



RESEARCH BRIEF ON

DISABILITY AND EQUALITY IN SOUTH AFRICA



2013 - 2017

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Abbreviations and Acronyms

BBBEEA	Broad-Based Black Economic Empowerment Act, 53 of 2003
CCMA	Commission for Conciliation, Mediation and Arbitration
CEE	Commission for Employment Equity
CRPD	Convention on the Rights of Persons with Disabilities
DOL	Department of Labour
DPSA	Department of Public Service and Administration
DPW	Department of Public Works
EEA	Employment Equity Act, 55 of 1998
LRA	Labour Relations Act, 66 of 1995
NGO	Non-Governmental Organisation
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
SAHRC	South African Human Rights Commission
UN	United Nations
WPRPD	White Paper on the Rights of Persons with Disabilities

INTRODUCTION 1

Globally, people with disabilities are marginalised and excluded from full participation in society. In South Africa, people with disabilities face multiple forms of discrimination in various social spheres, including in respect of access to health care services, employment and education.¹ Previous work done by the South African Human Rights Commission (SAHRC or Commission) in relation to disability shows that the progress made by the South African government on matters pertaining to disability and the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) has been slow.

Merely defining the term 'disabled' or 'disability' has proved to be a contentious issue. This is due to the fact that there are differing interpretations of disability and differing views of what categories fall under the umbrella of disability. As a comprehensive human rights instrument for people with disabilities, the CRPD recognises that disability is an 'evolving concept', stating that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.² This definition places a greater focus on disability as a result of the lack of an enabling environment than on individual capability.

The recent tragedy that occurred when thousands of mental health care patients were transferred from the Life Esidimeni care centre to unprepared NGOs, illustrates both the vulnerability of people with disabilities as well as apathetic social attitudes towards their well-being. People with disabilities further continue to experience exclusion from the economy and education system. A major obstacle to the social inclusion of people with disabilities is the stigma that still attaches to disability. Urgent attention should therefore be paid to promoting equality and inclusion in the context of disability. In order to facilitate awareness-raising and education regarding disability, government should act swiftly in bringing the promotional aspects of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) into operation.

This research brief does not aim to provide a comprehensive overview of equality in the context of disability in South Africa. Instead, it presents an outlook on some of the key challenges pertaining to access to health care services, employment and education that have arisen in the period between 2013 and 2017. In addition, selected developments and responses to these equality-related challenges are highlighted.

1 Stats SA *General Household Survey 2015* (2016) sets out relevant demographics: '5,1% of South Africans aged 5 years and older were classified as disabled in 2015. A larger percentage of women (5,5%) than men (4,7%) were classified as disabled. North West (7,4%), Northern Cape (7,1%) and Eastern Cape (6,8%) presented the highest prevalence of disability in the country.'

2 Article 1 of the CRPD.

MANDATE OF THE SAHRC **2**

The South African Human Rights Commission is mandated by section 184 of the Constitution of the Republic of South Africa, 1996 to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The Commission does so through a number of means, one of which is by conducting research.³

APPLICABLE LEGAL FRAMEWORKS **3**

3.1 South African legal and policy framework

Section 9 of the Constitution prohibits unfair discrimination on the basis of disability. Discrimination on this ground is presumed to be unfair unless it has been shown to be otherwise. Section 9 of the Constitution further allows for positive measures to be taken to promote the achievement of equality for categories of persons previously disadvantaged by unfair discrimination, which includes people with disabilities.

Various statutes aim to give effect to the constitutional right to equality, the most prominent of which for purposes of this research brief are PEPUDA and the Employment Equity Act, 55 of 1998 (EEA). PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims at the 'eradication of social and economic inequalities'.⁴ Section 9 of PEPUDA prohibits unfair discrimination on the ground of disability, including:

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

Following a review of PEPUDA, numerous suggestions were made for its improvement. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the Department of Justice and Constitutional Development (DOJCD). The Commission, as Chair of the Equality Review Committee, will be monitoring this process closely.

Another important Act that will be referred to throughout this research brief is the Employment Equity Act. The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action to ensure redress and equitable representation in the workforce.

³ S 184(2)(c) of the Constitution.

⁴ See Preamble to PEPUDA.

The Broad-Based Black Economic Empowerment Act, 53 of 2003 (BBBEEA) and the Broad-Based Black Economic Empowerment Amendment Act, 55 of 2013 are reflections of the EEA and provide practical legislative definitions and policies to realise substantive equality.

In terms of the applicable policy framework, the Department of Social Development launched the White Paper on the Rights of Persons with Disabilities (WPRPD) in 2016. It provides clarity on various issues including the development of standard operating procedures for mainstreaming disability; it sets out the norms and standards in terms of which discriminatory barriers should be removed; and it broadly outlines stakeholder responsibilities.

3.2 International and regional legal framework

South Africa ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol without any reservations in 2007 and it subsequently entered into force on 3 May 2008. The CRPD sets out a broad range of rights – ranging from civil and political rights to social, economic and cultural rights – of persons with disabilities in an effort to enhance the lives of this group.

Although the African Charter on Human and Peoples' Rights does not exclusively deal with disability, it addresses the rights of persons with disabilities in article 18(4), which provides that the aged and the disabled have the right to 'special measures of protection' in keeping with their physical or moral needs. In February 2016, the African Commission on Human and Peoples' Rights adopted the Draft African Protocol on the Rights of Persons with Disability, which aims to address continued exclusion, harmful practices, and discrimination affecting those with disabilities, especially women, children, and the elderly.

