



PROJECT 25

STATUTORY LAW REVISION

**REPORT ON LEGISLATION ADMINISTERED
BY THE DEPARTMENT OF PUBLIC SERVICE AND
ADMINISTRATION**

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**To Mr TM Masutha (Adv), MP, Minister of Justice and Constitutional
Development**

**I am honoured to submit to you in terms of section 7(1) of the South African
Law Reform Commission Act 19 of 1973 (as amended) for your
consideration, the Commission's Report on Statutory Law Revision
Legislation administered by the Department of Public Service and
Administration.**

**Mr Justice JN Kollapen
Chairperson: South African Law Reform Commission**

Date:

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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.

EXECUTIVE SUMMARY

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 found as follows.

- a) Some obsolescence and redundancy occur in the Public Service Act (Proc 103 of 1994), as indicated in Chapter 3 of this Report.
- b) The Public Administration Management Act 11 of 2014 does not have any unequal, 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.

2. Consequently the Commission recommends as follows:

Public Service Act 103 of 1994

No and year of law	Short title	Extent of Amendment
103 of 1994	Public Service Act	<p>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)</p> <p>31 Unauthorized remuneration</p> <p>...</p> <p>(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</p>

		<p>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</p> <p>(c) 'section 30' includes any corresponding provision of any such law.</p>
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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 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;

¹ See the 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 (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.

- (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.

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

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.

might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

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 1957⁶ 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 obsolescence. 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.

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

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

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.

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 other Departments

1.21 SALRC wishes to express its appreciation to the respondents to Discussion Paper 142.

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.

¹⁰ Curry I and de Waal J 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

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

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.saflii.org, <http://www.saflii.org.za/cases/ZACC/1998/15.html>.

is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The needs 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

(b) *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

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.

(c) The equality analysis

2.19 The Court per Goldstone J (majority judgement) set out the following equality analysis²⁰-

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 36²¹ of the Constitution has to be made to determine whether the discrimination is tenable in society.
8. Is the discrimination fair? If yes, then there is no violation of the equality section.

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.
 (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.

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 test²⁴-

- 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

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.

their communities, but should be able to participate, contest and redefine the norms and standards that affect them.²⁷

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

(d) *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”.

(e) *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, pregnancy, marital status, ethnic or social origin, colour,

²⁷ 192.

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>.

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.

³¹

Justice Langa par 40.

(f) The equality analysis according to the Equality Act

2.29 The issue before the Equality Court in the *Pillay* case³² 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.

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 patterns 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

³³ *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21.

³⁴ Par 63.

³⁵ Par 47 – 68.

³⁶ Par 69.

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 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

³⁷ Par 69 – 76.

³⁸ Par 77-79; 85 - 91; 94 - 102 and 112.

³⁹ Par 81.

⁴⁰ Par 65 – 68; 88.

⁴¹ Par 71 - 73; 76 - 81; 85 - 91 and 93 – 98.

CHAPTER 3

THE PUBLIC SERVICE ACT, 1994 (PROCLAMATION 103 OF 1994): RESPONSES AND EVALUATION

1. Summary

3.1 All responding Departments supported and agreed with the findings of the Commission.

3.2 The DPSA advised that an amendment will be effected when the next substantial amendment to the Public Service Act is done as this is a technical amendment that does not warrant an immediate amendment to the Act.

3.3 They indicated that the Minister for the Public Service and Administration has brought into effect the Public Service Regulations, 2016 on 1 August 2016 whereby the Public Service Regulations, 2001 has been replaced entirely. The Public Service Regulations, 2016 has made the required changes to “executing authority” as proposed.

3.4 The South African Police Service and the Departments of Public Enterprises, Rural Development and Land Reform, Tourism, Health and Arts and Culture and the Office of the Public Service Commission have indicated that the findings of the discussion paper are not applicable to them. They however support and agree with the findings of the Commission.

3.5 The Department of Higher Education and Training has made some comments which are discussed hereunder.⁴²

A Proposals in the discussion paper: Inequality, redundancy, and obsolescence

2. Section 31: Unauthorised remuneration

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

3.7 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.

3.8 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.

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

B Public Service Act Regulations

3.10 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;

3.11 The regulations, however, still refer to an “executing authority” and state as follows:⁴³

- (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;

3.12 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.

3.13 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.

3.14 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.

3.15 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.

3.16 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.

3.17 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

⁴³

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

suggestions on this item are included in the proposed draft Bill. The SALRC however believes that this proposed amendment is also receiving the attention of the DPSA in its revised regulations.

C. Exposition of comments

3.18 Mr Mashwahle Diphofa, Director-General of the DPSA stated:

“Your recommendation to amend section 31(3)(c) of the Public Service Act, 1994 is appreciated, however, we advise that such an amendment will be effected when the next substantial amendment to the Public Service Act is done as this is a technical amendment that does not warrant an immediate amendment to the Act.

As regards the Public Service Regulations, we confirm that the Minister for the Public Service and Administration has brought into effect the Public Service Regulations, 2016 on 1 August 2016 whereby the Public Service Regulations, 2001 has been replaced entirely. The Public Service Regulations, 2016 has made the required changes to “executing authority” as proposed”

3.19 Adv. M Dlamini, Director: Legal and Legislative Services/Skills of the Department of Higher Education and Training stated:

“The Department has perused the Discussion Paper and have noted the obsolescence and redundancy that occur in the Public Service Act 103 of 1994 (PSA). The Department has further perused chapter 3 and 4 of the Discussion Paper, noted the advice, suggestions and views by the SALRC which are according to the Department valid and as such supports same and is agreeable with the proposed amendments.

The SALRC might also want to relook at the following for consideration:

1. Section 9 of the Public Administration Management Act (PAMA) places an obligation on government employees to disclose the financial interests of their spouses and a person living with the said employee as if they were married to each other to the Head of the Institution, failing which an employee is liable for an offence and may be subjected to a disciplinary hearing for misconduct. This amounts to discrimination based on category of an individual as an employee of government. This seems to be inconsistent with section 9(3) of the Constitution of South Africa Act 106 of 1996.
2. Section 31 of the PSA which deals with the unauthorised remuneration refers to the “Head of Department” and the “Accounting officer” whereas section 9 of PAMA refers to “Head of Institution.” PAMA does not define “Head of Institution” whereas PSA defines “Head of Department” There is no uniformity between the two Acts.”

