

UNIVERSITY OF PRETORIA

CAMPUS-WIDE ANTI-DISCRIMINATION AND DIVERISTY CONSULTATION

31 AUGUST 2017, FUNCTION ROOM

OVERVIEW OF RELEVANT DOMESTIC AND UNIVERISTY OF PRETORIA LEGAL AND POLICY FRAMEWORKS CURRENTLY IN PLACE

Some of the main legal and policy measures of relevance to discrimination in South Africa and the University of Pretoria are as listed below.

1. GLOBAL AND REGIONAL INSTRUMENTS

Some of the relevant global and regional standards may be found at <http://adsdatabase.ohchr.org/SitePages/Anti-discrimination%20database.aspx>.

Extracts and short summary of some of the relevant global and regional instruments prepared for the Consultation may be found [here](#)

2. SOUTH AFRICAN NATIONAL INSTRUMENTS CURRENTLY ADDRESSING DISCRIMINATION

2.1 Legislation of importance:

2.1.1 Constitution of the Republic of South Africa, (the “Constitution”)

The most important law in South Africa as pertains to equality and the prevention of discrimination is the Constitution of the Republic of South Africa, (the “Constitution”) specifically the following section on the Bill of Rights:

Section 9(1) to Section 9(5) on the right to Equality, Section 10 on the right to Human Dignity, Section 16 on the right Freedom of Expression, section 23 on Fair Labour Practices, and section 36 on the Limitation of Rights are particularly relevant.

Section 9: The Right to Equality

Section 9(1) *“Everyone is equal before the law and has the right to equal protection and benefit of the law.”*

Section 9(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.”*

Section 9(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.”*

Section 9(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.”*

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.”*

Section 10: The Right to Human Dignity

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 16: The Right to Freedom of Expression

Section 16(1) *“Everyone has the right to freedom of expression, which includes—*

- (a) freedom of the press and other media;*
- (b) freedom to receive or impart information or ideas;*
- (c) freedom of artistic creativity; and*
- (d) academic freedom and freedom of scientific research.”*

Section 16(2) *“The right in subsection (1) 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.”*

Section 23: Labour Relations

- (a) Everyone has the right to fair labour practices*

Section 36: Limitation of Rights

Section 36(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.”*

Section 36(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.*”

2.1.2 Labour Relations Act, 1995, (the “LRA”)

Section 187 of the LRA *inter alia*, provides for certain dismissals of employees in the workplace, to be classified as *automatically unfair dismissals*, such as discriminative action taken by the employer as a result of an employee’s pregnancy or related to her pregnancy (section 187 (1) (e)), and/or unfair discrimination against an employee, directly or indirectly, *inter alia* including discrimination on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility. (Section 187 (1), subsection (f).

The Code of Good Practice on the Handling of Sexual Harassment cases is included in the Codes of Good Practice of the LRA.

2.1.3 Employment Equity Act, 1998

Section 5:

“Every employer must take steps to Promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”

Section 6:

Section 6(1): “*No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.*”

Section 6(2) *“It is not unfair discrimination to—*

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.”

Section 6(3) *“Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1). ...”*

2.1.4 The Promotion of Equality & Prevention of Unfair Discrimination Act, 2000 (PEPUDA)

Preamble:

“...This Act endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.”

Chapter 2: Prevention, Prohibition and Elimination of Unfair Discrimination, Hate Speech & Harassment

Section 6: *“Prevention and general prohibition of unfair discrimination”*

Section 7: *“Prohibition of unfair discrimination on ground of race”*

Section 8: *“Prohibition of unfair discrimination on ground of gender”*

Section 9: *“Prohibition of unfair discrimination on ground of disability”*

Section 10: *“Prohibition of hate speech”*

Section 11: *“Prohibition of harassment”*

Section 12: *“Prohibition of dissemination and publication of information that unfairly discriminates”*

Chapter 5: Promotion of Equality

Section 24: *“General responsibility to promote equality”*

Section 25: *“Duty of State to promote equality”*

Section 26: *“Responsibility of persons operating in public domain to promote equality”*

Section 27: *“Social commitment by all persons to promote equality”*

Section 28: *“Special measures to promote equality with regard to race, gender and disability”*