CONCEPTUALISING EQUALITY 4

The following research brief aims to provide a facts-based account of the state of disability-related equality in South Africa. Nonetheless, it is useful to provide a brief overview of some key equality-related concepts that are often used in legislation and by government, judges, human rights practitioners, civil society actors and academics.

Equality can be thought of in a 'formal' or 'substantive' sense. *Formal equality* refers to laws and policies that appear neutral by treating everyone the same. Such laws and policies may in fact cement existing inequalities that prejudice persons with disabilities, since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words, unequal structures, hierarchies and power relationships that underlie our society and economy and that prejudice people based on disability – are therefore left unaddressed. As the Constitutional Court has stated, '[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality'.⁵ The idea of formal equality remains useful in cases of *direct discrimination* based on disability, but falls short in dealing with cases of *indirect discrimination*, where equal treatment prejudices those who are different. Formal equality is similarly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa's huge income gap and grossly unequal distribution of wealth and land.

5 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O'Regan).

Whereas formal equality tries to ensure equal treatment for all regardless of their identities, substantive equality aims to achieve *equal outcomes* by treating people and groups differently.⁶ Different treatment is justified where some people are discriminated against on the basis of their identities or characteristics. This is reflected in the constitutional endorsement of positive redress measures, or ‘affirmative action’, in section 9(2). This places an obligation on the State to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education. Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the State to achieve substantive equality.

Closely related to affirmative action, and especially significant in relation to disability, is the concept of *reasonable accommodation*. The CRPD defines reasonable accommodation as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. In terms of PEPUDA and the CRPD, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on the ground of disability. Reasonable accommodation is further defined in the EEA as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’. As explained by former Chief Justice Langa:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.⁷

However, when equality of outcomes is advocated for, it must be borne in mind that equal outcomes can be achieved without addressing structures of society that perpetuate discrimination.⁸ For example, a man with a disability might be employed at the same level as his counterpart who does not have a disability. However, in order to procure the same position, a woman with a disability might in addition have had to conform to patriarchal notions of working patterns that do not acknowledge her unpaid work related to motherhood.⁹ Whereas in cases of racial discrimination, reasonable accommodation might require an underlying societal norm to be changed, a specific adjustment may have to be made to accommodate difference in instances of disability.¹⁰ Substantive equality should therefore encompass more than equality of outcomes.¹¹

Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits.

6 This is supported by the definition of ‘equality’ in PEPUDA: “equality” includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.

7 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 73.

8 S Fredman ‘Substantive Equality Revisited’ (2014) *University of Oxford Legal Research Paper Series No 70* 1, 14.

9 *Ibid.*

10 *Ibid* 30.

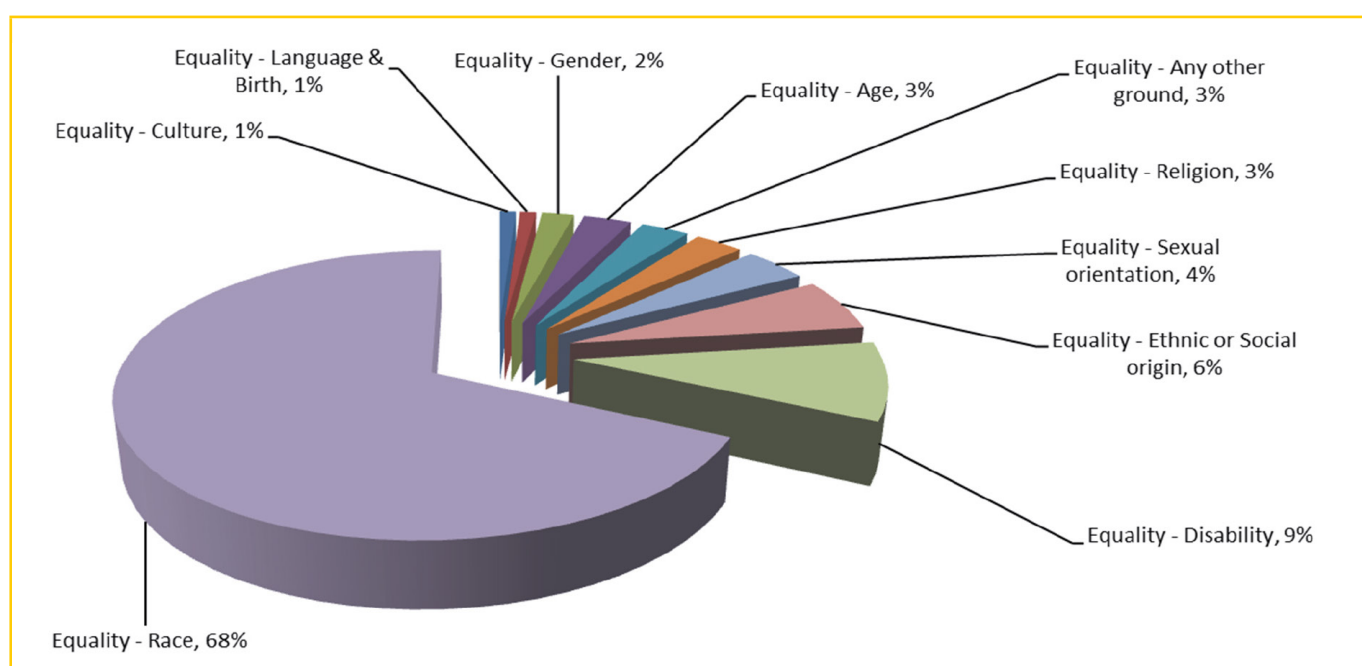
11 *Ibid* in general.

