South African Law Reform Commission

DISCUSSION PAPER 142

LEGISLATION ADMINISTERED BY THE DEPARTMENT OF PUBLIC SERVICE AND ADMINSTRATION

PROJECT 25

STATUTORY LAW REVISION

SEPTEMBER 2016

CLOSING DATE FOR COMMENTS

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INTRODUCTION

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973.

The members of the Commission are –

The Honourable Mr Justice J Kollapen Chairperson)
Professor V Jaichand (Member);
Advocate M Sello (Member);
Mr I Lawrence (Member); and
Ms N Siwendu (Member)
Prof A Ogutto (Member);and
Prof M Carnelley (Member).

The Secretary is Mr TN Matibe. The project leader responsible for this investigation is Professor V Jaichand. The researcher assigned to this investigation is Ms Tania Prinsloo.

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PREFACE

The object of the South African Law Reform Commission (SALRC) is to do research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law.

The current project 25 investigation of the SALRC into the legislation administered by the Department of Public Service and Administration (DPSA) emphasizes compliance with the Constitution. Redundant and obsolete provisions that were identified in the course of this investigation are recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution. Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process.

Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

This discussion paper has been prepared to elicit responses from the public on the preliminary findings and proposals on legislation administered by the DPSA contained in this paper. The SALRC has liaised with the DPSA in the investigation leading to the development of this discussion paper and we acknowledge the valuable assistance we have received from the DPSA, particularly from officials in the Legal Services section.

This discussion paper contains the Commission's preliminary proposals. The views, conclusions, and recommendations that follow should not be regarded as the SALRC's final views.

The closing date for comments on this discussion paper is 30 November 2016.

Any enquiries about this paper should be addressed to the researcher allocated to the project, Ms Prinsloo. Her contact particulars appear on the previous page.

PRELIMINARY PROPOSALS

A Preliminary recommendations

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution are redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are approximately 2800 statutes on the statute book. Two Statutes are administered by the Department of Public Service and Development, namely the Public Service Act 103 of 1994 and the Public administration Management Act 11 of 2014. After analysis of the statutes the SALRC proposes as follows.

a) Some obsolescence and redundancy occur in the Public Service Act (Proc 103 of 1994), as indicated in Chapter 3 of this discussion paper.

Public Service Act 103 of 1994

No and year of law	Short title	Extent of Amendment
103 of 1994	Public Service Act	1.Amendment of section 30(3)(c) Subsection (c) of subsection 3 of section 30 is hereby amended by deleting the letter and number (3)(b) in subsection (c) **31 Unauthorized remuneration** **…** (3) For the purposes of subsection (1) *(a)* (i)- *(a)* **'this Act'** includes any law repealed by this Act; *(b)* **'determination of the Minister'** includes any recommendation of the Public Service Commission established by section 209 (1) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), or of any commission for administration, public service commission or other like institution established by or under, or which functioned in accordance with, any such law; and *(c)* **'section 30'** includes any corresponding provision of any such law.

b) The Public Administration Management Act 11 of 2014 does not have any non-equal, obsolescence or redundancy of provisions.
c) The DPSA was responsible for the State Information Technology Agency Act 88 of 1998 but this responsibility has been moved to the Department of Telecommunications and Postal Services by Proclamation No 47, 2014 in Government Gazette No 37839 of 15 July 2014.

CHAPTER 1

BACKGROUND AND SCOPE OF PROJECT 25

A Introduction

1 The objects of the South African Law Reform Commission

1.1 The objects of the SALRC are set out in the South African Law Reform Commission Act 19 of 1973, as follows: to do research with reference to all branches of the law of the Republic, and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including:

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic; and
- the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body aiming to renew and improve the law of South Africa on a continual basis.

2 History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, ordinances, and proclamations of the former colonies and republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its Project 25 on statute law, which aims to establish a permanently simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act 94 of 1981, which repealed approximately 790 post-Union statutes.

1.4 All legislation enacted prior to 1994, the year which heralded the advent of constitutional democracy in South Africa, remains in force. Numerous pre-1994 provisions do not comply with the country's new Constitution, a discrepancy

exacerbated by the fact that some of those provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the (then) Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination, as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004 the SALRC included in its law reform programme an investigation on statutory law to revise all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the current investigation emphasizes compliance with the Constitution. Redundant and obsolete provisions that are identified in the course of this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes exist, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

B What is statutory law revision?

1.8 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.[1] Such revision

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[1] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from

lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or "live". If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.9 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.[2] Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or is presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that may be repealed:[3]

(a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
(b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
(c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
(d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
(e) repealing provisions e.g. "Section 33 is repealed/shall cease to have effect";
(f) commencement provisions once the whole of an Act is in force;
(g) transitional or savings provisions that are spent;
(h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
(i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

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http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008 (hereinafter referred to as Law Commission for England and Wales *Background Notes on Statute Law Repeals*).

