

**FROM:** Frank Speight  
**LOCATION:** International Department  
**EXTENSION:** 6520  
**DATE:** 6 March 2000  
**REFERENCE:** Y2253  
**SUBJECT:** SOUTH AFRICA: PROMOTION OF EQUALITY  
AND PREVENTION OF UNFAIR  
DISCRIMINATION ACT  
**ATTACHMENTS:** Appendix 1: Note from General Representative  
**ACTION POINTS:** **Managing Agents, Brokers and Underwriters to  
Note**  
**DEADLINE:** **Immediate**

During a presentation to the Market on 1<sup>st</sup> November 1999, Ronnie Napier, Lloyd's General Representative in South Africa advised that a Promotion of Equality Bill had recently been published.

Whilst the Bill was at the committee stages, the South African Insurance Association (SAIA), sent a delegation, led by Ronnie Napier (recently appointed Chairman of SAIA), to make representations to parliament about the provisions contained within the Bill.

Following on from these initial discussions with the parliamentary sub-committee, SAIA set out their concerns with regard to the Bill and their proposals for amendments. The International Department were advised in January that the Bill had been redrafted and the new version contained most of the proposed amendments suggested by SAIA.

However, as a result of a representation made by the Congress of Trade Unions, the parliamentary sub-committee resorted back to the Bill's original provisions, which could have an extremely negative effect on the insurance industry. Despite negotiations by SAIA and the Financial Services Board on the implications that these provisions would have on the insurance industry, the Bill was passed at the beginning of February, although it only comes into force on a date to be fixed by the President by proclamation in the Gazette. To-date no date has been fixed, but it is felt that this will be imminent

**The Act sets out the prohibited grounds on which persons may not unfairly discriminate and these in brief are:**

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or**
- (b) any other ground where discrimination based on that other ground:**
  - (i) causes or perpetuates systemic disadvantage .....**

**In addition, if anyone complains about discrimination and makes out a prima facie case and shows that discrimination did take place on prohibited grounds, then the discrimination is deemed to be unfair unless the insurer can prove that the discrimination was fair and objective.**

**The new Act will not distinguish between the concepts of differentiation and discrimination. This was the major stance on the representations that were made to parliament, on the basis that insurance underwriting is all about differentiation.**

**See Appendix 1 for a copy of Ronnie Napier's memo in which the full implications of this Act are discussed.**

Ronnie Napier is currently seeking a further meeting with the Minister to explain the difficulties that the insurance industry will face under the new Act, and to try to negotiate amendments on the insurance industry's behalf.

However, the market should be aware of the provisions of the Act and should examine its practices to ensure that no breach of the Act is likely to occur. In the meantime, the International Department and Ronnie Napier will determine how the local market intends to ensure compliance under this Act.

If you have any questions regarding the Promotion of Equality and Prevention of Unfair Discrimination Act, please contact Maxine Hooper, International Department on extension 6291 or Ronnie Napier, Lloyd's General Representative on 00 27 11 240 5000. In addition, if you would like a copy of the new Act to be sent to you, please contact Maxine Hooper, via email, on maxine.j.hooper@lloyds.com.

This bulletin is being sent to all compliance officers, managing agents, active underwriters, brokers and market associations.

Frank Speight  
 Head of International  
Business Development Unit



**PROMOTION OF EQUALITY AND PREVENTION  
OF UNFAIR DISCRIMINATION ACT**

I mentioned the introduction of this Act when I spoke to the market at Lloyd's early in November as the Bill had then been published for the first time. During November and December 1999, I was in touch with Frank Speight of the Lloyd's International Department regarding the Bill which, at that point, was at the committee stages in parliament. In the event, the South African Insurance Association decided to send a delegation to make representations to parliament about the provisions contained in the Bill and I led this delegation to Cape Town.

A detailed representation was made, the main thrust being that although the principles in the Bill were laudable, bearing in mind South Africa's long history of discrimination, many of the implications of the specific provisions of the Bill were impractical, particularly having regard to the effect on the insurance industry. We were assured at the end of the debate in parliament by the chairman of the sub-committee that the Bill would not go through in its then form as the government did not intend to cause any hardship to either the banking or the insurance industry. As a result, further detailed representations proposing specific changes to the Bill were made to the parliamentary sub-committee during December 1999 and early January 2000 and we were optimistic that the Bill would be amended in a way that would not affect the insurance industry materially or at least would be in line with other such legislation internationally.

In the event, this did not happen as the trade union wing of the ANC insisted that the more penal sections of the Bill should remain in and although the Act has been amended slightly from its original form, it now contains some provisions which give rise to considerable concern to the insurance industry.