For example, whereas a man with a disability may face direct and indirect discrimination, a woman with a disability may be discriminated against on the bases of disability and gender, whereas a poor Black homosexual woman with a disability faces discrimination based on disability, gender, race, socio-economic disadvantage and sexual orientation.¹²

CURRENT TRENDS 5

In terms of investigations of human rights violations conducted by the SAHRC, in the financial year ending 31 March 2016, 16 percent of the total complaints received by the SAHRC alleged a violation of the right to equality. Of the 749 equality related complaints, 9 percent (66) were on the ground of disability.

Equality-related complaints from the public received by the SAHRC 1 April 2015 – 31 March 2016

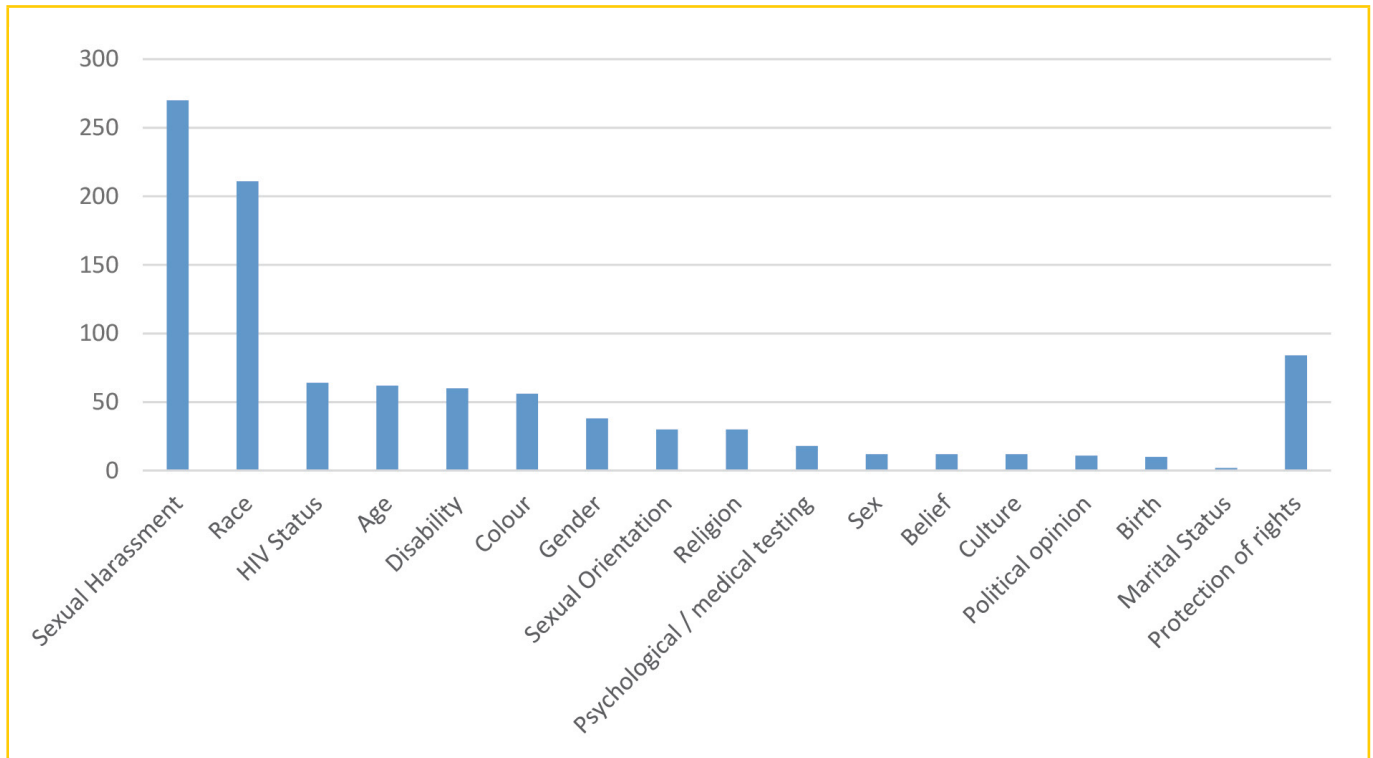


Furthermore, in terms of the workplace, according to the Commission for Conciliation, Mediation and Arbitration (CCMA), the listed grounds of sexual harassment and race have consistently been the highest, with HIV and AIDS status, age, and disability rounding up the top five grounds of violations on average over this period.¹³

¹² Intersectionality within the context of persons with disabilities is recognised in Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2016) 60-70 in respect of 'Pillar 2 – Protecting the Rights of Persons at risk of Compounded Marginalisation'.

¹³ Commission for Conciliation, Mediation and Arbitration *Submission to the Panel for the South African Human Rights Commission National Hearing on Unfair Discrimination in the Workplace* (2016).

Unfair discrimination complaints on listed grounds at the CCMA: August 2014 to March 2016



LIFE ESIDIMENI 6

Section 9(a) of PEPUDA prohibits unfair discrimination on the ground of disability in the form of ‘denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society’. The gross negligence and consequent tragedy that occurred in the Life Esidimeni matter, severely violated this provision in respect of persons with mental health-related disabilities.

