

Widows Speaking Out

Using the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

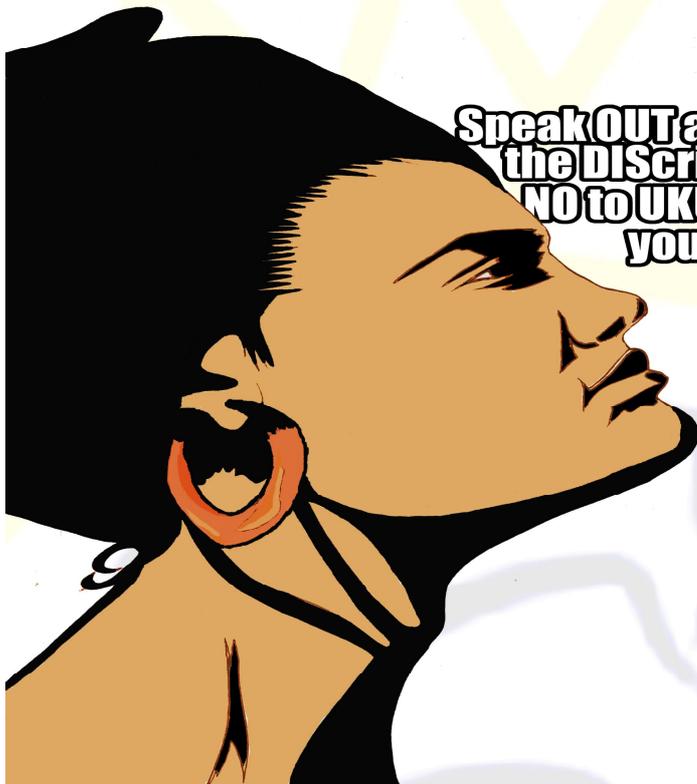
A Khulumani Support Group Manual

Produced with support from
the Foundation for Human Rights



WOMEN'S DAY

9th AUGUST



**Speak OUT and Mobilise AGAINST
the DIScrimination of WIDOWS
NO to UKUNGENA, 'I married
your Brother. NOT YOU!'**



the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA



FOUNDATION
FOR HUMAN RIGHTS



CONTENTS

An Introduction to PEPUDA	4
Questions about PEPUDA	5
The Human Rights Problems that Affect Widows in Communities	6
A Checklist of Discriminatory Practices Experienced by Widows	7
What does the Constitution say about Preventing Gender Discrimination	8
How does PEPUDA try to counter gender discrimination?	9
How does a person bring a case to the Equality Court?	10
PEPUDA Glossary	12
How to Compile a Complaint Form	14
PEPUDA Complaint Forms:	
<u>Form A:</u> Complainant Form	15
<u>Form B:</u> Respondent Form	17
Case Law that has Supported the Elimination of Gender Discrimination against Widows	18
Draft PEPUDA Workshop Programme	20
Advocacy Slogans developed in Provincial Workshops	21

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) 2000 (Act No. 4 of 2000) (the Equality Act) was promulgated in 2000 to give effect to Section 9 of the Constitution. It endeavors to facilitate the transition to a **democratic society united in its diversity and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.**

A Summary of PEPUDA:

- The Act seeks to promote the right to equality in South Africa including equality between men and women.
- The Act provides remedies to women who have experienced discrimination on the basis of gender.
- The Act provides for complainants to submit complaints to an Equality Court with the assistance of an appointed Clerk of the Equality Court.
- The Act lists the grounds and categories of direct and indirect discrimination that can assist the complainant in making their complaint.
- PEPUDA provides for a range of remedies for an aggrieved person
- PEPUDA provides for a person to appeal a decision of an Equality Court.

QUESTIONS ABOUT PEPUDA

The Main objectives of PEPUDA are:

1. To prevent, prohibit and eliminate unfair discrimination and harassment
2. To promote equality
3. To prevent and prohibit hate speech
4. To provide for matters associated with unfair discrimination

What can be achieved through PEPUDA?