2 See Law Commission for England and Wales *Background Notes on Statute Law Repeals* the *Background,* par 6.

3 See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 7.

1.12 The Law Commission of India notes that in England the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded”, and “obsolete” were defined in memoranda to Statute Law Revision Bills as follows: [4]

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time

- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required

- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate

- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one

- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise

- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.13 Statutory provisions usually become redundant as time passes.[5] Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

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4 Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from http://lawcommissionofindia.nic.in/51-100/Report96.pdf on 28 May 2008.

5 See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 9 and 10.

1.14 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act 33 of 1957[6] mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.[7] Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

C The initial investigation

1.15 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of revising the South African statute book for constitutionality, redundancy, and obsoleteness. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001 and submitted to the SALRC in April 2001.[8] These four steps are outlined here.

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6 With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

7 See Law Commission for England and Wales *Background Notes on Statute Law Repeals* the *Background*, par 8.

8 "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001 available upon request from pvanwyk@justice.gov.za.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.

2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.

3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.

4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.16 The SALRC has finalised the following reports, which propose reform of discriminatory areas of the law or the repeal of specific discriminatory provisions:

(a) the Recognition of Customary Marriages (August 1998);

(b) the Review of the Marriage Act 25 of 1961 (May 2001);

(c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);

(d) Traditional Courts (January 2003);

(e) the Recognition of Muslim Marriages (July 2003);

(f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);

(g) Customary Law of Succession (March 2004); and

(h) Domestic Partnerships (March 2006).

D Scope of the project

1.17 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation is limited to those statutes or provisions in statutes that –

- Differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.18 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.[9] However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, where anomalies and obvious inconsistencies

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9 Albertyn prepared a '*Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution*', specifically for the SALRC in February 2006 available upon request from pvanwyk@justice.gov.za.

with the Constitution are identified, recommendations have been made on how to address them.

E Consultation with stakeholders

1.19 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered "inside" knowledge – of the kind usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invites the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This process ensures that all relevant provisions are identified during the review, and are dealt with responsively and without creating unintended negative consequences.

1.20 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC's preliminary findings and proposals. The next step the SALRC undertakes is the development of a discussion paper in respect of legislation of each department. On the paper's being approved by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

F Consultation with the Department of Public Service and Administration

1.21 The DPSA currently administers two statues, namely the Public Service Act, Proc 103 of 1994 and the Public Administration Management Act, 11 of 2014. The SALRC has reviewed both statutes for constitutionality and redundancy. The SALRC wishes to express its appreciation to the Chief Directorate Legal Services of the DPSA for its assistance and cooperation in this review.

CHAPTER 2

FORMAL EQUALITY IN THE CONSTITUTION OF SOUTH AFRICA, 1996

A Introduction

2.1 This chapter aims to set out how courts interpret the equality provision in the Constitution. It begins with an exposition of the right and then explains the terminology associated with the interpretation. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution, as described above in par 1.18.

2.2 Formal equality is manifested once every person has rights, but substantive equality manifests once the results of a law or conduct are observed with regard to a particular group. If a certain group or individual is hampered by a seemingly equal rule or conduct, formal equality (where everybody is treated the same) needs to be tempered by substantive equality.[10]

2.3 Consequently, a law or a provision in a law which appears on the face of it to be neutral and non-discriminatory, but which has – or could have – discriminatory effect or consequences, has been left to the judicial process. This part is left to the courts to determine, as can be seen from the judgements below. The “actual social and economic” situations of “groups or individuals” have to be examined to ascertain whether they, in fact, have these rights.

2.4 Both these areas will be attended to in the following discussion, although the investigation focuses only on the occurrence of formal equality in the DPSA legislation.

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[10] I Curry and J de Waal in association with Lawyers for Human Rights and the Law Society of South Africa *The Bill of Rights Handbook* 5th ed Juta, 2005 (Hereafter the *Bill of Rights Handbook)* 232 and 233.

B The Equality Clause in the Constitution

2.5 Section 9 of the Constitution of South Africa, 1996 provides as follows with regard to equality:

> ***9 Equality***
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

2.6 Curry and de Waal in *The Bill of Rights Handbook*[11] state that the "formal idea of equality" encompasses the fact that people similar in some ways should be treated similarly and that people not similar should not be treated the same. Substantive equality encompasses the principle that reasonable accommodation should be made for dissimilar people in order to treat them similarly.[12] This is especially important in South Africa with its history of inequality.[13]

1 The definitions: section 9 explained

(a) Terms used to describe unfair discrimination

2.7 The specified grounds for discrimination are those mentioned in section 9 of the Constitution, namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Analogous grounds are those where discrimination is based on attributes and characteristics such that human dignity

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11 *Bill of Rights Handbook* 230-231.
12 *MEC for Education Kwazulu-Natal and others v Pillay* 2008 (1) (SA) 474 (CC) para 71-76.
13 *Bill of Rights Handbook* 232.

might be denied or badly affected. Such discrimination can also result in patterns of inequality.