3.20 Lieutenant General JK Phahlane, Acting National Commissioner: South African Police Service indicated that:

“The Service, amongst other things, supports the preliminary findings and proposals of the Commission, that the two statutes, namely the Public Service Act, 1994 (Proclamation 103 of 1994) and the Public Administration Management Act, 2014 (Act No.11 of 2014) administered by the Department

of Public Service and Administration are compatible with section 9 (Equality Clause) of the Constitution of the Republic of South Africa, 1996.

Furthermore, the Service also supports the proposed Public Service Legislation Amendment Bill of the Commission which seeks to repeal certain redundant and obsolete provisions of the Public Service Act, 1994.

The Discussion Paper does not have any an impact on the mandate and functions of the Service.

The service has the following comments on the Discussion Paper:

- Ad page 21 footnote 42, the Constitution must be cited in full to read “the Constitution of the Republic of South Africa, 1996.”
- Ad page 23 paragraph 3.8, amend Labour Relations Act pf 1996 to read “Labour Relations Act, 1995 (Act No 66 of 1995).”

3.21 Mr Mogokare Richard Seleke, Director-General: Department of Public Enterprises indicated that:

“I have had the opportunity to peruse through both your letters and the discussion paper enclosed thereunder. I wish to advise that I support and endorse the proposals made by SALRC in both the Public Service Act 103 of 1994 and the Public Administration Management Act 2014.”

3.22 Mr PM Shabana, Director-General: Department of Rural Development and Land Reform stated that:

“Having regarded the fact that all of the proposals of the South African Law Reform Commission (SALRC) are receiving the attention of the Department of Public Service and Administration (DPSA), the Department has no comments on the SALRC’s preliminary findings and proposals on legislation administered by the DPSA.”

3.23 Mr Victor Tharage, Director-General: Department of Tourism indicated that:

“...I am pleased to inform you that the department notes and supports the legislative reforms bought about by project 25 to clean existing legislation and aligning it with the constitution. The Department however does not have any comments or additional proposals on the document.”

3.24 Mr MP Matsoso, Director-General: Department of Health states:

“...We are in agreement with the legislative proposal to the Public Service Act, (Act Proclamation 103 of 1994) as contained in the draft Public Service Amendment Bill and the proposed amendment to the Public Service Regulations to bring them in line with the Public Service Amendment Act, 2007 (Act No. 30 of 2007).”

3.25 Mr Y Ndima, Acting Director-General: Department of Arts and Culture indicates that:

“... We thank you for the work done in reviewing the legislation administered by the Department of Public Service and Administration. We wish to inform that we do not have any comments thereto...”

3.26 The Office of The Public Service Commission has indicated that they have no response on the Discussion Paper.

D. Evaluation and recommendation

3.27 The South African Police Service and the Departments of Public Enterprises, Rural Development and Land Reform, Tourism, Health and Arts and Culture have indicated that the findings of the discussion paper are not applicable to them. They however support and agree with the findings of the Commission.

3.28 The DPSA has indicated that the recommendation to amend section 31(3)(c) of the Public Service Act, 1994 is appreciated, however, they advise that such an amendment will be effected when the next substantial amendment to the Public Service Act is done as this is a technical amendment that does not warrant an immediate amendment to the Act.

3.29 As regards the Public Service Regulations, they confirmed that the Minister for the Public Service and Administration has brought into effect the Public Service Regulations, 2016 on 1 August 2016 whereby the Public Service Regulations, 2001 has been replaced entirely. The Public Service Regulations, 2016 has made the required changes to “executing authority” as proposed.

3.30 The South African Police Service has indicated that Ad page 21 footnote 42, the Constitution must be cited in full to read “the Constitution of the Republic of South Africa, 1996” and Ad page 23 paragraph 3.8, amend Labour Relations Act of 1996 to read “Labour Relations Act, 1995 (Act No 66 of 1995).

3.31 The Department of Higher Education and Training has however made some specific remarks.

E The Public Administration Management Act 2014

3.32 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.

3.33 The Act is discussed in Chapter 4 of this report.

F Commission recommendations

3.34 Except for the DPSA, the Police and the Department of Higher Education and Training, no amendments have been suggested. While the Commission stands by the recommendation of the DPSA that the Act be amended at the next available opportunity, it will discuss the responses of the Department of Higher Education and Training in the next chapter.

CHAPTER 4

THE PUBLIC ADMINISTRATION MANAGEMENT ACT 2014: RESPONSES AND EVALUATION

1. Summary

4.1 As these issues do not fall within the mandate of project 25 investigations, the Commission does not make a recommendation or expresses an opinion. It merely states the relevant issues at play.

4.2 It seems that the Regulations (regulation 19) are drafted wider than the Act (section 9), the regulations might be unlawful as it is wider than the prescribed mandate of the Act as the types of disclosures necessary as mentioned in the Regulations (regulation 19) are wider than those mentioned in section 9 of the Act. The regulations also do not make references to disclosures by spouses or domestic life partners, as mentioned in section 9 of the Act.

4.3 Section 9 and the relevant regulations also seem to be drafted to widely as it does not contain a waiver as to the right not to incriminate one self.

A Proposals in the discussion paper

4.4 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.⁴⁴

⁴⁴ Department of Public Service and Administration Briefing in 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. In <http://pmg.org.za/committee-meeting/21248>

4.5 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.⁴⁵

4.6 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.

B Constitutional Compliance

4.7 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.

⁴⁵ Department of Public Service and Administration Briefing in 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. In <http://pmg.org.za/committee-meeting/21248>

C. Exposition of comments

4.8 The Department of Higher Education and Training has indicated that the SALRC might also want to consider the following:

“1. Section 9 of the Public Administration Management Act (PAMA) places an obligation on government employees to disclose the financial interests of their spouses and a person living with the said employee as if they were married to each other to the Head of the Institution, failing which an employee is liable for an offence and may be subjected to a disciplinary hearing for misconduct. This amounts to discrimination based on category of an individual as an employee of government. This seems to be inconsistent with section 9(3) of the Constitution of South Africa Act 106 of 1996.

2. Section 31 of the PSA which deals with the unauthorised remuneration refers to the “Head of Department” and the “Accounting officer” whereas section 9 of PAMA refers to “Head of Institution.” PAMA does not define “Head of Institution” whereas PSA defines “Head of Department” There is no uniformity between the two Acts.”

D. Evaluation and recommendation

1 Privacy and the right against self - incrimination

4.9 The mandate of project 25 investigations only extends to the lack of equality and redundancy and obsolescence in legislation. The exposition hereunder relates to aspects outside of the mandate of the investigation that can possibly be unconstitutional. The Commission does not make a finding but merely expresses the relevant issues.