1. Persons affected by unfair discrimination such as widows and their children, can be protected by the state
2. Discriminatory laws can be repealed
3. Enjoyment of the rights enshrined in the bill of rights can be promoted
4. All regulations, policies and laws can be reviewed for their coherence with the principles of non-discrimination

What are the human rights problems that affect widows in communities?

South African widows face discrimination on daily basis. They are frequently evicted from the home they shared with their husband. They may lose custody of their children to the husband's family. They lack right to inherit their late husband's property or land. After the death of a husband, the widow may be forced to drink the water that was used to wash her husband's body in preparation for burial.

After the death of a husband, the widow is often treated as if his death is her fault. She may be labeled a 'witch' and she may be forced to marry her brother-in-law. If she refuses, she may be forced to leave the village and her homestead. Widows are at high risk of being raped. Some widows are raped by their own brothers-in-law.

These practices may leave widows destitute and may increase the vulnerability of the children of the marriage with girl children being at particular risk of being taken advantage of by older men who can meet some of their most urgent material needs in response to their demands for sex.

The increasing prevalence of child marriages and of diseases like HIV, have increased the number of widows and especially of young widows.

Widows are subjected to all sorts of inhumane practices. In many different cultures, widows experience persecution and are not protected from gender-based violations despite most countries having ratified signed or ratified a range of human rights agreements to eradicate all forms of discrimination against women.

A Checklist of Discriminatory Practices Experienced by Widows

- ⊕ Widows are often denied an equitable share of inheritance of the property of her husband
- ⊕ Widows may be denied the right to continue living in the matrimonial home
- ⊕ Widows may be evicted from the matrimonial home
- ⊕ Widows may be denied the right to remarry a partner of her own choice
- The right to dignity of widows may be violated
- ⊖ Widows may be denied the right to bodily and physical integrity
- Widows may be subjected to inhuman, humiliating and degrading treatment
- ⊖ The right of widows to take over as guardians and custodians of their children after the death of their husbands, may be violated.

What does the Constitution say about preventing discrimination against women?

Section 9 of the Constitution says that neither the state nor any person may 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. These are called **the grounds of discrimination**.

Direct discrimination of women occurs where a woman is disadvantaged simply on the grounds of her race, sex, ethnicity or religion or on the grounds of any characteristics that may be specific to members of the particular community with which she identifies. A woman may thus not be discriminated against for wearing a *hijab*, for example (the headscarf worn by Muslim women) or for being a widow.

Indirect discrimination occurs when policies are applied which appear to be neutral but in practice adversely affect a disproportionate number of persons belonging to a certain community.

Section 9 of the Constitution also provides legislative and other measures to protect or to advance the rights of persons, or categories of persons disadvantaged by unfair discrimination in order to promote equality. This means that special measures for redress or restitution are permissible. These measures must set out to systematically counter patterns of inequality that may have persisted from the past into the present. Affirmative action measures meet these criteria because they set out to achieve an equality of outcome for persons who have suffered unfair discrimination in the past.

Section 9 of the Constitution also provides that national legislation must be enacted to specifically prevent or prohibit unfair discrimination. This is the reason for the promulgation of PEPUDA.

How does PEPUDA give effect to the directives of Section 9 of the Constitution?

PEPUDA, also known as the 'Equality Act', contributes to creating an environment that supports the principles of a democratic society that is characterized by a respect for diversity and for the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

The background to the Equality Act is the understanding that there are systemic (deeply embedded) patterns of discrimination that reproduce material disadvantages based on race, gender, class, and, other forms of inequality.

Specifically, the Equality Act provides for the prevention and prohibition of unfair discrimination.

Discrimination is defined as any act or omission, including policies, legislation, rules and practices, or any situation which directly or indirectly

1. Imposes burdens, obligations or disadvantages on any person; or
2. Withholds benefits or opportunities from any person on one or more of the grounds of discrimination.