2.8 Discrimination means differentiation based on illegitimate grounds, namely those stipulated above. By contrast, differentiation occurs where people are separated on the basis of legitimate grounds. Rationality is achieved if the reasons for the law or act of separation are legitimate. A court will ascertain whether the purpose of the law justifies differentiation.[14]

2.9 The fairness of discrimination is determined by the following factors: the "position of the complainants in society", and "whether they have suffered patterns of disadvantage"; where "the discrimination is based on a specific ground", the "nature of the provision or power and the purpose sought to be achieved" by the provision; and the "extent to which the discrimination has affected the rights and interests of the complainant", and "whether this has led to an impairment of their fundamental dignity".[15]

C Current Legislation and Case Law

2.10 Equality is established by basing the rules and conduct of the State on section 9 of the Constitution. Similarly, the horizontal application of the Constitution means that the rules which regulate the behaviour of private persons must be based on the Constitution.[16]

2.11 In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,[17] the following is stated:

> [16] Neither s 8 of the interim Constitution nor s 9 of the 1996 Constitution envisages a passive or purely negative concept of equality; quite the contrary. In *Brink v Kitshoff NO*, O'Regan J, with the concurrence of all the members of the Court, stated:
>
> Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to

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14 *Bill of Rights Handbook* 239 – 259.

15 *Harksen v Lane NO and Others* 1998 (1) (SA) 300 (CC) http://www.saflii.org.za/za/cases/ZACC/1997/12.html. 324.

16 Act 108 of 1996.

17 (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) see www.saflli.org, http://www.saflii.org/za/cases/ZACC/1998/15.html.

> proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4).

2.12 Section 9 of the Constitution sets out the rights which every person has in terms of equality. What is important for purposes of law reform is the determination of what constitutes inequality in legislation or government action. A relevant case, as mentioned in the *Bill of Rights Handbook*, is *Harksen v Lane and Others.*[18]

1 The case of *Harksen v Lane NO and Others*

2.13 In the case of *Harksen v Lane* (hereafter referred to as *Harksen*), judged on the interim Constitution of 1993,[19] the process of determining whether a law has an unequal effect is set out. The case involved a woman who was married to an insolvent person. Her property was "confiscated" together with that of her insolvent husband's according to section 21 of the Insolvency Act 24 of 1936.

2.14 Mrs Harksen's property was attached upon the insolvency of her husband, and she was summonsed to appear at the first meeting of the creditors in the insolvent estate of her husband. She had to produce all documentation relating to her financial affairs and that of her husband.

2.15 One of the questions that needed to be answered was whether section 21 of the Act, and the portions of sections 64 and 65 that provided for the inquiry into the estate, business affairs or property of the spouse of an insolvent person, were constitutional.

2.16 Section 20(1) of the Insolvency Act states that the effect of sequestrating the estate of an insolvent person is to divest the person of his or her estate, which will then vest in the Master of the High Court until a trustee has been appointed.

2.17 Section 21(1) provides for the vesting of the estate of a solvent spouse in the Master of the High Court, and eventually the trustee. Section 21(2) states that

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[18] 1998 (1) (SA) 300 (CC) http://www.saflii.org.za/za/cases/ZACC/1997/12.html.

[19] It is commonly accepted that the previous equality clause, section 8, is broadly similar to the new one, section 9. *Bill of Rights Handbook* 234 and 235.

the solvent spouse has to prove that his or her properties fall within one of the exceptions mentioned therein.

2.18 The contention was that the vesting of a solvent spouse's property in the Master amounts to unequal treatment of solvent spouses and discriminates against such people. The effect is to impose severe burdens, obligations and disadvantages on spouses, beyond those which are applied to other persons whom the insolvent person had dealings or close relationships with, or whose property is found in the possession of the insolvent person. Section 21 is seen also to discriminate against spouses who are not traders.

2 The equality analysis

2.19 The Court per Goldstone J (majority judgement) set out the following equality analysis[20]-

1. Is there differentiation between people or categories of people?
2. If so, is there a rational connection between the differentiation and the legitimate government purpose it is designed to achieve?
3. If there is no rational connection, the equality provision is being violated.
4. If there is rational connection, there might still be unfair discrimination.
5. Therefore, does the differentiation amount to discrimination:

a. Is it on a specific ground? If so, it is presumed to be discrimination, but the presumption is rebuttable.
b. If it is not on a specific ground, does substantive inequality occur? (The analogous grounds).

6. Does the differentiation amount to unfair discrimination:

a. If discrimination occurred on a specified ground, it is presumed to be unfair, but the presumption is rebuttable.
b. If discrimination occurred on an analogous ground, the complainant has to establish unfairness by proving substantive inequality.

7. If discrimination is found to be unfair, a determination in terms of the limitations article 36[21] of the Constitution has to be made to determine whether the discrimination is tenable in society.