In 2016, the Gauteng Department of Health (GDoH) terminated its contract with the Life Esidimeni facility in an attempt to deinstitutionalise the care of patients. Over a thousand mental health patients were moved from the facility to numerous NGOs. As a result, between 118 and 143 people lost their lives between March and December 2016.¹⁴ It is alleged that the termination of the contract with Life Esidimeni was influenced by a number of factors, including policy and legislative considerations that favour community-based care over institutional care.

¹⁴ Eyewitness News ‘Health Ombud Confirms 118 Deaths in Life Esidimeni Tragedy’ (9 October 2017) *EWN* <<http://ewn.co.za/2017/10/09/health-ombud-confirms-118-deaths-in-life-esidimeni-tragedy>>. Times Live ‘Esidimeni: excuses infuriate judge’ (28 November 2017) <https://www.timeslive.co.za/news/south-africa/2017-11-28-esidimeni-excuses-infuriate-judge/>. Patients died due to a variety of reasons, including lack of care, the unpreparedness of the NGOs, starvation, dehydration and cold. See Health Ombud *Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province: No Guns: 94+ Silent Deaths and Still Counting* (2017) 7-8, 9-10.

The Commission received a complaint pointing to the potential violation of human rights and loss of life from the Ubuntu Centre on 15 March 2016.¹⁵ The Commission's subsequent investigation related to violations of the right to life, access to health care, the right to dignity, the right to freedom and security of the person, the right to food and adequate nutrition, access to information and proper consultation, cruel and inhumane treatment, and the responsibilities of private business in respecting human rights. The Commission, through its monitoring process, formally requested responses from the Gauteng Department of Health in order to ascertain, amongst other things, what steps were put in place by the Department to ensure the safety and well-being of patients who were transferred from Life Esidimeni to NGOs across the province. In response, the GDoH gave assurances to the Commission that the termination of the contract with Life Esidimeni followed a review of a number of longstanding contracts with service providers, in line with prescripts of the Auditor General, as well as constitutional imperatives regarding public procurement. In addition, the GDoH indicated that placement of patients was carried out through a specialist project team and the suitability of NGOs to cater for specific needs of patients was assessed prior to placement.

However, after conducting an inspection at one of the NGOs to which mental health care users had been transferred, the Commission determined that it would be appropriate to bring the matter to the attention of the Office of the Health Ombud. The findings of the Health Ombud's report demonstrated egregious violations of various constitutional rights, including the right to life; the right of everyone to have access to health care services; the right to have human dignity respected and protected; the right to an environment that is conducive to health and wellbeing; the right to sufficient food; and the right of access to information.¹⁶ It further found that the GDoH had covered up the number of people that had died; that the licencing process was deeply flawed with invalid licences issued to all the NGOs where patients had been transferred; and that the GDoH had no idea of the whereabouts of several patients, whether dead or alive.¹⁷ Regarding the GDoH's decision to relocate the patients, the report found:

The decision was unwise and flawed, with inadequate planning and a 'chaotic' and 'rushed or hurried' implementation process... The decision to terminate the contract precipitously contradicted the National Mental Health Policy Framework and Strategy; the cost rationale could not be justified above the rights of the mentally ill patients to dignity and the state's constitutional obligation to accessible health care... This precipitous approach was not supported by available research experience or legislative prescripts... The project has brought 'pain and anguish' to many families, it has also brought national and international disrepute and embarrassment to South Africa, particularly its Health System.¹⁸

Amongst other things, the Health Ombud recommended that the Minister of Health should request the Commission to undertake a systematic and systemic review of human rights compliance and possible violations related to mental health on a national level.

15 The Democratic Alliance was scathing in its criticism of the SAHRC's response to this complaint. *DA Human Rights Commission Failed to Act on Esidimeni Patient Transfers* (February 2017) <<http://da-gpl.co.za/human-rights-commission-failed-to-act-on-esidimeni-patient-transfers/>>. For the SAHRC's response, see SAHRC *SAHRC Response on Statement by the Democratic Alliance on Esidimeni Patient Transfers* (February 2017) <<https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/524-sahrc-response-on-statement-by-the-democratic-alliance-on-esidimeni-patient-transfers>>. For the SAHRC's subsequent submission to the Portfolio Committee on Justice and Correctional Services, see SAHRC "Esidimeni" Complaint: *South African Human Rights Commission (SAHRC) briefing* (22 February 2017) <<https://pmg.org.za/committee-meeting/24013/>>.

16 Health Ombud *Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province: No Guns: 94+ Silent Deaths and Still Counting* (2017) 49.

17 Ibid 1, 6, 13-14, 30-31, 43, 48.

18 Ibid.

The Minister of Health subsequently requested the Commission to do the same. In view of the findings of the Health Ombud, the Commission reiterates its 2009 recommendations regarding the protection of the rights of vulnerable people, including people with physical and mental disabilities.¹⁹ The Commission's investigation and monitoring of the Life Esidimeni matter continue, and a National Investigative Hearing was held on 14 and 15 November 2017 with a view to highlighting the human rights dimensions of the tragedy. Currently, arbitration proceedings are taking place between the State and affected families, and are presided over by retired Deputy Chief Justice Dikgang Moseneke.

