

**EQUALITY AND
DIVERSITY
POLICY
FOR THE
BAR**

A. FOREWORD

1. The legal profession should lead the way among professions in adopting a practical, accommodating and sensitive approach to equality and diversity within itself. A concern with fair treatment and respect for individual dignity is especially important in a profession which has as its central task the upholding of human rights without fear or favour.
2. Advocates advise and represent clients from an increasingly diverse range of backgrounds. They remain a significant recruitment pool for judicial appointments. It is in the best interests of both the public and the Bar that individuals of the highest ability and talent are attracted to the profession and allowed to prosper there. This is especially true in relation to the need to address the imbalances which remain inherent in the profession due to South Africa's history and that of the profession.
3. Recent statistics for entry to the Bar are encouraging, however the retention of desirable young advocates from previously disempowered and disadvantaged groups remains a concern. Cultures, practices and commercially entrenched patterns which may deter deserving advocates from remaining with the profession or from achieving their full potential within its ranks must continue to be identified and, where possible, eliminated.
4. Public confidence and support for the Bar can only be enhanced by systems which are seen to be open and fair. Advocates need to be able to recognise their own prejudices and to be aware of the assumptions which they make in evaluating others. They must learn how to ensure that these prejudices and assumptions do not operate to influence their treatment of others in the work context.

B. INTRODUCTION

5. This document states the policy of the Bar in relation to equality and diversity. It seeks also to provide practical guidance for its implementation. It places an emphasis on facilitating practice development and proper working environments for all, but particularly for those who have previously been subject to practices and attitudes which have led to them being disadvantaged within the profession. It was the central aim of protecting those who are more vulnerable against discrimination and victimisation.
6. The Bar has a constitutional role in ensuring the independence of advocates before the courts. In order to maintain confidence in that role, its own practices must be, and be seen to be, fair.
7. This policy is designed to assist advocates and their employees and pupils in dealing sensitively with the promotion of equality and diversity in their working environments and in the eradication of racist and sexist attitudes and practices which may have their foundation in historical structures and ideologies.
8. All advocates are required to comply with the broad prohibitions against discrimination as set out in the Constitution of the Republic of South Africa, the Promotion of Equality and prevention of Unfair Discrimination Act 4 of 2000 ("*Equality Act*") and the Ethical Rules of the Bar. This policy has been drawn in accordance with the tenets and requirements of these laws/rules of conduct.

C. THE POLICY

9. The General Council of the Bar ("GCB"), in pursuit of its constitutional function to represent the interests of the Bar, will promote equality of opportunity irrespective of race, colour, ethnic or national origin, nationality, citizenship, sex, marital status, sexual orientation, disability, age, religion or political persuasion.
10. The constituent Bar Councils are enjoined to monitor adherence to these principles by all of their members and to foster promotion of the aforesaid objectives.
11. It may be regarded as unprofessional conduct for an advocate to conduct him- or herself in a manner that offends these principles.

D. GUIDELINES IN RELATION TO THE APPLICATION OF THE POLICY**12. Key Concepts**

12.1 Discrimination on racial grounds encompasses nationality, race, colour and ethnic and religious origins.

12.2 Sex discrimination encompasses not only discrimination on the grounds of gender, but also discrimination on the grounds of marital status, pregnancy, sexual orientation or gender reassignment.

12.3 Discrimination on grounds of pregnancy is a particular type of sex discrimination where no comparator is required (i.e. it is no defence to a claim based on pregnancy that a man, absent by reason of sickness, would have been treated in a similar fashion).

12.4 Unlawful discrimination generally falls into one of three categories:

12.4.1 Direct discrimination: this is where one person is treated less favourably than another was or would be treated in the same or similar circumstances because of a particular characteristic (gender, race, disability, sexual orientation, religion or belief) where such less favourable treatment is unlawful and not in accordance with accepted statutory, policy and constitutional principles and provisions;

12.4.2 Indirect discrimination: this is where an apparently neutral provision, criterion or practice has a disadvantageous impact upon a particular group and where the provision, criterion or practice is not a proportionate or fair means of achieving a legitimate aim (for example, holding a chambers training seminar at a time when a particular group of members will find

it difficult to attend and when the meeting could reasonably be held at some other time which would not exclude any particular group);

12.4.3 Victimization: this is where a person is treated less favourably because he or she has brought proceedings under anti-discrimination procedures or legislation, given evidence or information relating to such proceedings or has alleged that unlawful discrimination has occurred (or is suspected of having done so or of intending to do so).