2. Address by the (then) Minister of Public Service and Administration

4.10 There is a strong need to eradicate corruption in the public service, amongst others. This recalls section 195 of the Constitution which requires a public service that has democratic values, and principals, including [the] “promotion and maintenance of a high standard of ethics.”⁴⁶ The then Minister of

⁴⁶ DPSA Ngoako Ramatlodi: Address by the Minister of Public Service and Administration at the Integrity Leadership Summit, KZN (22/10/2015) accessed on 2 June 2017 (Address by the Minister of Public Service and Administration) p 2.

Public Service and Administration highlights several documents geared to stamp out corruption in the public service, like the Code of Conduct, the Bahto Pele principles as well as the Service Charter of 2013. In 2013 Cabinet approved the Integrity Management Framework. This framework manages conflict of interest that can result from “Financial interests, gifts, hospitality and other benefits, and remunerative work outside the public service.”⁴⁷

4.11 Conflict of interest is a situation where the employee’s personal interests conflict with their duties as a civil servant. Therefore the financial disclosure framework was introduced to prevent this situation. Its aim is to prevent conflict of interests by promoting just and fair administrative actions by officials in senior positions and protecting the public service from unlawful administrative actions as a result of ulterior motives. Other categories of employees than senior management will have to form part of this framework. The Public Service Regulations 2001 is in the process of being amended to address this issue. The Public Administration Management Act is a direct result of the unethical behaviour in the whole administration of government. This Act provides that all employees are to disclose their financial interest.⁴⁸

4.12 This is reflected in section 9 of the Public Administration and Management Act:

9 Disclosure of financial interest

- (1) An employee must, in the prescribed manner, disclose to the relevant head of the institution all his or her financial interests and the financial interests of his or her spouse and a person living with that person as if they were married to each other, including all-
 - (a) shares and other financial interests in an entity;
 - (b) sponsorships;
 - (c) gifts above the prescribed value, other than gifts received from a family member;
 - (d) benefits; and
 - (e) immovable property.
- (2) Failure by an employee to comply with the obligation referred to in subsection (1) constitutes misconduct.⁴⁹

⁴⁷ The Address by the Minister of Public Service and Administration p 2.

⁴⁸ The Address by the Minister of Public Service and Administration p 3.

⁴⁹ Regulation 19 however states the following and does seem to be drafted wider than section 9 of the Act in terms of types of disclosures. It does not expressly provide for the disclosure by spouses or domestic life partners:

19. Details of interests to be disclosed

The following details of interests shall be disclosed:

- (a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law:
 - (i) The number, nature and nominal value of shares of any type in any public or private company and its name; and
 - (ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.

4.13 The following sections of the 2016 Regulations are applicable:

Definitions

In this Part, unless the context indicates otherwise-

“designated employee” means-

- (a) any member of the SMS;
 - (b) any other person in terms of section 36(3) of the Public Finance Management Act approved or instructed by the relevant treasury to be the accounting officer of a department; or
-
- (b) Income-generating assets:
 - (i) A description of the income-generating asset;
 - (ii) the nature of the income; and
 - (iii) the amount or value of income received.
 - (c) Trusts:
 - (i) The name of the trust, trust reference or registration number as provided by the Master of the High Court, and the region where the trust is registered;
 - (ii) the purpose of the trust, and your interest or role in the trust; and
 - (iii) the benefits or remuneration received (these include fees charged for services rendered).
 - (d) Directorships and partnerships:
 - (i) The name, type and nature of business activity of the corporate entity or partnership; and
 - (ii) if applicable, the amount of any remuneration received for such directorship or partnership.
 - (e) Remunerated work outside the employee’s employment in her or his department:
 - (i) The type of work;
 - (ii) the name, type and nature of business activity of the employer;
 - (iii) the amount of the remuneration received for such work; and
 - (iv) proof of compliance with section 30 of the Act must be attached.
 - (f) Consultancies and retainerships:
 - (i) The nature of the consultancy or retainership of any kind;
 - (ii) the name, type and nature of business activity of the client concerned; and
 - (iii) the value of any benefits received for such consultancy or retainership.
 - (g) Sponsorships:
 - (i) The source and description of direct financial sponsorship or assistance;
 - (ii) the relationship between the sponsor and the employee;
 - (iii) the relationship between the sponsor and the department; and
 - (iv) the value of the sponsorship or assistance.
 - (h) Gifts and hospitality from a source, other than a family member:
 - (i) A description, value and source of a gift;
 - (ii) the relationship between the giver and the employee;
 - (iii) the relationship between the giver and the department; and
 - (iv) a description and the value of any hospitality intended as a gift in kind.
 - (i) Ownership and other interests in immovable property:
 - (i) A description and extent of the land or property;
 - (ii) the area in which it is situated;
 - (iii) the purchase price, date of purchase and the outstanding bond on the property; and
 - (iv) the estimated market value of the property.
 - (j) Vehicles:
 - (i) A description (make and model) of the vehicle;
 - (ii) the registration number of the vehicle; and
 - (iii) the purchase price, date of purchase and the outstanding amount owing on the vehicle.

- (c) any other employee or category of employees determined by the Minister;

“**form**” means a printed or electronic form contemplated in regulation 18;

“**interests**” means the financial interests listed in regulation 19;

“**register**” means the register of interests kept in terms of regulation 17; and

“**remuneration**” means any payment or benefit in cash or in kind.

17. Register of designated employees’ interests

- (1) The Director-General: Office of the Commission shall keep a register of designated employees’ interests, who are members of the SMS.
- (2) A head of department shall keep a register of any other designated employees’ interests not contemplated in subregulation (1).

18. Disclosure of designated employees’ interests

- (1) SMS members, except for a head of department shall, not later than 30 April of each year, disclose to the relevant head of department, in a form prescribed for this purpose by the Minister, particulars of all his or her interests in respect of the period 1 April of the previous year to 31 March of the year in question.
- (2) A head of department shall, not later than 30 April of each year, disclose to the relevant executive authority, in the form prescribed for this purpose by the Minister, particulars of all his or her interests in respect of the period 1 April of the previous year to 31 March of the year in question.
- (3) Any other designated employee not contemplated in subregulations (1) and (2) shall submit to the relevant head of department, on a date and form directed by the Minister, particulars of all his or her interests for the period as may be directed by the Minister.
- (4) Any person who assumes duty as a designated employee on or after 1 April in a year shall make such disclosure within 30 days after assumption of duty in respect of the period from 1 April to date of disclosure.
- (5) The head of department or executive authority, as the case may be, shall ensure that the disclosure of interests by designated employees is submitted electronically to the Commission or the relevant authority as may be directed by the Minister in terms of subregulation (3), unless otherwise determined by the Minister.
- (6) An executive authority shall submit to the Commission a copy of the form submitted to the executive authority in terms of-
- (a) subregulation (2) not later than 31 May of the year in question; or
- (b) subregulation (4), in so far as it relates to a head of department, not later than 30 days after it has been so submitted.
- (7) A head of department shall submit to the Commission a copy of the form submitted to the head of department by a member of the SMS in terms of-
- (a) subregulation (1) not later than 31 May of the year in question; or
- (b) subregulation (4), in so far as it relates to a member of the SMS, excluding a head of department, not later than 30 days after it has been so submitted.

