

# Psychological test use in South Africa

Karl F Mauer

Professor Emeritus

Department of Industrial Psychology

University of South Africa

April 2000

## 1. Introduction

In South Africa, the situation relating to the classification, possession, control and use of psychological tests, and other devices[1] used for assessing individuals within a working context, is strictly controlled by legislation. In some cases the legislation is extended by Regulations that are promulgated by the relevant minister, and which have the same force of law as the Act with which they are associated. In addition to the Acts and regulations, resolutions of the Health Professions Council of South Africa, and the Professional Board for Psychology (in this case) also have a regulatory function, and their merits would probably have to be challenged in the High Court of South Africa should any dispute arise.

Matters relating to psychological tests, and other similar forms of assessment, are not, as will be shown below, a political issue, mere faddism, a matter of whimsy on the part of psychologists, or an issue that can be ignored without taking into account the possible juridical and professional consequences.

One may regard the situation as being controlled by two sets, or streams, of legislation. The one set is that which includes the Constitution of the Republic of South Africa (Act 108 of 1996), the Labour Relations Act (66 of 1995), and the Employment Equity Act (55 of 1998). These Acts deal with matters of individuals' rights and with specific substantive issues. The second piece of legislation is the Health Professions Act (56 of 1974) in which the scope of the profession of psychology, and the responsibilities and duties/functions of psychologists are addressed within the context of health care (clearly including mental health) in the country.

Understanding the issue of the control and classification of the devices referred to above, ought to be best understood by trying to plot a trail through the salient aspects of the first set of legislation referred to above, and then to attend to the legislation regulating the profession and scope of psychology in South Africa.

---

## 2. The Constitution of the Republic of South Africa

The South African Constitution is the *supreme law of the Republic*[2], and therefore *law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled* (section 2).

Chapter 2 of the Constitution contains the Bill of Rights. In terms of the provisions of the Constitution, *(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*[3] *and freedom* (section 7). As far as the application of the Bill of Rights is concerned, the legislature regarded it as so important that they decreed that *the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state* (section 8(1)).

Equally important is the fact that the Bill of Rights is not a one-sided affair. It is as binding for natural and juristic persons as it is for the various state organs cited in section 8 (1). Section (2) states that *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 any duty imposed by the right*. Stated differently, this implies that every natural or juristic person in South Africa is under a legal obligation to honour the various clauses of the Bill of Rights vis-à-vis another natural or juristic person in a manner no different from that expected of the organs of state referred to in the foregoing clause.

It is important to note that a number of the rights that are contained in the Bill are defined as non-derogable rights. These include, among others, Equality and Human dignity. It is therefore of great consequence, I believe, to take note of the whole section dealing with equality, section 9.

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

- (2) *(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, categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *(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) *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).*
- (5) *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

In subsection 2 above, the term “unfair discrimination” is encountered for the first time in this discussion. Although the concept may appear to be contradictory at first sight, it is important to note that there are forms of discrimination that would be regarded as “fair” within the parameters of the Constitution. It would, for example, be unfair discrimination to appoint a woman in a vacancy for a post office clerk if it were done for no other reason than her gender, under the assumption that there were suitable male applicants, and that the male/female distribution were equitable in the

---

[3]<![endif]> Note that the term “equality” appears as part of the first section of the Bill of Rights. It is also treated in section 9 of the Constitution. Given the fraught history of the country, the

staffing of the organisation. It is highly unlikely, however, that it would be unfair to appoint a woman, rather than a man, as a gynaecologist's receptionist. Unfair discrimination refers to the grounds that are listed in subsection 9 (3) of the Constitution, and to certain grounds that have been added in the Labour Relations and Employment Equity Acts. This issue will be touched on again.

An issue about which there is some uncertainty among human resources practitioners in South Africa is the extent to which, and whether, the Right to Privacy (section 14) of the Constitution impinges on an individual being assessed in any manner. Part of the difficulty, I believe, is associated with the vagueness of the wording of the Privacy clause, and the fact that it has not, to the best of my knowledge, been tested in either the Constitutional or Labour Court. The section is worded as follows:

14. *Everyone has the right to privacy, which includes the right not to have —*

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

Much of the Constitution is not written in the style in which meanings are unambiguously defined. In fact, according to subsection 8 (3) *when applying a provision of the Bill of Rights to a natural or juristic person ... a court —*

- (a) *(a) in order to give effect to 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) *(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)[4]<![endif]>.*

Returning to the matter of privacy addressed in section 14, it is doubtful that assessing an individual would automatically be viewed as an infringement of her or his privacy. It must also be borne in mind that the matter of privacy is not a non-derogable right. While this without doubt implies that an individual may give permission for another natural or juristic person to delve into matters deeply private, it is also clear that she or he may, within her or his Constitutional rights, refuse to provide any information of a private nature. The wisdom of such a move must, however, be very carefully considered. It is all too easy for an unsuccessful job applicant later to cite the provision of such information as having constituted the basis for unfair discrimination under the provisions of the Labour Relations or Employment Equity Acts.