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20 *Bill of Rights Handbook* 235-236 and *Harksen* 320 – 325.

21 **36. Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

> 8. Is the discrimination fair? If yes, then there is no violation of the equality section.

2.20 In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Constitutional Development*,[22] Justice Ackerman on pages 571 to 573 states the following:

> [18] This does not mean, however, that in all cases the rational connection inquiry of stage *(a)* must inevitably precede stage *(b)*. The stage *(a)* rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable…

2.21 According to Professor Albertyn,[23] *Harksen v Lane* indicates the following with regard to the equality test[24]-

- The "contextual assessment of the impact" of the rule or conduct is important.
- Due regard has to be paid to the "degree of disadvantage suffered by the complainant and his or her group".
- The "purpose of the act or conduct".
- The "extent to which the complainant's rights and interests are invaded".
- The weighing of "factors in the overall assessment" of the importance of "human dignity".

2.22 Professor Albertyn is of the view that the *Harksen* case "unduly prioritises dignity and limits the values and principles that underlie equality", "while the purpose of remedying the disadvantage is suppressed". Real freedom of choice and the fulfilment of personhood are denied.[25] She considers that a "flexible test" is required so that courts can respond to" disadvantage, stigma, and vulnerability; to differing claims of recognition and redistribution; and to competing claims for power, status, and resources".[26]

2.23 Professor Albertyn points out that freedom of choice and the ability to move out of a group need to substantially exist. Women should not be defined by their communities, but should be able to participate, contest and redefine the norms and standards that affect them.[27]

> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

22 1998 (2) SACR 556 (CC).

23 Albertyn, C *The Stubborn Persistence of Patriarchy: Gender equality and Cultural Diversity in South Africa* 2009 2 *Constitutional Court Review,* 165 – 208.

24 185.

25 185.

26 186.

27 192.

2.24 Professor Albertyn also notes the need to democratise existing customs to allow women to freely participate in a given culture.[28] She adds another criterion for testing inequality: are there conditions to participate, and is there freedom of choice? She thus adds the following points to the *Harksen* test:

- Focusing on "context"; and
- "Name, describe, and engage in the full set of values and principles." [29]

3 The State's obligation: section 9(4)

2.25 Section 9(4) imposes the obligation on the State to enact legislation that can prevent or prohibit unfair discrimination. As a result, the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 has been enacted.

2.26 This Act, as stated in the long title, gives effect to section 9, read with section 23(1) of schedule 6 of the Constitution, to achieve the following aims: "prevent and prohibit unfair discrimination and harassment", "promote equality and eliminate unfair discrimination", and "prevent and prohibit hate speech".

4 The Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)

2.27 In *MEC for Education: Kwazulu-Natal and Others v Pillay*,[30] Chief Justice Langa of the Constitutional Court held as follows:

> [39] Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by s 9(3) and (4) of the Constitution, which read:
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex,

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28 192.

29 194.

30 *Pillay v MEC for Education: KwaZulu-Natal and Others* 2006 (6) SA 363 (EqC) and *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21; see http://www.saflii.org.za.

> pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

> The Equality Act is clearly the legislation contemplated in s 9(4) and gives further content to the prohibition of unfair discrimination. Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, of course, religion and culture. Although this court has regularly considered unfair discrimination under s 9 of the Constitution, it has not yet considered discrimination as prohibited by the Equality Act. Two preliminary issues about the nature of discrimination under the Act therefore arise.

> [40] The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to 'fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights'. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.

2.28 Litigants should make use of the Equality Act rather than the Constitution, now that the Promotion of Equality and the Prevention of Unfair Discrimination Act is in force.[31] The following two cases illustrate how the Equality Act functions.

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[31] Justice Langa para 40.

5 The equality analysis according to the Equality Act

2.29 The issue before the Equality Court in the *Pillay* case[32] was whether the school's refusal to permit a learner to wear a nose stud at school was an act of unfair discrimination in terms of the Equality Act. The school she attended refused to allow an exception under its code of conduct; therefore she was not allowed to wear the nose stud at school.

2.30 The *Pillay* case, as heard in the equality court, indicated that the appellant has to make out a prima facie case that discrimination took place.

2.31 Section 13 of the Promotion of Equality and the Prevention of Unfair Discrimination Act deals with the issue of burden of proof. Section 13 provides that if the complainant makes out a prima facie case of discrimination, either the respondent must 'prove, on the facts before the court, that the discrimination did not take place as alleged; or the respondent must prove that the conduct was not based on one or more of the prohibited grounds". If the discrimination did take place on a ground in paragraph (a) of the definition of "prohibited grounds", then it is unfair, unless the respondent proves that the discrimination is fair; or if discrimination took place on a ground in paragraph (b) of the definition of "prohibited grounds", then it is unfair if one or more of the conditions set out in paragraph (b) of the definition of "prohibited grounds" is established, unless the respondent proves that the discrimination is fair.