UNEQUAL EMPLOYMENT OPPORTUNITIES 7

Section 9(c) of PEPUDA prohibits discrimination in the form of 'failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons'. However, as a result of historical discrimination, persons with disabilities face disproportionately high levels of unemployment, are employed in low status jobs, or receive lower than average remuneration.²⁰ Furthermore, massive earning disparities exist by geographical location in that persons with disabilities in urban areas generally have higher earnings compared to those in rural areas. This is attributed to limited access to employment opportunities in rural areas as well as only having access to low-paying and unskilled jobs.²¹ Consequently, the opportunities for work available to persons with disabilities are scarce due to the fact that a disability discredits the actual or perceived ability of an individual to engage in social, educational, economic and even political arenas. The National Development Plan accordingly recognises that '[d]isability and poverty operate in a vicious circle. Disability often leads to poverty and poverty, in turn, often results in disability'.²²

7.1 The right to work

The CRPD acknowledges that employment is vital to the self-worth of persons with disabilities. Article 27 of the CRPD places specific obligations on governments to promote equal access to employment for persons with disabilities. Key measures outlined in Article 27 include the prohibition of discrimination on the basis of disability with regard to all matters concerning all forms of employment; the promotion of employment opportunities and career advancement for persons with disabilities in the labour market; promoting opportunities for self-employment and entrepreneurship, the development of cooperatives and starting one's own business; promoting the employment of persons with disabilities in the private sector through appropriate policies and measures; and ensuring that reasonable accommodation is provided to persons with disabilities in the workplace. The United Nations (UN) Sustainable Development Goals likewise aim to 'achieve full and productive employment and decent work for all women and men, including ... persons with disabilities' by 2030.²³

In addition to the various concrete benefits that come with the ability to make a livelihood, employment enables individuals to be economically self-sufficient and eases their full integration into society.

19 SAHRC *Public Inquiry: Access to Health Care Services* (2009) 61.

20 Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities* (2017) vii <<http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf>>.

21 Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2016) 40.

22 National Planning Commission *National Development Plan 2030* (2011) 52.

23 UN *Sustainable Development Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all*.

High unemployment levels among persons with disabilities are prevalent on the African continent, and this represents a significant challenge to ensuring that persons with disabilities live their lives with dignity.²⁴ Notably, the right to work is not contained in the Constitution, but is enshrined in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which South Africa ratified in 2015. In South African case law, the right to work has been viewed as a core component of the rights to life and human dignity and as ‘one of the most precious liberties that an individual possesses’ because ‘to work means to eat and subsequently to live’.²⁵ The Constitutional Court has echoed the importance of the right to work, stating:

Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity.²⁶

7.2 Reasonable accommodation in the workplace

The requirement for reasonable accommodation aims to ensure that all groups can compete on merit in the workplace and other spheres of life. Reasonable accommodation thus aims to create enabling environments and should cater equally for individuals with physical and intellectual disabilities.²⁷

Article 9 of the CRPD obliges States to enable persons with disabilities to live independently and participate fully in all aspects of life, and to ensure that people with disabilities have access, on an equal basis with others, to the physical environment. Reasonable accommodation is likewise required by section 9(c) of PEPUDA, which prohibits unfair discrimination – including discrimination in the form of inaccessibility – on the ground of disability. Moreover, reasonable accommodation measures expected of employers are introduced in section 15(2)(c) of the EEA. This is further operationalised by the publication of the Department of Labour’s Technical Assistance Guidelines on the Employment of People with Disabilities.²⁸

In the public sphere, the Department of Public Works (DPW) is the custodian of public buildings and is responsible for making those buildings accessible in order to prevent indirect unfair discrimination from occurring. The Department of Public Service and Administration (DPSA) has developed a regulatory framework that aims to foster consistency across the public sector in respect of the provisions of assistive devices, personal assistance and technology for public servants with disabilities.²⁹ The resultant Policy on Reasonable Accommodation and Assistive Devices in the Public Service came into effect in April 2016.³⁰

The policy provides guidelines on overcoming key barriers to employees with disabilities, such as the provision of transport for employees who may not otherwise be able to use public transport, leave for repairs of assistive devices, acquisition and disposal of assistive devices and provision of personal assistants and caregivers.

24 African Union *Continental Plan of Action for the African Decade of Persons with Disabilities* (2010).

25 *City of Johannesburg v Rand Properties (Pty) Limited and Others* 2007 (1) SA 78 (W) para 64.

26 *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 59.

27 S Ferraina ‘Analysis of the legal meaning of Article 27 of the UN CRPD: Key Challenges for Adapted Work Settings’ (2012) *Cornell University ILR School DigitalCommons@ILR*.

28 Department of Labour *Technical Assistance Guidelines on the Employment of People with Disabilities* (2017) <<http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf>>.

29 Department of Women, Children and People with Disabilities *Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa* (2013) 33.

30 *DPSA Policy on Reasonable Accommodation and Assistive Devices in the Public Service* (2015) <http://www.dpsa.gov.za/dpsa2g/documents/ee/2015/289_1_2_3_20_08_2015_Policy.pdf>.

However, the problem of inaccessibility continues to hinder the access of people with disabilities to workplace environments. For example, it recently came to light that a senior State official had been employed but had not been provided with a personal assistant, and his spouse had been required to help with overall administration of their office.³¹ In response, the DPSA emphasised that whenever someone is employed, reasonable accommodation must be provided to cater for her or his needs, and that progress in this respect had been unacceptably slow to date.³² The DPSA further reported that government still tends to employ persons with disabilities at entry level, thereby further impeding transformation.³³ The DPSA proposed a five-step plan to address the situation in the public sector, which consists of (i) disability sensitisation; (ii) data collection regarding the number of persons with disabilities who are employed as well as relevant types of disabilities; (iii) the development of reasonable accommodation policies and strategies at the departmental level; (iv) the provision of basic facilities such as wheelchair ramps for those departments that still required these facilities; and (v) the improvement of ineffective recruitment strategies.