13. Clarifying some Common Misconceptions

13.1 Proof of discrimination does not depend on the ability to show motive or bad faith. It is possible to discriminate without intending to discriminate. Even treatment which is well-intentioned may amount to discrimination.

13.2 There is no defence of “joke” or “banter”. Jokes and banter which cause offence may be discriminatory even though there was no intention to cause offence or harm.

13.3 Individuals from the same protected group may commit acts of unlawful and unprofessional discrimination against each other. A woman may unlawfully discriminate against another woman for example

14. How does an Individual Prove Discrimination

14.1 If there is a difference in treatment and a difference in relevant identifying characteristics (e.g. gender) of two persons in the same or similar circumstances, an inference of unlawful discrimination may be drawn provided the difference in treatment is unlawful and contrary to

prevailing constitutional and other considerations such as the legitimate furtherance and protection of the interests of certain persons.

- 14.2 It is rare for discriminatory attitudes to be expressed overtly. In addition, unlawful and unprofessional discrimination may take place without the perpetrator being conscious that he or she is discriminating. Generally, the inference-drawing process is the primary method by which courts and tribunals test whether there has been an unlawful or unprofessional discrimination.
- 14.3 In assessing whether inferences should be drawn, courts and tribunals look at factors such as whether there have been assumptions or stereotyping which have influenced the complainant's treatment.
- 14.4 Sometimes, an organisation or entity may demonstrate preference for individuals in their own image: "*people like us*" or someone "*who fits in*". Ignorance of cultural difference may lead to the application of inappropriate evaluations of behaviour or attitude in this context.
- 14.5 An explanation for the difference in treatment which is objectively adequate will usually prevent any inference arising. Good practice affords a large measure of protection in this regard.

15. **Harassment**

- 15.1 Harassment is any form of unwanted conduct that has the aim or effect of diminishing a person's dignity or creating a humiliating or offensive environment for that person.
- 15.2 Harassment is also constituted by unlawful discrimination.

- 15.3 The fact that one person may be in a position or able to ignore or deal comfortably with certain behaviour does not mean that it is acceptable if directed at another.
- 15.4 A single incident may constitute harassment if it is sufficiently serious.
- 15.5 The motive or intention of the perpetrator is normally irrelevant.
- 15.6 Harassment amounting to physical or sexual assault is a criminal offence and victims should be encouraged to report it to the police
- 15.7 All chambers should have a harassment policy, which sets out a clear summary of the type of behaviour which is unacceptable in the working environment and the procedures for dealing with complaints about such behaviour.
- 15.8 The policy should apply to all members and pupils and to employees (where appropriate, regard being had to applicable employment law). All such persons should be made familiar with the policy.
- 15.9 Such policies should enable them to react quickly and appropriately if a complaint is raised. It becomes significantly more difficult to deal with complaints effectively where there is a delay.
- 15.10 A model harassment policy is annexed hereto marked annexure "A".

16. **Maternity, Paternity and Parental Leave**

- 16.1 All chambers should have a written policy on maternity, paternity and parental leave. This policy should contain particulars of:

- a member's right to return to chambers after a specified period of leave;
- the extent of the period of leave offered free of rent and other expenses (if any);
- the manner in which the rent and expenses to be waived, deducted or reimbursed in respect of any period of leave will be calculated;
- the member's entitlement to work part-time or flexibly for childcare reasons (with due regard to the Ethical Rules of Conduct of the Bar);
- the procedure for dealing with grievances under the policy;
- the chambers' commitment regularly to reviewing the effectiveness of its policy.

16.2 A model maternity/paternity policy is annexed hereto marked "B".

17. **Complaints handled internally**

- 17.1 It is recommended that all chambers have a formal written grievance procedure and that this should include the procedures for handling complaints of discrimination and harassment. The procedure should be brought to the attention of every pupil, member and employee.
- 17.2 It is vital for a person who wishes to complain about discrimination, particularly where harassment is alleged, to have access to a person who can give them sympathetic advice and, if necessary, counselling. This should take place in an atmosphere of confidentiality.
- 17.3 Complaints and grievances should be dealt with promptly, objectively and fairly.