2.32 The respondent therefore has to prove either that discrimination did not take place or that it was not unfair. Thereafter, the court must determine whether the discrimination was unfair. This is determined by referring to section 14.

2.33 Section 14 of the Promotion of Equality and the Prevention of Unfair Discrimination Act deals with the determination of fairness or unfairness. This section provides that measures designed to protect or advance persons who are disadvantaged by unfair discrimination, or members of such groups or categories of persons, do not amount to unfair discrimination. In determining whether the defendant has proved unfair discrimination, the following is taken into account:

1. The context.
2. Whether the discrimination impairs or is likely to impair human dignity.

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[32] *Pillay v MEC for Education: KwaZulu-Natal and Others* 2006 (6) SA 363 (EqC).

3. The impact or the likely impact of the discrimination on the complainant.
4. The position of the appellant in society and whether she or he suffers from disadvantage or belongs to a group that suffers from such patters of disadvantage.
5. The nature and extent of the discrimination.
6. Whether the discrimination is systemic in nature.
7. Whether the discrimination has a legitimate purpose.
8. Whether and to what extent the discrimination achieves its purpose, and whether there are less restrictive and less disadvantageous means to achieve the purpose.
9. Whether and to what extent the respondents have taken steps as being reasonable in the circumstances to address the disadvantage that arises from one or more prohibited ground and to accommodate diversity.
10. Whether the discrimination reasonably and justifiably differentiates or fails to differentiate between persons according to objectively determined criteria intrinsic to the activity concerned.

2.34 In *Pillay* as heard in the Constitutional Court[33], Justice Langa held that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. The judgment states that these values are not mutually exclusive but enhance and reinforce each other.[34]

2.35 In this case, the differences between culture, religion, and voluntary religious practices were analysed. Discrimination on the grounds of both religion and culture was found to have been committed in terms of the Equality Act.[35] The fairness of the discrimination then had to be determined.[36]

2.36 Discrimination on the grounds of religion and culture is prohibited in the Constitution in sections 9, 15 and 30; and in terms of section 14(3)(i)(ii) of the Equality Act. The court held that the school had a duty to reasonably accommodate the learner's subjective beliefs regarding her cultural and religious preferences in wearing a nose stud. "Reasonable accommodation" was defined as an "exercise in proportionality" within the specific context of the case.[37]

2.37 Two questions needed to be answered, according to Justice Langa. Firstly, what would the impact on the school have been if it had exempted the

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33 *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21.
34 Para 63.
35 Para 47 – 68.
36 Para 69.
37 Para 69 – 76.

learner from its code of conduct so that she could wear a nose stud? Second, what would the impact on the learner have been of the school not granting this exemption from its code of conduct to allow her to wear a nose stud? The judgment stated that the impact on the school of exempting the learner from complying with the code of conduct by wearing a nose stud would not have been enormous. By contrast, the impact on the learner of the school's not granting such exemption from its code of conduct would have been undesirable.[38] The question was whether the fundamental right to equality had been violated; in turn, this question required the Court to determine what obligations the school bore to accommodate diversity reasonably.[39]

2.38 The Constitutional Court held that even voluntary religious and cultural practices, if sincerely followed, need to be protected by the Constitution.[40] The school could have avoided the discrimination by granting exemption from its code of conduct. Therefore, the school unfairly discriminated against the learner.[41]

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38 Para 77-79; 85 - 91; 94 - 102 and 112.
39 Para 81.
40 Para 65 – 68; 88.
41 Para 71 - 73; 76 - 81; 85 - 91 and 93 – 98.

CHAPTER 3

THE PUBLIC SERVICE ACT, 1994 (PROCLAMATION 103 OF 1994)

A Introduction

3.1 The aim of this chapter is to consider the Public Service Act with a view to identifying any obsolescence, redundancy and inequality in its wording. No instances of inequality have been found.

B The New Constitution

3.2 The Constitution of the Republic of South Africa, 1996[42] deals with the basic values and principles governing public administration. These are described in the following paragraphs.

3.3 Section 195 provides as follows:

> (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
>
> (a) A high standard of professional ethics must be promoted and maintained.
>
> (b) Efficient, economic and effective use of resources must be promoted.
>
> (c) Public administration must be development-oriented.
>
> (d) Services must be provided impartially, fairly, equitably and without bias.
>
> (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
>
> (f) Public administration must be accountable.
>
> (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
>
> (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
>
> (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

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42 108 of 1996.

(j) The above principles apply to –

(i) administration in every sphere of government;
(ii) organs of state; and
(iii) public enterprises.

(k) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(l) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(m) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(n) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.

3.4 Section 197 provides as follows regarding the Public Service:

1. Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.
2. The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
3. No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.
4. Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.