19. Details of interests to be disclosed

The following details of interests shall be disclosed:

- (a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law:
- (i) The number, nature and nominal value of shares of any type in any public or private company and its name; and
- (ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.
- (b) Income-generating assets:
- (i) A description of the income-generating asset;
- (ii) the nature of the income; and
- (iii) the amount or value of income received.
- (c) Trusts:

- (i) The name of the trust, trust reference or registration number as provided by the Master of the High Court, and the region where the trust is registered;
- (ii) the purpose of the trust, and your interest or role in the trust; and
- (iii) the benefits or remuneration received (these include fees charged for services rendered).
- (d) Directorships and partnerships:
 - (i) The name, type and nature of business activity of the corporate entity or partnership; and
 - (ii) if applicable, the amount of any remuneration received for such directorship or partnership.
- (e) Remunerated work outside the employee's employment in her or his department:
 - (i) The type of work;
 - (ii) the name, type and nature of business activity of the employer;
 - (iii) the amount of the remuneration received for such work; and
 - (iv) proof of compliance with section 30 of the Act must be attached.
- (f) Consultancies and retainerships:
 - (i) The nature of the consultancy or retainership of any kind;
 - (ii) the name, type and nature of business activity of the client concerned; and
 - (iii) the value of any benefits received for such consultancy or retainership.
- (g) Sponsorships:
 - (i) The source and description of direct financial sponsorship or assistance;
 - (ii) the relationship between the sponsor and the employee;
 - (iii) the relationship between the sponsor and the department; and
 - (iv) the value of the sponsorship or assistance.
- (h) Gifts and hospitality from a source, other than a family member:
 - (i) A description, value and source of a gift;
 - (ii) the relationship between the giver and the employee;
 - (iii) the relationship between the giver and the department; and
 - (iv) a description and the value of any hospitality intended as a gift in kind.
- (i) Ownership and other interests in immovable property:
 - (i) A description and extent of the land or property;
 - (ii) the area in which it is situated;
 - (iii) the purchase price, date of purchase and the outstanding bond on the property; and
 - (iv) the estimated market value of the property.
- (j) Vehicles:
 - (i) A description (make and model) of the vehicle;
 - (ii) the registration number of the vehicle; and
 - (iii) the purchase price, date of purchase and the outstanding amount owing on the vehicle.

20. Confidentiality of submitted forms and register

- (1) Subject to subregulation (3), only the following persons have access to a submitted form or the register:
- (a) The Minister;
 - (b) the executive authority to whom the form is submitted;
 - (c) the head of department to whom the form is submitted;
 - (d) Commissioners of the Commission;
 - (e) The Director-General: Office of the Public Service Commission;
 - (f) The Director-General: Public Service and Administration;
 - (g) The relevant designated ethics officer as contemplated in regulation 23; and
 - (h) such other persons designated by the Minister, an executive authority, head of department or the chairperson of the Commission for purposes of record keeping and the effective implementation of this Part.

- (2) No person who has access to a submitted form or the register may, except when a court so orders, disclose any information in that form or register to anyone other than-
- (a) a designated employee in respect of his or her submitted form or an entry in the register in respect of that employee; or
 - (b) another person who is permitted access in terms of subregulation (1) or to whom access is granted in accordance with subregulation (3).
- (3) Any person, other than a person contemplated in subregulation (1), may only be given access to a submitted form or the register in terms of section 11 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

21. Conflict of interest

- (1) In so far as conflict of interest relates to members of the SMS:
- (a) The Commission shall verify the interests disclosed.
 - (b) If the Commission is of the opinion that an interest of a SMS employee disclosed in terms of regulation 18 conflicts or is likely to conflict with the execution of any official duty of that employee, it shall verify the information regarding that interest and refer the matter back to the relevant executive authority.
 - (c) Upon the referral, the executive authority shall consult with the employee concerned on appropriate steps to remove the conflict of interest.
 - (d) If the employee, after the consultation referred to in subregulation (1) (c), fails to take the appropriate steps to remove the conflict of interest, the executive authority shall instruct the relevant authority to take disciplinary action against the employee.
 - (e) An executive authority shall, within 30 days after such referral, report to the Commission by-
 - (i) stating whether any steps were taken; and
 - (ii) if steps were taken, giving a description of those steps or providing reasons if no steps were taken.
- (2) In so far as conflict of interest relates to designated employees who are not members of the SMS:
- (a) The head of department shall verify the interests disclosed.
 - (b) If the head of department is of the opinion that an interest of such designated employee disclosed in terms of regulation 18 conflicts or is likely to conflict with the execution of any official duty of that employee, he or she shall consult the employee concerned and, where possible, take appropriate steps to remove the conflict of interest.
 - (c) If the employee, after the consultation referred to in subregulation (2)(b), fails to take the appropriate steps to remove the conflict of interest, the head of department shall take disciplinary action against the employee.
 - (d) A head of department shall no later than 31 August of each year report to the Minister on-
 - (i) the number of cases identified in terms of subregulation (2)(b);
 - (ii) whether any steps were taken;
 - (iii) if steps were taken, a description of those steps; and
 - (iv) if no steps were taken, reasons thereof.

4.14 The regulations further states:

Part 3

Anti-corruption and ethics management

22. Anti-corruption and ethics functions

A head of department shall-

- (a) analyse ethics and corruption risks as part of the department's system of risk management;
- (b) develop and implement an ethics management strategy that prevents and deters unethical conduct and acts of corruption;
- (c) establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct, and such system shall provide for-

- (i) confidentiality of reporting; and
- (ii) the recording of all allegations of corruption and unethical conduct received through the system or systems;
- (d) establish an information system that-
 - (i) records all allegations of corruption and unethical conduct;
 - (ii) monitors the management of the allegations of corruption and unethical conduct;
 - (iii) identifies any systemic weaknesses and recurring risks; and
 - (iv) maintains records of the outcomes of the allegations of corruption and unethical conduct; and
- (e) refer allegations of corruption to the relevant law enforcement agency and investigate whether disciplinary steps must be taken against any employee of the department and if so, institute such disciplinary action.