7.3 Employment of persons with disabilities

The Department of Labour (DOL) is mandated to coordinate and monitor commitment to inclusive employment practices, as stipulated in a number of pieces of legislation and policies, namely the Public Service Act, 103 of 1994, the Labour Relations Act, 66 of 1995 (LRA), the EEA and the BBEEA, which, among other things, aim for greater representation of persons with disabilities in the public service. The legislation on employment equity is binding on both the public and private sectors. However, despite the existence of legislation and policy, various barriers prevent many persons with disabilities from accessing employment opportunities.

In terms of the WRPD, the employment equity and work opportunity targets for persons with disabilities should increase to at least 7 percent by the year 2030.³⁴ However, current employment equity statistics cast doubt on the prospects of meeting this target. As a designated employer in terms of the EEA, the public sector set its employment target for persons with disabilities at 2 percent for 2005.³⁵ More than a decade later, this target has still not been met. In addition, even current statistics from the Commission for Employment Equity may not accurately reflect the position of persons with disabilities in the employment context, since people with ‘invisible disabilities’ (whether psychosocial, neurological, aural or intellectual) may not be aware of or report their disabilities, and will thus not be eligible to benefit from affirmative action measures such as those encompassed by the EEA.³⁶ Moreover, those persons with disabilities who do benefit from the EEA are often White and male, and are therefore less dependent on reasonable accommodation than those persons with disabilities who belong to more vulnerable population groups.³⁷ Finally, it should be borne in mind that since the EEA does not apply to the judiciary, judicial officers including magistrates cannot benefit from the Act’s provisions. Consequently, Chapter 5 of PEPUDA, which obliges all members of society (including the judiciary) to promote equality, should be operationalised as a matter of urgency to ensure that judicial officers with disabilities are also reasonably accommodated.

31 Parliamentary Monitoring Group *Public Service and Administration - Disabled People South Africa - Briefing on Education, Employment & Accessibility Challenges* (2015) <<https://pmg.org.za/committee-meeting/15509/>>.

32 Ibid.

33 Ibid.

34 Department of Social Development *White Paper on the Rights of Persons with Disabilities: Implementation Matrix 2015-2030* (2016) 17.

35 Department of Women, Children and People with Disabilities *Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa* (2013) 56.

36 Department of Social Development *White Paper on the Rights of Persons with Disabilities* (2016) 95.

37 Ibid.

It is estimated that on average, eight in ten persons with disabilities are unemployed, 'making discrimination in terms of the denial of employment opportunities one of the most daunting challenges faced by persons with disabilities in South Africa'.³⁸ Moreover, the employment of people with disabilities is currently decreasing at all levels. The representation of persons with disabilities decreased at the top management level from 1.7 percent in 2014 to 1.2 percent in 2016. Representation decreased even further at senior management level, from 1.7 percent to just 1.1 percent during the same period. The professionally qualified level experienced a similar trend with representation decreasing from 1.4 percent in 2016 to 0.9 percent in 2016. Even the unskilled sector recorded a decrease in representation from 1.4 percent in 2014 to 0.8 percent in 2016.³⁹ Additionally, those persons with disabilities who do find employment at top levels are usually White males (and thus less vulnerable than people with disabilities from other population groups), with 50.8 percent White male representation in top management⁴⁰ and 39 percent White male representation at senior management level.⁴¹ It is only at the skilled, semi-skilled and unskilled levels that representation by African males with disabilities exceeds representation by the White population group. Males with disabilities enjoy greater representation than females with disabilities at all employment levels and across all population groups.⁴²

The decrease in the levels of employment of people with disabilities indicates that reasonable accommodation may not be taking place in the workplace. Moreover, inequality and discrimination in the workplace, as evident from imbalances in representation of persons with disabilities across population groups and gender, persist due to the legacy of apartheid in South Africa.

INEQUALITY IN EDUCATION 8

Section 29(1) of the Constitution guarantees the right to a basic education (which is immediately realisable) as well as the right to further education, which the State must make progressively available and accessible through reasonable measures. Article 24 of the CRPD guarantees the right to inclusive education, at all levels, for persons with disabilities. This right explicitly includes both equal access to education, and equal participation *in* education. Reasonable accommodation is therefore crucial to ensure that persons with disabilities can enjoy quality education on an equal basis with other people in their communities. Inclusive education should be directed to the full development of human potential, dignity and self-worth, personality and creativity of people with disabilities.⁴³ Simultaneously, inclusive education should enable persons with disabilities to participate fully in all aspects of society, including the labour market.⁴⁴

38 SAHRC *Promoting the Right to Work of Persons with Disabilities: Toolkit for the Private Sector* (2015) 8.

39 Commission for Employment Equity *Annual Report 2016-2017* (2017) 56-63.

40 Ibid 14.

41 Ibid 19.

42 Ibid 14, 19, 23, 28, 32, 36.

43 Article 24(1)(a)-(b) of the CRPD.

44 Ibid article 24(1)(c). See also UN *Sustainable Development Goal 4: Ensure inclusive and quality education for all and promote lifelong learning*, which acknowledges the need for inclusive education for children with disabilities.

