACAS codes were not binding but could be taken into account by industrial tribunals. We think that non-binding codes could play an important role in achieving equality. (It is interesting to note that although the British EOC has been given the power to make non-binding codes, it has not done s0.% We would hope that a Commission would seize such opportunity and produce a Code governing a wide array of matters from maternity and paternity leave to recommendations concerning maintenance payments.)

C Appointment to the Commission

Research has shown that a crucial factor in determining the success of Equal Opportunities Commissions is the appointment of effective people to the Commission. In her comparative study of the British and American models, Meehan concludes that both have been undermined at times by the appointment of people who are not committed to the goal of equality. Neither the British nor the United States statutes contain specific provisions regarding who should be appointed to the Commission, and accordingly appointment falls entirely within the political process, as is proposed in the draft Bill. We do not think that this is satisfactory.

However, we think that this is one of the areas where proper consultation prior to the implementation of the Bill is essential. One possible way of ensuring that appropriate people are appointed may be to provide in the Bill that representatives of certain interest groups should be appointed ih womenâ\200\231s organisations) and we would recommend that this be considered. However, the appointment of representatives from bodies other than womenâ\200\231s organisations needs full consultation and careful thought. A common proposal given the employment focus of much equal opportunities legislation is the appointment of representatives from both sides of industry. Meehan notes that this commitment was won during parliamentary debateÂ® in Britain and that the British EOC still is dominated by representatives of the TUC and CBI. However, these representatives often have little interest in equality and have not promoted the creation of an active strategy to reach sally -- it is arguable that both the TUC and CBI may have a common interest in not furthering the needs of women.â\200\235 It is not clear whether similar conclusions can or should be drawn in the South African context. Further consultation is essential.

It is of concern is that the Bill requires that only one member of the Commission be a full-term appointment. Although there is a Siortoge of expertise in South Africa, if the Commission 1s to carry out its task effectively, it will need energetic members who have time to devote to the goal of the Commission. We think, and this again requires

66. Section 6 of the Employment Protection Act 1975.

67. See Lord Wedderburn The Worker and the Law (1986: Penguin, Harmondsworth) 3rd ed p 247; p 308.

68. See Meehan at 114.

69. It was never inserted in the Act, but was a political commitment made by the ruling Labour Party.

70. See, critique of women in trade unions in Britain by N Charles â\200\230Women and Trade Unions in the Workplaceâ\200\231 (1983) 15 Feminist Review 3, and J Conaghan â\200\230The Invisibility of women in Labour Lawâ\200\231 (1986) 14 International Journ

al of
Sociology of Law 377.

consultation, that the majority of members of the Commission should be full-time appointments.

In addition, the Bill makes no express provision for a secretariat to assist the Commission. This is unacceptable and must be remedied.

V. SANCTIONS

Clause 35 of the Bill provides that the following breaches of the Act will give rise to criminal penalties:

* breaches of provisions of a code of conduct compiled by the Commission where the Minister has declared the code to be binding and that breaches of certain provisions will be a criminal offence (clause 27(5)(b));

* the failure by any person to submit a report to the Commission when required to do so in connection with an alleged contravention of the provisions of the Act (clause 28(2));

* a breach of the victimisation prohibition in clause 34;
* knowingly giving false information to the Commission (clause 35(d)).

We welcome the narrowness of the criminal provisions. It is generally accepted that criminalising discriminatory conduct is unlikely to have the desired effect of avoiding such conduct.

Code of Conduct

We think that in general any code of conduct should not be enforced by criminal sanctions, but by civil sanctions. This should be stated clearly in the legislation whi ch
might also indicate the limited circumstances in which criminal sanctions might be appropriate. Breaches of a code of conduct could be justiciable before a specialist tribunal.

Victimisation

It is not clear to what extent criminal victimisation provisions discourage victimisin behaviour. All the major South African labour statutes contain criminal victimisation provisions which are rarely used. Even attempts to use them as the basis for interdicto ry
relief failed.â\200\235 The unfair labour practice jurisdiction has almost certainly be en more
effective than the criminal provisions in outlawing the victimisation of workers, particularly the dismissal of workers. Similar doubts about the efficacy of victimisati on
provisions have been voiced in England.â\200\235

There are a range of reasons why victimisation provisions do not work: people who are victimised are not aware that victimisation is unlawful; proving victimisation in crimi nal
proceedings requires proof beyond reasonable doubt of the motive of the victimiser

71 See PE Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 (A).

72 See Szyszczak and O'Donovan Equality and Sex Discrimination Law (1988) at 222-3,

which is very difficult; and using civil proceedings such as interdicts has proved problematic.â\200\235

If a victimisation provision is to work, consideration needs to be given to how these problems could be addressed. Possibilities include changing the standard of proof, shifting the burden of proof, expressly permitting interdict proceedings and widening standing. In the short time at our disposal, we have not been able to consider all these, but urge the drafters to do so.

Damages

See Part Four, section I:B:5 above for a discussion of the industrial courtâ\200\231s power to award damages. There we suggest that proper consideration should be given to heads of damages in legislation. In particular, and because South African courts have failed to follow their counterparts in other jurisdictions and will not award damages for non-patrimonial loss in contract, legislation should direct its attention to the question of damages for non-patrimonial loss and exemplary damages.

73 See PE Bosman Transport Works Committee above.

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Â¥ | SWEDEN

Act concerning Equality between Men and Women

The Equal Opportunities Act

Ds 1992:92

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INTRODUCTION

Great advances in the development towards equality between men and women have been made in Sweden during the last few decades, especially when seen in an international perspective. In the decade before the passing of the 1979 Act, the issue of equality between the sexes was debated intensively in this country. The increasing tendency of women to enter the labour market also necessitated measures to make it easier for both men'and women to be able to combine gainful work and parenthood. The 1970s saw the introduction of several important reforms which, to a high degree, helped to improve the pre-conditions for a continued development towards equality between men and women, for instance the separate assessment of couples for tax purposes (i.e. the independent taxation of incomes), more comprehensive parental insurance and improved child-care facilities.

Throughout the whole of the 1980s in Sweden, the proportion of women in the workforce - even those with young children - continued to increase. 82 % per cent of the women aged 16 â\200\224 64 were in the workforce in 1991. Practically as many women as men have gainful employment in this country.

For both men and women to be able to combine gainful work and parenthood is a central point of departure in a situation where women both continue to increase the frequency with which they take gainful employment and the number of hours they work.

A good deal remains to be done, however, in several important sectors in the community. In 1988 the Swedish Parliament adopted a policy for equality in the form of a five-year plan of action. This plan comprises five sectors: the role of women in the economy, equality between men and women on the labour market, equality in education and equality in the family as well as the influence of women in the

_communiry. Concrete objectives have been laid down for each sector,

with the measures required to enable these objectives to be reached in a specified time. In the 1993/94 fiscal year the Government in to nnke a comprehensive review of the results of the work for equality originated in this plan of action.

One major impediment in the development towards equality in Sweden is the sex-segration of the labour market. Women work in certain sectors and occupations, men in others â\200\224 in general women are to be found in subordinate posts and men in senior positions, women in part-time and men in full-time work. The great majority of women still work in the lowly paid occupations, primarily in the public sector.

Work is now in progress all over Sweden with a view to breaking down this sex-segregated labour market. This undertaking concerns both questions relating to how working-life is organized, to the nature of the working environment for men and women, to their opportunities for development at work, and to the evaluation of the various forms of â\200\234ork.

The Government has, for instance, granted funds for labour-market policy programmes and pilot projects of various kinds. Furthermore the Government has set up a committee to investigate pay differentials between men and women. The CommittÃ©e is to report back at the beginning of 1993 and to submit draft measures.