Although an organisation may hold that the assessment procedure is a standard part of its employment policy and practices, it is obvious that such a situation will give rise to a legal dilemma. Although I am not aware that this matter has been tested in a labour court it, the potential dangers have to be borne in mind.

In all, the Constitution provides the basis for all legislation and jurisprudence in South Africa. The impact of the Bill of Rights, and particularly those rights that deal with equality, human dignity and privacy, cannot be denied or avoided in matters concerning decisions relating to workers.

---

concept is taken very seriously, and is a theme that runs through much of the other legislation with which I shall deal.

[4]<![endif]> Section 36 deals with very stringent rules relating to the possible limitation of derogable rights under circumstances which have to be most carefully argued.

It is also worth taking note of the provisions of section 32[5]<![endif]> which deals with the right to access to information. This could quite readily result in a situation in which a person can, for example, demand access to the full 16PF, Rorschach, SAWAIS, CPA, IRIS or any other assessment device record, as *everyone has the right of access to ... any information that is held by another person and that is required for the exercise or protection of any rights*. Given some of the provisions of the Labour Relations and Employment Equity Acts, it is within the bounds of possibility that any assessment device record might become part of the court record, and that a member of staff of the organisation which provides the device, or a registered practitioner, would be called to present evidence on the equity, nature and functions of the device.

### 3. 3. The Labour Relations Act (66 of 1995)

The Labour Relations Act (LRA), with the Employment Equity Act (EEA) and the Basic Conditions of Employment Act (75 of 1997), form the basis of the South African legislative framework regarding labour and employment. Clearly, these Acts have to be read against the background of the Constitution of the country. The Basic Conditions of Employment Act is not of any real significance as far as the issues addressed in this document are concerned.

The range of topics dealt with by the LRA is extensive, and obviously the majority of them are irrelevant to the specific issues that are being addressed here.

*The purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are—*

- (a) *(a) to give effect and to regulate the fundamental rights conferred by section 23[6]<![endif]> of the Constitution;*
- (b) *(b) to give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation;*
- (c) *(c) to provide a framework within which employees and their trade unions, employers and employees' organisations can—*
  - (i) *(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and*
  - (ii) *(ii) formulate industrial policy; and*
- (d) *(d) to promote—*
  - (i) *(i) orderly collective bargaining;*
  - (ii) *(ii) collective bargaining at sectoral level;*
  - (iii) *(iii) employee participation in decision-making in the workplace; and*
  - (iv) *(iv) the effective resolution of labour disputes.*

The purpose of the LRA is clearly broad: it is an instrument in terms of which labour stability is pursued, the rights of organised labour are recognised, and where the legislative framework to safeguard workers from possible exploitation by employers is developed.

---

[5]<![endif]> There is legislation currently being debated by Parliament to regulate the principles contained in section 32 of the Constitution.

It is of importance, I believe, to take note of Part B, headed *Unfair labour practices*, of Schedule 7 of the LRA. In referring to *Residual unfair labour practices*, the Act states:

- (1) (1) *For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving—*
  - (a) (a) *the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;*
  - (b) (b) *the unfair conduct of an employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;*
  - (c) (c) *the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;*
  - (d) (d) *the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.*
- (2) (2) *For the purposes of sub-item (1)(a)—*
  - (a) (a) *“employee” includes an applicant for employment...*

It is important to note that the grounds for unfair discrimination that appear in the LRA are the same as those in the Constitution. Furthermore, what constitutes an unfair labour practice may be either an act or an omission. Another vital consideration is the fact that unfair labour practices relate to a wide range of dealings with employees for which assessment devices could, conceivably, be used. It has to be noted that the final clause cited above holds severe implications for all employers. It would be illegal — in the sense that it constitutes an unfair labour practice — to treat an applicant in an undignified or dismissive manner.