Section 29: *“Illustrative list of unfair practices in certain sectors”*

2.1.5 Protection from Harassment Act, 2011

Section 1: Sexual harassment means “any-

- (a) *unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;*
- (b) *unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;*
- (c) *implied or expressed promise of reward for complying with a sexually oriented request; or*
- (d) *implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.”*

2.1.6 Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016 (not yet in force):

Section 3: Offence of Hate Crime

Section 3(1) *“Hate crime is an offence recognised under any law, the commission of which by a person is motivated on the basis of that person’s prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of*

the following characteristics or perceived characteristics of the victim or his or her family member:

- (a) Race;*
- (b) gender;*
- (c) sex, which includes intersex;*
- (d) ethnic or social origin;*
- (e) colour;*
- (f) sexual orientation;*
- (g) religion;*
- (h) belief;*
- (i) culture;*
- (j) language;*
- (k) birth;*
- (l) disability;*
- (m) HIV status;*
- (n) nationality;*
- (o) gender identity;*
- (p) albinism; or*
- (q) occupation or trade.”*

Section 4: Offence of hate speech

Section 4(1)(a) *“Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –*

- (i) advocates hatred towards any other person or group of persons; or*
- (ii) is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to*
 - (aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or*

(bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons, based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech.”

2.2 Policies and regulations outside the University

- 2.2.1 National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 – 2021): Draft, South Africa.
- 2.2.2 Sexual Violence Task Team, Rhodes University / UCKAR, December 2016, “*We will not be silenced*”:
- 2.2.3 Policy: Harassment: University of Johannesburg
- 2.2.4 Policy: Sexual Harassment, Sexual Assault and Rape Policy and Procedures: The University of the Witwatersrand.
- 2.2.5 Policy on Racism and Racial Harassment: University of Cape Town.

3. UNIVERSITY OF PRETORIA: POLICIES, CODES AND REGULATIONS

The Vision Mission and Values of the University *inter alia*, aim to foster excellence in research, teaching and learning, and undertakes to use “quality, relevance, diversity and sustainability” in its pursuits.

Academic freedom, creative and innovative thought, ethical standards and integrity, accountability and social justice as well as the staff and students of the University are regarded as the University’s core assets and are cherished as such. (<http://www.up.ac.za/about-up/article/258153/vision-mission-values>). It is within this framework that diversity is to be understood and embraced, and equality in its fullest sense is to be strived for.

The following relevant policies, codes and procedures are currently in place at the University:

3.1 Unfair discrimination on the basis of race, Rt267/08

<http://www.up.ac.za/media/shared/409/unfair-discrimination-on-the-basis-of-race.zp87166.pdf>

The current policy makes provision for the prohibition of unfair discrimination on the basis of race and victimization in the campus environment. The policy re-affirms the Chapter 2, section 9 values in the Constitution and makes provision for a protocol to be followed. The policy is aligned with the Promotion of Equality & Prevention of Unfair Discrimination Act, 2000 (PEPUDA).

- (a) Paragraph 2 subparagraphs 2.1 to 2.1.5 prohibits any conduct which impairs an individual's right to a non-racial, non-discriminatory working, living and study environment.

An extract from paragraph 2 of the policy outlines the framework of follows:

“Paragraph 2.

Definitions:

2.1 *Unfair Discrimination on the Basis of Race*

Any conduct which impairs an individual's right to a non-racial, non-discriminatory working, living and study environment, including:

- 2.1.1 *the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;*
- 2.1.2 *the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;*
- 2.1.3 *the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at excluding a particular race group;*

- 2.1.4 *the provision of inferior services to any racial group, compared to those of another racial group;*
- 2.1.5 *the denial on the basis of race of access to opportunities, including access to services or contractual opportunities for rendering services for consideration. “*

3.2 **Handling of sexual harassment, Rt267/08**

<http://www.up.ac.za/media/shared/409/code-of-conduct-on-the-handling-of-sexual-harrasment.zp85249.pdf>

Sexual harassment as a form of discrimination and a barrier to equality are prohibited by this policy. The policy makes provision for the handling of sexual harassment in the campus environment.