The Government has also taken steps to renew and deregulate the social services sector in which the majority of Swedish women work. More competition and a trend leading towards increased private altematives in this sector will give women a wider choice and better working conditions.

Legislation on equality between men and women in working life is of central importance. It is a matter both of creating justice and protection for the individual employee and of establishing equality at the individual place of work and on the labour market as a whole.

Sweden obtained its first statute concerning equality in 1979, the Act on Equality between Men and Wamen at Work. Ten years later, in 1989, a review of the functioning of this legislation was commissioned. This review showed, among other things, that the Act needed to be made more stringent on a number of points. In 1991 Parliament adopted the Government's proposals for a new Act concerning

Equality between Men and Women. This new statute entered into force on 1 January 1992.

This statute is similar in form to the earlier Act. This means that it is also divided into two main parts, which together shall be regarded as one entity. The first part contains rules regarding an employer's obligation to carry on active work for equality at the workplace. The second part contains rules prohibiting sex discrimination. This latter part is concerned with the Â¢ombating of concrete discriminatory actions in individual cases as a protection for the individual employee and job applicant. These provisions are an important complement to the rules concerning active measures; their purpose is to combat discrimipation in a more general sense and in a positive manner to

support and to encourage activities that are calculated to promote equality at the workplace.

The new Act not only contains a number of new provisions but it also tightens up the old rules. One significant innovation is that every employer having more than ten employees must draw up a plan for the work for equality at the workplace every year (section 10). The plan, which must be concrete in form, must indicate the measures that the employer, both in the short and in the long term, intends taking with a view to obtaining greater equality. The plan may concem the recruitment of the underrepresented sex (according to sections 8 and 9), training programmes (in accordance with section 7), pay (section 2) and/or measures whereby the working environment can be improved (section 4) and measures to combat, for instance, sexual

harassment (section 6). The plan can also concern measures by which it is made easier for men and women to combine gainful employment

and parenthood, which is an obligation imposed by law on an employer (section 5).

The ban on sexual discrimination has also been tightened up in comparison with earlier legislation. â\200\230This mn particular applies to the ban on pay discrimination (section 18) which has now been adapted to

the rules applying in the EC. The new Act also contains a special ban on harassment (section 22).

The Equal Opportunities Ombudsman and the Equal Opportunities Commission have a very important role to play in regard to ensuring that the rules contained in the Act are complied with. The employer and the employee organizations also have a key role. The rules relating to active measures can be superseded by rules in collective agreements between these parties which impose on them special responsibility for equality at the workplace. In sectors of the labour market where no such agreement exists, the rules embodied in the Act apply.

The Equal Opportunities Ombudsman, through advice and information etc., also has the important function of informing the general public about the Act and of promoting equality in working life and in education. â\200\235

Legislation alone cannot naturally lead to the implementation of the goals for equality and to the elimination of sex discrimination. For this sustained efforts are required and also active work in many different quarters in the community and among individual people.

However, it is my conviction that Sweden’s Act conceming Equality between Men and Women gives the fundamental support required and is an active instrument in the work of advancing the development towards equality on the labour market. Above all, it is an unambiguons expression of the principle of the equal rights of men and women and sets out the limits for what is or is not permissible, and for what should be required of the parties concemed.

Stockholm, August 1992

rn â\202¬ 3) oS 7 Â£

Birgit Friggebo â\200\235
Minister of Culture with special responsibility for Equality Affairs.

ACT CONCERNING EQUALITY Swedish Conde of
BETWEEN MEN AND WOMEN hig 433) "54

egy . 4 oe .
("The Equal Opponunities Actâ\204¢y;!

promulgated on 30 May 1991.

In accordance with a decision2 by Parliament, the following is prescribed.

The purpose of the Act

Section 1. The purpose of this Act is to promote the equal rights and opportunities for men and women? with regard to work, terms of engagement and other terms of employment as well as opportunities for development at work (equality in working life).

The Act aims to improve, in the first instance, the conditions for women in working life.

Co-operation

Section 2. Employers and employees shall work together with a view to attaining equality in working life.

They shall endeavour in particular to level out and prevent differences in pay and other terms of engagement between men and

women who perform equal work or work that is rated as of equal value.â\200\231

Â§ Active measures
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LE Lt We

Purposeful work for equality

Section 3. By purposeful efforts employers, within the framework
of their activities, shall actively promote equality in working life.

FI’lis is a translation of the Swedish Jamstilldhetslag.
2Government Bill 1990/091:113, AUIT, iskr. 28%

3Words relating to the sexes are mentioned in alphabetical order i.e. â\200\234menâ\200\235 betore
â\200\234womenâ\200\235, â\200\234herâ\200\235 before â\200\234himâ\200\235 and â\200\234heâ\200\235 betore â\200\234sheâ\200\235

More detailed provisions concerning the obligations of employers are laid down in Sections 4 - 11.

!
RWarking- conditions |

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Section 4. An employer shall take â\200\224 with regard to her or his resources and other circumstances â\200\224 such measures as may be

required to ensure that the working conditions shall be appropriate for both men and women.

Section 5. An employer shall facilitate for both female and male employees the combination of gainful employment and parenthood.

Section 6. Employers shall endeavour to ensure that no employce is subject to sexual harassment or harassment.on account of a complaint about sex discrimination.

Recruitment and related matters.

Section 7. An employer shall promote by training, the development of skills and other suitable measures, an even distribution of men and women in various types of work and within different categories of employees.

Section 8. An employer shall endeavour to ensure that both men and women apply for job vacancies.

Section 9. When at a workplace there is not, in the main, an even distribution of men and women in a certain type of work or within a certain category of employees, an employer shall make special efforts, when taking on new employees, to obtain applicants of the underrepresented sex and endeavour to see that the proportion of employees of that sex gradually increases.

The first paragraph shall however not be applied if there are special reasons for not taking sugh measures or if the measures cannot in all reason be required in view of the employer’s resources and other circumstances.

Plan of uction

Section 10. Each year an employer shall draw up a plan for her or his work aimed at promoting equality.

"I’his obligation does not however apply to employers who on the last day of the previous calendar year employed fewer than ten employees.

Section 11. A plan aimed at promoting equality according to Section 10 shall contain i summary of the measures according 1o Sections 4 â\200\224 9 that are. needed at the workplace mn guestion and indicate which of those measures the employer intends to commence or implement during the coming year.

An account of how the planned measures have been implemented shall be included in the plan for the following year.

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Collective agreements

Section 12. In cach of the respects specified in Sections 4 â\200\224 11, other rules may be laid down in collective agreements which have been concluded or approved by a central employee organization.

Section 13. An employer who is bound by a collective agreement such as is referred to in Section 12 may apply the agreement also to an employee or job applicant who is not a member of the employee organization contracting the agreement but who is working in a job such as is referred to in the agreement or is applying for such a job.

Section 14. In assessing what according to Sections 4 â\200\224 11 is incumbent upon an employer who is not bound by a collective agreement as is referred to in Section 12, regard shall be paid to collective agreements in comparable conditions.

â\200\230Ban on sex discrimination

Direct and indirect sex discrimination

Section 15. Sex discrimination is taken in this Act to be that someone is treated unfavourably in such circumstances that this

treatment has a direct or indirect connection with the fact that the person treated unfavourably belongs to a particular sex.

Sex discrimination is unlawful to the extent set out in Sections 16 â\200\224 20. â\200\231

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Engaging employees and related matters

Section 16. Unlawful sex discrimination shall be considered to exist when an employer, in engaging an employee or promoting or training a person for promotion, engages someone in preference to someone else of the opposite sex although the person passed over is objectively better qualified for the work or the training.