#### **4. 4. Employment Equity Act (55 of 1998)**

This Act (EEA) is perhaps the most feared of the suite of Acts of which the South African labour legislation is composed. Part of the reason is to be found in the purpose of the Act, while the magnitude of the fines that can be imposed in terms of the provisions of the Act are quite daunting.

To grasp the tenor of the Act it is necessary to understand the purpose and the section on the prohibition of unfair discrimination.

2. 2. *The purpose of this Act is to achieve equity in the workplace by —*
  - (a) (a) *promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and*
  - (b) (b) *implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups [7]<![endif]>, in order to ensure their equitable representation in all occupational categories and levels of the workforce.*

---

[6]<![endif]> Section 23 of the Constitution deals with labour relations, and it provides for the development and promulgation of appropriate legislation to give effect to the principles contained in section 23. The LRA and the other Acts referred to above constitute that legislation.

[7]<![endif]> In terms of the definitions contained in the Act, “designated groups” means *black people, women and people with disabilities*.

It is clear that the Act was designed to ensure that all employers of more than 50 members of staff implemented equity and integration in the workplace. Chapter III of the Act spells out the steps that have to be taken to ensure that the purpose of the Act is realised.

Section 6 of the Act, which deals with the prohibition of unfair discrimination, includes the same list of grounds for unfair discrimination encountered in the Constitution and the LRA, but it adds *family responsibility* and *HIV status* as further grounds for automatically unfair discrimination.

In addition, section 6 (2) of the EEA determines that —

- (3) *It is not unfair discrimination to —*
- (a) *(a) take affirmative action measures consistent with the purpose of this Act;*  
*or*
  - (b) *(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*

It is evident that any procedure, process, approach, and so on, that discriminates unfairly against people — especially those from designated groups — and also on any of the other grounds that have been listed as constituting the basis for such discrimination, might well lead to a situation in which an employer will be obliged to defend what he or she has done in the labour court. This applies to medical testing which is prohibited except under certain specified conditions, psychological testing, and other similar assessments.

Section 8 of the EEA deals with the matter of psychological testing. The wording is:

8. *8. Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used —*
- (a) *(a) has been scientifically shown to be valid and reliable;*
  - (b) *(b) can be applied fairly to all employees;*
  - (c) *(c) is not biased against any employee or group.*

In the earlier drafts of the Bill that eventually became the EEA, psychological testing was completely forbidden. As a result of a good deal of lobbying and debate, the Parliamentary Portfolio Committee on Labour was persuaded that the complete banning of all psychological assessment devices would result in a situation in which the employees and employers of the country would lose a great deal. The way in which most of the unscientific and unethical practices of the past could be dealt with, was clearly to ensure that users of assessment devices would comply with internationally recognised standards of assessment practice and ethics. To accomplish such a requirement implied that basic psychometric requirements had to be enshrined in law.

By the time that the Portfolio Committee was finalising the legislation, it had also become clear that a number of organisations had abandoned their previous assessment practices, and that they had tended to follow the route of making use of unstructured interviews under the often fatuous and witless belief that they would thereby avoid infringing the provisions of the draft legislation. Another route that had emerged was for people to use assessment devices which were clearly psychological tests or assessment devices [8]<![endif]> in terms of their content domain, structure,

---

[8]<![endif]> See discussion on the Health Professions Act (56 of 1974) below for more detail.

instructions, and so on. They tried to convince their clients (and themselves, it would appear) that these devices were not psychological tests because the people who were selling them were not trained as psychologists, and because they had removed most of the terminology that sounded vaguely as if it pertained to psychology. Suddenly, it became acceptable in certain circles to talk about “brightness” or “astuteness” rather than “intelligence” or “mental alertness”, about “character” rather than “personality”, and so on.

It was clear that the abuses of the past would have been exacerbated had the legislature turned a blind eye to the situation.

The wording in section 8 was consequently deliberately couched in terms that constitute the building blocks of sound measurement theory [9]<![endif]> — regardless of whether it applies to psychology, sociology, nursing science, criminology, education etc. The Portfolio Committee also decided that all procedures and practices that were used in taking decisions about employees’ careers had to be controlled, and hence the insertion of the phrase ... *and other similar assessments* ... in this section of the Act. Such control, far from being crass authoritarianism and excessive state involvement, was a measure carefully crafted to comply with the spirit of the Constitution, the LRA and the EEA, and to place obstacles in the way of any possible continuation, or exacerbation, of some of the excesses of the past.

