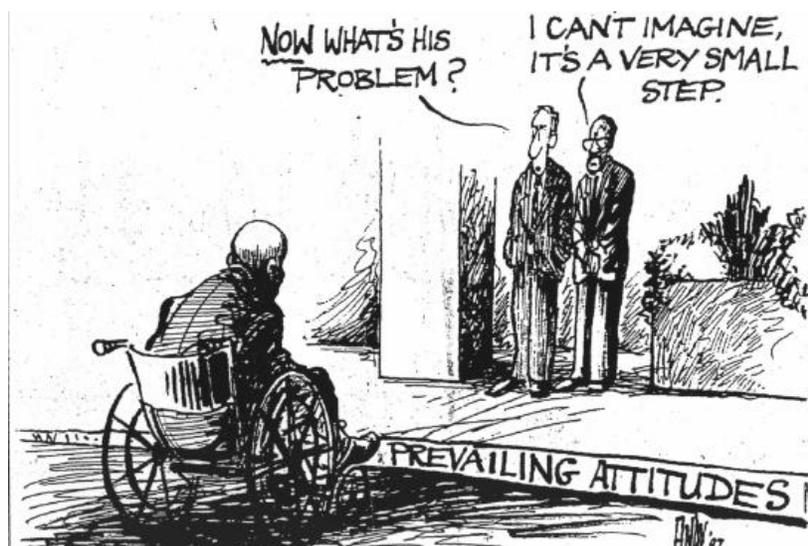


# Know Your Rights



**“Among the yardsticks by which to measure a society’s respect for human rights, to evaluate the level of its maturity and its generosity of spirit, is by looking at the status that it accords to those members of society who are most vulnerable, disabled people, the senior citizens and its children”**

**– T M Mbeki (November 1997). INDS White Paper**

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# QuadPara Association of South Africa (QASA)

PO BOX 2368, PINETOWN, 3600

**Tel: 031 7670348 / 7670352 Fax: 031 7670584**

**Email: info@qasa.co.za**

NPO 000-881

QASA is very proud to publish and distribute a unique publication, so necessary to empower persons with disabilities to understand your rights.

South Africa has unique legislation, offering equal opportunities for all citizens, and it is critical that people with disabilities understand the legislation and ensure that their rights are not transgressed in anyway.

Our **Know Your Rights** publication is a well researched and simply presented manual, allowing access to specific areas of legislation.

Understanding your rights is essential in navigating a barrier free and accessible pathway to your goals as a person with a disability. In order to integrate into mainstream society, it is essential know your rights and obligations and take hold of the opportunities these rights and obligations offer us.

We acknowledge the sponsorship for the printing of this manual by SASOL who have invested in empowering persons with disabilities through this publication.

We hope this publication will capacitate you and allow you to understand your rights and to maximize opportunities.

**Ari Seirlis**  
**National Director**



*Know Your Rights* was written by Sarah Briggs, Project Co-ordinator of the QuadPara Association of South Africa  
*Know Your Rights* is published by the QuadPara Association of South Africa in partnership with SASOL  
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## CHAPTER ONE - HOW THIS MANUAL WORKS

The purpose of this manual is to empower persons with disabilities, disabled people's organisations, employers and other people and groups with information about the rights and obligations of persons with disabilities.

South Africa is fortunate to have a Constitution which commits our government to treating persons with disabilities fairly. Government and civil society has also developed a number of policies and laws to give effect to the Constitution's provision that people may not be discriminated against on the ground of disability.

The changes and improvements desired by persons with disabilities in South Africa won't happen without every person with a disability, their friends, families, employers and communities understanding and supporting the rights of persons with disabilities to lead lives where they have access to all the activities, opportunities and facilities of able-bodied people. These changes start with everybody understanding and demanding their rights.

This manual is divided into areas of issues that affect our everyday lives:

1. Equality & Human Rights
2. Education & Skills Development
3. The Workplace
4. Government Services

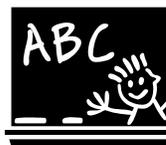
Each of these sections will give you the following information:

- What are my rights and obligations?
- What is the law on these issues?
- What are the policies on these issues?
- How can I address this issue if it affects me?

The following symbols will identify certain types of information for you:



**A LAW**



**EXAMPLE**



**A POLICY**



**USEFUL  
INFORMATION**



**RESOURCES**

## 1.1. TERMINOLOGY & DEFINITIONS

**“Disability”** – There are many different (and sometimes conflicting) definitions of disability. Some of these definitions reflect the way in which the perceptions of people with disabilities are changing.

Over the last few decades, people with disabilities as individuals and in formal or informal groups have been fighting to have disability viewed as a social and human rights issue rather than a medical issue<sup>1</sup>.

Historically, disability has been regarded as a health and welfare issue, and people with disabilities have been regarded as dependent and unable to care for themselves or lead independent lives. People with disabilities are regarded as being sick and/ or weak, in need of special care and unable to manage their own lives or participate in decision making. This model ignores the fact that the physical and social environment in which people with disabilities live is itself “disabling”.

The social attitudes which develop from disability being viewed as a health and welfare issue means that people with disabilities tend to be isolated from mainstream society, with “special” schools and “special” jobs and the expectation that people with disabilities should and will be dependant on hand-outs from family, welfare organisations and the government. This is called the “Medical Model” of disability. This model ultimately disempowers people with disabilities by excluding them socially, financially and politically from mainstream society.

The **“Social Model”** views disability as a human rights and development issue, which sees people with disabilities as equal members of society with the same rights and responsibilities as everyone else. The result is that all planning and delivery of services, whether by government or private companies, must routinely take into account the needs of people with disabilities. This approach focuses on the removal of barriers to equal participation and the elimination of discrimination based on disability.

When people with disabilities demand access, they are not asking for special treatment; they are simply requesting that their needs, which may be different but are not “special”, be planned for and provided as the needs of non-disabled people are.

In light of this shift of thinking, the definitions of disability have changed too. There is no single definition of disability which is generally accepted. There are various definitions in various laws, policy documents and declarations.

A “person with a disability” as defined by national legislation is a person that is “limited in one or more functional activities”. This includes communication, hearing, seeing, learning, moving, intellectual and emotional disabilities. The impairment may be permanent, recurring or transitory. It may be sensory, physical, cognitive or psychological. Although people have different disabilities, they experience similar barriers and discrimination in society. The extent and experience of disability is, to a large extent, determined by how much the person’s environment prevents that individual from taking part in community life on an equal level with others.

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<sup>1</sup> Integrated National Disability Strategy 1997

**“Legislation”** is simply a law. In South Africa, laws are made by Parliament. To make a law, the relevant national government department (for example, the Department of Transport) will draw up a proposal called a Bill. This Bill is given to the members of parliament to discuss and change, if they want to. When all members of Parliament are happy with the Bill, they vote to make the Bill a law.

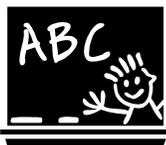
When the Members of Parliament meet to discuss the Bill, they are supposed to let members of the public meet with them to give their ideas on the proposals written in the Bill. This is called the consultation process, and it is a very important part of democracy. The Bill should be made available to anyone who wants to see it.

It is important that persons with disabilities keep themselves informed of all the Bills that are being discussed in Parliament, so that they can make sure that the government is aware of their views if they will be affected by the new law. In a democracy like South Africa, we have rights such as the right to vote, but we also have responsibilities such as the responsibility to keep ourselves informed of issues that affect us.

**“Policies”** are guidelines that people and organisations use to help them address various issues. For example, a company will have a policy on the recruitment of people with disabilities. All actions to do with the recruitment of people with disabilities must be in line with that policy.

Why do we need policies? A policy is not the same as a law, because it is easier to change a policy and there are no legal penalties (e.g. a fine) if we don't follow a policy. BUT policies are necessary to make sure that all people are treated fairly, and that organisations run effectively. The public sector (such as government) and the private sector (such as businesses) all use policies in their daily activities, to make sure that they act fairly and consistently.

**“International Best Practice”** means that the experience of countries worldwide has shown that a particular way of doing things is the most effective way.



Many companies give money to charity. Most companies have created their own charity organisation (e.g. the Vodacom Foundation) which is a separate organisation, falling under the main organisation, which ONLY does charity projects. The reason why most companies do this is because experience worldwide has shown that this is the most effective way of giving money to communities in need and monitoring the way those communities spend that money. This is an example of “International Best Practice” for corporate social investment.

How do we know what “International Best Practice” is? Many organisations, such as the United Nations, the World Health Organisation and the International Labour Organisation, conduct research in these areas to find the best way of doing things. Other countries and organisations can save a lot of time and money by adapting these practices for themselves.

**“Previously Disadvantaged Groups/ Individuals”** – this phrase refers to groups of people who were discriminated against by South African governments prior to the first democratic elections in 1994. The Constitution identifies these groups as black people, women and people with

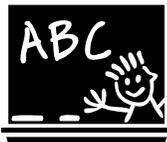
disabilities. The discrimination that they experienced may have been the result of a deliberate government policy, such as the policy of apartheid, or it may have been the result of attitudes and perceptions, such as discrimination against people with disabilities. It is important to note that the Constitution states that all people with disabilities have been disadvantaged, regardless of race.

## 1.2. HOW DO LAWS, POLICIES, AND INTERNATIONAL BEST PRACTICES ALL FIT TOGETHER?

Government makes laws to protect the rights of its citizens. Government also enforces those laws in various ways, such as the police force, the South African Revenue Services, and the Department of Labour. The courts make decisions in terms of those laws, to decide whose rights are most important in individual cases.

Everyone has to follow those laws – private citizens, government departments, companies, organisations. Often a company or an organisation will develop a policy to help it follow the law.

Often, policies are based on International Best Practice – meaning examples that have been tried by a number of companies or countries in the world that have worked well, and are now seen as the best way of doing things.



The *Employment Equity Act* is a **LAW** that states that employers must employ a certain percentage of people with disabilities. This law is enforced firstly by the Department of Labour, then by the Commission for Conciliation, Mediation and Arbitration (CCMA), then by the Labour Court. These are all government bodies.

In order to help employers to employ people with disabilities, the Department of Labour has developed a **POLICY** called “*The Code of Good Practice on the Employment of People with Disabilities*”. The Department of Labour has also written a manual called the “*Technical Assistance Guidelines on the Employment of People with Disabilities*”, which gives the employer practical advice on meeting the needs of employees with disabilities. Both of these documents are based on **INTERNATIONAL BEST PRACTICE**.

## CHAPTER 2 – EQUALITY & HUMAN RIGHTS

The Constitution of the Republic of South Africa guarantees human rights to all South Africans. The Constitution is the highest law in South Africa, which means that all other laws must be in line with the Constitution.

Human rights are the rights that everyone has, simply because they are human beings. They are the rights we all have from the moment we are born. We do not have to earn them and they cannot easily be taken away from us.

The list of human rights protected in South Africa is the Bill of Rights, which is Chapter 2 of the Constitution. The Constitution is the highest law of South Africa. Everyone in South Africa, including the government, must follow it. The rules set out in a Constitution are very hard to change, and so the rights in the Bill of Rights are also very hard to change. This means that it is difficult for anyone to change your rights or to try and take them away from you.

Because everyone has these rights regardless of their race, age or gender, we all have to respect other people's rights as well. It is no good saying that you have these rights if you are doing things at the same time, which go against other people's rights. And, we must all respect and follow the laws of the country as well.<sup>2</sup>

Equality is one of the human rights that are guaranteed in the Constitution. Equality means that all people should be treated the same, regardless of their age, race, religion or any other considerations. This includes persons with disabilities, in all aspects of their lives.



### 2.1. THE BILL OF RIGHTS

Chapter 2 of the Constitution of the Republic of South Africa (Act 108 of 1996) is as follows:

#### “7. Rights

1. This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
2. The state must respect, protect, promote and fulfill the rights in the Bill of Rights.
3. The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

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<sup>2</sup> <http://www.sahrc.org.za>

## 8. Application

1. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
2. A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
3. When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court
  - a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
  - b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).
4. A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

## 9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, **disability**, religion, conscience, belief, culture, language and birth.
4. <sup>1</sup>No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

## 10. Human dignity

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

## 11. Life

Everyone has the right to life.

## **12. Freedom and security of the person**

1. Everyone has the right to freedom and security of the person, which includes the right
  - a. not to be deprived of freedom arbitrarily or without just cause;
  - b. not to be detained without trial;
  - c. to be free from all forms of violence from either public or private sources;
  - d. not to be tortured in any way; and
  - e. not to be treated or punished in a cruel, inhuman or degrading way.
2. Everyone has the right to bodily and psychological integrity, which includes the right
  - a. to make decisions concerning reproduction;
  - b. to security in and control over their body; and
  - c. not to be subjected to medical or scientific experiments without their informed consent.

## **13. Slavery, servitude and forced labour**

No one may be subjected to slavery, servitude or forced labour.

## **14. Privacy**

Everyone has the right to privacy, which includes the right not to have

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

## **15. Freedom of religion, belief and opinion**

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
2. Religious observances may be conducted at state or state-aided institutions, provided that
  - a. those observances follow rules made by the appropriate public authorities;
  - b. they are conducted on an equitable basis; and
  - c. attendance at them is free and voluntary.
3.
  - a. This section does not prevent legislation recognising
    - i. marriages concluded under any tradition, or a system of religious, personal or family law; or



- ii. systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- b. Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

## **16. Freedom of expression**

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.
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.

## **17. Assembly, demonstration, picket and petition**

Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

## **18. Freedom of association**

Everyone has the right to freedom of association.

## **19. Political rights**

1. Every citizen is free to make political choices, which includes the right
  - a. to form a political party;
  - b. to participate in the activities of, or recruit members for, a political party; and
  - c. to campaign for a political party or cause.
2. Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
3. Every adult citizen has the right
  - a. to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
  - b. to stand for public office and, if elected, to hold office.

## **20. Citizenship**

No citizen may be deprived of citizenship.

## **21. Freedom of movement and residence**

1. Everyone has the right to freedom of movement.
2. Everyone has the right to leave the Republic.
3. Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
4. Every citizen has the right to a passport.

## **22. Freedom of trade, occupation and profession**

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

## **23. Labour relations**

1. Everyone has the right to fair labour practices.
2. Every worker has the right
  - a. to form and join a trade union;
  - b. to participate in the activities and programmes of a trade union; and
  - c. to strike.
3. Every employer has the right
  - a. to form and join an employers' organisation; and
  - b. to participate in the activities and programmes of an employers' organisation.
4. Every trade union and every employers' organisation has the right
  - a. to determine its own administration, programmes and activities;
  - b. to organise; and
  - c. to form and join a federation.
5. Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
6. National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

## 24. Environment

Everyone has the right

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
  - i. prevent pollution and ecological degradation;
  - ii. promote conservation; and
  - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

## 25. Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
2. Property may be expropriated only in terms of law of general application
  - a. for a public purpose or in the public interest; and
  - b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
  - a. the current use of the property;
  - b. the history of the acquisition and use of the property;
  - c. the market value of the property;
  - d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - e. the purpose of the expropriation.
4. For the purposes of this section
  - a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - b. property is not limited to land.
5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is

entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
9. Parliament must enact the legislation referred to in subsection (6).