However, this does not apply if the employer can show

1. that the decision has no dircct or indirect connection with the sex of the person discriminated against,

2. that the decision is part of the endeavours to promote equality in working
life, or

3. it is warranted out of consideration for an ideological interest or some other special interest which is of such a kind that it should manifestly not be subordinate to the interest of equality in working

life.

Section 17. Unlawful sex discrimination shall be considered to exist when an employer, in engaging an eniployee or promoting or training a person for promotion, engages someone in preference to someone else of the opposite sex who objectively has equivalent prereuisites for the work or training if it is probable that the employer, when making her or his decision, aimed to discriminate against someone on grounds of sex.

However, this does not apply when the conditions are such as are specified in Section 16, second paragraph, subsections 2 or 3.

Terms of employment

Section 18. Unlawful sex discrimination shall be considered to exist when an employer has recourse to lower pay or otherwise poorer terms of employment for an employee than those for an employee of

the opposite sex when they both carry out equal work or work that is rated as of equal value on the labour market.

This does not however apply if the employer can show that the difference in terms of employment is due to dissimilarities in the employeesâ\200\231 objective prerequisites for the work or that the ditference has, at any rate, no direct or indirect connection with the sex of the employees.

Direction of the work

Section 19. Unlawful sex discrimination shall be considered to exist when an employer directs and distributes the work in such a way that an employee is manifestly unfavourably treated in comparison with an employee of the opposite sex.

However, this does not apply if the employer can show that the conditions are such as are specified in Section 16, second paragraph.

Termination of employment, transfers and related matters

Section 20. Unlawful sex discrimination shall be considered to exist when an employer terminates a contract of employment, transfers, lays off or dismisses someone or takes some other comparable step to the detriment of an employee of the one sex if the step taken has a direct or indirect connection with the sex of the employee concerned.

However, this does not apply when the conditions are of such a kind as are specilicd in Section 16, second paragraph, subsections 2 or 3.

Particulars about qualifications

Section 21. A job applicant who has not been engaged or an employee who has not been promoted or heen selected for training for promotion is entitled to request and obtain written particulars from the employer regarding the nature and scope of the training, the vocational experience and other comparable qualifications of the person ol the opposite sex who obtained the job or the place on the training in question.

Ban on harassment:

Section 22. An employer may not subject an employee to harassment because the latter has rejected the employer's sexual advances or lodged aâ\200\230 complaint about the employer for sex discrimination.

The person who in the employer's stead has the right to make decisions concerning an employee's working conditions shall be considered, when the first paragraph is applied, to be acting as an employer.

Compensation and other sanctions
Invalidity

Section 23. An agreement is null and void in so far as it prescribes or allows such sex discrimination as is not permitted by virtue of Sections 16 - 20.

Section 24. If an employee sutlers discrimination in a way that is not permitted according to Sections 18 â\200\224 20 through a clause in an agreement with an employer or by the employer terminating an agreement or performing some other similar legal act, the clause or the legal act shall be declared null and void, if the employee so requests. The aforesaid does not hold good when Section 23 is applicable. 3

Â«Compensation

Section 25. If sex discrimination occurs by the employer engaging, in a way that is not permitted according to Sections 16 or 17, one or several persons in preference to one or several persons of the opposite sex, the employer shall pay compensation to the person or the persons who suffered discrimination for the injury the discrimination in question constitutes.

If several persons who have suffered discrimination in such a case request compensation, the compensation shall be determined as if only one of them had suffered discrimination and be shared equally among them.

Section 26. If an employee suffers discrimination in a way that is not permitted according to Sections 18 = 20, the employer shall pay compensation 10 the employee for the loss that arises and for the moral injury the discrimination constitutes.

Section 27. If an employee is subject to harassment such as is referred to in Section 22, the employer shall pay compensation (o the employee for the moral injury the harassment constitutes.

Section 28. If there is good reason, compensation according to Sections 25, 26 or 27 may be reduced or be waived entirely.

Other sanctions

Section 29. In respect of an employer who does not fultil her or his obligations according 10 a collective agreement of a kind such as is referred to in Section 12, what is stated concerning sanctions in the agreement or in the Act (1976:580) concerning the Joint Regulation of Working Life shall be applied.

Overseeing compliance with the Act

Section 30. In order to oversee compliance with this Act, there shall be an Equal Opportunities Ombudsman and an Equal Opportunities Commission.

The Equal Opportunities Ombudsman and the Equal Opportunities Commission are to be appointed by the Government.

The Equal Opportunities Ombudsman

Section 31. The Equal Opportunities Ombudsman shall ae thie bust instance seek to persuade employers 1 Tollow the proviso. ol this Act voluntarily.

The Ombudsman shall also participate generally in the ettorts to promote equality in working life.

sometimes known as the Co-determination Act.

The Equal Opportunities Commission

Section 32. It shall be incumbent upon the Equal Opportunities Commission to consider questions concerning orders requiring com-

pliance under penalty of â\200\230a fine according to Section 35 and appeals according to Section 42.

Obligation to supply particulars

Section 33. An employer is. obliged, if so requested by the Equal Opportunities Ombudsman, to supply particulars on the conditions in her or his field of activity that can be of importance for the Ombudsman when overseeing compliance according to Section 30.

Imposition of a monetary penalty

Section 34. If the employer does not pay heed to a request according to Section 33, the Equal Opportunities Ombudsman may order the employer to do so under penalty of a fine.

Section 35. An employer who does not follow one of the directions specified in Sections 4 = 11 may be ordered under penalty of a fine to fulfil her or his obligation. Such an order is to be made by the Equal Opportunities Commission at the petition of the Equal Opportunities Ombudsman. :]

When making this petition, the Ombudsman shall indicate what measures the employer ought to be required to take, what grounds are

put forward in support of the petition and what investigation has been made.

Procedure

Section 36. The employer shall be ordered â\200\224 and reminded that the matter can nevertheless be settled without her or his compliance â\200\224 to make known her or his views within a certain period of time on the Ombudsmanâ\200\231s petition accoiding to Section 35 and supply the particulars conceming conditions in her or his field of activity which the Commission needs before it can consider the matter.

Section 37. The Equal Opportamties Cotsien shall coe that the matters at issue shall be mvestigated othe extent thew nature requires.

When necessary, the Commission shall have the investigation supplemented. Excess investigation may be rejected.

Hearing of the matters at issue

Section 38. Matters relating to an order requiring compliance under penalty of a fine according to Section 35 are to be settled after a hearing, except when the Commission deems that no such hearing is needed.

Section 39. The Equal Opportunities Ombudsman and the employer shall be summoned to attend a hearing according to Section 3X.

The Commission may order, under penalty of a fine, the employer or her or his deputy to appear in person.

If this is required for the investigation, the Commission may also summon others to the hearing.

Settlement of the matters at issue

Section 40. A matter concerning an order requiring compliance under penalty of a fine according to Section 35 may be settled even if the employer does not make a statement regarding the matter nor

takes part in the investigation or if he or she does not attend the hearing.

Section 41. In the settlement of a matter concerning an order requiring compliance under penalty of a fine according to Section 35, the Equal Opportunities Commission may enjoin the employer to lake measures other than those requested by the Equal Opportunities Ombudsman if these measures are not patently more onerous for the employer.

In such an instance the Commission shall state how and within what period the measures to be taken by the employer are to be com-menced or implemented.

The Commission’s decision shall be given in writing and served on the employer.