4.15 The disclosure of the financial interests of spouses and domestic life partners can be relevant in determining whether the reason for this provision has been complied with, namely detecting corruption. The issue of marital privilege also comes into play. This will raise another issue, namely the legal recognition of domestic life partners- do they have a legal privilege as well?

4.17 Issues relating to the right to privacy of the other person and the employee come into play here, and the public interest in fair administration and the right not to incriminate one self. The question can also be asked as to whether the provisions have been formulated to narrowly or to widely.

4.18 The disclosure by the spouses or persons living with the public servant as if married is not required according to the regulations hereunder and the e-disclosure forms of the DPSA.⁵⁰ The regulations also take the types of disclosure further than those mentioned in the Act.

4.19 The question can be asked, why only a person married to or living with the employee as married and not a family member or any other person the employee has dealings with. They can also be corrupt and corrupt the employee so as to do devious deeds with an ulterior motive when performing his or her functions. The following case is in point.

3. The case of Harksen v Lane NO and Others⁵¹

4.20 In the case of *Harksen v Lane*, judged on the interim Constitution of 1993,⁵² the process of determining whether a law has an unequal effect is set

⁵⁰ E disclosure system managed by the DPSA.

⁵¹ As above

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.

4.21 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.

4.22 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. The question has been answered positively, namely that it was discrimination against the spouse on the basis of equality.

4.23 Section 9 of the 2014 Act can be seen as an administrative requirement that is regulating the public service. The following cases deal with constitutionally admissible searches. It is however related to the invasion of privacy and administrative compliance provisions and as such guidance is given on the extent that personal information can be accessed by the state in the exercise of administrative compliance provisions.

4. Privacy

4.24 Davis and Steenkamp⁵³ states that the Constitutional Court in the *Mistry* case⁵⁴ found that the authorisation by a statute to warrantless enter a private home were in breach of the right to privacy as there were no prior safeguards in the Act. These safeguards will be prior judicial authorisation to limit the extent of

⁵² 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.

⁵³ In Cheadle MH, et al *South African Constitutional Law: The Bill of Rights*, Chapter 9 Privacy

⁵⁴ *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (cc) 1998 (4) SA 1127 (CC); (CCT13/97) [1998 ZACC10; 1998 (4) SA 1127; 1998 (7) BCLR880; 2011 (7) BCLR 651(CC) (29 May 1998); <http://www.saflii.org>

the invasion of the right to privacy. The warrantless entry was disproportionate to its purpose and overbroad in its reach.

4.25 In *Magajane vs. Chairperson, North West Gambling Board*⁵⁵ it was stated with regard to the right to privacy that business are further removed from the private sphere of a person (his home) and that in order to protect the public, business has to be regulated. It also distinguished between searches as compliance investigations regulated by legislation and searches where the aim is to gather criminal evidence.

4.26 In this case it was decided that the search and seizure provision in the provincial gambling act applicable does limit the right to privacy. The proportionality of the provision (the right to privacy and the protection of the public) must be determined.

4.27 This case defines a compliance inspection as:

‘the random, overarching supervision of an industry at large, with particular actors in that industry targeted without particular regard to any pre-existing objective save the integrity of the scheme of regulation in general.’

4.28 Enforcement inspections are defined as:

‘A focused investigation of a particular actor under the regime, often with a view to quasi-penal consequences.’

4.29 The court looked at the right to privacy and the importance of the purpose of the limitation. It accepted the public’s right to health, safety, and general welfare to be protected. It also stated with regard to the nature and extent of the limitation that three issues will have a bearing on the nature and extent of the limitation: the level of reasonable expectation of privacy, the degree to which the statutory provision resembles criminal law and the breadth of the provision.

4.30 It stated that the more the business can harm the public, the less its expectation of privacy would be. (Privacy being regarded as a series of circles ranging from the most protected, namely the home, to the least protected, namely

⁵⁵ 2006 (10) BCLR 1133 (CC)

the public business.) It further stated that when the aim of the inspection is to gather criminal evidence, the right to privacy would be infringed.

4.31 Therefore a warrant will be needed, as that will be a less restrictive means to achieve the purpose of gathering criminal evidence. The court states the following: that the warrant guarantees that the state must justify and support intrusions upon individuals' privacy under oath before a neutral officer of the court prior to the intrusion. It will also govern the time, place and scope of the invasive search, guiding the state in the conduct of the inspection and informing the subject of the legality and limitation of the search.

4.32 For legislation to ensure a constitutionally relevant compliance investigation, it has to be a constitutionally adequate substitute for a warrant. It has to define the scope of the investigation and limit the power of the inspectors. The powers of the inspectors should be limited in terms of time, place, and scope and must make it clear that the premises of the business will be subject to periodic investigations. There must be a connection between the purpose of the law and the limitations.

4.33 It can be said that, based on the above, that Government, in its endeavour of fair administration, has to regulate the integrity of the public service by monitoring the financial interactions of its employees within the economy, looking for possible unscrupulous actions. The way the monitoring system is set up in terms of the Acts and Regulations under discussion necessitate employees to disclose possible unscrupulous actions.

4.34 In the *Mistry* case⁵⁶ the Constitutional Court held:

- ...
- [16] "An inspector may at all reasonable times -
- (a) enter upon any premises, place, vehicle, vessel or aircraft at or in which there is or is on reasonable grounds suspected to be any medicine or Scheduled substance;
 - (b) inspect any medicine or Scheduled substance, or any book, record or document found in or upon such premises, place, vehicle, vessel, or aircraft;
 - (c) seize any such medicine or Scheduled substance, or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft and appearing to afford evidence of a contravention of any provision of this Act;

⁵⁶

As above

- (d) take so many samples of any such medicine or Scheduled substance as he may consider necessary for the purpose of testing, examination or analysis in terms of the provisions of this Act.”

...