## **26. Housing**

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

## **27. Health care, food, water and social security**

1. Everyone has the right to have access to
  - a. health care services, including reproductive health care;
  - b. sufficient food and water; and
  - c. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

## **28. Children**

1. Every child has the right
  - a. to a name and a nationality from birth;
  - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - c. to basic nutrition, shelter, basic health care services and social services;
  - d. to be protected from maltreatment, neglect, abuse or degradation;
  - e. to be protected from exploitative labour practices;
  - f. not to be required or permitted to perform work or provide services that
    - i. are inappropriate for a person of that child's age; or

- ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
    - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
      - i. kept separately from detained persons over the age of 18 years; and
      - ii. treated in a manner, and kept in conditions, that take account of the child's age;
    - h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
    - i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child's best interests are of paramount importance in every matter concerning the child.
3. In this section "child" means a person under the age of 18 years.

## 29. Education

1. Everyone has the right
  - a. to a basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
  - a. equity;
  - b. practicability; and
  - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
  - a. do not discriminate on the basis of race;
  - b. are registered with the state; and
  - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

### **30. Language and culture**

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

### **31. Cultural, religious and linguistic communities**

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community
  - a. to enjoy their culture, practise their religion and use their language; and
  - b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

### **<sup>\*2</sup>32. Access to information**

1. Everyone has the right of access to
  - a. any information held by the state; and
  - b. any information that is held by another person and that is required for the exercise or protection of any rights.
2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

### **<sup>\*3</sup>33. Just administrative action**

1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
  - a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - c. promote an efficient administration.

#### 34. Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

#### 35. Arrested, detained and accused persons

1. Everyone who is arrested for allegedly committing an offence has the right
  - a. to remain silent;
  - b. to be informed promptly
    - i. of the right to remain silent; and
    - ii. of the consequences of not remaining silent;
  - c. not to be compelled to make any confession or admission that could be used in evidence against that person;
  - d. to be brought before a court as soon as reasonably possible, but not later than
    - i. 48 hours after the arrest; or
    - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
  - e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
  - f. to be released from detention if the interests of justice permit, subject to reasonable conditions.
2. Everyone who is detained, including every sentenced prisoner, has the right
  - a. to be informed promptly of the reason for being detained;
  - b. to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
  - c. to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - d. to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
  - e. to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
  - f. to communicate with, and be visited by, that person's
    - i. spouse or partner;
    - ii. next of kin;
    - iii. chosen religious counsellor; and
    - iv. chosen medical practitioner.
3. Every accused person has a right to a fair trial, which includes the right
  - a. to be informed of the charge with sufficient detail to answer it;
  - b. to have adequate time and facilities to prepare a defence;
  - c. to a public trial before an ordinary court;

- d. to have their trial begin and conclude without unreasonable delay;
  - e. to be present when being tried;
  - f. to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
  - g. to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - h. to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - i. to adduce and challenge evidence;
  - j. not to be compelled to give self-incriminating evidence;
  - k. to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - l. not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - m. not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - n. to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - o. of appeal to, or review by, a higher court.
4. Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
  5. Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

### **36. Limitation of rights**

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
  - a. the nature of the right;
  - b. the importance of the purpose of the limitation;
  - c. the nature and extent of the limitation;
  - d. the relation between the limitation and its purpose; and
  - e. less restrictive means to achieve the purpose.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."



What does all this mean for us? All the rights which are listed above cannot be taken away from us. This is the basis for ensuring that all people, including people with disabilities, are protected and treated fairly in South Africa.

The Constitutional Court consists of a President, a Deputy President and nine other judges. A matter before the Constitutional Court must be heard by at least eight judges. The Constitutional Court takes the final decision on whether any matter is a constitutional matter and on all constitutional matters. The Constitution can only be interpreted by the Constitutional Court, and the decision is binding on all other legislation and on all institutions and citizens

Some of these rights are ***economic and social rights***, such as the rights to access to housing, water, healthcare, education, social security and food. These are issues which have great significance for people with disabilities who are:

- (a) often dependent on social security (the disability grant, Workmen's Compensation or the Road Accident Fund) for their income;
- (b) often not provided for in government projects to provide these services (such as accessible low-cost housing, sanitation and education);
- (c) traditionally excluded from being economically active because they have battled to gain employment and to access finance from banks to purchase assistive devices, vehicles, homes or businesses.

Why are economic and social rights included in the Bill of Rights? They are there because the government recognizes that, because the actions of previous governments in South Africa, the basic needs of many South Africans were never met. As a result, many people have been unfairly prevented from having decent housing, access to water and sanitation, access to education, or even enough food to eat.

Some of the rights in the Bill of Rights are ***civil and political rights***, such as the right to vote, the right to life, and the right not to be unfairly imprisoned. While these rights might seem irrelevant in our daily lives, they allow us to give input to the government and hold government accountable when it does not keep its promises.

As a result of section 9 of the Bill of Rights which deals with equality (which is a ***civil right***) the government passed a law that deals specifically with promoting equality and preventing discrimination. What do we mean by discrimination? Discrimination is when a person or group of people are treated differently from another person or group of people. Discrimination is not automatically unfair. In South Africa, the law says that there is a difference between ***fair discrimination*** and ***unfair discrimination***. Fair discrimination is when people are treated differently because they have previously been disadvantaged in some way. Affirmative action is an example of fair discrimination.



## 2.2. THE PROMOTION OF EQUALITY & PREVENTION OF UNFAIR DISCRIMINATION ACT

The Promotion of Equality and Prevention of Unfair Discrimination Act says:

### **“Prohibition of unfair discrimination on ground of disability**

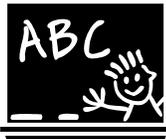
**9.** Subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including–

(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.”

This law gives persons with disabilities the legal right to demand equal access to all facilities and services. It also places a legal obligation on government, employers, service providers and others to ensure that their facilities and services are accessible. This means that not only must their buildings be physically accessible but they must make sure that their services can be used by a person with a disability.

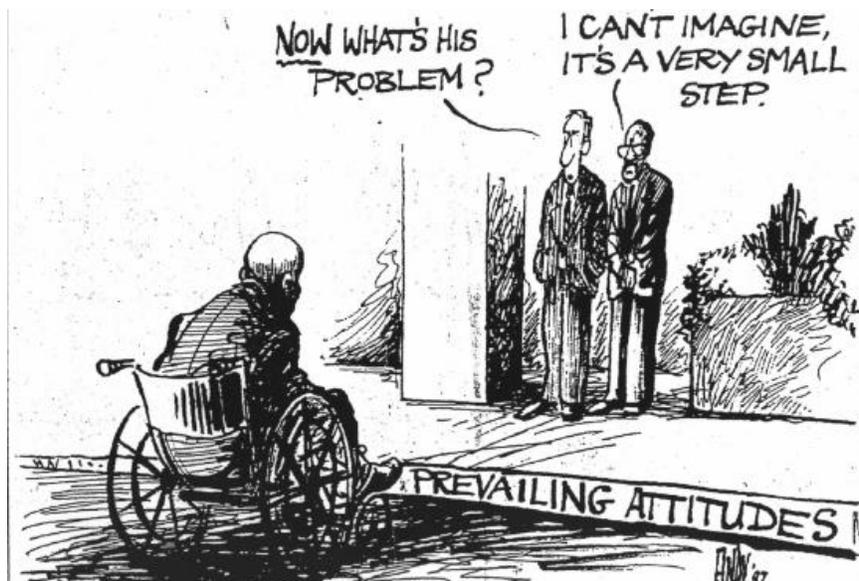


A person who uses a wheelchair wants to fly from Durban to Johannesburg. This means that the airport buildings must be physically accessible to a wheelchair user, including the toilets, restaurants, shops and airport lounges. There must be a Passenger Aid Unit to transport the person, still in their chair, to the aeroplane and lift the person into the aeroplane, and to help that person to disembark on the other side. All of these are issues of physical accessibility.

However, we cannot say that people with disabilities have been treated equally unless all the services that the airport and the airline offer are also accessible for people with disabilities. For example, do the airline staff treat people with disabilities with dignity? When you book your ticket on the internet, can you indicate what your needs are? Does the airline train their staff in emergency procedures for people with disabilities? For a hearing impaired person, can the staff communicate in sign language? For a sight-impaired person, can their guide-dog travel in the cabin with them?

Another question we must ask is, does the airline or airport make a person with a disability do anything that an able-bodied person would not have to do – for example, some airlines say that, if

you are a passenger who uses a wheelchair, you must have a companion traveling with you, and you must of course buy a separate ticket for that person.



### 2.3. THE INTEGRATED NATIONAL DISABILITY STRATEGY

This is a government **policy** which states the government's commitments to people with disabilities. It was first put in place in 1997, and is supposed to be a guideline for Parliament and all government departments to meet the needs of people with disabilities.

The INDS starts with a situation analysis which sets out the causes and implications of disability, and explains why internationally countries are moving away from the Medical Model of disability to the Social Model of disability.

The INDS then has a look at international best practices on addressing the needs of persons with disabilities and at international programmes in this regard, including the United Nations World Programme of Action Concerning Disabled Persons, the Disability Rights Charters and the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities. These documents have all been used as a basis for the Integrated National Disability Strategy (INDS).

The **objectives** of the INDS are as follows:

1. the facilitation of the integration of disability issues into government developmental strategies, planning and programmes;

2. the development of an integrated management system for the coordination of disability planning, implementation and monitoring in the various line functions at all spheres of government;

3. the development of capacity building strategies that will enhance Government's ability at all levels to implement recommendations contained in the *Integrated National Disability Strategy*.

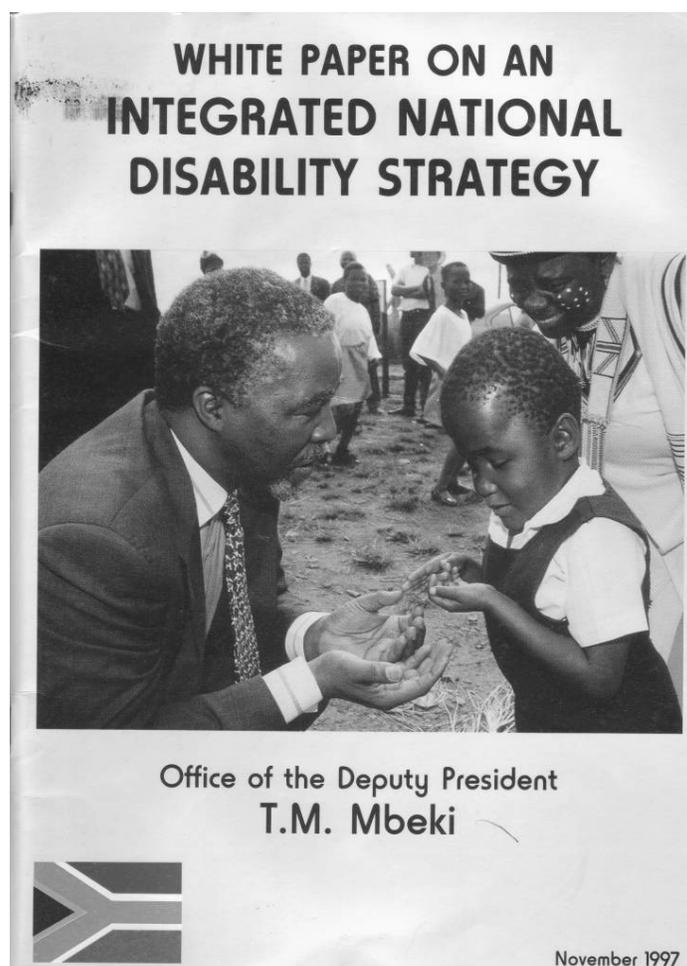
4. a programme of public education and awareness raising aimed at changing fundamental prejudices in South African society."

The **principles** of the INDS are:

- A people-driven process – meaning that people with disabilities can and should be the representing themselves in all processes and spheres which affect them; and
- Integration and sustainability – that disability issues are fully includes into the principles, strategy and framework of any programme run by government to meet the needs of its citizens.

What do these guidelines mean for us? They are the government's written commitment to actions to benefit people with disabilities, and the government can be held accountable if it fails to act in terms of this policy. This policy also affects all future actions that the government takes to meet the needs of people with disabilities, including any laws it makes in any of the areas named in the INDS.

At present there is **NO** disability-specific legislation on South Africa.