C Current legislation

3.5 The current legislation governing the Public Service is the Public Service Act, Proclamation 103 of 1994 and the Public Administration Management Act 11 of 2014.[43]

3.6 The following Amendment Acts have been passed: the Public Service Second Amendment Act 13 of 1996; Public Service Laws Amendment Act 47 of 1997; Public Service Laws Amendment Act 86 of 1998; Public Service Amendment Act 5 of 1999; and the Public Service Amendment Act 30 of 2007.

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[43] This Act has been accented to on 19 December 2014. The commencement date is still to be proclaimed.

Delegated legislation made in terms of the Public Service Act is the Public Service Regulations, 2001.[44]

3.7 The Public Service Act of 1994[45] brought together the 11 existing administrations. Currently there are 49 national departments[46]. However, the Public Service Regulations and the Public Service Staff Codes still contained differentiation between personnel.[47]

3.8 The old Public Service Staff codes were repealed and replaced with the new Public Service Regulations in 1999.[48] Labour relations have also been reorganised, because the Labour Relations Act of 1996 now also applies to public servants.[49]

3.9 The Public Service of South Africa is now divided into national departments, provincial departments and Offices of the Premier national government components and provincial government components.[50]

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44 *Government Notice* No R 1 of 5 January 2001 as amended.

45 Proclamation 104 of 1994.

46 The DPSA indicated that to date there are 49 national departments, 3 of which will be removed in the next financial year due to renaming.

47 WA Joubert et al *The Law of South Africa* First Reissue Volume 21 Butterworths Durban 2000 (hereinafter Lawsa) 287–288, par 416 vol 21

48 Government Notice 847 in Government Gazette 20271 of 1 July 1999

49 Article 212 and Schedule 6 of the Labour Relations Act 66 of 1995

50 LAWSA 293 par 420 vol 21 and section 7(1) and (2) of the Public Service Act:

7 Public service, departments and heads of departments

(1) The public service established by section 197 (1) of the Constitution shall be structured and organised as provided for in this Act.

(2) For the purposes of the administration of the public service there shall be-

(a) national departments and Offices of the Premier mentioned in column 1 of Schedule 1;
(b) provincial departments mentioned in column 1 of Schedule 2;
(c) national government components mentioned in column 1 of Part A of Schedule 3; and
(d) provincial government components mentioned in column 1 of Part B of Schedule 3.

D Inequality, redundancy, and obsolescence

1. Section 31: Unauthorised remuneration

3.10 Section 31 of the 1994 Act deals with unauthorised remuneration, as cited in the next paragraph.

3.11 **31 Unauthorised remuneration**

(3) For the purposes of subsection (1) (a) (i) –
(a) **'this Act'** includes any law repealed by this Act;
(b) **'determination of the Minister'** includes any recommendation of the Public Service Commission established by section 209 (1) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), or of any commission for administration, public service commission or other like institution established by or under, or which functioned in accordance with, any such law; and
(c) **'section 30 (b)'** includes any corresponding provision of any such law.

3.12 Subsection 3(c) mentions section 30(b) of the Public Service Act. However, there is no section 30(b) in the Public Service Act, but the Act does have a section 30(3)(b). The wording of the Act should be changed accordingly.

3.13 The DPSA advises that subsection 3(c) should be amended to section 30. The current section 30 was section 30(b).

E Public Service Act Regulations

3.14 The Public Service Amendment Act of 2007 defines the expression “executive authority” as follows:

'executive authority', in relation to –
(a) the Presidency or a national government component within the President's portfolio, means the President;
(b) a national department or national government component within a Cabinet portfolio, means the Minister responsible for such portfolio;
(c) the Office of the Commission, means the Chairperson of the Commission;
(d) provincial government components mentioned in column 1 of Part B of Schedule 3.
(d) the Office of a Premier or a provincial government component within a Premier's portfolio, means the Premier of that province; and
(e) a provincial department or a provincial government component within an Executive Council portfolio, means the member of the Executive Council responsible for such portfolio;

3.15 The regulations, however, still refer to an "executing authority" and state as follows:[51]

> (e) **"executing authority"** means the executing authority as defined in section 1 (1) of the Act, except with regard to the appointment and other career incidents of a head of department, in which case it means the executing authority as contemplated in section 3B of the Act;

3.16 The SALRC proposes that the definition of "executing authority" should be amended in the Regulations to be in line with the amendments effected by the Public Service Amendment Act of 2007.

3.17 Therefore, "executing authority" should be changed to "executive authority". The SALRC believes that this proposed amendment is receiving the attention of the DPSA in its revised regulations.

3.18 Section 3B of the Act, as mentioned in 3.15 above, was repealed by section 5 of the Public Service Amendment Act of 2007. The Regulations need to be amended accordingly. The SALRC believes that this proposed amendment is also receiving the attention of the DPSA in its revised regulations.

3.19 Item B2A in Part III of the Regulations deals with planning, work organisation and reporting. The item provides that directives issued in terms of section 3(3)*(e)* of the Public Service Act shall specify which determinations on the organisational structure of the department shall be subject to consultation with the Minister. The reference to section 3(3)*(e)* of the Act is outdated because section 3(3)*(e)* has been repealed.