21. It is against this functional background that the powers of entry, inspection, and seizure granted by section 28(1) must be analysed. The most striking feature of section 28(1) is the lack of qualification of the powers of entry and inspection given to the inspectors. In general terms, the only requirement imposed is that the powers must be exercised at reasonable times. The single criterion for entering “any premises, place, vehicle, vessel, or aircraft” is that any medicine or scheduled substance is there or is reasonably suspected of being there. Defined as it is to include any substance used for the treatment of disease or its symptoms, the term “medicine” covers the kinds of analgesics, ointments or influenza relief potions to be found in the majority of South African homes. Once on the premises, the inspector may look not only at any medicine or scheduled substance, but also at “any book, record, or document.” The result is that inspectors are given the power to enter any home where aspirins, ointments or analgesics happen to be, and once there, may inspect not only medicine cabinets or bedside drawers, but also files which might contain a person’s last will and testament, private letters and business papers.

Scope of the right to privacy and permissible limitations

22. The constitutionality of these powers has to be examined in the light of section 13 of the interim Constitution which states:
“Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”

23. ... What is clear, nevertheless, is that however the terms “search” and “seizure” may be interpreted in a particular case, to the extent that a statute authorises warrantless entry into private homes and rifling through intimate possessions, such activities would intrude on the “inner sanctum” of the persons in question and the statutory authority would accordingly breach the right to personal privacy as protected by section 13. There can be no doubt that the language of section 28(1) is so sweeping as to permit such entry and inspection. Accordingly, it is in breach of section 13 and has to be justified by the state as being reasonable and justifiable in terms of section 33 of the interim Constitution.

...

A The nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality.

25. Section 13 accordingly requires us to repudiate the past practices that were repugnant to the new constitutional values, while at the same time re-affirming and building on those that were consistent with these values.

...

C The extent of the limitation.

27. ... In *Bernstein and Others v Bester and Others* NNO Ackermann J posited a continuum of privacy rights which may be regarded as starting with a wholly inviolable inner self, moving to a relatively impervious sanctum of the home and personal life and ending in a public realm where privacy would only remotely be implicated. In the case of any regulated enterprise, the proprietor’s expectation of privacy with respect to the premises, equipment, materials, and records must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative

inspections that are an inseparable part of an effective regime of regulation. The greater the potential hazards to the public, the less invasive the inspection. People involved in such undertakings must be taken to know from the outset that their activities will be monitored. If they are licensed to function in a competitive environment, they accept as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors...

28. Although it has become almost a judicial cliché to say that the object is “... [to protect] people, not places”, that is, to safeguard personal privacy and not to protect private property, there can be no doubt that certain spaces are normally reserved for the most private of activities. The section is so wide and unrestricted in its reach as to authorise any inspector to enter any person’s home simply on the basis that aspirins or cough mixture are or are reasonably suspected of being there. What is more, the section does not require a warrant to be issued in any circumstances at all.

D Whether the desired ends could reasonably be achieved through other means less damaging to right in question.

29. It is difficult to see how the achievement of the basic purposes of the Medicines Act requires that inspectors be allowed at will to enter private homes and inspect private documents. If only periodic regulatory inspection of the premises of health professionals was in issue, then a requirement of a prior warrant might be nonsensical in that it would be likely to frustrate the state objectives behind the search. Once the investigation extends to private homes, however, there would seem to be no reason why the time-honoured requirement of prior independent authorisation should not be respected. Whether that would require a prior, warrant from a judicial officer in all circumstances where homes were being searched need not be decided now. If, however, the circumstances were in fact such that even trained police officers would be required to get such a warrant, all the more reason for medical inspectors to do so; it would be odd if the law allowed personnel who might be medical experts but forensically untrained to rush in where even experienced police officers must refuse to tread. ...
30. To sum up: irrespective of legitimate expectations of privacy which may be intruded upon in the process, and without any predetermined safeguards to minimise the extent of such intrusions where the nature of the investigations makes some invasion of privacy necessary, section 28(1) gives the inspectors carte blanche to enter any place, including private dwellings, where they reasonably suspect medicines to be, and then to inspect documents which may be of the most intimate kind. The extent of the invasion of the important right to personal privacy authorised by section 28(1) is substantially disproportionate to its public purpose; the section is clearly overbroad in its reach and accordingly fails to pass the proportionality test...

...

4.35 It would seem according to case law that the requirement that a public servant declare all financial interest is administrative in nature and in the interest of fair governance.⁵⁷ The non-removal of a conflict of interest will result in disciplinary action. Actual criminal action will result in a criminal investigation.⁵⁸

⁵⁷

Magajane vs. Chairperson, North West Gambling Board 2006 (10) BCLR 1133 (CC); *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (cc) 1998 (4) SA 1127 (CC); (CCT13/97) [1998 ZACC10; 1998

4.36 Thus, if a civil servant truthfully declares all possible conflict of interests and subsequently, interests that can be criminal in nature, the disclosure must be referred to the relevant law enforcement agency.

4.37 This can amount to giving self-incriminating evidence, and there is no a safeguard given against such evidence (so called direct evidence) being used in possible further criminal investigations.

5. Right against self-incrimination

4.38 In *Park-Ross and another v Director: Office for Serious Economic Offences*⁵⁹ applicants contended that either the whole of the Investigation of Serious Economic Offences Act 117 of 1991 or sections 5 and 6 were unconstitutional as it violated their constitutional rights namely sections 13 and 25 of the Interim Constitution. Relevant parts of the headnote to this case states as follows:

The object of the Act, as described in its long title, is '(t)o provide for the swift and proper investigation of certain serious economic offences'. Section 5(1)(a) of the Act provides that '(i)f the Director [of the Office for Serious Economic Offences] has reason to suspect that a serious economic offence has been or is being committed or that an attempt has been made or is being made to commit such an offence, he may hold an inquiry on the matter in question . . .'. For the purposes of such inquiry, the Director may summon any person who is able to furnish information on the subject of the inquiry or having in his possession any book, document or other object relating to the inquiry, to attend the inquiry to be questioned or to produce such book, document or other object. In terms of ss (8)(a) of s 5, a person who is summoned to such inquiry 'shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him to a criminal charge', while ss (8)(b) provides that '(n)o evidence regarding any questions and answers contemplated in para (a) shall be admissible in any criminal proceedings . . .'. In pursuit of an inquiry the Director is empowered by s 6 of the Act to 'enter any premises on which or in which anything connected with that inquiry is or is suspected to be' without notice, to seize copies of or extracts from any book or document found there and to request from any person an explanation of any entry therein. Section 7 prevents the disclosure of any information obtained as a result of any inquiry, search, and seizure without the permission of the Director.