Appeals and related mattersâ\200\231

Section 42. An appeal against a decision by the Equal Opportunities Ombudsman regarding an order requiring compliance under penalty of a fine according to Section 34 may be lodged with the Equal Opportunities Commission.

In such an appeal Sections 35 â\200\224 41 are to be applied.

Section 43. There is no appeal under this Act against a decision by the Equal Opportunities Commission. t

Section 44. Cases concerning the payment of a monetary penalty pursuant to this Act are to be presented in a District Court by the Equal Opportunities Ombudsman.

Litigation in discrimination disputes
Rules applicable

Section 45. Cases relating to the application of Sections 15 - 20 and 22 â\200\224 28 shall be dealt with under the Act (1974:371) on Litigation in Labour Disputes. .

In this respect a job applicant shall also be regarded as an employee and a person to whom someone has applied for a job also as an employer.

The second paragraph holds good also in the application, in a disput˜ regarding Sections 15 â\200\224 20 and 22 - 28, of the rules con-ceming the settlement of disputes in the Act (1976:580) concerning the Joint Regulation of Working Life.

The right to present a case

Section 46. In a dispute according to Section 45, the Equal Opportunities Ombudsman may present the case for an individual

employee or job applicant il the person concerned so permits and if the Ombudsman deems that a judgment in the dispute would be of importance as a precedent or if there are otherwise special reasons for this.

Such a case is to be presented in the Labour Court.

Section 47. When an employee organization is entitled to present a case for an individual according to Chapter 4, Section S. in the Act (1974:371) on Litigation in Labour Disputes. the Equal Opportunities Ombudsman may present the case only if the organization does not do $0.

What is prescribed in the said Act regarding the position of individuals in legal proceedings shall be applied also when the Ombudsman presents the case.

Joint proceedings

Section 48. When several employees or job applicants bring an action for compensation against the same employer and the employer holds that the compensation shall be shared between them according to Section 25, second paragraph, the cases â\200\224 at the employer’s request â\200\224 shall be dealt with at the same proceedings.

Section 49. If actions have been brought at different courts, the proceedings shall take place before the Labour Court if one of the cases falls within its jurisdiction. Otherwise the proceedings shall take place at the District Court where the action was first brought or, if the actions are brought at the same time at various District Courts, at the District Court chosen by the cmployer.

Section 50. Cases that have been brought at a court other than the one where the joint proceedings shall take place, shall be translerred to the latter.

â\200\230There is no right of appeal against the decision to transfer a case.

Section S1. If several persons have brought actions at the same

court, Section 48 is to be applied if the cases are not nevertheless dealt with jointly by virtue of some other Act.

Section 52. Proceedings in a case concerning compensation pursuant to Section 25 shall, if the employer so requests, be postponed in so far as this is necessary to enable the case to be heard jointly with some other action for such compensation which has already been brought or may be brought.

An action for compensation according to Section 25 arising out of a decision regarding the engaging of someone by a public employer

may not be considerd before the decision in question has obtained legal force.

Limitation of time and related matters

Section 53. If anyone brings an action on account of the giving of notice or dismissal, Sections 34 and 35, Section 37, Section 38, second paragraph, second sentence, Sections 39 â\200\224 42 and Section 43, first paragraph, second sentence and second paragraph in the Act (1982:80) on Security of Employment shall be applied.

Section 54. In regard to an action other than is referred to in Section 53 in this Act, Sections 64 â\200\224 66 and Section 68 in the Act (1976:580) on the Joint Regulation of Working Life shall be applied with the difference that the period of time specified in Section 66, first paragraph, first sentence, shall be two months.

An action for compensation such as is referred to in Section 25 may however not be brought later than eight months after the discrimination. When an organization has let this period expire, the person who is or has been a member of the organization can bring an action within two months of the eight-month period having expired.

Section 55. With regard to an action for compensation on account of a decision regarding the engaging of someone by a public employer, the periods of time allowed according to Section 54 are counted from the day the decision in question obtained legal force.

Section 56. An action brought by the Equal Opportunities Ombudsman is to be treated as if the action had been brought on her or his own by the employee or the job applicant.

This Act enters into force on | January 1992 when the Act (1979:1118) on Equality between Women and Men at Work ceases to be valid.

On behalf of the Government

INGVAR CARLSSON

MARGOT WALL STROM
(Ministry of Public Administration)

ORDINANCE WITH INSTRUCTIONS Swedish Code of
˜ An . . Statutes (SES)
FOR THE EQUAL OPPORI UNITIES 1991:1438

OMBUDSMAN;

promulgated on 14 November 1991.

The Government prescribes the following.

Duties

Section 1. The Equal Opportunities Ombudsman is to carry out the duties stipulated in the Act conceming Equality between Men and Women (1991:433).

These duties include the following

1. in the first instance through advice and information, discussions with private individuals and organizations or by other suitable measures, to ensure that the provisions of the Act are complied with voluntarily,

2. after a complaint or on the Ombudsmanâ\200\231s own initiative, 10 take up matters conceminy the failure of employers who are not bound by collective agreements relating to equality between men and women to follow the provisions of the Act concerning active measures and, when the Ombudsman is of the opinion that results cannot be obtained by a voluntary agreement, to file a petition for an order requiring compliance under penalty of a fine with the Equal Opportunities Commission,

3. in disputes about a breach of the ban concermg sex discrimi: tion or of the ban concerning harassment, to assist on request the employees and job applicants who are not represented by an emplose organization with the measures that the Ombudsman considers

warranted and also to present the case at the Labour Court when the Ombudsman is of the opinion that a ruling in the dispute would be a precedent or there are otherwise special reasons for this,

4. 10 inform the general pyblic and in other suitable ways participate in the efforts to promote equality in working life.

The Equal Opportunities Ombudsman, through advice and intorma-tion, shall also endeavour to ensure equality in the schools, higher education, labour-market training and other forms of training.

Organization

Section 2. The Equal Opportunities Ombudsman is to have a deputy.

The application of the Public Authorities Ordinance

Section 3. The following provisions in the Public Authorities

(General Provisions) Ordinance (1987:1100) shall apply in respect of

the Equal Opportunities Ombudsman:

â\200\224 Section 2 regarding competence to represent the State in courts of law, â\200\230

â\200\224 Sections 14 and 15 regarding the issuing of regulations by the public authorities,

- Section 16 regarding internal regulations, *

â\200\224 Section 17 regarding the collection of data,

â\200\224 Section 18 regarding a list of matters outstanding,

â\200\224 Sections 25 and 26 regarding the presentation of matters,

â\200\224 Section 27 regarding the right to decide in certain questions,

â\200\224 Section 28 regarding who is entitled to request explanations, etc,

â\200\224 Section 29 regarding decisions taken by a public authority.

Section 4. The Equal Opportunities Ombudsman is to be responsible for the relevant activities, and for the duties that are specified in Sections 4 â\200\224 7. 9 and 10 in the Public Authorities Ordinance (1987:1100). -

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The conduct of business

Section 5. Matters at issue arc to be decided by the Equal Opportunities Ombudsman.

Matters which are of such a kind that they do not have to be considered by the Eyual Opportunities Ombudsman may however be decided by some other official. How this shall take place is to be specified in the rules of procedure or in special decisions.

Section 6. An order requiring compliance under penalty of a fine pursuant to Section 34 in the Act concerning Equality between Men and Women (1991:433) shall be served on the employer concerned.

Such an order may be served according to Section 12 in the Service of Documents Act (1970:428) only if there is reason to assume that the employer has absconded or is evading service in some other way.