Provision is made for a test for the conduct complained of and a protocol to be followed. The policy is aligned with Chapter 2 section 9 of the Bill of Rights in the Constitution, in relation to discrimination on prohibited grounds in relation sexual harassment. The code is also aligned to the Employment Equity Act, 55 of 1998, (Amended Code of Good Practice on the Handling of Sexual Harassment in the Workplace) and the Labour Relations Act, 1995, (section 187 (1) (f) in relation to unfair dismissals), including the Code of Good Practice on the Handling of Sexual Harassment cases.

“(c) *Paragraph 3 of the policy notes that:*

Sexual harassment in the University environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation”.

3.3 **The Disciplinary Code and Procedure for Employees (Rt 157/06)**

3.3.1 The Disciplinary Code and Procedure is essential to ensure the successful management of the University and the fair treatment of its employees. It also provides the mechanism for the exercise of discipline in the workplace, when required.

3.3.2 Chapter 6, annexure A, part 4 of the code, in particular makes provision for disciplinary disciplinary measures in regard to “Offences to the Person or dignity of others”. Transgressions like harassment or unfair discrimination may invoke a sanction of dismissal at a first offence.

3.4 **The Disciplinary Code: Students, General Rules, Section B**

3.4.1 Paragraph 1.1.4.1 *inter alia*, defines as an act of misconduct the unlawful infringement of another person’s rights as contained in the Bill of Rights, Chapter 2 of the Constitution, while on University controlled premises or in University context, which may be punishable by suspension or expulsion of a student.

3.5 HIV/Aids policy, IF13/01

<http://www.up.ac.za/media/shared/409/aids-policy.zp84968.pdf>

The University strives to equip, support, educate and care for members/students with HIV/AIDS or members/students related to members with HIV/AIDS, and afford them a discrimination free learning and working environment.

3.6 Language policy, R16/10

Please note that the new language policy is in the process of finalization.

3.7 Code of Conduct applicable to Personal Relationships between Staff and Students (Rt 187/14)

<http://www.up.ac.za/media/shared/409/personal-relationships-between-employees-and-students.zp84967.pdf>

This policy places considerable focus on personal relationships between personnel members and students and possible exploitation that and/or a conflict of interest which may result. Contravention of the provisions of this policy may lead to disciplinary measures in terms of the Disciplinary Code: Students and/or Disciplinary code and procedure, HR029e, Rt157/06, relevant to personnel members. The purpose and objective of the policy are *inter alia* to:

“... to ensure that employees and students conduct themselves in a professional manner, treat each other equitably and impartially, and refrain from any form of discriminatory conduct towards each other. “

3.8 Code of Conduct (Personnel) (Rt 199/12)

3.8.1 The revised Code of Conduct for Personnel sets standards of ethical conduct, integrity and respect for the entire University community. In carrying out their duties, employees

of the University are required to assist with the realisation of the University's Vision and Mission in a manner that complies with the University's core values.

3.8.2 The Code requires from University employees to conduct themselves with dignity, honesty, integrity and respect when interacting with colleagues, students, clients or customers of the University or the general public.

3.8.3 This code has not been ratified yet and the Code of Conduct Business Practices is still the governing code. The process of ratification will however hopefully shortly be finalized.

3.9 Whistle-blowers policy, Rt377/15

<http://www.up.ac.za/media/shared/409/whistle-blowers-policy.zp84788.pdf>

This policy strives to provide protection and prevent unfair discrimination towards members of staff and students who are in need of its protection and to ensure compliance with relevant legislation.

In paragraph 4 of the policy, specific provision is made for students and employees to raise concerns through appropriate channels, which may include as per paragraph 4.1.6:

“unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been practiced, is being practiced or is likely to be practiced;”

3.10 Students with disabilities, Rt282/13

<http://www.up.ac.za/media/shared/409/students-with-disabilities.zp84969.pdf>

This policy strives to align measures dealing with members of staff and Students with disabilities in the campus environment with relevant Legislation, and afford to them a learning and working environment free from discrimination and suited to their needs.

