

30 June 2021

FROM: Commission of the General Church Assembly (GCA)

TO: Ms F Bhayat

The Director-General: Justice and Constitutional Development
Private Bag X81
Pretoria
0001

E-MAIL: fbhayat@justice.gov.za

Dear Ms Bhayat,

COMMENTS ON THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION AMENDMENT BILL, 2021

In response to the invitation¹ by the Department of Justice and Constitutional Development for the submission of public comments on the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill (the Bill), the Netherdutch Reformed Church of Africa (the NHKA) wishes to take this opportunity to comment on the Bill.

From the outset it needs to be emphasised that the NHKA does not tolerate any form of unfair discrimination and has through the years, through numerous resolutions and other measures, endeavoured to rid the Church Order of any real or potential unfair discriminatory provisions, and to promote equality, and adjusted church practices accordingly. The NHKA will therefore support all legitimate government efforts to this end.

However, we have certain reservations with regard to the proposed amendments to the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act (the principal Act).²

1. THE PREVENTION OF DISCRIMINATION

The first part of the Act, which deals mainly with the prevention of discrimination, is currently in full operation and a few amendments are proposed in the Bill, reportedly “to improve the protection of complainants against discrimination”.³

¹ *Government Gazette* no 44402, 26 March 2021.

² The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000), gives effect to section 9 of the Constitution by providing for, among others, the equal enjoyment of all rights and freedoms by every person; the promotion of equality; the values of non-racialism and non-sexism contained in section 1 of the Constitution; the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; and the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution.

³ Background note, *Government Gazette* (*Id.*).

1.1 A stricter liability

With the insertion of the words “whether intentional or not” in the definition of discrimination,⁴ the Bill introduces a form of strict liability (absolute liability or liability in the absence of fault) to the principal Act with regard to unfair discrimination (as negligent unfair discrimination is arguably not a common occurrence).

Although strict liability is not completely foreign to South African law,⁵ it remains highly exceptional and has always been approached with the utmost circumspection. It is a basic norm of our society that liability for harm should rest on fault, whether in the form of negligence or intent.⁶ The Supreme Court of Appeal in *National Media Limited v Bogoshi*⁷ ruled that (in a defamation by media case) strict liability cannot be defended if “the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process is recognised” (at 25). The Court thereby put an end to one of the few instances where strict liability still applied. The Court also points out that strict liability has been rejected by several international jurisdictions (at 26). Moreover, the Court left the common law requirement of *animus iniuriandi* (direction of the will and knowledge of wrongfulness) for non-media defamation defendants unchanged. Following the judgment it seems reasonable to expect that the same reluctance to adopt strict liability be extended to cases of unfair discrimination.⁸

It is near impossible to lead a normal life with the constant threat of unintentionally (or accidentally) unfairly discriminating against another. Every social interaction will become a perilous minefield of constant evaluation and re-evaluation, suspicion, finger-pointing, and withdrawal. Even the most cursory reading of fault in law, and the role of malice and intention therein, ought to confirm that this bizarre feature of the Bill is not reasonable, and would probably not stand its ground in any proper constitutional inquiry.⁹

1.2 Expansion of prohibited grounds

To complicate social interaction even more, the Bill expands the prohibited grounds listed in the principal Act¹⁰ by widening the scope to prejudice to, or otherwise undermining of the dignity of, any person “related to” one or more of the prohibited grounds.

⁴ "'Discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly – (a) imposes burdens, obligations or disadvantage on; (b) withholds benefits, opportunities or advantages from; (c) causes prejudice to; or (d) otherwise undermines the dignity of, any person related to one or more of the prohibited grounds, irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission."

⁵ For instance the *actio de pauperie*, the *actio de effusis vel deiectis*, actions based on the unlawful deprivation of personal freedom, and (limited) strict product liability in terms section 61 of the Consumer Protection Act (68 of 2008).

⁶ See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) (at 21).

⁷ 1998 (4) SA 1196 (SCA).