Section 7. The Equal Opportunities Ombudsman may grant reasonable remuneration out of public funds for travel and subsist- ence expenses to a person who has been summoned and attends in person to be heard during an investigation ol a matter.

The making of appointments

Section 8. The Equal Opportunities Ombudsman and the Ombudsmanâ\200\231s deputy are to be appointed by the Government for a prescribed period.

Other appointments are to be made by the Equal Opportunities Ombudsman.

Appeals

Section 9. â\200\230There is a tight of appeal to the Government against decisions by the Equal Opportunities Ombudsman regarding staff matters if nothing to the contrary ensues from

â\200\224 the Act (1987:439) on a Limitation of the Right of Appeal,

â\200\224 other regulations.

Section 10. There is a right of appeal against decisions by the Equal Opportunities Ombudsman regarding other matters only if it is specially prescribed.

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Renew

This Ordinance enters into force on 1 January 1992 when the Ordinance (1988:128) with Instructions for the Equal Opportunities Ombudsman shall cease to apply.

On behalf of the Government

BO KONBERG

Lotty Nordling
(Ministry of Public Administration)

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ORDINANCE WITH INSTRUCTIONS Swedish Code of
FOR THE EQUAL OPPORTUNITIES Sdn 9)
COMMISSION; 14]

promulgated on 14 November 1991.

â\200\230The Government prescribes the following.

Duties

Section 1. It is apparent from Section 32 in the Act concerning Equality between Men and Women (1991:433) that the Equal Opportunities Commission has been charged to consider questions concerning orders requiring compliance under penalty ol a fine

˜according to Section 35 and appeals according to Section 42 in the aforesaid Act.

Composition

Section 2. The Commission is to consist of nine members. One of the members is to be chairperson.
There is to be a personal substitute for each member.

Organization

Section 3. The Commission is to have a seaietuy.

â\200\230The application of the Public Authorities Ordinance

Section 4. The following provisions ol the Public Authorities

(General Provisions) Ordinance (1987:1100) shall be applied in

respect of the Commission:

˜ Sections 14 and 15 regarding the issuing of regulations by the public authorities,

-- Section 16 regarding internal regulations,

â\200\224 Section 17 regarding the collecting of data,

â\200\224 Section 29 regarding decisions taken by a public authority.

Section 5. The Commission is to be responsible for the relevant activities, and for the duties that are stipulated in Sections 4 â\200\224 7 and 10 in the Public Authorities Ordinance (1987:1100).

The conduct of business
Competence to make decisions

Section 6. The Commission has a quorum when the chairperson and at least five other members are present, among them an equal number both for the employer side and the employee side.

When matters of major importance are dealt with, all members shall if possible be present.

Section 7. More detailed provisions concerning the basic principles governing how the members are to serve and how the Commission is to be composed shall be evident from the rules of procedure.

Otherwise the composition of the Commission in a certain matter is to be decided by the chairperson.

Voting and divergent views

Section 8. If views differ in the course of deliberations, the provisions of Chapter 16 in the Code of Judicial Procedure relating to voting in civil cases are to be applied. The chairperson is however to voice her or his opinion first. :

If, in the presentation of a matter, any member considers that a hearing shall be held, that view is however to count as the Commission's decision.

Section 9. In Scction 19 in the Administrative Procedure Act (1986:223) there are provisions concerning the right to have a divergent view recorded.

Delegation

Section 10. In the rules of procedure or in special decisions the Commission may leave it to the chairperson to decide matters which are of such a kind that they do not need to be considered by the Commission.

Preparatory measures

Section 11. In the rules of procedure or in special decisions, it shall be decided who may request the submission of explanations, information or statements ol opinion relating to the matters considered.

Summons

Section 12. In a summons to a hearing, an employer shall be reminded that the matter can be decided even if he or she does not appear. i

Continuation of a hearing

Section 13. If the Commission adjoumns a hearing that has been commenced, the hearing shall be resumed as soon as possible. A new hearing does not have to be held on account of such an adjournment. _

Presentation of business

Section 14. Matters that are not decided after a hearing shall be decided after presentation. In the rules of procedure or in special decisions it may however be permitted that matters decided in accordance with Section 10 do not need to be presented.

Minutes

Section 15. At meetings of the Commission, minutes shall be kept and they shall be approved by the chairperson.

Decisions

Section 16. A decision concerning an order requiring compliance under penalty of a fine according to Section 35 in the Act concerning Equality between Men and Women (1991:433) shall be recorded separately and be signed by the chairperson. The same applies when

the Commission decides an appeal pursuant to Section 42 in the same Act.

Service of documents

Section 17. An order pursuant to Section 36 in the Act conceming Equality between Men and Women (1991:433) as well as a summons to a hearing shall be served on the person concerned. The same applies to other documents of which the employer or some other person shall be notified.

Section 18. A decision that means a monetary penalty is prescribed may be served according to Section 12 in the Service of Documents Act (1970:428) only if there is reason to assume that the employer concemed has absconded or is evading service in some other way.

Section 19. A copy of a decision such as is referred to in Section 16 shall be sent to the Equal Opportunities Ombudsman by ordinary mail the same day as the decision is rendered.

Remuneration from public funds

Section 20. The Commission may decide to remunerate from public funds a person who, after a decision by the Commission, has carried out an investigation of a matter or after a summons has appeared before the Commission to be heard.

Neither the employer concerned nor the Equal Opportunities Ombudsman may however be remuncrated in this way.

Section 21. The Commission may grant remuneration out of public funds for travel and subsistence expenses to an employer who has attended a hearing if the Commission deems that there is good reason to grant such remuneration.

Section 22. In respect of remuneration according to Sections 20 and 21, the following are to be applied: the Ordinance (1982:805) conceming Compensation out of Public Funds to Witnesses, etc. and the Decree (1973:261) conceming the Payment of Certain Remunera-tion in Cases or Matters at Issue in Courts, etc.

Register

Section 23. At the Commission a daily register of the matter an issue and the documents received relevant to them shall be kept in accordance with the more detailed regulations prescribed by the Commission in its rules or in special decisions.

The making of appointments

Section 24. Members and substitutes are to be appointed by the Government for a specific period. Â°

They may not be minors or in a state of bankruptcy or have a legal guardian pursuant to Section 7, Chapter 11, in the Code of Parent-hood and Guardianship.

Section 25. The chairperson and another two members are to be selected from among persons who do not represent employer and employee interests. â\200\230The same applies to their substitutes.

The chairperson and the substitute for the chairperson shall be lawyers and ought 10 have had experience of serving as judges

Section 26. Of the other six members appoinied

â\200\224 one is 10 be proposed by the Swedish Employersâ\200\235 Conledention,

â\200\224 one jointly by the Swedish Association ol Local Authorities and the Federation of County Councils,

â\200\224 one by the National Agency for Government Employers,

â\200\224 one by the Swedish Trade Union Confederation,

â\200\224 one by the Confederation of Salaried Employees,

- one by the Swedish Confederation of Professional Associations, SACO/SR.
Substitutes are to be appointed in the same way as members.

Section 27. The Commission is to appoint a secretary and other persons to present matters.

Appeals

Section 28. There is a right of appeal against the Commission's decisions only if it js specially prescribed.

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This Ordinance enters into force on | January 1992 when the Ordinance (1980:416) containing Instructions for the Equal Opportunities Commission ceases to apply.