The lawgivers’ perception of the gravity of labour-related matters, and the seriousness with which they intend taking measures to control the situation, is evident from Schedule 1 of the EEA. For contraventions of some of the sections of the Act, the schedule lists fines ranging from R500,000-00 in cases where there has been no previous contravention, to R900,000-00 where four previous contraventions have taken place during the preceding three years.

The extracts from the Constitution and from the labour legislation that have been presented, have, as far as all people who perform any form of assessment are concerned, led to a situation which, with regard to employees [10]<![endif]>, ought to be clear. My summary and interpretation of the situation within South Africa law — namely the South African Constitution, and the Labour Relations and the Employment Equity Acts, but excluding the Health Professions Act at this point — is as follows:

	<p>The South African Constitution is the supreme law of the country.</p> <p>The Constitution contains a Bill of Rights in terms of which individuals have specific rights.</p> <p>Rights like <i>equality</i> and <i>human dignity</i> are non-derogable.</p> <p>Section 23 of the Bill of Rights, which deals with labour relations, has, as enjoined in the Constitution, been thoroughly legislated upon, especially in the LRA and EEA.</p> <p>The LRA elaborates the principles of unfair discrimination, and unfair labour practices.</p> <p>The EEA requires that specific steps be taken to ensure equity in the</p>
--	--

---

[9]<![endif]> Also referred to as Classical Test Theory.

workplace, and it places severe constraints on the use of psychological tests/devices and all other similar assessment devices.

All assessment procedures can be used provided that the user can demonstrate that the assessment devices comply with the stipulations contained in section 8 of the EEA.

In terms of section 11 of the EEA the burden of proof rests on the employer whenever unfair discrimination is alleged.

The importance of these issues is demonstrated by the severity of the penalties listed in Schedule 1 of the EEA[i]<![endif]>.

## 5 5 Health Professions Act (56 of 1974)

Since its promulgation in 1974, the Health Professions Act (56 of 1974) has been amended on as many as 17 occasions. One of the most recent amendments, which reflects the Government's enlightened view of health-related matters, was to change the name of the Act from Medical, Dental and Supplementary Health Professions Act to its current, much more comprehensive and politically sensitive, name of Health Professions Act.

While the Act covers a broad spectrum of issues, it is singularly important to note that it deals very explicitly with matters pertaining to the practice of psychology. As will become evident, these provisions necessarily have a major impact on other professions and acts of people not registered [11]<![endif]> as psychologists. The definitions in section 1 of this Act clearly state that "*psychologist*" means a person registered [12]<![endif]> under this Act, and that an "*intern-psychologist*" means a person registered as such under this Act. The difficulty that is bound to arise from this Act does not relate so much to people wishing to refer to themselves as psychologists when they have not been registered, although the record shows that there are many who try to do so, but rather to the fact that there are a number of acts specifically reserved for people who have been registered under the provisions of this Act.

### 5.1 The Health Professions Council and the Professional Boards

The establishment of the Health Professions Council of South Africa (HPCSA) is determined by the provisions of section 2 of the HPCSA Act. Subsection 2 (1) stipulates that it be established as a juristic person, that the registrar convene the first meeting, and that the head office be in Pretoria.

Section 3 deals with the objects of the Council. These include the coordination of the Professional Boards, the promotion and regulation of *interprofessional liaison between registered professions in the interest of the public*, consultation and liaison with relevant authorities on matters affecting Professional Boards in general, assistance with the promotion of health of the population of the country, and advising the *Minister on any matter falling within the scope of this Act in order to support the universal norms and values of health professions, with greater emphasis on professional practice, democracy, transparency, equity, accessibility and community involvement*.

---

[10]<![endif]> The term "employees" is used here in the sense in which it is in the LRA and the EEA, namely that it *includes an applicant for employment* (EEA, Section 9).

[11]<![endif]> Registration is a prerequisite for practising. Section 17 stipulates that:

17. (1) *No person shall be entitled to practise within the Republic—*

- (a) *(a) the profession of a medical practitioner, dentist, psychologist or as an intern or an intern psychologist or any profession in terms of the Act; or*

Of more immediate relevance, however, is the matter of the Professional Boards. The establishment, objects, and general powers of Professional Boards are dealt with in section 15 of the relevant Act. The importance of Professional Boards is shown in subsection 15(1) which determines that *the Minister shall, on the recommendation of council, establish a professional board with regard to any profession in respect of which a register is kept in terms of this Act, or with regard to two or more such professions.* It is, therefore, patently clear that a Professional Board is, as much as is the Council, a juristic person [13]<![endif]>. It can only be established in terms of the HPCSA Act, and it has to be established by the Minister on account of the fact that psychologists are obliged to register under the provisions of the Act.