In the INDS, the government identifies the following areas where action must be taken to meet the needs of people with disabilities by developing a barrier-free and integrated society:

Guideline	Objectives	Strategies	Mechanisms
PREVENTION	<ul style="list-style-type: none"> <li>• Healthy lifestyle promotion</li> <li>• Protective measures</li> <li>• Secondary prevention</li> </ul>	<ul style="list-style-type: none"> <li>• Avoidance of conflict</li> <li>• Decrease in poverty</li> <li>• Improved health services</li> <li>• Reduction in accidents</li> <li>• Law to prevent accidents</li> <li>• Worker check ups</li> <li>• Monitoring of diseases</li> <li>• resources</li> </ul>	<ul style="list-style-type: none"> <li>• co-ordination of services</li> <li>• Public education programmes</li> <li>• Involvement of the disability sector</li> <li>• Personnel Training</li> <li>• Involvement of role players</li> </ul>
PUBLIC EDUCATION & AWARENESS RAISING	<ul style="list-style-type: none"> <li>• Awareness raising</li> <li>• Decreasing discrimination</li> <li>• Putting a value on diversity</li> </ul>	<ul style="list-style-type: none"> <li>• National disability awareness strategy</li> <li>• Media awareness</li> <li>• Government awareness</li> <li>• Media visibility</li> </ul>	<ul style="list-style-type: none"> <li>• Self representation</li> <li>• Public media</li> <li>• South African Human Rights Commission</li> <li>• Personnel training</li> <li>• Public Holidays</li> </ul>
HEALTH CARE	<ul style="list-style-type: none"> <li>• The development of a comprehensive universal health care system at primary secondary and tertiary level, that is sensitive to the general and specific health care needs of people with disabilities</li> </ul>	<ul style="list-style-type: none"> <li>• Elimination of discrimination</li> <li>• National database</li> <li>• Child health care</li> <li>• Computer technology</li> <li>• Barrier-free access</li> <li>• Communication</li> <li>• Training</li> </ul>	

Guideline	Objectives	Strategies	Mechanisms
REHABILITATION	<ul style="list-style-type: none"> <li>• To enable people with disabilities to reach and maintain their optimal physical, sensory, intellectual, psychiatric and/or social functional levels</li> <li>• To provide people with disabilities with tools to change their lives and give them a greater degree of independence</li> <li>• To prevent secondary disabilities or reduce the extent of a disability</li> <li>• To take into account the specific needs of different disability groupings</li> </ul>	<ul style="list-style-type: none"> <li>• Personnel training</li> <li>• Inter-sectoral collaboration</li> <li>• Role of DPO's</li> </ul>	<ul style="list-style-type: none"> <li>• Medical rehabilitation</li> <li>• Psychological rehabilitation</li> <li>• Educational rehabilitation</li> <li>• Vocational rehabilitation</li> <li>• Social rehabilitation</li> <li>• Assistive devices</li> </ul>
BARRIER-FREE ACCESS	<ul style="list-style-type: none"> <li>• To create a barrier-free society that accommodates the diversity of needs, and enables the entire population to move around the environment freely and unhindered.</li> </ul>		<ul style="list-style-type: none"> <li>• Inter-sectoral collaboration</li> <li>• Personnel training</li> <li>• Self-representation</li> </ul>
TRANSPORT	<ul style="list-style-type: none"> <li>• To develop an accessible, affordable multi-modal public transport system that will meet the needs of the largest number of people at the lowest cost, while at the same time planning for those higher cost features which are essential to disabled people with greater mobility needs</li> </ul>	<ul style="list-style-type: none"> <li>• Road transport</li> <li>• Railway services</li> <li>• Air travel</li> </ul>	<ul style="list-style-type: none"> <li>• Personnel training</li> <li>• Self representation</li> </ul>

Guideline	Objectives	Strategies	Mechanisms
<p>DATA, INFORMATION &amp; RESEARCH</p>	<ul style="list-style-type: none"> <li>• Regular, appropriate data collection on the living conditions of people with disabilities</li> <li>• Research should reflect gaps between people’s physical or mental conditions and their resources/ capacity (social, personal, economic) and the environment (geographic, architectural, political, social) in which they work, live and play</li> <li>• Disabled people to should have access to all information that affects their lives</li> </ul>	<ul style="list-style-type: none"> <li>•Data collection in conjunction with national censuses and household surveys, undertaken in close collaboration with universities, research institutes and DPO’s</li> <li>•Facilitation of better co-ordination of disability-focused research</li> <li>•Facilitation of access to disability-focused research by the general research sector</li> <li>•Integration of research through the establishment of a forum where researchers and the disability sector can exchange information related to disability &amp; research</li> <li>•Development of a national database on existing research aimed at identifying gaps</li> <li>•Development of national guidelines and minimum norms and standards for disability related research</li> <li>•Facilitation of the publication of market relevant and significant research findings</li> <li>•Networking with regional &amp; international research institutions</li> </ul>	

Guideline	Objectives	Strategies	Mechanisms
EDUCATION	<ul style="list-style-type: none"> <li>• Facilitate equal access to education, including community initiatives, and equity in education at all levels</li> <li>• Develop a single education system that will cater for the needs of all learners within an inclusive environment with various placement options</li> <li>• Facilitate capacity building for all stakeholders (parents, teachers, students and planners)</li> <li>• Facilitate earlier access to education for all learners, but in particular learners with special education needs</li> <li>• Facilitate effective and relevant research</li> </ul>		<ul style="list-style-type: none"> <li>• Development of a clear policy that includes all stakeholders and which is understood and accepted at school level and by the wider community</li> <li>• Curriculum development to ensure flexibility, addition and adaptation according to the needs of individual learners, regardless of the category to which they seem to belong</li> <li>• On-going pre-service and in-service teacher and support-teacher training</li> <li>• Parent empowerment programmes to encourage parent involvement in assessment and decision making concerning their children</li> <li>• Appropriate technology development in education and training</li> <li>• Development of effective inter-sectoral collaborative mechanisms at national, provincial and school level</li> <li>• Development of a long term vision for teachers fluent in Sign Language and sign language instruction in all centres of learning</li> <li>• Adequate and appropriate education support services to all learners</li> </ul>

Guideline	Objectives	Strategies	Mechanisms
EMPLOYMENT	<ul style="list-style-type: none"> <li>• Narrow the unemployment gap between non-disabled and disabled job-seekers</li> <li>• Conditions must be created to broaden the range of employment options for disabled people so as to provide them with real possibilities of occupational choice</li> <li>• Vocational integration of people with disabilities must be facilitated, whatever the origin, nature or degree of the disability</li> </ul>	<ul style="list-style-type: none"> <li>•Occupational choice</li> <li>•Inter-Sectoral Collaboration</li> <li>•Personnel training</li> </ul>	<ul style="list-style-type: none"> <li>•Promoting employment equity on the open market</li> <li>•Creating work opportunities through small, medium and micro-enterprises</li> <li>•Providing sheltered employment for people with disabilities who, because of their disability, are unable to keep a job on the open market, whether in sheltered employment or not</li> <li>•Linking subsidies for employers who employ people with disabilities</li> </ul>
HUMAN RESOURCE DEVELOPMENT	<ul style="list-style-type: none"> <li>• Developing capacity of people with disabilities to participate more effectively in the economic development of their communities and SA as a whole; governance; and the monitoring of the equalization of opportunities for people with disabilities within their local communities, and at provincial and national level</li> <li>• Opportunities for people with disabilities to obtain the highest possible educational and vocational qualifications</li> </ul>	<ul style="list-style-type: none"> <li>•Skills development</li> <li>•Inclusive training</li> <li>•Training Standards</li> <li>•Positive action</li> <li>•Inter-sectoral collaboration</li> </ul>	<ul style="list-style-type: none"> <li>•International Labour Organisation (ILO) convention 142, Recommendation 150 – Vocational Guidance &amp; Vocational Training in the Development of Human Resources</li> <li>•ILO Convention 159 Recommendation 168 – Vocational Rehabilitation and Employment of Disabled Persons</li> <li>•Personnel Training</li> <li>•Disabled People’s Organisations</li> </ul>

Guideline	Objectives	Strategies	Mechanisms
SOCIAL WELFARE & COMMUNITY DEVELOPMENT	<ul style="list-style-type: none"> <li>• Develop social welfare services that aim to integrate people with disabilities within all activities in their communities</li> <li>• Develop social welfare services which recognize the differing specific needs of people with disabilities as one component of a range of disability-related services</li> <li>• Facilitate the re-orientation and training of social welfare workers. This should include the training of people with disabilities as service providers in order to provide for more disability sensitive and integrated community development processes</li> </ul>	<ul style="list-style-type: none"> <li>•Community Development</li> <li>•Social Welfare services</li> </ul>	<ul style="list-style-type: none"> <li>•NGO Sectoral involvement</li> <li>•Public awareness</li> <li>•Personnel training</li> <li>•Inter-sectoral collaboration</li> <li>•Monitoring &amp; evaluation</li> </ul>
SOCIAL SECURITY	<ul style="list-style-type: none"> <li>• To provide for a co-ordinated and equitable system of social security to meet basic needs and to develop capacity for independent living, self-sufficiency and integration of people with disabilities into the mainstream of society</li> <li>• To increase the supply of accessible information to consumers on how to access benefits, criteria for qualification and the availability of mechanisms to assist with problems which may arise</li> </ul>	<ul style="list-style-type: none"> <li>•State grants and pensions</li> <li>•Workmen’s compensation</li> <li>•Road Accident Fund</li> </ul>	<ul style="list-style-type: none"> <li>•Inter-sectoral collaboration</li> <li>•Personnel training</li> </ul>

Guideline	Objectives	Strategies	Mechanisms
HOUSING	<ul style="list-style-type: none"> <li>To provide people with disabilities and their families with safe shelter and dwellings of their own through equitable access to a range of options in the housing subsidy scheme</li> </ul>	<ul style="list-style-type: none"> <li>Institutional housing</li> <li>Residential facilities</li> <li>Home ownership</li> </ul>	<ul style="list-style-type: none"> <li></li> </ul>
SPORT & RECREATION	<ul style="list-style-type: none"> <li>To develop and extend sporting activities for people with disabilities in both mainstream and special facilities so that they can participate in sport for both recreational and competitive purposes</li> </ul>		<ul style="list-style-type: none"> <li>Training of trainers</li> <li>Physical facilities</li> <li>Public education</li> <li>Sponsorship</li> <li>Co-ordination</li> </ul>
COMMUNICATIONS	<ul style="list-style-type: none"> <li>To develop strategies that will provide people with communication disabilities with equal opportunities for access to information, as well as public and private services.</li> </ul>		

## CHAPTER 3 - EDUCATION & SKILLS DEVELOPMENT

In the past, people with disabilities have been prevented from attending school or gaining a tertiary qualification to help them get a job. Why is this? It was never a particular policy of previous governments to discriminate against people with disabilities; instead, it was a result of the prejudice which perceived people with disabilities as being incapable.



### 3.1. THE SOUTH AFRICAN SCHOOLS' ACT

The South African Schools Act (84 of 1996) makes the following provision for learners with disabilities:

#### **Admission to public schools**

6. (1) A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.

(6) In determining the placement of a learner with special education needs, the Head of Department and principal must take into account the rights and wishes of the parents of such learner.

#### **Language policy of public schools**

(3) No form of racial discrimination may be practised in implementing policy determined under this section.

(4) A recognised Sign Language has the status of an official language for purposes of learning at a public school.

#### **Provision of public schools**

12. (1) The Member of the Executive Council must provide public schools for the education of learners out of funds appropriated for this purpose by the provincial legislature.

(2) The provision of public schools referred to in subsection (1) may include the provision of hostels for the residential accommodation of learners.

(3) A public school may be an ordinary public school or a public school for learners with special education needs.

- (4) The Member of the Executive Council must, where reasonably practicable, provide education for learners with special education needs at ordinary public schools and provide relevant educational support services for such learners.
- (5) The Member of the Executive Council must take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.

### **Membership of governing body of public school for learners with special education needs**

24. (1) The following categories of persons must be represented on a governing body of a public school for learners with special education needs, in each case by a member or members of the respective category:

- (a) Parents of learners at the school, if reasonably practicable;
- (b) educators at the school;
- (c) members of staff at the school who are not educators;
- (d) learners attending the eighth grade or higher, if reasonably practicable;
- (e) representatives of sponsoring bodies, if applicable;
- (f) representatives of organisations of parents of learners with special education needs, if applicable;
- (g) representatives of organisations of disabled persons, if applicable;
- (h) disabled persons, if applicable; and
- (i) experts in appropriate fields of special needs education”



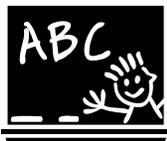
### **3.2. THE WHITE PAPER ON INCLUSIVE EDUCATION**

The government’s policy on improving education for people with disabilities is called *Education White Paper 6 – Inclusive Education*. In this policy, the Department of Education identified the following reasons why people with disabilities had been excluded:

- (i) specialised education and support have predominantly been provided for a small percentage of learners with disabilities within ‘special’ schools and classes;

- (ii) where provided, specialised education and support were provided on a racial basis, with the best human, physical and material resources reserved for whites;
- (iii) most learners with disability have either fallen outside of the system or been 'mainstreamed by default';
- (iv) the curriculum and education system as a whole have generally failed to respond to the diverse needs of the learner population, resulting in massive numbers of drop-outs, push-outs, and failures; and,
- (v) while some attention has been given to the schooling phase with regard to 'special needs and support', the other levels or bands of education have been seriously neglected."

It is important to note, as this policy acknowledges, that the type of education provided in "special" schools was generally not sufficient to equip people with disabilities with the skills and ability to move into the open labour market. For this reason, although some "special schools" did indeed receive preferential treatment on racial grounds, all people with disabilities regardless of race are deemed by the Constitution to have been previously disadvantaged.



For example, Njabulo suffered a spinal cord injury at the age of nine in a shooting accident and became paraplegic as a result. Although Njabulo's injury makes no difference to his intelligence or his ability to learn and do his schoolwork, he is sent to a "special school" where he will not be able to gain a matric exemption and so cannot attend university. There are two reasons why he has been sent to a "special" school: (1) no mainstream school is wheelchair accessible and (2) prejudice about disability means that many people will assume that because Njabulo has a disability he cannot cope with "normal" schooling.

As a result, the Department of Education has introduced "Inclusive Education and Training", which are described as:

- "Are about acknowledging that all children and youth can learn and that all children and youth need support.
- Are accepting and respecting the fact that all learners are different in some way and have different learning needs which are equally valued and an ordinary part of our human experience.
- Are about enabling education structures, systems and learning methodologies to meet the needs of all learners.
- Acknowledge and respect differences in learners, whether due to age, gender, ethnicity, language, class, disability or HIV status.
- Are broader than formal schooling and acknowledge that learning also occurs in the home and community, and within formal and informal modes and structures.
- Are about changing attitudes, behaviour, teaching methodologies, curricula and the environment to meet the needs of all learners.

- Are about maximising the participation of all learners in the culture and the curricula of educational institutions and uncovering and minimising barriers to learning.
- Are about empowering learners by developing their individual strengths and enabling them to participate critically in the process of learning."

How is this different from the old system?

Mainstreaming or Integration	Inclusion
Mainstreaming is about getting learners to 'fit into' a particular kind of system or integrating them into this existing system.	Inclusion is about recognising and respecting the differences among all learners and building on the similarities.
Mainstreaming is about giving some learners extra support so that they can 'fit in' or be integrated into the 'normal' classroom routine. Learners are assessed by specialists who diagnose and prescribe technical interventions, such as the placement of learners in programmes.	Inclusion is about supporting all learners, educators and the system as a whole so that the full range of learning needs can be met. The focus is on teaching and learning actors, with the emphasis on the development of good teaching strategies that will be of benefit to all learners.
Mainstreaming and integration focus on changes that need to take place in learners so that they can 'fit in'. Here the focus is on the learner.	Inclusion focuses on overcoming barriers in the system that prevent it from meeting the full range of learning needs. The focus is on the adaptation of and support systems available in the classroom

What has the Department of Education promised to do to promote inclusive education?