⁸ See also *S v Coetzee and Others* 1997 (3) SA 527 (at 163-169) for the Constitutional Court's view on the reluctance of South African and foreign courts to tolerate the imposing of strict liability.

⁹ E.g. section 35(3) of the Constitution. In any event, the Constitution already makes it easy enough for complainants to make out a case of unfair discrimination with a rebuttable presumption of unfairness as contemplated in section 9(5): *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

¹⁰ Section 1(xxii)(a) of the principal Act (similarly to section 9[3] of the Constitution) lists the prohibited grounds as: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

With the abolition of intention (see 1.1, *supra*) and the insertion of the very vague “related to” in the definition of discrimination, the bar to claim prejudice or the undermining of another’s dignity is set so low that it is near impossible to interact with other persons in a way that may not in some way or another be construed to be contravening the law. The scope for arbitrary interpretation and malevolent application seems endless. One could, for instance, think of endless possibilities that could be considered grounds “related to” belief and religion.

The test to establish whether an act or omission could have indeed led to the undermining of the dignity of another, is supposed to be an objective test. However, the wording of the proposed amendments, and the spirit of the Bill as a whole, as well as the principal Act, creates the impression that the subjective experience of the complainant will be the ultimate deciding factor.

However, a person’s feelings and experience do not necessarily mean that real damage or prejudice has ensued. The recent judgment by the Supreme Court of Appeal, in *Qwelane v South African Human Rights Commission and Another*,¹¹ that declared section 10 of the principal Act unconstitutional (and incidentally led to the Court instructing lawmakers to amend the Act, hence the Bill under discussion), concluded compellingly that the legislature sought to provide protection as broadly as possible,¹² and that the section departed significantly from the objective constitutional test.¹³ The Court reiterated that a person’s subjective emotions and feelings in response to the actions of a third party, do not equate with causing harm or incitement to harm.¹⁴ The constitutional standard involves an objective test, not the subjective opinion of a person.¹⁵ There is nothing in the Bill that could be construed as upholding the constitutional standard, or that the proposed amendments properly envisage how “causing harm or incitement to harm” is to be understood.

The expansion of the scope of what may lead to the undermining of the dignity of another, as introduced by the amendments, may lead to waves of frivolous or vexatious litigation. Often normal social expression of a free society may seem robust, but it should not continually be assumed to undermine the dignity of another or to cause prejudice.

Moreover, the Constitution and the principal Act and other legislation, as well as the common law, provide ample legal remedies against actions that cause damage and impair human dignity. In any event, people’s attitude towards equality and non-discrimination can hardly be changed by the perpetual introduction of additional legislation.

1.3 Vicarious liability

Another form of strict liability, namely vicarious liability,¹⁶ is sought to be introduced into the principal Act by the amendment of section 6, with the insertion of a new section 6(3): “If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act”.

¹¹ *Qwelane v South African Human Rights Commission and Another* 2020 (2) SA 124 (SCA).

¹² *Id.* (at 67).

¹³ *Id.* (at 68).

¹⁴ *Id.*

¹⁵ *Id.* (at 62 and 66).

¹⁶ The concept of vicarious liability mainly finds application in employer/employee relationships.

As noted in 1.1 (*supra*), it is trite that liability for harm should rest on fault, and it is unfathomable from a legal point of view that a person can be held vicariously liable for the no-fault actions of others. The “reasonable steps” expected by the Bill to prevent the worker, employee or agent from “unintentionally” contravening the Act” puts an almost impossible burden on an employer. To complicate matters, “contraventions and proceedings under the Act” include all the chapter 2 contraventions,¹⁷ including harassment and all the dubious forms of hate speech – convoluted by the likely application of the vague “related to” extension of prohibited grounds (*supra*).

A constitutionally untenable situation may arise where an employer is held liable for the accidental (unintentional) unfair discrimination of an employee on a ground related to one of those on the prohibited list. Floodgates of investigations and litigation may open – the no-fault liability of the supposed perpetrator and of his or her employer, and the financial resources of the latter, the major driving forces.