17.4 In order to assist in the effective resolution of grievances within chambers, it is recommended that, in addition to the formal procedure, chambers should nominate one or more members to act as informal advisers to potential complainants, and to assist, when asked, in informal resolution of grievances. Such persons should be chosen on the basis of attributes which recommend them for the role.

17.5 Formal grievance procedures should include:

- the allocation of responsibility for investigating complaints to at least two members of chambers, including one senior member. (In the event of a conflict of interest, provision should be made for the involvement of additional members of chambers or other nominated persons);
- the names of the aforesaid informal advisers ;
- an undertaking that complainants will not be victimized or suffer detrimental treatment because of a complaint made in good faith;
- an undertaking that all procedures will, as far as practicable, be confidential;
- a requirement for the complaint to be made in writing;
- a time limit within which a written response should be delivered;
- the range of remedial actions which can be adopted where complaints are substantiated;
- identification of the relevant Bar Council committees and persons as well as any external bodies to which complaints may be addressed or advice obtained;

- and indication of opportunities for support and counselling provided by various groups and associations.

18. **Remedies**

18.1 Where, following an investigation of a complaint, actual or potential discrimination is identified, remedial action should be taken as soon as possible. This may include all or some of the following:

- a change of a particular practice currently in operation;
- implementation of a proper adjustment;
- further advice, briefing or training for members or employees;
- advice and support to ensure that the complainant is not victimized as a consequence of having made the complaint;
- disciplinary action.

18.2 A report on all complaints and on all findings of investigations should be made to the Group Leader or the committee set up for the administration of the chambers. Chambers should maintain confidential records of all complaints as well as minutes of meetings held in regard to the complaint.

18.3 Chambers may be required to explain how they investigated any complaint that is ultimately taken to the Bar Council or any other external body. An analysis of complaints received will be useful for the purposes of identifying problem areas, training needs or scope for further action when chambers and the Bar Council review their procedures.

19. **Complaints made to External Bodies**

19.1 Any person may complain about the conduct of an advocate to the Professional Sub-committee of the relevant Bar Council.

19.2 Where a person has a complaint of a criminal or statutory nature, the complaint may be pursued through the police and court structures as appropriate

20. **Staff in Chambers**

20.1 It is important to ensure that all equal opportunity and diversity policy initiatives developed in chambers cover staff as well as members whenever appropriate.

20.2 Maternity and leave benefits for staff are circumscribed by statute and the common law and chambers should obviously, at least meet the minimum requirements in this regard.

20.3 All chambers should have a written complaints and grievance procedure for staff which include procedures covering complaints relating to discrimination and harassment. These should provide for both formal and informal routes for making complaints.

20.4 Chambers should nominate a person to act as an informal adviser to staff. Such person should be approachable and have attributes which recommend him or her for the role.

21. **Practice Development of Members**

21.1 Chambers should arrange regular feedback sessions for pupils and practice development meetings for junior members. The purpose of these meetings is to enable discussion relating to:

- work-opportunity problems being experienced by pupils and junior members;
- whether any members have suggestions relating to solutions and strategies which they believe would be advantageous to them in creating better work-opportunities and development of their practices;
- giving support and assistance to junior members.

21.2 Mentoring committees could be set up within chambers for the purpose of offering advice and guidance in relation to practice development.

22. **Marketing of Advocates**

22.1 Any marketing conducted by chambers should take into account equal opportunity considerations. For example, while socializing at lunchtime or after work in a restaurant or bar may provide an effective means of “networking” for those who do not have childcare commitments or financial constraints or both, such functions may tend to exclude pupils and juniors on the aforesaid bases. In addition, events such as cocktail parties may serve to exclude pupils and juniors whose religious beliefs preclude the drinking of alcohol or socializing at particular times. Chambers and individual members who wish to facilitate networking and marketing of the chambers and juniors should be sensitive to these issues and should ensure that such activities are organised so that all

pupils and members can, as far as practicable, be equally involved and accommodated.

22.2 Chambers should encourage pupils and junior members to take part in seminars and lectures arranged within the chambers, to attend outside seminars and lectures, to write or contribute to articles in professional publications, to become involved in professional organizations connected with their line of work and to become involved with any legal advice or support centres or organizations.

22.3 The holding of regular "*Practice Meetings*" within chambers is encouraged as a means of discussing individual and group issues and as a means of integrating pupils and members of chambers.