As to s 5 of the Act:

The underlying right embodied in s 25(2) and (3) of the Constitution is that no accused person shall be compelled to be a witness against himself. It

(4) SA 1127; 1998 (7) BCLR880; 2011 (7) BCLR 651(CC) (29 May 1998); [http: www.saflii.org](http://www.saflii.org)

⁵⁸ Regulation 21 and 22

⁵⁹ 1995 (2) SA 148 (C)

is, however, clear that the very specific wording of s 25 confines that right, as well as the right to remain silent, to the criminal process: the right to remain silent at both the trial and investigative stage of the criminal process finds expression in the rights of an accused in s 25(3)(c) and of an arrested person in s 25(2)(a). The Constitution therefore deals with the right to remain silent in a narrow and precise fashion and limits that right to arrested persons and to accused persons during plea proceedings and trial. It does not lend itself to a wider general interpretation applicable to investigations and inquiries *dehors* criminal proceedings of arrest and trial.

Although information gathered or documents disclosed during the course of an inquiry under s 5 of the Act may set in train a process, which may lead to incrimination or give rise to real evidence of an incriminatory nature, an inquiry under s 5 is not part of the criminal process. *Non constat* that, because such an inquiry takes place, criminal charges are likely to follow therefrom. Nobody is an accused at that stage, nor is anyone necessarily likely to be.

The use of evidence given by a person at such an investigation or inquiry in any subsequent criminal trial of that person would mean that the underlying right embodied in s 25(3)(c) could be circumvented by the simple technique of compelling a person to speak at a pre-trial investigation. Section 5(8)(b) of the Act, however, excludes the use of such evidence in any subsequent criminal trial of that person.

The prohibition in s 5(8)(b) of the Act that '(n)o evidence regarding any questions and answers contemplated in para (a) shall be admissible in any criminal proceedings' relates to direct evidence given by the person interrogated and his answers to questions put to him ...

Given, therefore, that s 5(8)(b) excludes both direct testimony and derivative evidence from use in any criminal proceedings (other than those referred to in the reservatory portion of that section); s 5 is not in conflict with the Constitution.

...

Section 6 of the Act violates the Constitution in a further respect: unlike s 5(8)(b), s 6 makes no provision for excluding evidence obtained as a result of a search and seizure conducted under that section in any subsequent criminal proceedings. Without such exclusion, the right to a fair trial embodied in s 25 of the Constitution would be violated.

4.39 This case makes the point that the right to remain silent only vests once the trial begins. It also mentions the need for a disclaimer that no evidence gathered in a pre-trial investigation may be used in evidence at the trial. It also makes the point that prior independent judicial authorisation has to be obtained when gathering criminal evidence.

4.40 In *Ferreira v Levin*⁶⁰ the court per Ackerman J framed the question as to whether evidence obtained where a person has given evidence at an inquiry

⁶⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC)

which tend to incriminate themselves, is admissible in subsequent criminal proceedings.

4.41 The question in *Ferreira v Levin* is whether-

- There is an infringement of the right to privacy in terms of the right not to incriminate oneself; and
- Is such an infringement allowed under the limitations clause of the Constitution?

The judge quoted *S v Camane and Others* 1925 AD 570 at 575

'...it is an established principle of our law that no one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial, or during the trial.'

He went on to quote Kentridge AJ in *S v Zuma and Others*:⁶¹

'the Common law rule in regard to the burden of proving that a confession was voluntary has not been a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinstatement of Viscount Sankey's Golden threat: That it is for the prosecutor to prove the guilt of the accused beyond reasonable doubt ... Reverse the burden of proof and all these rights are seriously compromised and undermined...'

4.42 The court then ventures into use immunity and derivative use immunity. With reference to the Canadian case of *Thomson Newspapers LTD et al v Director of Investigation and Research et al* [1990] 67 D.L.R (4th) 161, he describes derivative evidence as existing independently of the compelled testimony. This is evidence obtained independently from the person involved in the case. If the accused is compelled to give evidence it would give the prosecutor/state evidence it did not have and which will enhance its case against the accused. The court will have a discretion in deciding to allow the evidence. It will allow it if the evidence will not bring the administration of justice into disrepute. The test will be the fairness of the process.

4.43 The court then proceeded to apply the limitations test. It looked at the reason for the statute compelling the evidence and whether there is less intrusive means to obtain the goal of the act - is there proportionality between the object of

⁶¹ 1995 2 SA 642 (CC)

the act and the means chosen to achieve the object. What was needed was a waiver to exclude unconstitutionally obtained evidence.

4.44 The court quoted the following from the Canadian case of *Thomson Newspapers LTD et al v Director of Investigation and Research et al* [1990] 67 D.L.R (4th) 161.⁶²

‘derivate evidence that could not have been found or appreciated except as the result of the compelled testimony under the act should in the exercise of the trial judge’s discretion be excluded since its admissibility would violate the principle of fundamental justice... such exclusion should (not) take place if the evidence would otherwise have been found and its relevance understood... the touchstone for the exercise of the discretion is the fairness of the trial process.’

And

‘complete immunity against such use is not required by the principles of fundamental justice. The immunity against use of actual testimony provided by section 20(2) of the Act together with the judge’s power to exclude derivate evidence where appropriate is all that is necessary to satisfy the requirement of the charter.’

He quoted further at p 1071 para 144

‘A right to prevent the subsequent use of compelled self-incriminating testimony protects the individual from being conscripted against himself without simultaneously denying an investigator’s access to relevant information. It strikes a just and proper balance between the interest of the individual and the state.’

And at p 1068 para139

‘derivate evidence which could not have been obtained or the significance of which could not have been appreciated but for the testimony of a witness, ought generally be excluded... in the interest of trial fairness.’

Chaskalson (at 233 – 264) in the main judgement defined this waiver as follows:

“...as long as incriminating evidence is not admissible at the criminal trial and the use of ‘derivate evidence’ at such trial is made dependent upon such use being subject to ‘fair criminal trial’ standards, the rule against self-incrimination is adequately protected.”

4.45 Thus, a person must answer self-incriminating evidence if there is a waiver that the evidence will not be used to incriminate the person in a latter trial subject to judicial discretion to allow unconstitutionally obtained evidence. A direct use immunity is thus established.

⁶² 1051 at par 112

4.46 In *Shaik v Minister of Justice and Constitutional Development and Others*⁶³, Justice Ackermann explained the constitutional protection granted to examinees as follows⁶⁴:

In *Ferreira v Levin* this Court considered, in the context of enquiries and the examination of persons under section 417 of the Companies Act 61 of 1973, the constitutional validity of subsection 417(2)(b) that provided the following:

“Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him.”