3.20 Item B2A states as follows:

> B.2A Directives issued in terms of section 3(3)(e) of the Act, shall specify which determinations on the organisational structure of the department, shall be subject to consultation with the Minister. For purposes of such consultation, the information to be supplied shall be as set out in such directive.

3.21 The SALRC is of the view that this section should be re-evaluated to ascertain its value. Since the SALRC is not currently proposing a solution, no suggestions on this item are included in the proposed draft Bill. The SALRC

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[51] *Government Notice No. R. 1* of 5 January 2001 as amended.

however believes that this proposed amendment is also receiving the attention of the DPSA in its revised regulations.

F The Public Administration Management Act 2014

3.22 Post 1994 a new Public Administration Management Bill was published for comment in *Government Gazette* 36521 vol 575 on 31 May 2013. The Bill became an Act in December 2014 but has yet to be operationalised.

3.23 The Act is discussed in Chapter 4 of this paper.

CHAPTER 4

THE PUBLIC ADMINISTRATION MANAGEMENT ACT 2014

A Introduction

5.1 The Public Administration Management Act 11 of 2014 must be read in conjunction with the existing Public Service Act of 1994, as the Act does not address all issues relevant to the Public Service.

5.2 This chapter aims to introduce the new Public Administration Management Act very briefly.

B History of the New Public Administration Management Act

5.3 This Bill was introduced in Parliament in June 2008, but was withdrawn in November 2008.[52] On 31 May 2013 the Bill was published in the *Government Gazette* for public comment.[53]

5.4 It was introduced in the National Council of Provinces as a proposed section 76 Bill at the request of the Minister for the Public Service and Administration. It was withdrawn on 12 November 2013. It was assented to on 19 December 2014 but has not yet commenced.[54]

C The objects of the Act

5.5 The Act states in its preamble, amongst others, that-

- The Constitution provides that the Republic is one, sovereign, democratic state and that the government is constituted as national,

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52 http://www.dpsa.gov.za.
53 Government Gazette No. 36521 vol 575,
54 Public Administration Management Act 11 of 2014,

provincial and local spheres of government which are distinctive, interdependent and interrelated.

- Administration in every sphere of government is governed by the values and principles governing public administration in section 195(1) of the Constitution.
- section 197(1) and (2) of the Constitution provides for a public service within the public administration, which must function and be structured, in terms of national legislation, and the terms and conditions of employment of which must be regulated by national legislation.
- section 197(4) of the Constitution provides that provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations within a framework of uniform norms and standards applying to the public service.
- sections 151(3) and 153 of the Constitution provide that a municipality has the right to govern, on its own initiative, the local government affairs of its community and to structure and manage its administration, subject to national and provincial legislation, as provided for in the Constitution.
- section 154(1) of the Constitution stipulates that the national government and provincial governments must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

5.6 In a briefing by the DPSA to the Committee of Parliament on the Public Administration Management Act it was stated (in the summary):

> The Act is foreseen to among other important matters, place a prohibition on civil servants from doing business with the state and this prohibition includes, amongst others, spouses of employees
>
> It further provides for individual transfers and secondments; the criteria and procedure for transfers, and paves the way for minimum norms and standards in the public service and municipalities.[55]

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[55] In http: //pmg.org.za/committee-meeting/21248: Public Administration Management Act: Department of Public Service and Administration Briefing Public Administration Management Act: Department's briefing: National School of

5.7 The briefing document also states the following:

> The Act creates a framework that would cover existing legislation like the Public Service Act and the Municipal Systems Act.
>
> It creates mechanisms for equitable distribution of resources across all spheres of government as highlighted by the secondment and transfer policies. It streamlines constitutional values through the spheres of government and responds to the National Development Plan.[56]

5.8 The objects of the Act are described in section 2:

2. Objects of Act

The objects of this Act are to-

(a) promote and give effect to the values and principles in section 195 (1) of the Constitution;
(b) provide for the transfer and secondment of employees;
(c) promote a high standard of professional ethics in the public administration;
(d) promote the use of information and communication technologies in the public administration;
(e) promote efficient service delivery in the public administration;
(f) facilitate the eradication and prevention of unethical practices in the public administration; and
(g) provide for the setting of minimum norms and standards to give effect to the values and principles of section 195 (1) of the Constitution.

D Constitutional Compliance

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government on New Curriculum, Public Service Commissioner Vacancies: Adoption of Committee Report.

[56] In http: //pmg.org.za/committee-meeting/21248: Public Administration Management Act: Department of Public Service and Administration Briefing Public Administration Management Act: Department's briefing: National School of government on New Curriculum, Public Service Commissioner Vacancies: Adoption of Committee Report.

5.9 The Act was examined for compliance with the constitutional provisions on equality. No instances of incompatibility with the equality provisions of the Constitution were identified in the Act.