Subsection 15(5) states that *regulations relating to the constitution, functions and functioning of a professional board shall at least provide for —*

(a)

(b)

...

(e) *(e) the establishment by a professional board of such committees as it may deem necessary, ... and the delegation to any person or any committee so established, such of its powers as it may from time to time determine, but shall not be divested of any power so delegated.*

The Professional Board for Psychology is, therefore, a juristic person in terms of the provision of Act 56 of 1974. This board deemed it necessary and appropriate to establish a number of committees to enable it to fulfil its duties. In addition to committees such as Preliminary Inquiries, and Education, the board, fully within its mandate and powers, also established a committee for Psychometrics. There is nothing in the establishment of the Psychometrics Committee to suggest that it is *ultra vires* in so far as the provisions of section 15A — the Objects of Professional Boards — and section 15B — the general powers of Professional Boards are concerned. In fact, the scope of a Professional Board is extremely wide when note is taken of subsection 15B. (1) (d) which reads: *a professional board may ... consider any matter affecting any profession within the ambit of the professional board and make representations or take such action in connection therewith as the professional board deems advisable.* In addition a Professional Board is allowed to (subsection 15B. (1) (g)) *perform such other functions as may be prescribed, and generally, do all such things as the professional board deems necessary or expedient to achieve the objects of the Act in relation to a profession falling within the ambit of the professional board.*

- 
- (b) *(b) except in so far as it is authorized by the provisions of ... [various acts], and sections 33, 34, and 39 of this Act, for any other profession the practice of which mainly consists of—*
- (i) *(i) the physical or mental examination of persons;*
  - (ii) *(ii) the diagnosis, treatment or prevention of physical or mental defects, illnesses or deficiencies in man;*
  - (iii) *(iii) the giving of advice in regard to such defects, illnesses or deficiencies ...*

[12]<![endif]> Section 18 of the Act prescribes the keeping of registers in respect of health professionals.

[13]<![endif]> It is clear from the content of the Health Professions Act that the Board complies with the standard requirements for a juristic person in the sense that it was established in perpetuity

### 5.1.1 5.1.1 Mandate of the Psychometrics committee of the Professional Board for Psychology

Having shown that the establishment of the Psychometrics committee was within the parameters of the Board's legal capacity to act, and within the "authority" of the Professional Board for Psychology, the Psychometrics committee's delegated mandate had to be established. This was done at the meeting at which the present Professional Board was constituted on 23 April 1999, and amended in a resolution that was taken at the 3<sup>rd</sup> meeting of the Professional Board for Psychology on 26 August 1999.

The wording of the resolution, which I quote in full, is:

#### *MANDATE OF THE PSYCHOMETRICS COMMITTEE*

*In June 1999, during a meeting, of the Psychometrics Committee of the Professional Board, the Chairperson informed the members that the Executive Committee had discussed the mandates of the Different sub-committees at the meeting held on 9 June 1999, and that it would be recommended to the Professional Board that the Mandate of the Committee would be to deal with and to report to the Professional Board on —*

- i. all matters pertaining to the practical and theoretical training of psychometrists, and psychotechnicians within the current policy parameters as determined by the Professional Board;*
- ii. to classify and regularly revise any device, instrument, questionnaire, apparatus, method, technique or test aimed at the evaluation of emotional, behavioural and cognitive processes or adjustment of personality of individuals or groups of persons, or for the determination of intellectual abilities, personality make-up, personality functioning, aptitude or interests by the usage and interpretation of questionnaires, tests projections or other techniques or any apparatus, whether of SA origin or imported, for the determination of intellectual abilities, aptitude, personality make-up, personality functioning, psycho-physiological functioning or psycho-pathology and to report thereon to the Professional Board.*

*RESOLVED that the recommendation of the Executive Committee of June 1999 pertaining to the mandate of the Psychometrics Committee of the Professional Board be adopted.*

In view of the fact that this resolution was taken by the Professional Board in August 1999, and also taking into consideration the subsequent meeting of the full Health Professions Council at which no objection was raised about this issue, the mandate indicated above must be taken as a *fait accompli*. The implications of this resolution are clear enough, and they have been further elaborated in a press release/public

---

(there is nothing in the Act to indicate that the Board is a temporary or transitional arrangement or body), the Board has assets which are disposable at the discretion of the Board, and the Board has the capacity to act according to its mandate and within the parameters of the Act and any Regulations passed in terms of the Act.

statement issued on 1 July 1999 [14]<![endif]>.Although the press release had, *inter alia*, been precipitated by a dispute concerning the use of the polygraph, its contents have far wider ramifications.As the document may not be generally available, it is included here in full for the sake of convenience.