This also begs the question: Is there any justification in holding a minister or church council of a congregation vicariously liable for the unintentional discriminatory acts by the church office bearers in their official church duties? Would it even make sense to hold anyone liable for no-fault actions?

1.4 Prohibition of retaliation

The Bill proposes the insertion of a new section 9A in the principal Act which calls for the “prohibition of retaliation”: “No person may retaliate or threaten to retaliate against a person who objects to a discriminatory act or omission...”

At face value this amendment is puzzling. It is not explained what is understood by “retaliation”. It surely can’t mean that there is no recourse or remedy available to the accused? That would be unprecedented. There is certainly no statutory regulation, common law provision or court judgment to support such an injunction. At the very least, there certainly have to be limits to this restriction. The Bill, for instance, does not make it clear whether retaliation is justified if the objection to a discriminatory action is found to be made under false pretences. It is not difficult to foresee the institution of a myriad of frivolous cases if this amendment is not discarded or completely redrafted.

1.5 The distinction between fair and unfair discrimination

The proposed amendments seem to disprove the constitutional qualifying distinction between fair and unfair discrimination. In several sections the qualifying term “unfair” has fallen by the wayside where it refers to the elimination of discrimination, e.g. the proposed 24(2): “All persons have a duty and responsibility to eliminate discrimination and to promote equality”.¹⁸ This peculiarity is not found in the principal Act. On the contrary, section 14 of the principal Act is dedicated to the determination of fairness or unfairness, and the aim to eliminate “unfair discrimination” is reiterated throughout the Act and the Constitution.

The definition of discrimination (see footnote 4), including, *inter alia*, any act or omission that directly or indirectly imposes burdens or obligations on, or withholding benefits, opportunities or advantages from any person related to one or more of the prohibited grounds, certainly calls for a distinction between fair and unfair.

¹⁷ “Prevention, prohibition, and elimination of unfair discrimination, hate speech and harassment.”

¹⁸ This omission also occurs, *inter alia*, in the proposed amended sections 24(2) and (3)(a), 25(1)(d), 25(4), 26A and 27(1)(a).

The reality is, people discriminate – and it is trite that certain forms of discrimination are acceptable and even feasible. The omission of the word “unfair” negates a very important and well-established distinction and it changes the intention of the Constitution in a way that is not tenable. This is a pivotal issue and to disregard it will have a serious domino-effect. The mere action of scrutinising and considering candidates for a certain position of employment is discriminatory in effect, but generally fairly so. How is a congregation supposed to select a minister to appoint, without the ability to (fairly) discriminate? Moreover, would churches discriminate unfairly if they require of prospective (and serving) ministers to uphold certain tenets and doctrines? What may be expected from church members? And a religious organisation’s maintaining of ethics and morality, which is discriminatory by their very nature, would inevitably carry a risk of prosecution. To consider all forms of discrimination (“unintentional” discrimination to boot) to be unacceptable, puts an almost unbearable burden on individuals, churches and other religious associations.

2. THE PROMOTION OF EQUALITY

The proposed amendments to the second part of the principal Act, which deals with the promotion of equality by organs of state and public and private bodies, purport to provide clarity and strengthen accountability.¹⁹ The second part of the Act is not yet in operation, and only a few comments will be made on the amendments.

2.1 Legal aid to complainants

The proposed section 25(8)²⁰ provides for legal aid to be granted to persons who wish to institute proceedings in terms of this Act. The support potential complainants is offered, curiously does not extend to the accused. Equality certainly includes the state’s duty to ensure equal access to resources, incidentally intended in so many words by the proposed section 25(6)(a).²¹

2.2 Regulatory powers

The Bill calls for the substitution of section 28 of the principal Act with, *inter alia*: *All persons, non-governmental organisations, community-based organisations or traditional in situations must promote equality in their relationships with other bodies and in their public activities.* This is a tall order when considering the extension of the definition of equality to include “equal access to resources, opportunities, benefits, and advantages”,²² and in this instance not limited to the duty of the state.

¹⁹ *Government Gazette* no 44402, 26 March 2021 (at 2.4.2).