On behalf of the Government

BO KONBERG

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Louty Nordling
(Ministry of Public Administration)

DRAFT BILL

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

connected therewith. :

BE IT ENACTED by the State President and the Parliament of the Republic of

South Africa. as follows: â\200\224

Definitions

1. In this Act. unless the context otherwise indicatesâ\200\224

â\200\234advertisementâ\200\235 means any notice or invitation to the public or to any section
of the public. irrespective of the medium used to communicate such notice or invitation and irrespective of the form or method in which such notice or invitation is communicated. and â\200\234advertiseâ\200\235 has a corresponding meaning :

â\200\234Commissionâ\200\235 means the Equal Opportunities Commission establish by section
17;

â\200\234educational institutionâ\200\235 means any educational institutionâ\200\224

(a) which is managed or operated by the State or with the aid of state funds:

(b) established or registered by or under any law; or

(c) of which the standard of education or training which is provided there. is determined or controlled by or under any law:

â\200\234employeeâ\200\235 means a person who is in the employment of or who works for an

- employer and receives a reward or is entitled to receive a reward or who works under the direction or supervision of an employer:

â\200\234employerâ\200\235 meansâ\200\224

(a) a person who employs another person or provides such person with employment and rewards or expressly or tacitly undertakes to reward such person; or !

(b) a person who intends to become an employer within the meaning of paragraph (a);

â\200\230executive actâ\200\231 meansâ\200\224

(a) any authorization which is granted to a person under any law, including any permit. licence. registration. approval. permission. concession. benefit or grant provided for in terms of a law: or

(b) any bursary. loan. subsidy or financial allocation granted to a person by the State. a statutory council or a local authority:

â\200\234local authorityâ\200\235 meansâ\200\224.

(a) an institution or a body contemplated in section 84(1)(f) of the Provincial Government Act. 1961 (Act No. 32 of 1961).

(b) a local authority as defined in section 1(1) of the Black Local Authorities Act. 1982 (Act No. 102 of 1982):

(c) a regional services council established under section 3 of the Regional Services Councils Act. 1985 (Act No. 109 of 1985):

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(d) aboard of management as defined in section 1 of the Rural Areas Act (House of Representatives). 1987 (Act No. 9 of 1987);

(e) a local council established under section 2 of the Local Councils Act (House of Assembly). 1987 (Act No. 94 of 1987); or

(f) any other institution established by law which the Minister by notice in the Gazernte declares to be a local authority for purposes of this Act:

â\200\230marital statusâ\200\235 means the status ofâ\200\224

(a) being single:

(b) being married:

(c) being married but not living together with the other spouse as husband and wife;

(d) being divorced; or

(e) living together with a person of the opposite sex as husband and wife as if married;

â\200\234Ministerâ\200\235 means the Minister of Justice:

â\200\234occupational controlling bodyâ\204¢ means any body. board. association or orga
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nization. whether or not established or recognized by law. which exercises control by way of membership. registration or any other system over the practice by persons of a particular profession. occupation, craft or trade:

*â\200\230partnershipâ\200\231â\200\231 means also a partnership yet to be established:

â\200\230registered associationâ\200\231 meansâ\200\224

(a) a trade union registered under the Labour Relations Act, 1956 (Act No. 28 of 1956).

(b) an employersâ\200\231 organization registered under the Labour Relations Act, 1956;

(c) a pension fund organization registered under the Pension Funds Act, 1956 (Act No. 24 of 1956); ;

(d) a friendly society registered under the Friendly Societies Act, 1956 (Act No. 25 of 1956);

(e) a medical scheme registered under the Medical Schemes Act. 1967 (Act No. 72 of 1967).

CHAPTER 1 !
PROHIBITION OF DISCRIMINATION

Discrimination on the ground of sex

2. (1) In any of the circumstances specified in sections 5,7.8 and 10 to 13, a person discriminates against a female on the ground of sex if such a personâ\200\224

(a) treats the female less favourable, solely on the ground of her sex or on the ground a quality which is generally attributed to females, than that person treats or would treat a male; :

(b) refuses or deliberately fails to afford the female, solely on the ground of her

sex or on the ground of a quality which is generally attributed to females, any benefit or opportunity over which such a person has control; or imposes a requirement or condition with regard to the female which such person imposes or would impose equally with regard to a male, butâ\200\224

(i) which is such that the females who can comply with it are considerably less in proportion to the proportion of males who can comply with it;
(ii) which cannot be reasonably justified irrespective of the sex of the person to whom it is applied; and
(iii) which is to her detriment because she cannot comply with it.
(2) In any of the circumstances specified in sections 5. 7, 8 and 10 to 13, a person discriminates against a male on the ground of sex if such a personâ\200\224

(a) treats the male less favourable, solely on the ground of his sex or on the ground of a quality which is generally attributed to males, than such a person treats or would treat a female;

(b) refuses or deliberately fails to afford the male. solely on the ground of his sex or solely on the ground of a quality which is generally attributed

to males. any benefit or opportunity over which such a person has

* control; or

(c)

imposes a requirement or condition with regard to the male which such person imposes or would impose equally with regard to a female, butâ\200\224
(i) which is such that the males who can comply with it are considerably less in proportion to the proportion of females who can comply with it;
(ii) which cannot be reasonably justified irrespective of the sex of the person to whom it is applied: and
(iii) which is to his detriment because he cannot comply with it:

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

Discrimination on the ground of marital status

3. In any of the circumstances specified in sections 5. 7. 8 and 10 to 13. a person discriminates against another person on the ground of marital status if the first-mentioned personâ\200\224

(a)

treats the other person less ours, cy on the ground of his or her marital status or solely on the ground of a quality which is generally attributed to persons with the marital status of such other person. than the said first-mentioned person treats he would treat a person with another marital status;

refuses or deliberately fails to afford the other person, solely on the ground of his or her marital status or solely on the ground of a quality which is generally attributed to persons with the marital status of such other person, any benefit or opportunity over which the said first-mentioned person has control; or

imposes a requirement or condition with regard to the other person which the said first-mentioned person imposes or would impose equally with regard to a person with another marital status. butâ\200\224

(i) which is such that persons with a marital status similar to that of such other person who can comply with it. are considerably less in propor-tion to the proportion of persons with another marital status who can comply with it;

(ii) which cannot be reasonably justified irrespective of the marital status of the person to whom it is applied; and

(iii) which is to such other personâ\200\231s detriment because he or she cannot comply with it. oe

Discrimination on the ground of pregnancy

4. In any of the circumstances specified in sections 5, 7, 8 and 10 to 13. a person discriminates against a female on the ground of pregnancy if such a personâ\200\224

(a)

(b)

treats the female less favourable. solely on the ground of her pregnancy or solely on the ground of a quality which is generally attributed to pregnant females. than such a person treats or would treat a female who is not pregnant;

refuses or deliberately fails to afford the female, solely on the ground of her pregnancy or solely on the ground of a quality which is generally attributed to pregnant females. any benefit or opportunity over which such a person has control; â\200\234 y i

imposes a requirement or condition with regard to the female which such a person imposes or would impose equally with regard to a female who is not pregnant, butâ\200\224

(i) which is such that pregnant females who can comply with it are considerably less in proportion to the proportion of females who are not pregnant who can comply with it;

(ii) which cannot be reasonably justified irrespective whether the female to whom it is applied is pregnant or not: and

(iii) which is detrimental to the pregnant female because of her pregnancy she cannot comply with it.

Prohibition of discrimination by employers

5. (1) No employer shall with regard toâ\200\224
(a) any employment or position offered; 5
(b) any arrangements made to recruit or select candidates for employment or any position;
(c) any advertisement in which the employment or position is advertised: or
(d) the conditions, including the remuneration and service benefits, on which the employment or position is offered. 10
discriminate against a person on the ground of sex. marital status or pregnancy.
(2) No employer shall with regard toâ\200\224
(a) remuneration and other service benefits;
(b) opportunities for promotion;
(c) training or any other benefits, facilities or services; 15
(d) the transfer or reorganization of staff;
(e) the reduction or dismissal of staff; or
(f) general working conditions,
discriminate against an employee in the employer's employment on the ground of sex. marital status or pregnancy. 20
(3) Subsections (1) and (2) shall. in so far as they prohibit discrimination on the ground of sex. not apply to any employment where the sex of the employee or prospective employee is a genuine occupational requirement for the relevant employment or position.