- Development of educators and their managers so that lessons can be varied according to the needs of all learners; the provision of specialized schools that will focus on problem solving and the development of the learner's strengths and competencies, rather than focusing on the learners weaknesses.
- Within each school district, support staff such as occupational- and physiotherapists will support the teaching staff, and to identify and assist schools to overcome barriers to an inclusive environment.
- There will be three types of schools: **special** (catering only for learners with disabilities); **full service** (catering for learners with disabilities and learners without disabilities); and **mainstream**, which will cater only for learners without disabilities. This system means that some schools which are currently only mainstream schools will have physical and other barriers to access removed, so that learners with disabilities can attend these schools.

What are curriculum and institutional barriers to learning, and how can they be removed?

- "The content (i.e. what is taught).
- The language or medium of instruction.
- How the classroom or lecture is organised and managed.
- The methods and processes used in teaching.
- The pace of teaching and the time available to complete the curriculum.
- The learning materials and equipment that is used.
- How learning is assessed."

### **3.3. SKILLS DEVELOPMENT**

South Africa has quite an old-fashioned education system which hasn't been producing people who had the rights skills for the South African job market. The answer to this problem is not only to educate people (i.e. to make them able to read, write, make calculations and other knowledge that is taught at schools) but also to give them skills. A skill can be defined as an ability to perform a task or a set of tasks – for example, to use a computer, drive a car, or perform surgery.

Another problem with the South African qualifications system is that it was not flexible. So for example, if you left school without a matric exemption, you could never go to university, ever. If you went to Technikon after school, and later in your career decided you wanted to study further at a university, the university would not recognize any of the knowledge you had gained at Technikon. Also, all schools, technikons and universities operated in a different manner and were allocated different resources by the government, so that some institutions offered a better standard of education than others.

In order to fix these problems, a new system of educating people and developing their skills was introduced. It is called the National Qualifications Framework (NQF). Every type of qualification that you can get in South Africa is registered on the NQF, and a national body called the South African Qualifications Authority oversees all the qualifications in the country.

The advantage of this system is that now all people who wish to get a certain qualification have to do the same things and be assessed in the same way, so we know that all institutions are providing the same quality of teaching, and all employers are guaranteed a certain type of skill when they employ someone with that qualification.

Technically, education (schools, colleges and universities) are the responsibility of the Department of Education, while skills (job training) are the responsibility of the Department of Labour. Obviously, there are many cases where education and job training overlap, and so these two departments work very closely.

The education and skills of people in a country have a very large impact on the economy of that country, since goods (such as motor cars) and services (such as tourism) are only as good as the people who provide the goods and services. That is why the Department of Labour has

become involved in developing skills. It is important that the skills that are being taught are the kinds of skills that employers need, which is why the focus is on technical skills, to keep up with the worldwide technological revolution.

There are a number of laws to give the Department of Labour the powers it needs to manage skills development. These laws include the Skills Development Act and the Skills Development Levies Act, which state that employers have the responsibility for improving the skills of their employees, and that the employers must pay 1% of their salary and wage costs to the Department of Labour in order to fund this training. The Department of Labour puts the money into the National Skills Fund, from where it is used on skills development projects.

In order to make sure that the skills that are being taught will meet the country's needs, the Department of Labour draws up a five year plan called the National Skills Development Strategy (NSDS). At the moment, we are in the second five year cycle. One of the principles of the NSDS is that, by 2010, 4% (four percent) of all people trained by the Department of Labour must be people with disabilities. The Strategy goes on to say "*Learners with disabilities to be provided with reasonable accommodation such as assistive devices and access to learning and training material to enable them to have access to and participate in skills development*".

## 4. THE WORKPLACE

No other group in South Africa experiences such high unemployment as people with disabilities. The employment figures for people with disabilities are very similar across race and gender groups.

It is estimated that approximately 99% of people with disabilities in South Africa are unemployed.<sup>3</sup> This lack of employment, and resulting lack of income, has obvious effects on the standard of living of people with disabilities, and is one of the primary reasons why people with disabilities so often have to be financially dependent on their families or the state. Without financial support, people cannot secure adequate medical care, buy a house or vehicle, or lead an independent life.

There are consequences which cannot be counted in rands and cents, but which are equally severe – social isolation, a lack of a sense of self-worth, difficulty forming relationships.

There are many factors which contribute to the high rate of unemployment amongst people with disabilities:

- Lack of accessible schools and tertiary education institutions has meant that many people with disabilities are unable to gain a qualification;
- Lack of physically and socially accessible workplaces;
- Lack of accessible and safe transport to and from the workplace.

Employers must clearly understand that employing a person with a disability is not an act of charity; it is the environment in which a person works which “disables” that person, not their physical or mental condition. People with disabilities can be valuable and productive employees if they are able to work in an accessible and inclusive environment. People with disabilities can also be entrepreneurs and employers of others, thereby contributing to the growth of the national economy.



<sup>3</sup> *The Employment of People with Disabilities in South Africa*, Development Bank of Southern Africa, 2006



#### **4.1. THE EMPLOYMENT EQUITY ACT**

The government started to address the issue of discrimination in employment with the Employment Equity Act, which was designed to ensure that people from previously disadvantaged groups were fairly employed.

The Employment Equity Act has three main purposes:

1. Eliminating unfair discrimination – promoting equal opportunity and fair treatment in employment.
2. Implementing affirmative action – ensuring equitable representation of designated groups in all occupational categories and levels in the workforce
3. Determining income differentials – progressively reducing disproportionate income differentials.

The Employment Equity Act reads as follows:

##### **5. Elimination of unfair discrimination**

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

##### **6. Prohibition of unfair discrimination**

(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, ethnic or social origin, colour, sexual orientation, age, **disability**, religion, conscience, belief, culture, language and birth.

(2) It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purposes of this act; and
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.

##### **7. Medical Testing**

1. Medical Testing of an employee is prohibited unless-
  - (a) legislation permits the required testing; or

- (b) it is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

## **8. Psychometric testing**

Psychometric testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable;
- (b) can be applied fairly to employees, and
- (c) is not biased against any employee or group'

### **4.1.1. Affirmative Action**

What exactly is meant by "affirmative action" and how should employers be implementing "affirmative action"?

The Employment Equity Act reads:

#### **"15. Affirmative action measures**

(1) Affirmative action measures are measures designed to ensure that suitable qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include:

- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups.
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people,
- (c) making reasonable accommodation for people for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;"

**“People with Disabilities”** - People who have a long term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment.

**“Designated Employers” -:**

A person employing 50 or more employees

- An employer whose total annual turnover is at least equal to the amounts set out in this section
- A Municipality
- The state [subject to exclusions]
- A designated employer in terms of a collective agreement

Designated employers must implement affirmative action measures [S.13][1] to ensure that “suitably qualified people” from “designated groups” have equal employment opportunities and are equitably represented in all occupational categories and levels

**NOTE :** Employers are not required to create absolute barriers to employment opportunities for people not from “designated groups”

**“Suitably qualified person”** - Section 20(3) states:

*“A person may be suitably qualified for a job as a result of any one of, or any combination of that person’s:*

- *Formal qualifications*
- *Prior learning*
- *Relevant experience or*
- *Capacity to acquire, within a reasonable time, the ability to do the job.”*

In determining whether a person is suitably qualified for a job:

*“An employer may not unfairly discriminate against a person solely on the grounds of that persons lack of relevant experience” [Sec. 20[5]*

Affirmative action measures include:

- Measures designed to ensure that suitable qualified people from designated groups have equal employment opportunities and are equitable represented in all occupational categories and levels in the workforce of a designated employer, e.g. the preferential treatment, numerical goal etc.
- Making reasonable accommodation for people from designated groups to ensure equality, advancement and equitable representation, e.g. not too slow or too fast, not blindly or arbitrarily, easing access to training or advancement; more understanding and helpful with performance problems.
- Measures to retain, develop and train people from designated groups – e.g. where AA plans or access may be affected by the application of LIFO in a retrenchment situation efforts may be made to retain designated people.

#### 4.1.2. Discrimination

*"S6 - 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."*

Medical testing of employees or job applicants is also prohibited, unless it is permitted by legislation or is justifiable in light of medical facts, employment conditions, social policies, a fair distribution of employee benefits or the inherent requirement of the job.

Testing for HIV is prohibited without a court order.

Psychometric testing must be scientifically tested and non-discriminatory (section 8).

Employers may not discriminate against job applicants solely on the basis of lack of relevant experience, determining their suitability – there must be regard for the statutory meaning of suitably qualified.

Persons covered by the prohibition of section 6:

- Actual employees and job applicants
- Possibly independent pension funds or independent medical aid schemes, provided it is an employment related dispute – the act states "no person" may discriminate;
- The clients of a labour broker if it uses the employees services for longer than three months – otherwise jointly and severally liable with the employer (e.g. labour brokers).

*"S.5: Every employer must take steps to eliminate unfair discrimination in any employment policy or practice."*

**"Employment policy or practice"** includes but is not limited to:

- Recruitment procedures, advertising and selection criteria
- Appointments and the appointment process
- Job classification and grading
- Remuneration, employment benefits and terms and conditions of employment
- Job assignments
- The working environment and facilities
- Training and development
- Performance evaluation systems
- Promotion
- Transfer
- Demotion
- Disciplinary measures other than dismissal

- Dismissal

### ***Steps to eliminate unfair discrimination***

We would suggest the following steps in complying with section 5 of the Act i.e. the duty to take steps to eliminate unfair discrimination:

- **Step 1**  
Study and understand the provisions of chapter 11 sections 5 to 11
- **Step 2**  
Conduct an internal audit of your employee policies or practices as defined by the Act.
- **Step 3**  
Amend employment policies or practices where necessary
- **Step 4**  
Communicate changes in policies or practice to workforce [giving reasons for changes]
- **Step 5**  
Keep records relating to stages 1 to 4 above to substantiate the steps you have taken to comply.

### **Prohibition of unfair discrimination**

Discrimination is defined as “to differentiate/ to treat differentially/ to distinguish/ to make a distinction”

For differentiation to exist, the conduct of complained of (i.e. the decision, provision, requirement, policy, criteria) must result in:

- Different treatment of the employee/ job applicant compared to other people or different categories of people; or
- The employee’s/job applicant’s treatment was less favourable than other persons or groups of persons; or
- Other persons or groups of persons were more favourably treated.

Discrimination is a relative question or concept. A complaint of an adverse effect on an applicant without relying on any different treatment or any other persons cannot constitute differentiation.

### **Prohibition of unfair discrimination**

Suggested inquiry checklist:

1. Has there been a differentiation?
2. If so, does the differentiation amount to discrimination? When differentiation is based on unacceptable grounds it becomes discrimination.
3. If so, is the discrimination unfair?

Not all discrimination is unfair. It is open for an employer to show the discrimination was justified and/or based on affirmative action policies and/or the inherent requirements of the job.

## **Direct and Indirect Discrimination**

### ***Indirect discrimination***

Occurs when a criteria or practice or rule which appears neutral has the effect of:

1. Disproportionately preferring or excluding one group of people in comparison with others; or
2. Making it easier for one group than another to comply.

An employer may be guilty of indirect discrimination if the use of an apparently neutral criterion has a significant adverse impact on a particular group and the criterion is not sufficiently relevant to workplace needs to justify that impact.

### ***Four tests for indirect discrimination***

1. Has a requirement or condition been applied equally to both sexes or to all groups?
2. Is that requirement or condition one with which a considerably smaller number of men or women or persons of a particular group can comply in comparison to persons not of that group?
3. Is the requirement or condition justifiable irrespective of sex, colour, race, nationality, ethnic or national origins of the person in question?
4. Has the imposition of the requirement or condition operated to the detriment of a person who could not comply with it?

### ***Proving disproportionate impact.***

For the presumption of discrimination, there must be a significant difference in the number or percentage of one sex in the advantaged or disadvantaged group as against the other.

Very often the only way of proving indirect discrimination is by producing evidence that the criterion or requirement has a “disproportionate or disparate impact” on a particular group. Below are some guidelines on how a grievant would go about proving disproportionate impact:

- the grievant does not have to prove that the employer intended that the criterion would have a discriminatory impact. It is sufficient that there is the impact. Only the effect of the application of the criteria is relevant. Lack of intent does not constitute a defence.
- The grievant would need to produce statistics comparing the group allegedly discriminated against with the group which can meet the criterion.
- Generally the grievant does not need to produce figures on the actual applicants for the job and can rely on generalized national statistics.
- There may be occasions where the relevant comparison will be with the actual pool of applicants.
- Obtaining statistics can be difficult and expensive, particularly when relating to a small pool requiring specialized study.

## Defences

There are three main defences which can be raised to an allegation that the employer is guilty of unfair discrimination.

1. **The conduct is fair discrimination** – this admits that the employer has discriminated but that it is fair for it to do so. This defence will only succeed when the differentiation has a sound basis related to the nature of the enterprise.
2. **Affirmative action** – section 6(2)(a) of the EEA says that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the act, as set out in S2.

Affirmative action measures are measures to ensure that suitable qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and level of the workforce of a designated employer.

For affirmative action to constitute a valid defence, an employer must have an affirmative action policy. The policy must exist and must be in the form of a coherent and defensible plan. The employer cannot rely on a generalized intention to advance or protect.

The policy:

- Doesn't have to be in writing or formal, but does have to meet the requirements of S15 of the EEA
  - Must not be too restrictive of the rights of other employees;
  - In terms of the benefits granted it must be proportional and equitable;
  - Must not be haphazard, or applied arbitrarily or blindly;
  - Should not prejudice efficiency;
  - Can't just reserve posts for AA candidates;
  - The act emphasizes employment equity in groups rather than individual context; this means that while the group may be designated disadvantaged, the individual may not be disadvantaged;
  - The successful candidate needn't be the best qualified candidate, but must be suitable qualified (S20);
    - formal qualifications; or
    - prior learning; or
    - relevant experience; or
    - capacity to acquire, within a reasonable time, the ability to do the job
  - The act/ decision must not conflict with the employer's own AA policy.
3. **Inherent requirement of the job.** – Section 6(2)(b) of the EEA says that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. These are requirements which cannot be removed from the job without dramatically altering the nature of the job. A job performed without the imposition of these requirements will fail the test.

Defined as the possession of a particular indispensable characteristic necessary for effectively carrying out the job in question and to the real needs of the undertaking, e.g:

- Being female or male
- Being a particular colour or race
- Unrestricted in time or availability
- Immediate skill
- Able to speak particular languages
- Free of a disability or particular medical condition.

4. **Medical testing** (e.g. for HIV) of employees or job applicants is prohibited, unless it is permitted by legislation or is justifiable in light of medical facts, employment conditions, the fair distribution of employee benefits or interest requirements of the job.

- Must show a real need on the part of the undertaking, objectively
- Must be justifiable
- Must be job related
- There must be a proportional balance between the discriminatory effect and the reasonable needs of undertaking;
- Profitability and the requirement of uninterrupted service are relevant considerations in special circumstances.