This Act describes the procedures that should be followed in determining the circumstances under which discrimination is unfair.

The Act also provides for pro-active measures to be adopted to eradicate patterns of systematic and systemic discrimination. It demands that positive action is taken to try to eradicate such practices. The Equality Act therefore also provides for the promotion of equality.

The Act provides for the setting up of Equality Courts to hear matters relating to the Act.

How does a person bring a case to the Equality Court?

1. The person wishing to bring a case is known as 'the complainant'.
2. The complainant should go to the nearest Magistrate's Court and ask to speak to the Equality Clerk (EC).
3. The task of the Equality Clerk is to assist the complainant to fill in the form stating the grounds for her complaint. These forms are provided by the Department of Justice and are available at all Magistrate's Courts.
4. The respondent (the person being charged with violating a provision of PEPUDA) has the burden to prove whether the discrimination did or did not take place. This is not the responsibility of the complainant.
5. The complainant will be asked for their personal details and the relief (the remedy) she is seeking and whether she has lodged complaints with any other institution.
6. It is the duty of the Equality Clerk to inform the respondent that a complaint has been laid against them.
7. The complaint can be heard either in a court or in another forum including:
 - a) the South Africa Human Rights Commission;
 - b) the Commission for Gender Equality;
 - c) an Independent Electoral Court; or
 - d) by the Public Protector
8. If the presiding officer decides that the case should be held in a court, the officer will set a date for the hearing.

9. All the issues will be presented at this hearing with the purpose of trying to find a remedy for all the issues that have been raised by the complainant.
10. The procedure may vary slightly depending on whether the case is heard in a High Court or in an Equality Court.
11. A decision of an Equality Court has to be confirmed by a High Court; while a decision of a High Court stands.
12. If any person feels aggrieved by the decision made in the Equality Court, that person can appeal to the High Court or to the Supreme Court of Appeal.
13. The Equality Clerk is responsible for ensuring that the complainant and the respondent are informed of the final decision of the court.

A PEPUDA GLOSSARY

A glossary is a list of words and terms used and a description of their meanings. Every Act that is adopted has a Section that defines the words and terms that are used in the Act. This glossary explains the words used in the Act called PEPUDA. **PEPUDA** is an acronym that stands for the Promotion of Equality and Prevention of Unfair Discrimination Act.

“Clerk of the equality court” means an official appointed in a court to deal with complaints that refer to PEPUDA.

“Commission for Gender Equality” means the commission referred to in Section 187 of the Constitution that is tasked with promoting gender equality.

“Equality” includes the full and equal enjoyment of all the rights and freedoms that are contemplated in the Constitution and includes *de jure* (in law) and *de facto* (in practice) equality and equality in terms of outcomes.

“Equality Court” means a court contemplated in section 16 of PEPUDA and includes any court that hears a complaint that uses PEPUDA.

“Gender discrimination” means any distinction, exclusion or restriction or any deferential treatment based on a person’s sex and whose objectives or effects comprise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of their human rights and fundamental freedoms in all spheres of life.

“Harmful practices” means behaviors, attitudes and/or practices which negatively affect the human rights of women and girls.

“Harassment” means any unwanted conduct which is persistent or serious and which demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce the submission of the person who is targeted for harassment by actual or threatened adverse consequences and which is related to the person’s sex, gender or sexual orientation.

“Marital status” includes the status or condition of being single, married, divorced, widowed or in a relationship with a person of the same or the opposite sex, and involves and implies that there is a mutual commitment between the partners to reciprocal support in their relationship.

“Person” includes a juristic person, a non-juristic entity, a group or a category of persons.

Prohibited grounds for discrimination are:

- a) Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, commerce, belief, culture, language and birth; or
- b) Any other grounds where discrimination
 - i. Causes and perpetuates systemic disadvantage;
 - ii. Undermines human dignity;
 - iii. Adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground covered in paragraph (a)

“Respondent” means any person against whom proceedings are instituted in terms of this Act.