Equal remuneration for equal work 2s

6. (1) Where an employee performs the same work or work of the same value than that which is performed by another employee of the opposite sex in the employment of the same employer, andâ\200\224

(a) the first-mentioned employee's contract of employment, solely on the ground of his or her sex, contains a term which is less favourable for such 30 employee than a similar term in the last-mentioned employee's contract of employment. the clause in the first-mentioned employeeâ\200\231s contract of

_ employment shall be deemed to have been adjusted so that it is not less favourable; or

(b) the first-mentioned employee's contract of employment. solely on the 35 ground of his or her sex. does not contain a term which the last-mentioned employee's contract of employment contains, and of which the effect is to place the first-mentioned employee in a less favourable position than the last-mentioned employee. the first-mentioned employee's contract of em-ployment shall be deemed to also contain such term. 40

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

Prohibition of discrimination by employment agencies

7. (1) No employment agency shall with regard toâ\200\224
(a) the advertisement of employment or positions or the recruitment of 45 candidates for such employment or positions; or
(b) the placing of candidates for employment or positions,
discriminate against a person on the ground of sex. marital status or pregnancy.
(2) Subsection (1) shall not. in so far as it prohibits discrimination on the ground of sex. apply in respect of employment or a position where the sex of a person is a 50 genuine occupational requirement for the relevant employment or occupation.

Prohibition of discrimination by partnerships

8. (1) No partnership shall with regard toâ\200\224 iy
(a) any position as a partner in the partnership which is offered by the partnership;
(b) any arrangements made by the partnership to invite persons or to recruit or select candidates for a position as partner;
(c) any advertisement in which the partnership advertises a position as partner; or
(d) the conditions, including the remuneration and other partnership benefits, on which the partnership offers the position.
discriminate against a person on the ground of sex, marital status or pregnancy.
(2) No partnership shall with regard toâ\200\224
(a) the benefits or profit-sharing by partners in the partnership;
(b) training or any other benefits, facilities or services;
(c) the dissolution of a partnership against a partner; or
(d) general working conditions,
discriminate against a partner in the partnership on the ground of sex, marital status or pregnancy.
(3) Subsections (1) and (2) shall, in so far as they prohibit discrimination on the ground of sex, not apply with regard to a position as partner where the sex of the partner is a genuine occupational requirement for the relevant position.

Work, employment and positions where sex is an occupational requirement

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

requirement.
Prohibition of discrimination by registered societies

10. (1) No registered society shall with regard to the admission, or the conditions of admission. of persons as members of the society discriminate against a person on the ground of sex. marital status or pregnancy.

(2) No registered society shall with regard toâ\200\224

(a) the benefits, facilities or services which it offers its members;

(b) the conditions of membership or the variation of the conditions of

˜ membership: or

(c) the renewal, extension. withdrawal or suspension of membership,
discriminate against a member of the society on the ground of sex, marital status or

pregnancy.
Prohibition of discrimination by occupational controlling bodies

11. (1) No occupational controlling body shall with regard to the admission or conditions of admission of persons to the profession, occupation. craft or trade which is controlled by the occupational controlling body, discriminate against a person on the ground of sex. marital status or pregnancy. : /

(2) No occupational controlling body shall with regard toâ\200\224

(a) the benefits. facilities or services which it offers to persons who have been admitted to the profession. occupation, craft or trade;
(b) the conditions of any registration, admission or recognition of such persons, or the variation of such conditions;
(c) the renewal. extension, withdrawal or suspension of any such registration,

admission or recognition,
discriminate against a person who practise such profession. occupation, craft or trade on the ground of sex, marital status or pregnancy.

(3) Subsections (1) and (2) shall, in so far as they prohibit discrimination on the ground of sex. not apply with regard to the participation in a competitive sport or

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

Prohibition of discrimination by educational institutions

12. (1) No educational institution shall with regard toâ\200\224

(a) the admission of persons to or the expulsion of persons from such an institution; or

(b) the education or training which is provided at such an institution,

discriminate against a person on the ground of sex, marital status or pregnancy.
(2) Subsection (1) shall not preventâ\200\224

(a) an educational institution which is managed exclusively or mainly for pupils or students of a particular sex to refuse the application of a person of the opposite sex for admission to the institution: or

(b) separate living quarters for males and females who receive education or

training at such an institution.
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Prohibition of discrimination in respect of executive acts

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

Sexual harassment

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

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

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

(4) For the purpose of this section sexual harassment means any conduct where a person makes an unwelcome sexual suggestion to another person. or makes an unwelcome request for a sexual favour to another person. or engages in any other unwelcome conduct of a sexual nature in relation to another person. in circum-stances where such other person has reasonable grounds to believe that the rejection of such conduct may prejudice him or herâ\200\224

(a) in any application for employment or a position with an employer or for admission to an educational institution: or

(b) in the continuation or the circumstances of his or her employment with an employer or of his or her studies at an educational institution.

Jurisdiction of Industrial Court

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

Certain agreements invalid

16. (1) Subject to the other provisions of this Act or any exclusion or exemption

under section 31. no agreement. whether in writing or verbally and whether concluded before or after the commencement of this Act. shall be valid in so far as it is contrary to a provision of this Act.

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

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: : CHAPTER II
PROMOTION OF EQUAL OPPORTUNITIES

Equal Opportunities Commission

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

Objects of Commission

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

Functions of Commission
ay |

19. (1) In order to achieve the objects of section 18. the Commission may. in addition to that which the Commission shall or may do in terms of the other provisions of this Actâ\200\224

(a) gather and process information on any matter to which this Act applies:
(b) undertake studies and surveys on such a matter;

(c) make recommendations on such a matter to any relevant authority:

(d) draw up and disseminate information documents on such a matter:

(e) draw up and promote draft legislation on such a matter.

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

Constitution of Commission

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

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

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

Chairperson

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

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

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

Period of office and remuneration

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

five years.

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

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

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

Meetings

23. (1) A meeting of the Commission shall be held at such time and place determined by the chairperson.

(2) The majority of the members of the Commission shall form a quorum for a meeting of the Commission.

(3) The decision of the majority of the members of the Commission present at a meeting of the Commission. shall constitute a decision of the Commission. and in the event of an equality of votes on any matter the chairperson of the Commission shall, in addition to a deliberative vote. also have a casting vote.

(4) In this section â\200\234chairpersonâ\200\235 includes a member of the Commission d esignated
under section 21(3).

Discriminatory laws

24. (1) The Commission may inquire into a provision of any law. including a provision of the common law. which distinguishes between males and females. or has a different effect in its application between males and females. with a view to establishing the possible unreasonableness of such a distinction or effect.

(2) If the Commission finds that the provision concerned constitutes an unreasonable distinction between males and females or has an unreasonable effect with respect to either males or females. the Commission may submit proposals for the amendment or repeal of the provision. together with a report of the Commission's inquiry. to the Minister.

(3) Subsection (1) shall not affect any provision which on the ground of physical attributes. other than mere strength or stamina. applies differently to males and females or applies only to males or only to females.