### **AIDS**

An employers rejection of a suitably qualified job applicant on the basis that he or she is HIV positive amounts to discrimination, unless the employer can prove that the infection or CD4+ level has reached a stage where it renders the applicant incapable of performing work attached to the job and/or may be a risk to some people in the workplace.

It is discriminatory to exclude a person because of a medical condition that will render the person unfit for work at some uncertain future date if the person at the time of the appointment or job application is capable of working and performing the duties of attached to the job and does not pose a risk.

Any potential hazards can be managed through monitoring, counseling and medication.

Later performance problems can be managed through monitoring, re-deployment and/or dismissal for incapacity.

### **Retrenchment and discrimination.**

In a retrenchment process the employer and employees must attempt to agree on a method for selecting employees to be retrenched. If they fail to reach agreement, the employer must select employees according to fair and objective selection criteria. Generally this involves LIFO subject to skills, voluntary retrenchments and voluntary early retirement.

It is arguable that this may be adapted so as not to undermine AA policy or the progress made therein, e.g. by women proposing selection criteria which do not prejudice the equitable representation of women in the workforce.

S15 of the EEA requires employers to retain and develop people from designated groups.



Below is a summary of the Employment Equity Act<sup>4</sup>:

## **"1. Chapter 1 - Definitions, purpose, interpretation and application**

### **1.1 Purpose of the Act: Section 2**

The purpose of the Act is to achieve equity in the workplace, by

- a. promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b. implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.

### **1.2 Application of the Act: Section 4**

- a. Chapter II (sections 5 - 11) applies to all employers and employees.
- b. Chapter III (sections 12 - 27) applies to designated employers.
- c. A designated employer means an employer who employs 50 or more employees, or has a total annual turnover as reflected in Schedule 4 of the Act, municipalities and organs of state. Employers can also volunteer to become designated employers.
- d. A designated group means black people, women, or people with disabilities.
- e. The South African National Defence Force, National Intelligence Agency, and South African Secret Services are excluded from this Act.

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<sup>4</sup> [www.labour.gov.org](http://www.labour.gov.org)

## **2. Chapter 2 - Prohibition of Unfair Discrimination**

**2.1** 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, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.

**2.2** It is not unfair discrimination to promote affirmative action consistent with the Act or to prefer or exclude any person on the basis of an inherent job requirement.

### **2.3 Medical Testing: Section 7**

- a. Medical testing of an employee is permissible only when legislation requires testing or when this is justifiable for various reasons.
- b. HIV testing is prohibited unless such testing is determined to be justifiable by the Labour Court.

### **2.4 Psychological Testing: Section 8**

Psychological testing and similar assessments are prohibited, unless the test is scientifically valid and reliable, can be applied fairly to all employees, and is not biased against any employee or group.

### **2.5 Disputes concerning this Chapter : Section 10**

- a. An employee, or applicant for employment, may refer a dispute concerning alleged unfair discrimination (or medical or psychological testing) to the CCMA for conciliation. This must be done within six months of the alleged discrimination (or testing)..
- b. If a dispute is not resolved at conciliation, a party may refer it to the Labour Court for adjudication. The parties to a dispute may also agree to refer the dispute to arbitration.
- c. Unfair dismissal disputes in which unfair discrimination is alleged must be dealt with in terms of the Labour Relations Act. The dismissal must be referred to the CCMA within 30 days.

### 3. Chapter 3 - Affirmative Action

#### 3.1 Duties of a Designated Employer: Section 13

- a. A designated employer must implement affirmative action measures for designated groups to achieve employment equity.
- b. In order to implement affirmative action measures, a designated employer must:
  - consult with employees;
  - conduct an analysis;
  - prepare an employment equity plan; and
  - report to the Director-General on progress made in the implementation of the plan.

#### 3.2 Affirmative Action measures: Section 15

- a. Affirmative action measures are measures intended to ensure that suitably qualified employees from designated groups have equal employment opportunity and are equitably represented in all occupational categories and levels of the workforce.
- b. Such measures must include:
  - identification and elimination of barriers with an adverse impact on designated groups;
  - measures which promote diversity;
  - making reasonable accommodation for people from designated groups;
  - retention, development and training of designated groups (including skills development); and
  - preferential treatment and numerical goals to ensure equitable representation. This excludes quotas.
- c. Designated employers are not required to take any decision regarding an employment policy or practice that would establish an absolute barrier to prospective or continued employment or advancement of people not from designated groups.

### **3.3 Consultation: Sections 16 and 17**

A designated employer must take reasonable steps to consult with representatives of employees representing the diverse interests of the workforce on the conducting of an analysis, preparation and implementation of a plan, and on reporting to the Director-General.

### **3.4 Disclosure of Information: Section 18**

To ensure meaningful consultation, the employer must disclose relevant information to the consulting parties, subject to section 16 of the Labour Relations Act 66 of 1995.

### **3.5 Analysis: Section 19**

A designated employer must conduct an analysis of employment policies, practices, procedures, and working environment so as to identify employment barriers that adversely affect members of designated groups. The analysis must also include the development of a workforce profile to determine to what extent designated groups are under-represented in the workplace.

### **3.6 Employment Equity Plan: Section 20**

- a. A designated employer must prepare and implement a plan to achieve employment equity, which must:
  - have objectives for each year of the plan;
  - include affirmative action measures;
  - have numerical goals for achieving equitable representation;
  - have a timetable for each year;
  - have internal monitoring and evaluation procedures, including internal dispute resolution mechanisms; and
  - identify persons, including senior managers, to monitor and implement the plan.

### **3.7 Report : Section 21**

- a. An employer who employs fewer than 150 employees must submit its first report to the Director-General within 12 months after the commencement of

the Act, and thereafter every 2 years on the first working day of October.

- b. An employer who employs 150 or more employees, must submit its first report 6 months after the commencement of the Act, and thereafter every year on the first working day of October.

### **3.8 Designated employer must assign a manager: Section 24**

A designated employer must assign one or more senior managers to ensure implementation and monitoring of the employment equity plan and must make available necessary resources for this purpose.

### **3.9 Income Differentials : Section 27**

A statement of remuneration and benefits received in each occupational category and level of the workforce must be submitted by a designated employer to the Employment Conditions Commission (ECC).

Where there are disproportionate income differentials, a designated employer must take measures to reduce it progressively. Such measures may include collective bargaining, compliance with sectoral determinations (section 51 of the Basic Conditions of Employment Act); the application of norms and benchmarks recommended by the ECC, relevant measures contained in skills development legislation, and any other appropriate steps.

## **4. Chapter V - Monitoring, Enforcement and Legal Proceedings**

### **4.1 Monitoring: Section 34**

Employee or trade union representatives can monitor contraventions of the Act and report to relevant bodies.

### **4.2 Powers of the Labour Inspector: Section 35**

Labour Inspectors are authorised to conduct an inspection as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.

### **4.3 Undertaking to Comply: Section 36**

If the inspector has reasonable grounds to believe that a designated employer has failed to comply with its

obligations in terms of the Act, the inspector will obtain a written undertaking to comply within a specified period.

#### **4.4 Compliance Order: Section 37**

If the designated employer refuses to comply with the written undertaking, the inspector will issue an order to comply.

#### **4.5 Review by Director-General: Section 43**

The Director-General may conduct a review to determine whether an employer is complying with the Act.. On completion of the review, the Director-General may make recommendations for compliance within certain time frames.

#### **4.6 Powers of the Labour Court: Section 50**

The Labour Court has the powers to make any appropriate orders, award compensation, or impose fines.

#### **4.7 Protection of Employee Rights: Section 51**

The Act protects employees who exercise their rights and obligations under the Act against victimisation, obstruction and undue influence.

### **5. Chapter VI - General Provisions**

#### **5.1 State contracts: Section 53**

Designated employers and employers who voluntarily comply with Chapter III, who seek to do business with any organ of state, will have to apply for a certificate from the Minister confirming their compliance with Chapters II and III of the Act. Non-designated employers' compliance certificates will pertain to Chapter II.

#### **5.2 Liability of Employers: Section 60**

Should employees contravene any provision of this Act, while performing their duties, the employer will be

liable unless the employer can prove that it did everything in its power to prevent the undesired act.”

### **4.1.3. The Code of Good Practice on the Employment of People with Disabilities**

The Employment Equity Act does not give employers any guidelines or advice about employing people with disabilities. The Department of Labour has published a document called the Code of Good Practice on the Employment of People with Disabilities. This document is intended to be a guide for employers and is intended to help employers and employees to understand the rights of employees with disabilities.

The Code is NOT a law, nor is it a summary of the law. When a person refers to the Code of Good Practice, they must always remember that the Employment Equity Act has greater authority than the code. The point of the Code is to give employers a way forward when they decide they want to employ people with disabilities.

The Code identifies for employers the way in which they may unwittingly discriminate against people with disabilities by:

- Unfounded assumptions about the abilities and performance of job applicants and employees with disabilities;
- Advertising and interviewing arrangements which either exclude people with disabilities or limit their opportunities to prove themselves;
- Using selection tests which discriminate unfairly;
- Inaccessible workplaces; and
- Inappropriate training for people with disabilities.

The Code then defines the concept of disability, reasonable accommodation, recruitment and selection processes, interviews, job offers, medical and psychological testing, placement, training and career advancement, retention of people with disabilities, and termination of employment.

The Code also addresses the issue of confidentiality and disclosure of employment:



#### **14.1. Confidentiality**

14.1.1. Subject to sections 7 [*Medical Testing*] and 18 [*Disclosure of Information*] of the Employment Equity Act, employers, including health and medical service personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose, and with the written consent of the person.



- 14.1.2. Employers must protect the confidentiality of the information that has been disclosed and must take care to keep records of private information relating to the disability of applicants and employees confidential and must be kept secret from general personnel records.
- 14.1.3. When an employer no longer required this information, it must be destroyed.
- 14.1.4. Subject to paragraph 14.2.7. employers may not disclose any information relating to a person's disability without the written consent of the employee concerned unless legally required.

## **14.2. Confidentiality**

- 14.2.1. People with disabilities are entitled to keep their disability status confidential. But if the employer is not aware of the disability or the need to be accommodated, the employer is not obliged to provide it. This does not absolve the employer from their responsibility not to discriminate unfairly, directly or indirectly against a job applicant.
- 14.2.2. A person with a disability may disclose their disability at any time, even if there is no immediate need for reasonable accommodation.
- 14.2.3. If the disability is not self-evident, the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.
- 14.2.4. If on reasonable grounds the employer does not believe that the employee is disabled, or that the employee requires accommodation, the employer is entitled to request the employee to be tested to determine the employee's ability or disability, at the expense of the employer.
- 14.2.5. As information about disability may be technical, employers should ensure that a competent person interprets the information.
- 14.2.6. If the employer requires further information, this must be relevant to the specific job and its essential functions.
- 14.2.7. An employer may not reveal the fact of an employee's disability, unless this is required for the health or safety of the person with the disability or other persons.

14.2.8. The employer may, after consulting the person with the disability, advise relevant staff that the employee requires accommodation.

#### **4.1.4. The Technical Assistance Guidelines on the Employment of People with Disabilities**

All this information is useful to an employer, but one of the biggest challenges that employers face is how to implement these guidelines. To help employers to understand the needs of applicants and employees with disabilities, the Department of Labour has published the Technical Assistance Guidelines on the Employment of People with Disabilities. This is a “how to” guide for employers, with practical advice and examples.

The Technical Assistance Guidelines examines in detail all the issues raised in the Code of Good Conduct: disability, reasonable accommodation, recruitment and selection processes, interviews, job offers, medical and psychological testing, placement, training and career advancement, retention of people with disabilities, benefits, confidentiality and disclosure, and termination of employment.

The Code of Good Conduct and the Technical Assistance Guidelines are not laws, and no employer has to do what these publications say. However, employers do have to follow the Employment Equity Act, and employers will find it much easier if they use the guidelines and advice offered in the Code of Good Conduct and the Technical Assistance Guidelines.



#### **4.2. THE BASIC CONDITIONS OF EMPLOYMENT ACT**

In addition to the Employment Equity Act, which does specifically target people with disabilities, all employees are also protected by the Basic Conditions of Employment Act, which governs issues such as working hours, benefits, and leave.

The Basic Conditions of Employment Act (BCEA) applies to all employees except those in the National Defence Force, the National Intelligence Agency, the South African Secret Service, unpaid volunteers working for an organisation serving a charitable purpose, and sailors covered by the Merchant Shipping Act.

Permanent employees, employees on fixed term contracts and temporary employees are all governed by the Act. There are some partial exclusions listed in the summary below.

There are variations to the act, meaning that conditions more OR less favourable than those stipulated in the Act can be implemented provided there is a collective or private agreement between the parties.

Variations can also be implemented where the Act is silent on particular terms and conditions.