“South African Human Rights Commission” means the South African Human Rights Commission as referred in section 184 of the Constitution.

“This Act” includes any regulations made in terms of this act.

“Violence against women” means all acts perpetrated against women which cause or could cause them physical, sexual, psychological and/or economic harm, including the threat to take such acts; or to impose arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

“Women” means persons of female gender, including girls.

HOW TO COMPILE (FILL IN) A COMPLAINT FORM

STEP ONE: Decide on the grounds for instituting action.

If you are a woman who has experienced some form of gender discrimination, you may wish to institute a complaint for one of the following acts of discrimination:

1. Gender-based violence
2. Female genital mutilation
3. The prevention of inheritance of family property due to your gender.
4. Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of a girl child
5. Any policy or conduct that unfairly limits your access to land rights
6. Discrimination on the grounds of pregnancy
7. Any limitation of your access to social services or benefits, such as health, education and social security, on the grounds of your gender.
8. Any denial of your access to opportunities such as contractual opportunities for rendering services
9. Any failure of a person or institution to reasonably accommodate your needs
10. Any systemic inequality of access to opportunities as a result of the sexual division of labour.

Some Areas in which Women May Experience Gender Discrimination:

- Membership of organizations, clubs, sports associations or professional bodies
- Discrimination in contracts for the procurement of goods or the rendering of services
- Discrimination in access to accommodation, property, land or other facilities
- Discrimination in access to employment or education opportunities
- Discrimination in respect of pensions provisions
- Discrimination in different forms of partnerships

A COMPLAINT FORM

The following are the particulars required when you lodge a complaint

Case No:

A. PARTICULARS OF COMPLAINANT

- Full names
- Age
- Gender
- Race
- Disability

B. PARTICULARS OF RESPONDENT

- Full names
- Gender
- Race

C. NATURE OF CASE

- Grounds:
- Category:
- Area from which the case emanates:

D. OUTCOME OF CASE

- Equality Court:
- Finding:
- Order:
- Alternative Forum:
- Name of Forum:
- Outcome:
- Method of ADR (Alternate Dispute Resolution) used:
.....

E. DURATION OF CASE

- Date of inception:
- Date of finalisation:

F. REPRESENTATION

- In person
- Represented

A RESPONDENT FORM

The following particulars in respect of the respondent must be furnished.

Name of Person(s) organization(s) against whom which proceedings are being instituted:					
Id. No. / Date of Birth / Registration No:					
Residential Address (if applicable):					
Residential Telephone number:					
Cellular telephone number:					
Work / Business Address:					
Work telephone number:					
Fax number:					
Proffered method in which the form is to be served:	Registered Post	E- mail	Fax	Sheriff	Clerk
Correspondence contact details (in terms of above):					
Physical Address (where documents can be served):					
Email address:					

CASE LAW related to ELIMINATING DISCRIMINATION AGAINST WIDOWS

The Constitutional Court declared unconstitutional and invalid provisions of section 23 (7) of the Black Administration Act and related regulations which segregated the administration of intestate black deceased estates. The court asked the Department of Justice and Constitutional Development to make the necessary changes in statutory law in to align such with Constitutional Court decision

Important advances were made through the courts in providing for the elimination of unfair discrimination against women through the judgments made in the *Bhe and Others v The Magistrate, Khayelitsha and Others* case; in the *Shibi v Sithole and Others* case; and in the *South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 (1) SA 563 (CC); 2005 (1) BCLR case.

In the *Bhe* case, the Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed to the estate of the deceased black person. It is also declared unconstitutional and invalid, section 23(7) of the Black Administration Act which unfairly discriminates against women and others with regard to the administration and distribution of black deceased estates.