²⁰ “The Board of Directors, appointed in terms of section 6 of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), must, when making recommendations to the Cabinet member responsible for the administration of justice for purposes of the regulations to be made in terms of section 23 of that Act, consider recommending, subject to the criteria determined by that member in terms of the said regulations, that legal aid be granted to persons who wish to institute proceedings in terms of this Act.”

²¹ Section 25(6): “The measures to be adopted by the State to achieve equality must – (a) proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including *equal access to resources, opportunities, benefits and advantages and social goods*” (emphasis added).

²² “‘Equality’ includes – (a) the full and equal enjoyment of rights and freedoms as contemplated in the Constitution; (b) equal right and access to resources, opportunities, benefits and advantages; (c) *de jure* and *de facto* equality; (d) equality in terms of impact and outcomes; and (e) substantive equality.”

Moreover, section 28(2) confers undue regulatory powers upon the relevant minister in a way that militates against constitutional associational rights.²³ These include the power to determine the measures to be adopted and implemented or to issue a code of practice related to discrimination and equality. (It appears that the incorrect conjunction, namely “or” [instead of “and”] was used between sections 28[2][b] and [c] in the Bill.)

Such efforts to infringe on the rights of religious organisations often appear to be rooted in the chequered history of South Africa rather than in principled considerations. To entrust the state with the power and obligation to compel religious organisations to eliminate all forms of discrimination in their proclamations and practices would amount to political tyranny. The way this would impact lives through legislation, such as the proposed amendments, is cause for concern.

The church’s right to arrange its own affairs in accordance with its tenets and beliefs will be seriously compromised if the amendments are adopted, and left in the hands of the state to determine “the measures to be adopted and implemented” to promote equality. This would inevitably lead to the erosion of the church’s right to self-expression, which will be dealt with below.

3. THE CHURCH’S RIGHT TO SELF-EXPRESSION

It seems that the main aim of the proposed amendments to the principal Act is to ultra-regulate the conduct of groups of people and individuals. This is of concern to the Church that has on numerous occasions had to assert its constitutional rights, and has often warned against the dangers of state regulation of religion and belief.

Chapter 2 (the Bill of Rights) of the Constitution expressly protects fundamental rights, including religious rights. Of particular interest to the NHKA are section 9 (notably the prohibition of discrimination on the listed grounds, which include religion, conscience and belief), 15 (Freedom of religion, belief and opinion), 16 (Freedom of expression), 18 (Freedom of association) and 31 (Cultural, religious and linguistic communities). The compound effect of these rights and liberties (individual and associational) effectively excludes all forms of state control of religion, belief and opinion. The rights to autonomy and self-rule also include the right of churches to enjoy the self-regulation of their own doctrines, creeds and confessions, and the teaching, preaching and practices stemming from this.

It is paramount to take note of the Constitutional Court’s authoritative dictum in *Prince v President of the Law Society of the Cape of Good Hope, Prince v The President of the Law Society of the Cape of Good Hope*²⁴ that the fact that some people’s beliefs are “bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion” and that “believers should not be put to the proof of their beliefs or faith”. The judgment is a decisive proclamation of the right of church members to freely manifest their religion and creeds without fear of state interference – even if some may find it to be offensive.

²³ The amended 28(2) reads as follows: “Subject to subsection (3), the Minister who is responsible for the portfolio in which persons, non-governmental organisations, community-based organisations or traditional institutions contemplated in subsection (1) operate must – (a) determine, by regulation or otherwise, the measures to be adopted and implemented; or (b) issue a code of practice, dealing with the elimination of discrimination and the promotion of equality, in respect of those persons, non-governmental organisations, community-based organisations or traditional institutions.”

²⁴ 2002 (2) SA 794 (CC) (at 42).

The low threshold to make a finding of unfair discrimination, breach of equality or impairing of the dignity of another, found in the Bill, may seriously inhibit believers from manifesting their religion – which is in direct contravention of the provisions in the Constitution. Religious and associational rights are, after all, buttressed by the right to freedom of expression. Although section 16(1) of the Constitution guarantees freedom of expression, section 16(2) contains an internal limitation regarding the definitional scope of the right to freedom of expression, demarcating forbidden forms of expression. It states that the right to freedom of expression does not extend to “(a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”. This very high threshold for expressions that are not protected by the Constitution does not extend to the Bill.