A summary of the Basic Conditions of Employment Act is as follows:

### **Statutory Regulation of Employment**

- BCEA sets minimum standards for contracts of employment.
- BCEA does not cover genuine independent contractors [but employees can't simply be labeled independent contractors]
- Not possible to 'Contract out' of the BCEA
- 'Client' is jointly responsible with a labour broker for non-compliance with the BCEA
- Variations to basic conditions are possible through Bargaining Council agreement or ministerial determination

### **Regulation of Working Time**

- Occupational health and safety legislation must be complied with
- Special consideration must be given to health and safety of workers and their family responsibilities
- Consideration must be given to guidelines in the Code of Good Practice on arrangement of working time

### **Exclusions from BCEA regulation of working time**

- BCEA regulation of working time does not apply to:
  - Senior managerial employees
  - Employees who earn more than R115 572.00 per annum
  - Sales staff who travel to customers and regulate their own hours of work
  - Employees who work less than 24 hours per month for an employer

### **Ordinary hours of work**

- Limited to 45 hours per week
- Limited to 9 hours per day [8 for employees working more than 5 days per week]
- Any additional hours are overtime

- Ordinary hours may be extended by 15 minutes per day for employee to continue serving members of the public [to a maximum of 1 hour per week]

### **Overtime**

- Limited to 10 hours a week not more than 12 hours a day [the previous maximum of 3 hours per day [removed by the 1 August 2002 amendment]
- May only be worked in terms of an agreement [which need not be written]
- If agreement to work overtime concluded during first 3 months of employment, valid for 12 months only
- Must be paid for at 1 ½ times the normal hourly wage or with paid time off

### **Compressed working week**

- Written agreement required
- May require work up to 12 ordinary hours per day [including meals]
- Subject to
  - Weekly limits on ordinary hours and overtime
  - Daily rest period
  - Maximum 5-day week

### **Averaging of Hours**

- Collective agreement required
- May permit averaging of hours over maximum of 4 months
- Subject to
  - Average weekly limit on ordinary hours and overtime
  - Daily and weekly rest period
- First two collective agreements lapse after a year

### **Meal Intervals**

- Meal intervals compulsory for employees working more than 5 hours [without a break of 1 hour]

- Must be at least 1 hour, but by written agreement may be reduced to 30 minutes
- Tea breaks not required by BCEA

### **Rest Periods**

- 12 Hours daily
- 36 Hours weekly
- Must include Sunday unless otherwise agreed
- Some flexibility permitted

### **Sunday Work**

- An agreement is required, but not in writing
- Must be paid at double the usual wage if Sunday not ordinarily worked
- 1½ times the usual wage if Sunday is ordinarily worked
- Minimum pay of usual day shift, even if only few hours worked
- With agreement, may be paid for with time off

### **Public Holidays**

- Employees entitled to at least the number of public holidays [presently 12] provided for in the Public Holidays Act
- Agreement needed to require employee to work on public holiday, but not in writing
- Public holiday must be paid for unless employee doesn't work and is not scheduled to work
- Must pay double pay [or ordinary wage plus time, if greater] for work on a public holiday that is on an ordinary work day
- Must pay ordinary wage plus amount earned for work on a public holiday that is not on an ordinary work day

### **Night Work**

- Night work means work between 6 pm and 6 am
- May only be required
  - With employee's agreement [need not be in writing]
  - If compensated with an allowance or reduced hours

- If transport is available
- Special consideration must be given to health and safety issues associated with night work
- Employer may have to pay for medical examinations

### **Annual Leave**

- At least 21 consecutive days 'statutory leave' per completed year of employment [or 1 day for 17 worked, or 1 hour for 17 hours worked]
- On full pay
- Public holidays not part of annual leave
- 'Encashment' of statutory leave not permitted
- Accumulation of statutory leave from one year to the next not permitted
- Statutory leave must be taken within 6 months of end of annual cycle
- Additional holiday leave may be agreed between employer and employee and may be dealt with in any way agreed
- Annual leave may not be deducted during other paid leave [e.g. sick leave] or a notice period [but may be requested during unpaid leave]
- Employee entitled to leave pay in advance
- Employee not entitled to dictate timing of leave taken: must be by agreement or as determined by employer

### **Sick Leave**

- Sick leave cycle is 3 years
- The entitlement [each cycle] is equivalent to the number of days usually worked in 6 weeks
- The entitlement is for sick leave, and cannot be taken for other reasons [claiming sick leave when not sick is dishonest and could lead to dismissal]
- No obligation to pay in excess of this entitlement, but agreement can be reached to make such payment
- Medical certificate required for absence:
  - Longer than 2 days, or
  - More than twice in 8 weeks
- Employees permitted [with agreement of employer] to reduce pay for sick leave in return for increasing the number of days sick leave proportionately

- Unused sick leave does not accumulate from one cycle to the next [unless this is agreed to]

### **Maternity Leave**

- Up to 4 months' absence
  - Starting from 4 weeks before due date of birth [or earlier if medically advised]
  - Ending not less than 6 weeks after birth [unless medical clearance is given for earlier return]
- Employee must give written notice of proposed start and end dates, at least four weeks before she intends to stop work.
- No employee may work for six weeks after the birth, whether or not the child is born alive or miscarries, unless certified to be safe to do so by a medical practitioner or midwife.
- Maternity leave is unpaid unless agreed otherwise
- Wages of women on maternity leave are paid by UIF, unless otherwise agreed in an individual contract of employment or collective agreement. UIF only pays a portion of the wages. The employer is not obliged to pay the difference (SS 25 & 26).
  - Dismissal related to pregnancy or intended pregnancy deemed automatically unfair
  - Pregnant or nursing employee not permitted to perform work hazardous to her health or that of her child
  - Pregnant employee doing night work to be offered alternative work if practicable

### **Family Responsibility Leave**

- Maximum of 3 days per annum
- Reasons include:
  - Paternity
  - Death of immediate family member (spouse, life partner, parent, grandparent, child, grandchild or sibling)
  - Sickness of child for whom employee is responsible
- Proof of 'event' may be required
- Only employees who have been in employment with the employer for longer than four months and who work at least 4 days a week for that employer qualify for family responsibility leave.
- Before paying an employee for family responsibility leave, an employer may require "reasonable proof" of such an event (e.g. a birth or death certificate or medical certificate).

- Any unused family responsibility leave lapses at the end of the leave cycle.
- Leave may be taken in respect of the whole or part of a day.
- Collective agreements may only vary the number of days and the circumstances under which leave is granted (section 27).
- A "child" may include any de facto dependants

#### **Written particulars of Employment**

- Prescribed particulars must be given in writing
- Written notification required of any changes
- Failure to give written particulars does not nullify the contract
- Written particulars must be explained
- BCEA rights must be displayed in the workplace
- Records must be kept for 3 years after termination of employment

#### **Deductions**

- Details of permissible deductions must be given in writing at start of employment
- Generally these are for tax, UIF, pension and medical aid contributions, etc
- Other deductions not permitted, unless
  - Employee agrees in writing; or
  - Deduction required or permitted in law, or by collective agreement, court order or arbitration award
- Employee's agreement must specify the debt [no general agreement permitted]
- Where deduction is for loss or damage caused by employee, further restrictions apply

#### **Notice Periods**

- Termination by employer is always subject to the law of unfair dismissal
- Minimum notice period are:
  - 1 Week if employed for 6 months or less
  - 2 Weeks if employed for more than 6 months but not more than year
  - 4 Weeks if employed one year or more

- Employee may not be required to give longer notice than employer
  - Employer may dispense with notice where grounds exist for summary dismissal
  - Notice of termination:
    - Must be in writing
    - May not be given during a period of BCEA leave
      - May not run concurrently with period of BCEA leave [except sick leave]

### **Payment instead of Notice**

- Where employee resigns employer may waive notice, but must pay unless employee agrees otherwise
- Where employer terminates, may elect to pay instead of notice
- Where accommodation is provided by employer, employee must be permitted to remain in accommodation for notice period [and at least one month]

### **Severance Pay**

- Payable when employer terminates employment for operational requirements [retrenchment]
- Minimum of one week's remuneration per completed year of service
- No entitlement for partially completed years of service
- Not payable to employee who unreasonably refuses to accept offer of alternative employment
- May be reduced [or increased], but only by the Minister

### **Duration of Employment**

- Employment is continuous for BCEA purposes where:
  - Prior period of employment with the same employer
  - Interrupted by a year or less
- Payment made [or leave granted] during previous period of employment may be taken into account

## Hierarchy of Agreements

- Collective agreement takes precedence over individual contract of employment
- Bargaining Council [collective] agreement takes precedence over other collective agreements

## Variation by Bargaining Council

- Collective agreement concluded in Bargaining Council may vary basic conditions of employment
- But variation
  - Must be consistent with purpose of the BCEA
  - May not increase BCEA ordinary hours of work
  - May not vary working hours so as to threaten health and safety
  - May not interfere with protection for night workers
  - May not reduce annual leave below 14 days
  - May not reduce BCEA maternity and sick leave entitlements
  - May not permit child or forced labour

### 4.2. Variations of Basic Conditions of Employment.

Parties generally cannot contract out of or agree to less favourable conditions than those in the Act.

The provisions of the Act constitute terms of any contract of employment, except to the extent that some other law, collective agreement or the contract provides for more favourable conditions.

Where a contract is silent on particular terms and conditions which are laid out in the Act, the provisions thereof will be "read into" the contract as if the parties had agreed to them.

Where the contract makes provision for such terms and conditions more favourable than those in the Act, the agreement is applicable.

However certain basic conditions may be varied less favorably between the parties by agreement in a Collective Agreement or Private Agreement. The agreement is only applicable if the specific variation is permitted by the Act or Minister (Sections 4, 40, 49 and 50).

**4.3. Maternity Leave and protection of Mothers - see above**

**4.4. Family Responsibility Leave - see above**

**4.5. Enforcement of the Act**

Labour inspectors appointed by the Department of labour must advise employees and employers of their rights and obligations in terms of the Act, facilitate and or order compliance with the Act.

There is a clear hierarchy of forums to give effect to labour legislation. Any labour issues must follow this hierarchy.

Matters are referred first to the Commission for Conciliation, Mediation and Arbitration (CCMA), then to the Labour Court, the Labour Appeal Court and finally the Constitutional Court. Matters from the Labour Appeal Court can only be referred to the Constitutional Court if the Labour Appeal Court authorises it so.

In exceptional cases the Constitutional Court may allow a matter to come directly before it. Labour Court judgements are subject to Constitutional Court Review.



### **4.3. THE LABOUR RELATIONS ACT**

The Labour Relations Act is also important for all employers and employees. The purpose of this Act can be summarised as seeking to advance economic development, social justice, labour peace and the democratisation of the workplace.

The Act governs the following matters:

1. Freedom of association and general protections [Chapter 11]
2. Collective bargaining [Chapter III]
3. Strikes and lock-outs [Chapter IV]
4. Workplace forums [Chapter V]
5. Trade unions and employers' organisations [chapter VI]
6. Dispute resolution [Chapter VII]
7. Unfair dismissals [Chapter VIII and Schedule 8]
8. Unfair labour practices

The Act deals with fair and unfair dismissals and unfair labour practice.

#### **4.3.1 Unfair Dismissals**

“Dismissal” includes:

- A termination with or without notice
- Failure to renew a fixed term contract where there had been a reasonable expectation of renewal;
- Refusal by a employer to allow an employee to return to work after she took maternity leave;

- Constructive dismissal, i.e. the employer makes continued employment intolerable.

S189 of the Labour Relations Act provides that a dismissal will be **unfair** if the employer fails to prove that:

- The reason for the dismissal is a fair reason and is based on the employees conduct or capacity or based on operational requirements;
- The dismissal was effected in accordance with fair procedure.

While an automatically unfair case must be pursued through the labour courts with the attendant risk of costs being awarded against the applicant, a dismissal which was for an unfair reason may be pursued through the CCMA where there is little risk having a cost order against an applicant and rights of representation are limited.

Applicants have a choice of forums to a certain extent and most would prefer to process the matter through the CCMA as the financial implications are not as serious should they be unsuccessful.

Automatically Unfair Dismissals	Other Unfair Dismissals
Participation in a protected strike	Misconduct dismissals
Refusal to do the work of an employee participating in a protected strike	Incapacity dismissals:
To compel an employee to accept a demand [lock-out dismissals]	- Poor performance
Employee exercising rights in terms of Act	- Ill health or injury
Pregnancy or any reason related to pregnancy	Dismissal for operational requirements
Unfair discrimination on any arbitrary ground [including job seekers]	Any dismissal where there was not a fair procedure

The meaning of automatically unfair dismissals:

In terms of s87 a dismissal can never be fair if the reason is invalid. If an employer dismisses an employee for an invalid reason the dismissal is automatically unfair. It is irrelevant what procedure was followed, because there is no such thing as fair procedure for an invalid dismissal.

E.g.

- The employee's pregnancy, intended pregnancy or any reason related to her pregnancy
- Reasons or grounds such as sex, gender, marital status or family responsibility, sexual orientation, race, age etc.

### **Defences Against Claims of Unfair Dismissals**

A dismissal on any of the grounds set out in s187(1)(f) may be fair, or fair discrimination, if the reason for the dismissal is based on an inherent requirement of the particular job, or age because the employee has reached the normal or agreed upon age of retirement.

Accordingly a defence is only permitted in the case of alleged discrimination or discriminatory dismissals. So an employer may not claim that a dismissal on the grounds of an employee's pregnancy is justified because of an inherent requirement of the particular job. It may however be possible in exceptional circumstances for an employer to argue that an employee's incapacity or poor performance justify a dismissal for an operational requirement.

### **4.3.2. Unfair Labour Practices**



*S186(2)*

*"Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving-*

- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits of an employee;*
- (b) the unfair suspension of an employee or any other unfair disciplinary action short of a dismissal in respect of an employee;*
- (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and*
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act (Act No. 26 of 2000) on account of the employee having made a protected disclosure in terms of the Act.*

Conduct which amounts to unfair labour practice:

- Unprocedural conduct or lack of due process;
- Inconsistent conduct;
- Arbitrary conduct;

- Discriminatory conduct;
- Conduct lacking a commercial rationale;
- Conduct that is purposeless;
- In promotion disputes unfair conduct may arise if
  - the employer did not follow or comply with its own promotion policy or procedures;
  - affirmative action was not applied or not correctly applied;
  - the complainant has all the necessary attributes for the job and no reasonable employer could have made the appointment that it did
- The concept of ‘unfairness’ in unfair conduct is wider than unfair discrimination because conduct can be unfair without being discriminatory. Discrimination is a type of unfair conduct.

### **Enforcement**

An automatically unfair dismissal or unfair labour practice is taken to conciliation with the CCMA. If the conciliation process is unsuccessful, the matter will either go to arbitration, or to the Labour Court. If the matter goes through the Labour Court, it can further be referred to the Labour Appeal Court and, if permitted, to the Constitutional Court.

### **Remedies for unfair dismissal**

The remedies for unfair dismissal are contained in Section 193 of the Act and are summarised below:

1. **A Labour Court or arbitrator has a choice of three remedies viz:**
  - Reinstatement
  - Re-employment in the employee’s former job or some other suitable job
  - An order of compensation
2. **Section 193[2] stresses that the primary remedy is reinstatement and should be the order granted unless:**
  - The employee does not wish it
  - A continuation of the employment relationship would be intolerable;
  - It is not reasonably practical
  - The dismissal was unfair for procedural reasons only



### **4.4. THE COMPENSATION FOR OCCUPATIONAL INJURIES & DISEASES ACT**

This is the Act which established the Workman’s Compensation Commission. The purpose of the Act is to explain the system by which occupational injuries and diseases are compensated, and to stipulate how the Workman’s Compensation Commission must be run.

It is important to understand that the Workman's Compensation Fund is a form of **insurance**. This means that there are certain procedures that have to be completed by the person who wishes to claim the insurance offered by the Fund.



#### **4.4.1. How to Claim from the Compensation Fund if you are a Worker<sup>5</sup>**

The Compensation for Occupational Injuries and Diseases Act gives workers the right to claim compensation if they were injured or go ill at work.

##### ***Claiming***

When workers want to claim they must use the following steps:

##### ***Step 1: Fill in the form***

Workers must report their injury or disease to their supervisor or employer immediately. Their employer must report it to the Compensation Fund and send in the necessary forms.