The Court held the provision to be constitutionally invalid and one of the issues was the extent of its invalidity. This in turn revolved around the question as to what form of protection, against the use of such examinees’ answers against themselves in a subsequent criminal trial, would be valid.

There were three choices:

- (a) Transactional immunity, that protected examinees from prosecution in respect of any offence disclosed in their answers;
- (b) direct and derivative use immunity, that protected the examinees from their answers being used against them and also the exclusion from any subsequent prosecution of evidence derived by the prosecuting authorities from such answers; and,
- (c) direct use immunity that protected the examinees from their answers being used against them, and no more.

The Court opted for the last-mentioned. It came to the conclusion that, in the South African context, mere direct use immunity was sufficient, bearing in mind that the trial judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.

5. Possible inconsistencies between the Public Service Act 103 of 1994 and the Public Service Management Act 11 of 2014

4.47 The Department of Higher Education and Training has indicated that the SALRC might also want to consider the following.

“... ”

3. Section 31 of the PSA which deals with the unauthorised remuneration refers to the “Head of Department” and the “Accounting officer” whereas section 9 of PAMA refers to “Head of Institution”. PAMA does not define “Head of Institution” whereas PSA defines “Head of Department” There is no uniformity between the two Acts.”

⁶³ CCT34/03 [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at [35] to [36] <http://www.saflii.org.za/za/cases/ZACC/2003/24.html>.

⁶⁴ 613 par 35-36

4.48 The Public Service Act Proclamation 103 of 1994 states:

31. Unauthorized remuneration
- (1)(a) (i) If any remuneration, allowance or other reward (other than remuneration contemplated in section 38(1) or (3)), is received by an employee in connection with the performance of his or her work in the public service otherwise than in accordance with this Act or a determination by or directive of the Minister, or is received contrary to section 30, that employee shall, subject to subparagraph (iii), pay into revenue -
- (aa) an amount equal to the amount of any such remuneration, allowance or reward; or
 - (bb) if it does not consist of money, the value thereof as determined by the head of the department in which he or she was employed, at the time of the receipt thereof,
- (ii) If the employee fails to so pay into revenue the amount or value, the said head of department shall recover it from him or her by way of legal proceedings and pay it into revenue.
- (iii) The employee concerned may appeal against the determination of the head of department to the relevant executive authority.
- (iv) The accounting officer of the relevant department may approve that the employee concerned retains the whole or a portion of the said remuneration, allowance or reward.
- (b) If -
- (i) in the opinion of the head of department mentioned in paragraph (a) an employee has received any remuneration, allowance or other reward contemplated in that paragraph; and
 - (ii) it is still in his or her possession or under his or her control or in the possession or under the control of any other person on his or her behalf, or, if it is money, has been deposited in any bank as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993), in his or her name or in the name of any other person on his or her behalf, that head of department may in writing require that employee or that other person or that financial institution not to dispose thereof, or, if it is money, not to dispose of a corresponding sum of money, as the case may be, pending the outcome of any legal steps for the recovery of that remuneration, allowance or reward or the value thereof.
- (c) A person or financial institution contemplated in paragraph (b) who or which fails to comply with a requirement in terms of that paragraph, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.
- (d) The provisions of this section shall also apply to an officer who is a head of department, and in such a case a reference to a head of department shall be construed as a reference to the Treasury.
- (2)(a) Subject to paragraph (b), any salary, allowance, fee, bonus or honorarium which may be payable in respect of the services of an employee placed temporarily at the disposal of an organ of state, another government or body contemplated in section 15(3) shall be paid into revenue.
- (b) In circumstances regarded by the relevant executive authority as exceptional, the said authority may approve of paying out of revenue an amount equal to that salary, allowance, fee, bonus or honorarium, or a portion thereof, to the employee concerned.

- (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 No. 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.

4.49 It defines "head of department" and "accounting officer" as follows:

Definitions

In this Act, unless the context otherwise indicates –

'accounting officer' means an accounting officer as defined in section 1 of the Public Finance Management Act;

'department' means a national department, a national government component, the Office of a Premier, a provincial department or a provincial government component;

'head of department', 'head of a department' or 'head of the department' means the incumbent of a post mentioned in Column 2 of Schedule 1, 2 or 3 and includes any employee acting in such post;

'national department' means a national department referred to in section 7(2);

4.50 The Public Administration Management Act 11 of 2014 states the following:

9. Disclosure of financial interest

- (1) An employee must, in the prescribed manner, disclose to the relevant head of the institution all his or her financial interests and the financial interests of his or her spouse and a person living with that person as if they were married to each other, including all:-
- (a) shares and other financial interests in an entity;
 - (b) sponsorships;
 - (c) gifts above the prescribed value, other than gifts received from a family member;
 - (d) benefits; and
 - (e) immovable property.
- (2) Failure by an employee to comply with the obligation referred to in subsection (1) constitutes misconduct.

4.51 It defines "institution" and "national department" as follows:

Definitions

In this Act, unless the context otherwise indicates:-

"institution" means a national department, a provincial department, a municipality or a national or provincial government component;

"national department" means a national department listed in Schedule 1 to the Public Service Act;

4.52 As can be seen from the definitions, institution can be equated to department and also to head of department. There seems to be no inconsistencies between these two acts in this regard.

E. Commission recommendations

4.53 As these issues do not fall within the mandate of project 25 investigations, the Commission does not make a recommendation or expresses an opinion. It merely states the relevant issues at play. It also recommends that as this issue might be relevant to the DPSA, that the DPSA takes note of this exposition.

4.54 It seems that the Regulations (regulation 19) are drafted wider than the Act (section 9). The regulations might be unlawful as it seems to be wider than the prescribed mandate of the Act. The types of disclosures necessary as mentioned in the Regulations (regulation 19) seems to be wider than those mentioned in section 9 of the Act. The regulations also do not make references to disclosures by spouses or domestic life partners, as mentioned in section 9 of Act 11 of 2014.

4.55 Section 9 and the relevant regulations also seem to be drafted to widely as it does not contain a waiver as to the right not to incriminate one self.

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- 8 Office of the Public Service Commission
- 9 South African Police Service

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	<p>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)</p> <p>31 Unauthorized remuneration</p> <p>...</p> <p>(3) For the purposes of subsection (1) (a) (i)-</p> <p>(a) 'this Act' includes any law repealed by this Act;</p> <p>(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</p> <p>(c) 'section 30' includes any corresponding provision of any such law.</p>