Currently, between 500,000 and 600,000 children with disabilities are out of school.⁴⁵ Whereas some of these children were turned away from mainstream schools in contravention of the prohibition against unfair discrimination on the basis of disability, others were refused admission to special schools based on their particular disability or learning needs.⁴⁶ Many children with disabilities do not attend school due to a failure to provide basic reasonable accommodation facilities such as wheelchair ramps and accessible toilets.⁴⁷ Where children with disabilities do access schools, such schools often fail to reasonably accommodate them. For example, research conducted by SECTION27 reveals wide-spread neglect of and discrimination against children with visual disabilities, in that adequate learning materials are unavailable, or teachers are not sufficiently trained to teach children with visual disabilities.⁴⁸ Poor living conditions in special school hostels, including abuse, have been alleged;⁴⁹ whereas a video of the abuse of a child with a disability by school employees has recently been shared widely on social media.⁵⁰

According to the Department of Women, Children and People with Disabilities' 2013 baseline report, the education system is currently not sufficiently skilling young persons with disabilities for the open labour market or as owners of economically viable small enterprises.⁵¹ The inaccessibility of learning material during early stages of education already impacts negatively on appropriate skills acquisition. Beyond basic education, individuals with a disability are less likely to obtain a post-secondary qualification compared to others. The Commission has found that transformation at public universities, including in respect of disability, has been insufficient.⁵² Furthermore, most universities do not adequately consider the needs of students with disabilities in the formulation of their language policies⁵³ or in their residence placement policies.⁵⁴ The failure to take students with disabilities' language of learning and accommodation needs into account constitutes discriminatory barriers to accessing further education.

Disaggregated data regarding persons with disabilities in various social spheres is not readily available, but the increase in the number of students with disabilities in post-secondary education institutions is slower than general intake numbers and growth over the past five years.⁵⁵ Only one fifth of persons between the ages of 20 and 24 years with 'severe difficulties across all functional domains'⁵⁶ attends tertiary institutions. Of these, most are from the White population group.⁵⁷

45 Department of Basic Education *Report on the Implementation of Education White Paper 6 on Inclusive Education: An Overview for the Period 2013-2015* (2016) 7; Human Rights Watch *Complicit in Exclusion: South Africa's Failure to Guarantee an Inclusive Education for Children with Disabilities* (2015) 80; S Khumalo & T Fish Hodgson 'The Right to Basic Education for Children with Disabilities' in F Veriava, A Thom & T Fish Hodgson (SECTION27) *Basic Education Rights Handbook* (2017) 117.

46 Human Rights Watch *Statement to Portfolio Committee on Basic Education* (8 March 2016).

47 Ibid.

48 SECTION27 *Left in the Dark: Failure to Provide Access to Quality Education to Blind and Partially Sighted Learners in South Africa* (2015) 15.

49 S Khumalo & T Fish Hodgson 'The Right to Basic Education for Children with Disabilities' in F Veriava, A Thom & T Fish Hodgson (SECTION27) *Basic Education Rights Handbook* (2017) 118.

50 Times Live 'Disabled Pupil Assaulted on School Bus in Soweto' (18 September 2017) *TimesLive* <<https://www.timeslive.co.za/news/south-africa/2017-09-18-watch--disabled-pupil-assaulted-on-school-bus-in-soweto/>>.

51 Department of Women, Children and People with Disabilities *Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa* (2013) 60.

52 SAHRC *Transformation at Public Universities in South Africa* (2016) 60.

53 Ibid 26, 67.

54 Ibid 61, 67, 68.

55 Department of Higher Education *Draft Policy Framework for Disability in the Post-School Education and Training System* (2016) 5.

56 Ibid.

57 Ibid.

Nevertheless, the Department of Higher Education is in the process of developing a policy framework for persons with disabilities in the post-school education and training system,⁵⁸ whereas the same Department recognises that transformation of the post-school education system must include the social inclusion of persons with disabilities.⁵⁹

In addition, the National Student Financial Aid Scheme (NSFAS) earmarked R76.6 million for students with disabilities in universities for the 2017 academic year, whereas the Department of Higher Education covers 80 percent of programme costs for students with disabilities who attend Technical and Vocational Education and Training colleges, with additional allocations made depending on the nature and severity of the disability.⁶⁰

Equal access to and enjoyment of quality education are thus essential to guarantee both the realisation of the full potential of persons with disabilities, as well as to equip persons with disabilities with adequate skills to successfully participate in the economy. At the same time, broader education is necessary to educate persons without disabilities about the need for social inclusion and reasonable accommodation. Article 8 of the CRPD makes provision for awareness-raising and seeks to ensure that States Parties combat stereotypes, prejudices and harmful practices relating to persons with disabilities. Chapter 5 of PEPUDA, which has not yet commenced by proclamation, likewise mandates the promotion of equality. However, stigma continues to be a barrier for persons with disabilities.

THE COMMISSION'S WORK ON DISABILITY 9

9.1 SAHRC complaints

9.1.1 Leeudoringstad School for the Deaf

In August 2015, a fire broke out in a hostel at the Leeudoringstad School for the Deaf in the North West Province.⁶¹ Three deaf learners died, while others were injured. In an initial media statement, the North West Department of Education and Sport Development noted that '[a]n alarm rang to sensitize learners of the fire, but [they] could not hear it due to the nature of their disability'. On 15 September 2015, the Commission conducted an inspection of the school in order to assess if there was any violation of human rights. The Commission enquired about the fire evacuation plans and aimed to ascertain whether plans were suited to the disability of the children. In 2017, the Commission provided a Provisional Investigative Report to the Respondents (the North West School for the Deaf, the North West Department of Basic Education and the Member of the Executive Council for Basic Education) for comment, after which the Office of the Head of Department undertook to implement the Commission's recommendations in accordance with the stipulated timeframes. Amongst other findings, the Commission found that the inappropriate fire alarm, along with other inadequate safety precautions, failed to reasonably accommodate the deaf learners, and therefore violated their right to equality and the equal enjoyment of various human rights. The Final Investigative Report will be produced in due course.