##### ***Step 2: Get forms from the doctor***

Workers must get the W.Cl.2 or W.Cl.1 form from their employer and take it to the doctor when they go for a visit. After the doctor has filled in the form, workers must take it back to their employer. Workers must take any other forms the doctor gives them to their employer.

##### ***Step 3: Keep in touch with the employer***

Workers must let their employers know when their address change and keep in touch with them. Workers' money will be sent to their employer's address, so it is important that their employer can find them. If employers do not send in the forms or the claims takes long, workers must contact the nearest labour centre and report it.



#### **4.4.2. Basic Guide to Claiming Compensation for Occupational Injuries<sup>6</sup>**

Compensation for occupational injuries is based on the degree of disablement. Workers may be entitled to increased compensation if their disablement is caused by the carelessness of their employer or a co-worker.

##### **Application**

The Compensation for Occupational Injuries and Diseases Act applies to:

- all employers; and
- casual and full-time workers who, as a result of a workplace accident or work-related disease:

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<sup>5</sup> [www.labour.gov.za](http://www.labour.gov.za)

<sup>6</sup> [www.labour.gov.za](http://www.labour.gov.za)

- are injured, disabled, or killed; or
- become ill.

This excludes -

- workers who are totally or partially disabled for less than 3 days;
- domestic workers;
- anyone receiving military training;
- members of –
  - the South African National Defence Force, or
  - the South African Police Service;
- any worker guilty of wilful misconduct, unless they are seriously disabled or killed;
- anyone employed outside the RSA for 12 or more continuous months; and
- workers working mainly outside the RSA and only temporarily employed in the RSA.

Workers who are affected by occupational injuries and diseases are entitled to compensation

### ***Claims for Compensation***

Claims for compensation must be submitted to the Commissioner, employer or mutual association within 12 months of the date of an accident or death.

### ***Increased Compensation Due to Negligence***

Workers may apply for increased compensation if they have an accident due to the carelessness of –

- the employer; or
- a worker who acts for the employer; or
- anyone in charge of machinery.



### **4.4.3. Basic Guide to Payment of Compensation for Disablement<sup>7</sup>**

The Compensation Commissioner determines the compensation payable based on medical evidence.

#### **Application**

The Compensation for Occupational Injuries and Diseases Act applies to:

- all employers; and
- casual and full-time workers who, as a result of a workplace accident or work-related disease:
  - are injured, disabled, or killed; or

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<sup>7</sup> www.labour.gov.za

- become ill.

This excludes -

- workers who are totally or partially disabled for less than 3 days;
- domestic workers;
- anyone receiving military training;
- members of –
  - the South African National Defence Force, or
  - the South African Police Service;
- any worker guilty of wilful misconduct, unless they are seriously disabled or killed;
- anyone employed outside the RSA for 12 or more continuous months; and
- workers working mainly outside the RSA and only temporarily employed in the RSA.
- Workers who are affected by occupational injuries and diseases are entitled to compensation

### ***Temporary or Partial Disablement***

Workers who are temporarily or partially disabled receive 75% of their pay from the date of the accident or disease diagnosis until their condition is stabilised or they are fit to go back to work..

**Employers must pay compensation for 3 months** from the accident or diagnosis date and then claim these payments back from the Compensation Fund.

### **Duration of Payments**

Compensation is no longer paid when workers –

- are able to work again.; or
- receive compensation for permanent disablement.

### ***Permanent Disablement***

Compensation is payable for any impairment of function, loss of limb or any permanent defect as a result of the injury or disease. Depending on the degree of disablement, compensation may take the form of lump sum or monthly pension payments. The degree of disablement is determined by the Compensation Commissioner, based on Schedule 2 of the Act, which provides a list of injuries and the associated degree of disablement.

### ***Lump Sum Payments***

A lump sum is paid when permanent disablement is 30% or less.

The formula for 30% is:

**15 X worker's pay** (up to a maximum of less than 30% calculated proportionally) **X degree of disablement ÷ 30.**

### **Pension Payments**



Pension is paid when the degree of permanent disablement is between 31% and 100%.

The formula is:

**75% of worker's pay X degree of disablement ÷ 100.**

## 5. ACCESSIBILITY & THE BUILT ENVIRONMENT

Every person, able-bodied or disabled, is entitled to barrier free access to the built environment. Unfortunately, as we are aware, this is very seldom the case. The legislation governing buildings (The Building Standards Act of 1977 and the National Building Regulations) are very outdated and have not been revised to bring them into line with the spirit of the Constitution or with international standards of accessibility.

The National Building Regulations stipulate that buildings may provide the following accessible facilities: ramps, bathrooms, doors, lifts and parking. However, the Regulations go on to say that these requirements are only a recommendation, and that if the owner of the building feels that making such adjustments would be too expensive, they are not obliged to make those adjustments.

The National Building Regulations also view access purely from the point of the mobility impaired, and does not give any consideration to or guidance in respect of the accessibility requirements of any other type of disability. For example, there is no mention of signage requirements or the use of Braille for persons with a sight impairment; no recommendations regarding the elimination of background noise for persons with a hearing impairment.

This weak legislation, coupled with very weak enforcement, is the primary reason why so many buildings remain inaccessible. The municipality should be the body which ensures that all building plans submitted for proposed buildings are accessible, but in many cases this does not happen. In buildings which have already been built, there is not responsibility on the owner to make the building accessible.

### 5.1. THE BUILT ENVIRONMENT

The South African Bureau of Standards is in the process of publishing standards to make buildings accessible.

The following measures are used widely in countries where accessibility of buildings is considered to be good:



#### Car Parking

- Sufficient parking bays, 3.5m in width, to be provided close to entrances and with ramps to allow people using wheelchairs to transfer from the car to the chair and move to the building with ease
- Parking bays clearly signposted and parking security to ensure that bays are only used by people with mobility impairments

#### Obstructions and protrusions

- Example of an obstruction – external bollards (landscaping)

- Example of a protrusion – drinks machine
- Obstructions and protrusions should be easily identifiable
- Should be placed so that a person with a white cane can locate the object with the cane
- Should allow passage past the object for a person using a wheelchair
- Preferably not placed on accessible routes

### Signage

- Braille should be used wherever possible
- Textured signage can also be helpful (e.g. the logo is raised from the background)
- Colour contrast (e.g. not printed on transparent background)
- Surfaces used for signage should be glare free, and lighting on signage should aim to reduce glare
- Signs should be at a suitable height for people of short stature, people using wheelchairs or people with limited mobility in their necks to easily see the sign
- Use of symbols is a good way of conveying information. Icons are ideal as they present a clear pattern and can be set against a contrasting background
- Use of readable font – i.e. a font with a clear shape and of a reasonable size

### Lighting

- Should be adequate to facilitate lip reading if necessary and to ensure that shadows are not cast and that there are no confusing silhouettes
- Fluorescent lighting and other lighting that casts a glare should be avoided
- “visual noise” such as bright advertisements should not be placed where the pattern of the picture will interfere with a person’s vision (for example, behind a bank teller)
- Fluorescent lights can also interfere with hearing aids
- Individuals should be able to control their lighting needs

### Textured Surfaces

- Textured surfaces provide assistance to people with visual impairments by providing information as to their whereabouts or to potential hazards (e.g. textured pavements just before an intersection)
- Floor surfaces should reduce glare and carpets should not be heavily patterned
- Relief maps and 3D models can also be used by people with visual impairments
- Floor surfaces should be stable, firm and slip resistant

### Building Layout

- Buildings of a similar type (e.g. MPCC’s) should have a uniform layout
- Waiting rooms and reception areas should have sufficient seating of different heights and with and without arms.
- Reception desks should be low enough so that a person of short stature or a person using a wheelchair can comfortably see the receptionist
- All floors / units should have an accessible toilet
- All floors/ units should be reachable by lift
- “Accessible Routes” which cater for the needs of people with disabilities should be identified throughout the building

## Turnstiles

- Where turnstiles are used, there should be an alternative method of entry/ exit for wheelchair users at the same location – NOT through a back or side door

## Offices

- Offices should not be cramped – sufficient space should be allowed for wheelchair users to move through or to turn around, and so that the passages and public spaces are not obstructed in any way
- Key office equipment such as photocopiers should be at the correct level and position that a person of short stature or a wheelchair user can make use of the machine, as well as be able to perform maintenance (e.g. replace paper)
- Office furniture such as desks should take into account the ergonomic and functional needs of the user; i.e., must be at the right height and angle and provide sufficient knee room

## Operating controls – such as door handles, light switches, window handles

- Operating controls should require little or no force or grasping ability to operate
- Doors and windows should be able to be opened with the minimum of force (e.g. a swing door)
- Operating controls should be able to be operated with one hand
- Operating controls should be in a contrasting colour to the surroundings
- Security door controls (e.g. with keypads) are difficult to use if the key pads are small and non tactile, and if a two handed action is required
- Lever handles and push-pull mechanisms are easier to use

## Security Barriers

- Security barriers may often block access for people with disabilities
- Security cards should have a tactile graphical symbol to identify the card and a tactile symbol to indicate the direction of insertion
- Security gates and screen should have visual and auditory commands to “stop” and “go”
- Security staff should have instructions to allow assistant animals into the building

## Narrow doorways & door location

- All doorways should be sufficient to admit a person using a wheelchair
- If a person is required to use a separate entrance (for example, cannot make use of a mantrap door) the separate entrance must be at the same location as the other and should be open at all times.

## Handrails

- Handrails should be rounded and free of obstruction so that the user can slide their hand along the rail
- The rail should be at a comfortable height for the user
- The rail should be colour contrasted with the wall surface
- When used on stairs, the handrail should extend beyond the start and end point of the stairs

### **Steps, stepped access & steep ramps**

- Nosings (the edge of the steps) should be colour contrasted
- Treads should be of an even depth and not too deep
- Ramps should always accompany steps so that people who use wheelchairs and people with visual impairments can safely gain access
- Ramps should not be too steep, and should not have sharp corners unless there is sufficient space for a wheelchair to turn safely.
- Ramps should have a non-slip surface, even when wet.
- People who use wheelchairs generally prefer the ramp to be smooth; people with visual impairments generally prefer the ramp to be textured.

### **Lifts**

- Lifts are a necessity for people who use wheelchairs or who require assistance to walk
- Lifts should have auditory and visual prompts. The auditory warnings should also advise when the lift opens or closes
- Lift buttons should have a tactile surface
- Lift buttons should only be activated by positive force (i.e. not heat sensitive)
- Lifts must stop level to the ground
- Lifts must be wide enough to safely accommodate a wheelchair user and his/her care attendant

### **Accessible toilets & washrooms**

- Accessible toilets are toilets, as well as washbasins and other equipment, which can be used by a wheelchair user or other person with a mobility impairment
- The toilet must be of a similar height to a standard wheelchair to facilitate transfer from the wheelchair to the toilet seat
- Grab rails must be provided and securely mounted to allow a person to grasp the rail to lever themselves onto the seat
- The flush mechanism should be a long handled lever requiring only light downward pressure to activate – grasping or twisting, or pushing of small buttons
- The area of the cubicle should be sufficient to ensure that a wheelchair can be turned
- The area of the cubicle should allow for both the wheelchair user and their care attendant
- The floor and entrance to the cubicle should be free of any obstacles
- The washbasin should be placed at a level which is comfortable for a seated person, with tap handles that are long and requiring only light pressure to activate – grasping or twisting, or pushing of small buttons
- The temperature of the water should be able to be easily regulated
- Any hand drying mechanisms should be placed at a level comfortable for a seated person and easily accessible
- For persons with visual impairments, symbols and contrasting colours should be used to indicate hot and cold taps

### Induction loops & Acoustics

- Induction loops eliminate background noise and should be used in all public places where a person with a hearing impairment may have to deal with background noise (e.g. in a bank)
- Acoustics may be affected by background music or televisions, which can make it very difficult for a person with a hearing impairment to decipher conversations
- All public facilities (and offices) should have a means of providing a sign-language interpreter immediately if the need arises

### Fire alarm & emergency procedures

- Fire alarms which rely on auditory warnings only are not suitable for persons with hearing impairments; alternatives are flashing lights (significantly brighter than the ambient lighting); personal vibrating alarms; and alarms that release a particular scent into the atmosphere
- All emergency procedures should include evacuation plans and equipment for people with mobility impairments (such as an evacuation chair) and this equipment must be immediately accessible
- All emergency procedures should take into account the role of assistant animals

### Kiosks

- All work surfaces in a kiosk or cubicle should accommodate a person of short stature or a person using a wheelchair and should provide adequate “knee-room” for a seated person
- All equipment/ forms in a kiosk should be easily accessible – i.e. requiring no grasping or twisting action

### Forms

- Forms for a person with a visual impairment should be available in tactile format (Braille) and in high contrast and large print versions
- Icons can be a very effective way of identifying the information required

### Internet / Intranet

- Many employers require employees to use the internet or intranet system. For a person with a visual impairment, auditory prompts should be provided.

## **5.2. ACCESS TO BEACHES FOR PEOPLE WITH DISABILITIES**

People with disabilities are allowed to take 4X4 vehicles onto beaches, provided they can motivate as to why they are unable to access the beach without a 4X4 vehicle.

To do this, they must apply for a beach access permit from the Department of Environmental Affairs and Tourism. The forms can be obtained from the Department, or from the QASA office. The process to apply is as follows:



1. Please ensure that all the necessary information required as annexures or attachments to your application are provided so as to facilitate the consideration of your application.
2. In terms of paragraph 5.9(a) of the *Guidelines on the Implementation of Regulations pertaining to the Control of Vehicles in the Coastal Zone (Regulation Gazette No. 8113 of 7 December 2004)*, an applicant must be a physically disabled person whose functional mobility prevents him or her from being able to walk on beach surfaces. You must therefore attach a letter from the National Council for Persons with Physical Disabilities in South Africa certifying that you are permanently severely mobility impaired. The contact details for the National Council for Persons with Physical Disabilities are as follows:  
**The National Director**  
**Tel: (011) 726 8040**  
**Fax: (011) 726 5705**  
Email: [nationaloffice@ncppdsa.org.za](mailto:nationaloffice@ncppdsa.org.za)
3. The Department will submit your completed application for comment to the relevant provincial authority or manager of a protected area if your application affects a protected area. This is due to the co-operative governance requirements of the Constitution (Act No.108 of 1996). Provincial working groups meet monthly to evaluate applications for vehicle use in the coastal zone. The Department will in consultation with the relevant authority endeavour to process your application within a reasonable period of time, defined as 30 to 45 days, subject to inclusion of all the information required in the application form. **You are therefore requested to submit your application form at least 45 days prior to the date on which you propose to use a vehicle in the coastal zone.**
4. Applicants must provide a certified copy of each of the driver's licences of those persons who will be driving the vehicle or vehicles to which this permit pertains.
5. The application must be completed and signed by the applicant. The applicant's signature must be commissioned by a Commissioner of Oaths. If the application is completed by a third party (such as a consultant or legal representative), then this third party's details must **also** be provided as required in this application.
6. The application must be addressed to the Department of Environmental Affairs and Tourism and handed in at the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, 7<sup>th</sup> Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town, 8001. Alternatively, applications may be posted to the Deputy Director: Integrated Coastal Management, Private Bag X2, Roggebaai, 8012 .
7. The submission of your application form **must be accompanied by the stipulated application fee, which is R150.00 (One Hundred and Fifty Rand) per application.** In order to facilitate payment of your application fee, you are advised to contact the Department telephonically to obtain a reference number **before** depositing the stipulated application fee.