The policy statement sets out the strategy to be followed to achieve the abovementioned goals, as follows:

3.11 Structures on campus

The following are among those structures that currently play a role in dealing with discrimination issues on campus:

3.11.1 Student Governance Structures, i.e.

- The Student Representative Council (SRC)

<http://www.up.ac.za/student-representative-council/>

- The Student Parliament (SP)

3.11.2 Constitutional Tribunal

<http://www.up.ac.za/constitutional-tribunal/>

3.11.3 Student Disciplinary Advisory Panel

<http://www.up.ac.za/student-disciplinary-advisory-panel/>

3.11.4 Service Providers

3.11.5 Registered Societies

3.11.6 Faculty Houses (and Class Representatives)

<http://www.up.ac.za/en/student-life/article/259314/faculty-houses>

3.11.7 Day Houses

<http://www.up.ac.za/day-houses>

3.11.8 Special Programmes (Tuks Top Junior Top Senior Leadership Development Programme, Students in Free Enterprise (SIFE), the Golden Key International Honour Society)

3.11.9 The Disability Unit

<http://www.up.ac.za/disability-unit>

3.12. Other

3.12.1 Student Complaints Protocol, Rt462/10

<http://www.up.ac.za/media/shared/409/students-with-disabilities.zp84969.pdf>

3.12.2 Student Leadership, Development and Training, Rt461/10

https://www.up.ac.za/media/shared/Legacy/sitefiles/file/3086/policyonstudentleadershipdevelopment_rt46110_amended_final.pdf

- (a) The Department of Student Affairs and, particularly the Student Development Division of the DSA is responsible for providing leadership development and training to the various student structures, with the exception of the residences, where training is provided by TuksRes.

3.12.3 University of Pretoria's Speak Out Campaign against Sexual Harassment

<http://www.up.ac.za/speakoutup>

3.13 **TuksRes Guide policies and rules:**

http://www.up.ac.za/media/shared/359/ZP_Files/tuksresguide2016-final.zp80069.pdf (from page 22)

In summary:

The measures addressing the wellbeing of resident students are contained in the TuksRes Guide – the above are noted more specifically in providing a discrimination free living and studying environment in accordance with Constitutional values and imperatives. The individual “House rules” are important as historically many varied discriminative measures were contained in these rules, and they are reviewed with regular intervals. The Disciplinary code for university-controlled residences, Rt62/06 are the applicable body to address difficulties within the residence, and escalation of disputes or more serious infraction of the code, will be referred to the Disciplinary Committee: Students.

“Annexure E: Policy on Pregnancy in Residences

1. Policy statement

1.1 The University of Pretoria (UP) is committed to creating and maintaining a safe and pleasant campus and residence environment, which supports the health and wellbeing of students. The proposed policy seeks to bring the University in line with the Constitution, other applicable legislation and the Batho Pele ethical principles with regard to how pregnancy in University residences is dealt with.”

“Annexure H: Policy on Sexual Harassment

1. Philosophy

1.1 The University of Pretoria:

- *is an academic and educational institution that is committed to providing a non-sexist, non-discriminatory, working, living and study environment for staff and students in which every person will be able to achieve his/her full potential;*
- *acknowledges that the preservation of human dignity and the discouragement of offensive behaviour are an integral part of this environment;*
- *acknowledges that sexual harassment is an unacceptable infringement of the core values of integrity, human dignity, privacy, equity and mutual respect and is a form of unfair discrimination.*

Sexual harassment in the University environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation”

“Annexure I: Policy on Unfair Discrimination

1. Philosophy

1.1 The University of Pretoria:

- *is an academic and educational institution that is committed to providing a non-racist, non-discriminatory working, living and study environment for staff and students in which every person will be able to achieve his/her full potential;*

- *acknowledges that the preservation of human dignity and the discouragement of offensive behaviour are an integral part of this environment; and*
- *acknowledges that racial harassment is an unacceptable infringement of the core values of human dignity, privacy and mutual respect, and is a form of unfair discrimination.*

1.2 The University Council, Executive, staff and students are co-responsible for combating racial harassment and discrimination on campus. To fulfil this responsibility, the University community agrees on the following policy.”

4. CONCLUSION

The above collation of information does not purport to be a detailed compilation of the entire scope of the current status of anti-discrimination measures internationally, nationally, in the higher education sector, or at the University of Pretoria. It should however provide a starting point to attempt to reform or expand the current system.

[Prepared by Christof Heyns and Ronel Jordaan. 21 August 2017]