58 Ibid generally.

59 Department of Higher Education *Policy Framework for the Realisation of Social Inclusion in the Post-School Education and Training System* (2016) 14.

60 B Nzimande, Department of Higher Education *Address by Minister of Higher Education and Training, on opportunities for Matric Class 2016 in Post-School Education and Training, Hatfield, Pretoria* (12 January 2017).

61 SAHRC Complaint NW/1516/0130.

9.1.2 Ndebele Nkosi and BMW South Africa

The Commission mediated a complaint which dealt with the reasonable accommodation of a visually impaired employee at BMW. The complainant, who was a Human Resources manager at BMW, became visually impaired after undergoing a series of medical treatments in 2014. The complainant was concerned that the relationship between her and the employer had been strained as a result of her disability in that she was not being treated with dignity and the employer was not willing to reasonably accommodate her. Amongst the actions agreed upon was that the respondent would conduct an environmental assessment of the workplace and make the necessary adjustments in order to ensure that the complainant was reasonably accommodated.

9.2 Hearings, conferences and resource development

9.2.1 The National Investigative Hearing on Unfair Discrimination in the Workplace

On 8 March 2016, the Commission hosted a National Investigative Hearing on Unfair Discrimination in the Workplace. The hearing sought to assist in addressing systemic forms of discrimination and social stigmas with a view to promoting and enhancing the achievement of equality and equitable employment opportunities for all persons. The hearing was attended by employees, public and private sector employers, trade union bodies and government departments. The hearing culminated in a report with recommendations for addressing the issues that arose during the course of proceedings. The report was launched on 23 November 2017.

9.2.2 National Conference on the Rights of Children with Disabilities

The Commission hosted a National Conference on the Rights of Children with Disabilities between 11 and 12 October 2017. The aim of the National Conference was to strengthen the working relationship between SAHRC, non-governmental organisations and government departments to practically map out and ensure an inclusive society for children with disabilities. At the same time, the conference sought to educate parents and communities about their rights and empower them to enforce these rights. In achieving these outcomes, the National Conference focused on reviewing policies and laws that should promote the rights of this vulnerable group of children, identifying progress made in the realisation of these rights, identifying challenges in the realisation of such rights, charting a map to mitigate such challenges and getting relevant stakeholders' commitment to ensuring a better life for children with disabilities. The potential utilisation of PEPUDA to promote the rights of children with disabilities was a pertinent theme that arose during the course of the conference.⁶²

⁶² Other conference themes included the need for coordination between the Department of Social Development and the Department of Basic Education; the state of hostels in special schools; the disadvantages of litigating for socio-economic rights; teacher training; empowering parents of children with disabilities; scholar transport for learners with disabilities; curriculum differentiation and curriculum adaptation; access to textbooks; and the impact of South Africa's ratification of the ICESCR.

9.2.3 Disability Toolkit

On 27 November 2015, the Commission launched a toolkit entitled '*Promoting the Right to Work of Persons with Disabilities: A Toolkit for the Private Sector*'⁶³ along with a Monitoring Framework (the Toolkit). The Toolkit is intended to raise awareness of the rights to work in the private sector of persons with disabilities. The launch of the Toolkit was attended by representatives from the private sector, organisations for people with disabilities, public sector employers and trade unions. The Commission was able to secure some support from businesses to test the tool and the support of the DOL to help implement the tool. However, in the course of its provincial launches of the Toolkit, the Commission noted poor participation in the events by business and organised labour. These levels of attendance appear to be indicative of the need to target the private sector more aggressively for the purposes of uptake and accelerated sensitisation. The Commission, going forward, will monitor compliance with this tool in order to determine trends, identify loopholes and determine timely interventions.

CONCLUSION 10

The tragic events that unfolded in the Life Esidimeni matter serve as a stark reminder of the untenable obstacles that people with disabilities still face in South Africa. Similar events cannot be allowed to recur, and all stakeholders should work together to ensure greater awareness of the plight of persons with disabilities and their full integration into society. Discrimination against people with disabilities persists in various social and economic spheres, including in the economy and education. Without sincere social inclusion and reasonable accommodation of people with disabilities, substantive equality cannot be achieved. It is to be hoped that government will act expeditiously in fully operationalising Chapter 5 of PEPUPA, which imposes obligations on all members of society to promote equality. This may help to combat the stigma that still surrounds disability. Furthermore, the availability of disaggregated data regarding people with disabilities in the context of poverty, inequality and unemployment would significantly contribute to more meaningful research in respect of persons with disabilities. In addition, the Department of Labour should engage with the Department of Public Service and Administration and the private sector to facilitate faster transformation of the labour market. Finally, the Department of Basic Education should urgently address the issue of out-of-school children with disabilities as well as the absence of reasonable accommodation of such children in schools, whereas the Department of Higher Education should continue its efforts to facilitate transformation and social inclusion in universities and other institutions of higher learning.

63 SAHRC *Disability Toolkit for the Private Sector* (2015).



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