Step 1: Contact Esther Howard on 021 – 402 3511



Step 2: Deposit the application fee into the following account.

Bank: ABSA

**Account name: Marine Living Resources Fund**

Account number: 4053081071

Branch code: 632005

Step 3: Include the reference number on the bank deposit slip.

Step 4: Attach proof of payment (e.g. copy of the bank deposit slip or other receipt) to the application form.

- 8. *Failure to provide the information requested herein may result in the application not being processed.***

The Department of Environmental Affairs and Tourism will ask you for the following information:

- Personal details
- Duration of access required
- Location where you intend to use the vehicles
- Details of the vehicle
- Details on the effect on the environment
- A motivation why your use of the vehicle will not adversely affect the rights of the public.

## 6. GOVERNMENT SERVICES FOR PEOPLE WITH DISABILITIES

What is the purpose of the government? If we talk about the State, we can say that this is an organisation which exists to provide for the needs of its citizens. It is divided into various Departments, and operates according to laws made by Parliament. Its activities are funded through the taxes paid by companies and individuals.

Why do we need a government? Some sort of government is necessary if there is to be any progress in society; without a government, each person would have to find their own food, shelter, medical care, and means of support. There would be no security, no protection from exploitation, no economy, no water or electricity, no secure food supply. Life would be a constant struggle for survival.

The type of government as we see it today is a relatively new invention in terms of world history. Only in the last century have the citizens of countries started to demand a government structure which would try not only to provide peace and security, but also to ensure that no citizens went without the basic needs for survival – food, shelter, medical care.

The South African Constitution, made into law in 1996, is regarded as one of the most fair and stable in the world. The constitution promises not only civil rights, like the right to vote, but social and economic rights such as the right to access to water, shelter and education. This section looks at the economic and social rights to which people with disabilities are entitled.

### 6.1. DEPARTMENT OF SOCIAL DEVELOPMENT

The Social Assistance Act (13 of 2004) makes the following provisions:



#### **“Disability grant**

**9.** A person is, subject to section 5, eligible for a disability grant, if he or she –

- (a) has attained the prescribed age; and
- (b) is, owing to a physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

#### **Grant-in-aid**

**12.** A person is, subject to section 5, eligible for a grant -in-aid if, that person is in such a physical or mental condition that he or she requires regular attendance by another person.”

These functions are the responsibility of the Department of Social Development. The Department has a Customer Charter:

You have the right to

- apply for grants
- receive services with dignity and in satisfactory conditions
- fair and unbiased assistance
- receive friendly, helpful, respectful and sensitive service by an identified, responsible, competent, sober and respectable official
- a review of the decision, if you think it is incorrect
- see your personal information
- have your privacy respected and information about you kept confidential
- clear procedures on reporting abuse, misuse and fraud
- receive protection when reporting abuse, misuse and anyone getting a grant or money illegally
- correct something that is wrong or unfair
- not be inconvenienced through administrative errors e.g. loss of documents and files etc.
- be given the opportunity to discuss unusual circumstances
- fair processes which includes representation, meeting with officials and participation
- be served in a language of your preference
- select someone to collect or apply for your grant on your behalf

## 6.2. DEPARTMENT OF HEALTH



The Department of Health has responsibility for the prevention, treatment and management of disability. This includes rehabilitation and the provision of assistive devices.

### 6.2.1. Summary: Provision of assistive devices in South Africa

#### 1. Budget

A budget for the provision of assistive devices should be promoted at provincial and district level.

#### 2. Assessment, Prescription & Ordering of Assistive Devices

- There shall be no discrimination against clients on the grounds of disability, race, gender social conditions, financial situation, disease, medical condition or any other basis in the assessment for issuing an AD.
- Prescription of ADs shall only be done by appropriately trained rehabilitation providers.

- Prescription forms for AD shall NOT have to be co-signed by a medical practitioner, but can be co-signed by department heads.
- Prescriptions may not be altered by any person responsible for ordering or administration of ADs.
- Newly developed assistive devices are to be considered for addition to the government tender.

### **3. Issuing of assistive devices**

- The client should be issued the AD by the institution discharging the client.
- The AD should be issued immediately when prescribed or, at the latest, on discharge.
- All persons with a disability where the sensory functions are affected shall be discharged from hospital with the basic assistive technology requirements

### **4. Repairs, Replacement & Recycling of Assistive Devices**

- Specialist repairs should be made available to users;
- Repairs under warranty should be dealt with according to business principles;
- There should be no limits on the replacement of an AD unless it is not needed any more, or there is evidence of poor maintenance or abuse;
- Repairs should be done on a "fix-while-you-wait" basis or within three days at the longest;

### **5. Payment for Assistive Devices, Accessories, and Maintenance**

- Payment for assistive devices should be done according to a uniform patient fee system;
- The same will apply to accessories and maintenance.

### **6. Free Assistive Devices**

- Assistive devices should be part of the service package offered free of charge to qualifying members, e.g. children under six and disabled people qualifying for free healthcare.

### **8. Training in the Use of Assistive Devices**

- Training/ rehabilitation should be done by an appropriately trained rehabilitation provider.
- The training/ rehabilitation regarding the AD usage should be inclusive in the payment for the device.
- Rehabilitation should start immediately and discharge should not be delayed unnecessarily. This will ensure a cost-effective service.

#### **10. Custom -made and Self-made Assistive Devices**

- Self-made devices should be the device of choice where appropriate;
- Clients are to be assisted to produce home-made devices out of appropriate materials.

### **6.3. LOCAL GOVERNMENT**

Your local municipality has responsibility for providing the following services to you in an accessible manner:

- Water and sanitation
- Electricity
- Housing
- Public transport
- Clinics
- Public facilities such as libraries, parks and sports facilities
- Access to the meetings of the Council, so that you can hear what is being discussed and give your point of view.

If you feel that your municipality is not delivering, you can demand answers from them. However, you also have a responsibility to notify the municipality of your requirements and to suggest ways of meeting these requirements.

There are a number of ways in which you can make your concerns known to your municipality:

- Participate in your municipality's public meetings
- Talk to your municipality's customer service department
- Talk to your ward councillor and ward committee
- Talk to the Municipal Manager's office directly
- Talk to the Mayor's office directly

### **6.4. THE ROAD ACCIDENT FUND**

The Road Accident Fund is an insurance fund, just like the Workmen's Compensation Fund. It was created in order to pay the costs of the victims of road accidents, be they medical or in some other way related to the accident (such as adjustments to your home if you have become a wheelchair user).

The Fund is paid for by petrol tax and also sometime claims costs on behalf of the victim from the person who caused the accident.

Any person who is the victim of a road accident is entitled to claim from the fund.

## 6.5. VEHICLE REBATES FOR PEOPLE WITH DISABILITIES

If you have a disability which requires you to have a special type of vehicle, you can apply to the South African Revenue Service for a rebate on the import duty of that vehicle. This will significantly reduce the costs of your vehicle.



### *How do you apply for a vehicle rebate?*

- Rebates can be awarded for imported or locally made vehicles that will be driven by a person with a disability, or used to transport a person with a disability.
- No left hand drive vehicles may be imported.
- A number of forms have to be completed by yourself and various experts, and then submitted to customs for approval. You can get these forms from the QASA office:
  1. ITAC application form
  2. Nominated driver(s) declaration form, with a copy of your ID document
  3. Medical Report Form (to be completed by your medical practitioner).
  4. Panel Report Form (to be completed by members of an APD Panel of Adjudicators. To get this form completed, you must make an appointment with your nearest panel of adjudicators. The contact details will be on the form you have to complete). This form only has to be completed by someone who will be driving themselves.
  5. Written motivation explaining exactly why you need that particular make and model of vehicle to support your disability.
  6. Copy of your driver's license and the driver's license of other nominated drivers
  7. A copy of the first page of your identity document
  8. The vehicle manufacturer's brochure of specification
  9. Homologation certificate (to be obtained from the dealer/ manufacturer in South Africa). The dealer must quote the homologation number (for imported vehicles only).
  10. If the vehicle is imported directly by a person with a disability, the South African Bureau of Standards must be contacted to obtain a Letter of Authority (LOA) stating that the ECE specification has been met.

- These documents must be forwarded (**NOT FAXED!**) to the National Council for Persons with Physical Disabilities, who will in turn forward the documents to SARS. The address for NCPPDSA is:

**PO Box 426  
Mellville  
2109**

**4 Lancaster Street  
Westdene  
Johannesburg  
2092**

### **For persons with physical disabilities that are drivers:**

You **WILL** get a rebate if:

- The vehicle is right hand drive and has been homologated by the South African Bureau of Standards to comply with the road safety requirements to register the vehicle with the licensing authorities; and
- Hand controls are to be fitted to the accelerator and brake pedals; or

- Brake and accelerator pedals have to be swapped; or
- Brake and accelerator pedals have to be extended.

You **WON'T** get a rebate if:

- The vehicle is a **left hand drive vehicle** and has not been homologated by the SABS that it complies with the road safety requirements of the licensing authorities; and
- The person is too tall to drive an ordinary vehicle but no adaptation is needed to drive a vehicle, except that the steering wheel folds away to allow access into the vehicle, this being a standard design feature of the vehicle that is produced in this way for all persons; or
- The person has a back problem or disease that has not progressed to such an extent that a special adaptation, except an automatic gearbox or options such as a power steering, is required to drive the vehicle.

**For persons with physical disabilities that are transported:**

You **WILL** get a rebate if:

- The vehicle is right hand drive and has been homologated by the SABS to comply with the road safety requirements to register the vehicle with the licensing authorities; and
- The organization that applies for the rebate permit is registered with the National Council for Persons with Physical Disabilities to care for persons with physical disabilities or the individual that applies for the rebate permit is registered with the International Administration Commission of South Africa to care for a specific person with a physical disability; and
- The vehicle has been or will be structurally adapted, i.e. the floor pan of the vehicle has been modified to incorporate clamps/clips and an anchorage for the safety harness to hold the wheelchair and person with a physical disability steady and in position when the vehicle is driven; or
- Railings are fitted to the door and sides of the vehicle for a person with a physical disability to hold onto when the vehicle is in motion; or
- The vehicle has to be fitted with medical equipment, such as an oxygen cylinder, to allow the person with the physical disability to be transported.

You **WON'T** get a rebate if:

- The vehicle is a **left hand drive vehicle** and has not been homologated by the SABS that it complies with the road safety requirements of the licensing authorities; and
- No structural adaptation is to be or has been made to the vehicle to transport persons. (Fitting only of a hoist to the vehicle is considered to be insufficient on its own) and / or
- The vehicle is used only occasionally by a non-registered person / organisation to transport the person with a physical disability



## 6.6. GOVERNMENT BODIES TO HELP YOU

- South African Human Rights Commission (to report human rights abuses address other human rights issues)  
011 484 8300
- The Public Protector (to report problems with government bodies)  
012 366 7000
- The Commission for Gender Equality  
011 403 7182
- The National Youth Commission  
012 309 7800
- Office on the Status of Disabled People (the Government department responsible for people with disabilities)  
012 300 5481
- Independent Complaints Directorate (complaints about police services)  
012 392 0400



## 6.8. DISABLED PEOPLE'S ORGANISATIONS

This is by no means a complete list of all the organisations which can be of assistance to people with disabilities.

- The QuadPara Association of South Africa  
031 767 0348/ 031 767 0352
- Disabled People South Africa  
021 422 0357
- National Council for the Blind  
012 452 3811
- DeafSA  
011 482 1610
- Epilepsy SA  
021 447 3014
- Autism SA  
011 484 6114

- Downs Syndrome SA  
011 484 6116
- National Council for People with Physical Disabilities SA  
011 726 8040
- Cheshire Homes  
021 692 1220
- South African Mental Health Federation  
011 781 1852
- Headway  
011 442 5733



# THE QUADPARA ASSOCIATION OF SOUTH AFRICA (QASA)



**PO Box 2368 PINETOWN 3600  
25 HAMILTON CRESCENT GILLITTS 3640  
TEL: 031 7670352 FAX: 031 7670584 EMAIL: INFO@QASA.CO.ZA**



**QASA'S MISSION IS TO BE AN EFFECTIVE CO-ORDINATING, POLICY-MAKING AND SUPPORTING ORGANISATION STRIVING TO PREVENT SPINAL CORD INJURY AND TO PROMOTE AND PROTECT THE INTERESTS OF PEOPLE WITH MOBILITY IMPAIRMENTS THROUGH ADVOCACY, LOBBYING AND DELIVERY OF SERVICES AND PRODUCTS TO PEOPLE WITH DISABILITIES.**



## **QASA PRODUCTS, PROJECTS AND SERVICES:**

**DEVELOPMENT OF REGIONS, DEVELOPMENT OF SELF-HELP CENTRES, FUNDRAISING CAMPAIGNS, DRIVER TRAINING PROGRAMMES, CAPACITY BUILDING WORKSHOPS, PRINTING OF PUBLICATIONS, WEB SITE, INTERNATIONAL RELATIONSHIPS, SKILLS DEVELOPMENT PROGRAMMES, SMALL BUSINESS DEVELOPMENT, RESEARCH, REGIONAL DEVELOPMENT LOANS, EDUCATION & SPORTS FUND, PROVISION OF BATTERIES, INFORMATION DISTRIBUTION, POWER WHEELCHAIR RACE, REHABILITATION CENTRE, BUCKLE-UP SAFETY CAMPAIGN, BUSINESS & NETWORKING CENTRES, DATABASE MANAGEMENT, ANNUAL ART EXHIBITION, ACCESSIBLE ACCOMMODATION, ACCESSIBLE TRANSPORT PROVISION, LIBRARY, PROVISION OF ASSISTIVE DEVICES, LEGISLATION LOBBY, ADVOCACY, CONSULTATION SERVICES, PREVENTION OF SCI PROGRAMMES, PEER SUPPORT.**



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