When the Act was passed, the minister did give some recognition to the earlier representations by stating publicly that it would be subject to review if the insurance industry could show that it was being negatively affected due to the fact that the Act does not allow for differentiation. This is obviously a very disappointing response from government because if a class action were instituted claiming substantial damages against an insurance company in South Africa because of differentiation, then it is hard to see how the minister could pass legislation having retrospective effect which would change the position back to where it was before the litigation commenced. This could be very detrimental to the company concerned and to the insurance industry as a whole. Accordingly, a further meeting is being sought with the minister to explain some of the difficulties which the industry is facing with the Act.

In any event, it has now been passed as Act No. 4 of 2000, although it only comes into force on a date to be fixed by the President by proclamation in the Gazette. No date has yet been fixed but as soon as the relevant proclamation has taken place, I shall advise the market.

## **Matters of concern contained in the Act**

There are a number of matters of major concern to the insurance industry contained in the Act and these are:

1. Unlike most similar anti-discriminatory legislation, the Act does not distinguish between “differentiation” and “discrimination”. This was of course the major ground of the representations made to parliament on the basis that insurance underwriting is all about differentiation and this has been accepted internationally. The Act sets out prohibited grounds on which persons may not unfairly discriminate and these in brief are:

“(a) *race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth*” or

“(b) *any other ground where discrimination based on that other ground:*

(i) *causes or perpetuates systemic disadvantage .....”.*

Further, it is provided that if anyone complains about discrimination and makes out a prima facie case and if he shows that discrimination did take place on a prohibited ground, then it is deemed to be unfair unless the respondent proves that the discrimination is fair. This reverse onus on the respondent clearly places a heavy burden on an insurance underwriter. This burden is made even more onerous in that the Bill provides that:

*“In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:*

(a) *the context*

(b) *other factors*

(c) *whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.”*

There are an additional nine other factors in point (b) above which must be taken into consideration by the court. Some of these are extremely vague and difficult to interpret and include *“the impact or likely impact of the discrimination on the complainant”* and *“the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage.”*

*“Discrimination is defined in the Act as meaning – any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –*

- (a) imposes burdens, obligations or disadvantage on; or*
- (b) withholds benefits, opportunities or advantages from*

*any person on one or more of the prohibited grounds.”*

2. The Act does not only concern itself with anti-discrimination alone but also legislates the promotion of equality on an equality of outcomes basis.
3. The Act, in Section 20, makes it clear that proceedings can be brought by any person acting as a member of or in the interests of a group or class of persons.
4. In order to determine whether discrimination has taken place under the Act, special equality courts are established, and the government made it clear that members of this equality court would be specially trained to ensure the proper implementation of the Act.

In addition, the equality court has certain powers to make appropriate orders, which would include:

*“(d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination .....” and*

*“(l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person.”*

5. In addition, the Act contains an illustrative list of unfair practices in certain sectors and in so far as the insurance sector is concerned, has the following list:

*“(a) Unfairly refusing on one or more of the prohibited grounds to provide or to make available an insurance policy to any person.*

*“(b) Unfair discrimination in the provision of benefits, facilities and services related to insurance.*

*“(c) Unfairly disadvantaging a person or persons, including unfairly and unreasonably refusing to grant services, to persons solely on the basis of HIV/AIDS status.”*

There are a number of other provisions in the Bill which could be commented on but the main problem with the Act is that it does not distinguish between the concepts of differentiation and discrimination. As a result, it undercuts the principles of insurance in a manner which may be highly prejudicial to insurers and therefore also to the insuring public.

When we made our representations to parliament, we specifically pointed out that other countries have Equality Acts (one of these being Australia) but the Australian legislation confirms that it will not be unfair discrimination if differentiation is made between persons or groups of persons on the basis of reasonable and justifiable criteria. We understand that in practice, these provisions work very well in Australia. However, the difficulty with the Act in its present form is that the onus is now on the insurer to prove that the criteria used in differentiating between people are in fact fair and objective. This may be very difficult to prove in practice.

As is said earlier in the memorandum, further representations are being made to the minister regarding the effect on the insurance sector and an additional memorandum will be sent out once that meeting has been held. In the meantime, the market should be aware of the provisions of the Act and should examine its practices to ensure that no obvious unfair discrimination is taking place. However, as I have tried to set out in this memorandum, the interpretation of the Act may be extremely difficult because a number of the sections of the Act are vague and difficult to interpret. In addition, there is the problem of the reverse onus on the insurance company and the illustrative list of unfair practices in the insurance services sector.

R S Napier  
Johannesburg  
24 February 2000