A LIST OF LEGISLATION

ACTS ADMINISTERED BY THE DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION

Public Service Act, Proc 103 of 1994

Public Service Amendment Act 13 of 1996, commenced 12 April 1996

Public Service Second Amendment Act 76 of 1996, commenced 1 May 1997

Public Service Laws Second Amendment Act 93 of 1997, commenced 17 December 1997

Public Service Amendment Act 5 of 1999, commenced 1 July 1999

Public Service Laws Amendment Act 47 of 1997, commenced 1 July 1999

Public Service Laws Amendment Act 86 of 1998, commenced 1 July 1999

Public Service Amendment Act 30 of 2007

Public Administration Management Act 11 of 2014

OTHER ACTS

The Promotion of Equality and the Prevention of Unfair Discrimination Act No 4 of 2000

Labour Relations Act 66 of 1995

The Constitution of South Africa, 1996

BILLS

Memorandum on the Objects of the Public Administration Management Bill, 2013

Public Administration Management Bill 2013 B55

http:www.dpsa.gov.za/legislation.php

PUBLIC SERVICE REGULATIONS

Public Service Regulations 2001 Government Notice No. R. 1 of 5 January 2001 as amended

PROCLAMATIONS AND GOVERNMENT NOTICES

GN 847 in GG 20271 of 1 July 1999 Withdrawal of public service staff code and other prescripts relating to the public service

Proclamation No 47, 2014 in Government Gazette No 73839 of 15 July 2014

B LIST OF CASES

Harksen v Lane NO and Others 1998 (1) (SA) 300 (CC) http://www.saflii.org.za/za/cases/ZACC/1997/12.html.

MEC for Education KwaZulu-Natal and Others v Pillay 2008 (1)(SA) 474 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (2) (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) see www.saflli.org, http://www.saflii.org/za/cases/ZACC/1998/15.html. 1998 (2) SACR 556 (CC).

Pillay v MEC for Education: KwaZulu-Natal and Others 2006 (6) SA 363 (EqC) and *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21; see http://www.saflii.org.za

C LISTS OF SOURCES

INTERNET

Albertyn C “Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution” February 2006 available upon request from pvanwyk@justice.gov.za

Albertyn, C *The Stubborn Persistence of Patriarchy: Gender equality and Cultural Diversity in South Africa* 2009 2 *Constitutional Court Review* 165

Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008

Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001 “Feasibility and Implementation Study on the Revision of the Statute Book” available upon request from pvanwyk@justice.gov.za.

Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from http://lawcommissionofindia.nic.in/51-100/Report96.pdf on 28 May 2008.

Parliamentary Monitoring Group: pmg.org.za/committee-meeting/21248 Public Administration Management Act

Department of Public Service and Administration Briefing in http: //pmg.org.za/committee-meeting/21248 Public Administration Management Act: Department's briefing: National School of government on New Curriculum, Public Service Commissioner Vacancies: Adoption of Committee Report

TEXTBOOKS

Currie, I and De Waal, J in Association with Lawyers for Human Rights and the Law Society of South Africa *The Bill of Rights Handbook* (5 ed) Juta and Company LTD, 2005

WA Joubert et al *The Law of South Africa* First Reissue Volume 21 Butterworths Durban 2000

ANNEXURE D

DRAFT BILL

GENERAL EXPLANATORY NOTE

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

_____Words underlined with a solid line indicate insertions in existing enactments.

DRAFT PUBLIC SERVICE LEGISLATION AMENDMENT BILL

BILL

To amend the legislation relating to the Department of Public Service and Administration in order to bring it in line with the equality provision in the Constitution of the Republic of South Africa; to provide for the repeal of certain redundant and obsolete legislation relating to the Department of Public Service and Administration; to correct obsolete and redundant provisions in current legislation relating to the Department of Public Service and Administration; and to provide for matters relating thereto.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

1 Amendment of laws

(a) The laws referred to the Schedule 1 to this Act are hereby amended to the extent mentioned in the third column thereof.

2. Short title and commencement

This Act is called the Public Service Legislation Amendment Bill and will come into operation on a date fixed by the President in the *Gazette.*

Schedule 1

LAWS AMENDED

Public Service Act 103 of 1994

No and year of law	Short title	Extent of Amendment
103 of 1994	Public Service Act	1.Amendment of section 30(3)(c) Subsection (c) of subsection 3 of section 30 is hereby amended by deleting the letter and number (3)(b) in subsection (c) **31 Unauthorized remuneration** **…** (3) For the purposes of subsection (1) *(a)* (i)- *(a)* **'this Act'** includes any law repealed by this Act; *(b)* **'determination of the Minister'** includes any recommendation of the Public Service Commission established by section 209 (1) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), or of any commission for administration, public service commission or other like institution established by or under, or which functioned in accordance with, any such law; and *(c)* **'section 30'** includes any corresponding provision of any such law.