Discriminatory practices

25. (1) The Commission may inquire into any arrangement. custom. condition or circumstance which is generally applied or in force with regard to any matter and which distinguishes between males and females. or which has a different effect on males and females. with a view to establishing the possible unreasonableness of such a distinction or effect.

(2) If the Commission finds that the arrangement. custom. condition or circumstance concerned constitutes an unreasonable distinction between males and females or has an unreasonable effect with 1espect to either males or females. the

. Commission may submit proposals (including legislative proposals) for the elimination of such unreasonable distinction or effect. together with a report of its inquiry. to the Minister.

(3) Subsection (1) shall not affect any arrangement. custom. condition or circumstance which on the ground of physical attributes. other than mere strength or stamina. or on the ground of the religious rights of a religious group. applies differently to males and females or applies only to males or only to females.

Commissionâ\200\231s power to conduct inquiries

26. (1) The Commission shall for the purposes of an inquiry under section 24 or 25 have the same powers as the South African Law Commission under the South African Law Commission Act. 1973 (Act No. 19 of 1973).

(2) The Commission may undertake any inquiry under sections 24 or 25 in

conjunction with the South African Law Commission. and the South African Law Commission may undertake any such inquiry on behalf of the Commission if requested thereto by the Minister.

Code of Conduct

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

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

females;
(b) the elimination of such arrangements. customs. conditions or circumstances

or of any unreasonable distinction or effect which such arrangements. customs. conditions or circumstances may have;

(c) the creation of special measures directed towards establishing equality between males and females, with due regard to the interests of other persons:

(d) care centres for children of working parents;

(e) the treatment of female employees with regard to pregnancy and childbirth, including maternity benefits;

(f) in general the promotion of equality and equal opportunities between males and females. |

(2) The Commission shall submit to the Minister a code drawn up under subsection (1) for his approval.

(3) The Minister may publish the code in the Gazette with such amendments as the Minister may think fit. or without amendments.

(4)(a) A code published under subsection (3). may be amended from time to time.

(b) For the purposes of such an amendment subsections (1). (2) and (3) shall apply mutatis mutandis.

(5)(a) A provision of the code shall not be binding. except where. and to the extent to which. the Minister declares it binding by notice in the Gazette.

(b) When the Minister declares a provision of the code binding. the Minister may determine that any contravention of or any failure to comply with such a provision shall be an offence.

Complaints with regard to contraventions

28. (1) The Commission may with regard to any alleged contravention of a provision of this Act which is brought to the notice of the Commission. take such steps which it may regard as necessary under the circumstances. includingâ\200\224

(a) the giving of legal and other advice to any person who has been prejudiced because of the contravention:

(b) the lodging of a complaint on behalf of the prejudiced person with the Ombudsman in terms of the Ombudsman Act. 1979 (Act No. 118 of 1979). in so far as such contravention falls within the jurisdiction of the Ombudsman;
the lodging of a complaint on behalf the prejudiced person with the Industrial Court. referred to in section 17 of the Labour Relations Act, 1956 (Act No. 28 of 1956). in so far as such contravention falls within the jurisdiction of the Industrial Court: or

(d) the submission of representations on behalf of the prejudiced person to any person who is responsible for the contravention or has control over its rectification.

(2) For the purposes of section (1) the Commission may order any person who is responsible for the alleged contravention of a provision of this Act to submit to it within a fixed period a report in writing on the circumstances regarding the alleged offence.

Annual report

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

Submission of certain reports and proposals of the Commission to Parliament

30. Copies ofâ\200\224
(a) an annual report of the Commission submitted to the Minister in terms of section 29: and
(b) any reports and proposals of the Commission submitted to the Minister in terms of section 24 or 25,
shall be tabled by the Minister in Parliament within 14 days after its receipt. if

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

CHAPTER III
MISCELLANEOUS PROVISIONS

Exclusions and exemptions 5

31. (1) The Minister may by notice in the Gazette, on the conditions and subject to the qualifications determined by the Minister. exclude from the operation of one or more of or all the provisions of this Actâ\200\224
(a) any industry, profession, occupation, craft or trade;
(b) any person or institution or category of persons or institutions; 10
(c) any agreement or category of agreements;
(d) any category of employment or positions; or
(e) any category of executive acts.
(2) The Minister may exempt any person in writing. on the conditions and subject to the qualifications determined by him. from the operation of one or more of or all 15 the provisions of this Act.
(3) The Minister may at any timeâ\200\224
(a) amend or revoke a notice issued under subsection (1) by notice in the Gazette,
(b) amend or revoke an exemption granted under subsection (2) by written 20 notice to the exempted person.

Permissible discrimination in favour of females

32. This Act shall not affectâ\200\224

(a) a provision of any law, the common law or the law of indigenous groups. a provision of any agreement or the domestic rules of any society or 25 organization, or any rule of practice, custom or understanding aimed at protecting or treating differently any particular female or females, or any

particular category of females. or females in general, for reasons inherent to the physical nature of the female;

(b) the performance of military service in so far as it is only required of males; 30

(c) any special treatment which a female receives because of pregnancy or childbirth or recovery after childbirth: or .

(d) any special measures of which â\200\230the sole purpose is the furthering of the development and advancement of females to enable them to realize their

. natural talents and potential in equality with males. 35

Permissible discrimination on the ground of religious rights

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

organization.
. Prohibition of victimization 40

34. An employer shall not dismiss an employee from his or her employment. or reduce the scale of the employee’s remuneration, or alter the terms or conditions of the employee’s employment to terms and conditions which are less favourable. or alter the employeeâ\200\231s position in relation to other employees in the service of such an
employer to the employeeâ\200\231s detriment, because of the fact, or because such 45 employer suspects or believes. whether or not the suspicion or belief is justified or correct, that the said employeeâ\200\224

(a) has lodged a complaint or intends to lodge a complaint under section 28 with the Commission. or has supplied or intends to supply the Commission with any information in connection with such an employeeâ\200\231s employment 50 with that employer;

(b) has laid or intends to lay a matter under section 4(1)(c) of the Ombudsman Act, 1979 (Act No. 118 of 1979), with the Ombudsman;

(c) has applied or intends to apply to the Industrial Court to declare any conduct of that employer in terms of section 15 to be a unfair labour practice; or 5

(d) has applied or intends to apply to a court of law for relief with regard to the said employeeâ\200\231s employment with that employer.

Offences and penalties

35. Any person whoâ\200\224
(a) contravenes or fails to comply with a provision of the code referred to in section 27(5)(b):
(b) fails to comply with an order under section 28(2);
(c) contravenes a provision of section 34;
(d) furnishes information or makes a statement to the Commission which is false in a material respect knowing it to be false,
shall be guilty of an offence and on conviction be liable to a penalty not exceeding RS 000 or to imprisonment for a period not exceeding six months.

Insertion of section 2A in Act 118 of 1979

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

â\200\230Appointment, conditions of service and functions of Assistant Ombudsman

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

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

(3) The Assistant Ombudsman shall, subject to the control and directions of the Ombudsman, deal in the name of the Ombudsman with matters brought before the Ombudsman under section 4(1)(e).â\200\235.

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

37. Section 4 of the Ombudsman Act. 1979, is hereby amended by the addition after paragraph (d) of subsection (1) of the following paragraph:
â\200\234(e) he has been discriminated against in an unlawful manner by the State or an institution, body, society or organization referred to in the definition of â\200\231public moneysâ\200\231 on the ground of sex, marital status or pregnancy within the meaning of the Promotion of Equal Opportunities Act, 1993, and that he has suffered serious prejudice or account of such discrimination,â\200\235 .

Act binds State *
38. This Act shall bind the State.

Short title and commencement ;

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

in the Gazette.

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