An Overview of these Cases

The *Bhe* and *Shibi* cases dealt with applications for confirmation of orders of constitutional invalidity made by the Cape and the Pretoria High Courts respectively. Both courts found section 23 10(a) and (c) of the Black Administration Act and regulation 2 (e) of the Regulation for the Administration of Estate Blacks unconstitutional and invalid. Section 1 (4) of the Intestate Succession Act was also declared unconstitutional in so far as it excluded estates regulated under section 23 of the Black Administration Act.

The *Bhe* case involved an application made by a mother, Mrs Bhe on behalf of her two minor daughters in respect of the estate of their deceased father, her late partner. The case before the court was that the customary rule male primogeniture and the impugned statutory provisions unfairly discriminated against the two female children by excluding them from inheriting the estate of their deceased father. A similar argument was made in respect of Shibi whose application involved inheriting the estate of her late brother. In the *Bhe* case the estate had been taken over by the grand father and in the *Shibi* case by two male cousins.

The court held that the application of the African customary rule of male primogeniture, has an outcome that unfairly discriminates against women and against children born out of wedlock and accordingly declared it unconstitutional and invalid. The court held that although courts should ideally develop customary law and align it with the Constitution, it was not feasible to achieve this outcome in this matter. The court further held that the provisions of the Intestate Succession Act and the Administration of Estates Act, with special modification to accommodate polygamous marriages, would apply to all estates previously regulated under the Black Administration Act and the rules of male primogeniture, until the legislature was able to provide a lasting solution.

The Impact of these Judgments on Women's Rights

Black women now enjoy equal succession rights to those of their white counterparts.

Women in polygamous marriages now have valid succession rights with all the wives having equal rights.

Draft PEPUDA Workshop Programme

How to start the workshop

The facilitator welcomes the participants and introduces herself.

She invites the participants to introduce each other to the group through a participatory exercise.

Participants are asked to share their expectations for the workshop

The expectations are written up on a flip chart.

The facilitator must identify which expectations can be met by the workshop and explain why.

The facilitator then reviews the workshop agenda with the participants

An Agenda for the Workshop

09:00 – 09:30	Introduction and expectations
09:30 – 10:00	Exercise 1: In small groups discuss the following: How did apartheid laws affect women in South Africa? What is the situation of women in your community in democratic South Africa?
10:00 – 11:00	Exercise 2: In groups of four, tell your stories on any unfair treatment you have experienced as a woman.
11:00 – 11:15	TEA
11:15 – 11:45	An introduction to PEPUDA, using the manual
11:45 – 12:15	Thinking back to the stories you heard, use the complaint form in the manual to prepare a complaint for submission to the Equality Court
12:15 – 12:45	Plenary presentation of the complaints Open discussion
12:45 – 13:00	Reflections on what I have learned as a tool of evaluation of the workshop
13:00	Closure and LUNCH

Slogans developed in Provincial Workshops

- *Widow discrimination is a violation against human rights*
- *Widows are people. They deserve respect*
- *Widows deserve privacy*
- *Wake up widows about discrimination*
- *Widows have rights- find out about yours.*
- *Use legislation to protect widows now!*
- *Protect your family- make a Will now. Culture around inheritance hurts widows*
- *Do you know that some cultural practices hurt widows?*
- *Widows are your family*
- *Widows are your sisters, mothers, daughters, aunts and nieces*
- *It is hard to wear black for 12 months. Would you do it?*
- *Challenge the cultures around widows*
- *One voice for widows*
- *Widows have a right to remarry*
- *Widows have a right to decide their own lives*
- *Widows are not children. They are decision- makers*
- *Widows unite!*
- *Widows are women first*
- *Widows will always be women- let them live their lives to the full.*
- *Widows are not aliens to be excluded*
- *Widows are leaders of children*
- *Widows are heads of families- deal with it*
- *Respect the children of widows*
- *We lost our husbands. We have not lost a lifestyle*
- *Widows must not be forgotten*
- *Khulumani Support Group speaks out for widows*
- *Widows speak out against discrimination*
- *Fight discrimination against widows*
- *Widows consideration now*
- *Khulumani Support Group supports widows*