The section relating to hate speech in the principal Act was indeed found to be invalid by the Supreme Court of Appeal in the *Qwelane* case.²⁵ It would be wise to consider the dictum by Navsa, J (at 69): “Daily human interaction produces a multitude of instances where hurtful words are uttered and thus, to prohibit words that have that effect, is going too far”. The stringent application of possible unfair discriminatory expressions and actions found in the Bill flies in the face of the *Qwelane* judgment.

A case in point is the amendment of section 6 of the principal Act, with the insertion of a new clause: “Any person who causes, encourages or requests another person to discriminate against any other person, is deemed to have discriminated against such other person”. In the light of the insertion of the words “whether intentional or not” in the definition of discrimination (see 1.1, *supra*), it becomes risky for clergy to encourage church-members to witness their faith to the world and to openly assert their convictions and confess their creeds.

To this end, the Constitutional Court (in *S v Lawrence; S v Negal; S v Solberg*)²⁶ has cautioned against *measures that force people to act or refrain from acting in a manner contrary to their religious beliefs* as such measures may impair one’s right to freedom of religion. Moreover, the doctrine of doctrinal entanglement, as applied in *Ryland v Edros*,²⁷ *Taylor v Kurtstag N.O. and Others*²⁸ and *Singh v Ramparsad*,²⁹ has become part of our law. Courts are increasingly hesitant to enter into doctrinal adjudication – and inclined to accept the autonomy of religious institutions based on their own self-understanding and self-definition.

Believers should be allowed to manifest their religion and creeds, free from statutory burdens, even when someone is somewhat affronted by the sincere expression of religious belief. Mere vigorous expressions should therefore not be prohibited – on the contrary, rancorous debate is healthy, even if found to be slightly offensive to the fainthearted.

It is accepted that certain individuals may invoke religious (or other) rights to escape censure for harmful views and actions. Proper juristic adjudication ought to deal with any such shameful imprudence adequately and decisively.

²⁵ Full reference at footnote 11.

²⁶ 1997 4 SA 1176 (CC) (at 92).

²⁷ 1997 (1) BCLR 77 (C).

²⁸ 2004 4 All SA 317 (W).

²⁹ 2007 ZAKZHC 1.

4. CONCLUDING REMARKS

While the Church supports any effort to curb unfair discrimination and any and all actions and expressions that threaten our fragile democracy, we cannot support continued efforts by the state to over-regulate the affairs of religious institutions and their members. The Bill seems like a dictatorial effort by the powers that be to control the lives of ordinary people. The proposed amendments to the principal Act militate strongly against constitutionally protected fundamental rights and freedoms.

It is not morally feasible to regulate people's thoughts and behaviour to the extent that the amendments set out to do. Bias, bigotry, and unfair discrimination on arbitrary grounds should be exposed and dealt with, but not by means of additional statutory laws. The Bill in its current form will arguably not contribute to the normalisation of an abnormal society, and may even have the potential to further divide society. Any attempt to legislate virtuous morals, good manners, and common sense appears futile. The Church will not underplay its own role in achieving equality, and non-discrimination, and social and cultural sensitivity – but the driving force should be respect and not fear. In achieving this, sustained human rights education seems more appropriate than additional (and draconian to boot) laws and the added strain on our overburdened legal system.

The Bill in its current form is flawed for all the reasons stated above and it falls short of the aims the Constitution sets out to achieve. The amendments need to be carefully redrafted, if not rejected completely, taking into account all the input from interested parties and individuals.

Best wishes,



Dr WC van Wyk
Secretary: Commission of the General Church Assembly
Nederduitsch Hervormde Kerk van Afrika (NHKA)
On behalf of the Scribe: Rev WJJ Kok

012 322 8885 x3103
wouter@nhk.co.za