“LEGAL AND ILLEGAL USE OF PSYCHOMETRIC TESTS INCLUDING THE POLYGRAPH:

*On 1 July 1999 the following public statement was issued: —*

*It has come to the attention of the Professional Board for Psychology that there is great uncertainty and confusion in South Africa regarding the use and possible misuse of psychological tests.*

*The Professional Board for Psychology wishes to bring to the public's attention that the Board is the controlling statutory body with the authority to classify and legalise the use of psychological tests, as well as prescribed questionnaires, apparatus and instruments for the determination of intellectual ability, aptitude, personality make-up, personality functioning, psycho-physiological functioning and psychopathology.*

*The Professional Board has a responsibility to inform the public and the profession about the dangers of the misuse and/or abuse of prescribed questionnaires or tests, as well as prescribed techniques, apparatus or instruments for the determination of the factors mentioned above. The Board is aware that unsuspecting members of the public may have their rights infringed by being subjected to psychometric tests which are inappropriate for the South African context, e.g.educational assessment and personnel selection.*

*The Board wishes to stress that it is the right of members of the public to enquire of psychometrists or psychologists whether a specific test has been classified by the Board. It is furthermore the responsibility of the developer of the test to apply to the Board for classification, and it is the responsibility of the psychometrist or psychologist to ensure that any test he/she intends to use has been classified by the Professional Board and that such a test is accompanied by a classification certificate issued by the Board.*

*The Professional Board for Psychology furthermore wishes to point out that the polygraph or lie-detector test as it is widely known, is completely unreliable and that the Board does not accept it as a valid test for the purposes in which it is commonly used in this country.*

*The Board stresses that the polygraph has never been accepted as definitive evidence in court cases in counties with reputable legal systems, since these tests can be both unreliable and invalid.*

*The Professional Board for Psychology further wishes to emphasise that the use of the polygraph has not been approved by the Board, and that the continued uncritical use of these tests is not in the interest of the public. These tests are also used in direct contravention of the Health Professions Act, as well as the Employment Equity Act, and the Board wishes to point out that any person subjecting himself/herself to this test does so at his/her own risk.*

---

*In terms of section 59 of the Health Professions Act it is also illegal for any person who has not been registered by the Professional Board for Psychology to administer or interpret any psychometric test, techniques or instruments, or to charge for such services.*

*Persons and institutions involved with the development and use of any psychometric instruments are welcome to contact the Professional Board for Psychology's Psychometrics Committee for further information at telephone (012) 328-6680 x 252. The contact person is Ms Alta Pieters."*

The section that I have underlined states the position of the Board quite unambiguously [15]<![endif]>.The Board maintains that **all developers** (and one should, quite logically, read importers and distributors into this section) **are obliged to apply to the Board for classification** of instruments which may conceivably comply with the descriptions that have been provided above, and also those that appear in section 37 of the Act (to be discussed below).Furthermore, there rests a legal obligation on each user who is registered in terms of this Act to ensure that the devices that he or she intends to use — let alone actually applies — have been classified in terms of the regulations.

Stated differently, people whose names appear on the registers of the Professional Board, and who use tests or other similar forms of assessment which have not been classified by the Psychometrics committee of the Board, are likely to be found guilty following *an inquiry into any complaint, charge or allegation of unprofessional conduct against any person registered under this Act (section 41(1))*.The same subsection determines that *on finding such a person guilty of such conduct it is empowered to impose any of the penalties prescribed in section 42(1)*.

The latter section determines that *every person registered under this Act who, after an inquiry held by the professional board, is found guilty of improper or disgraceful conduct, or conduct which, when regard is had to such person's profession, is improper or disgraceful, shall be liable to one or other of the following penalties—*

- (a) *(a)a caution or reprimand or a reprimand and a caution; or*
- (b) *(b)suspension for a specified period from practising or performing acts specially pertaining to his profession; or*
- (c) *(c)removal of his name from the register; or*
- (d) *(d)a fine not exceeding R10 000; or*
- (e) *(e)a compulsory period of professional service as may be determined by the professional board; or*
- (f) *(f)the payment of the costs of the proceedings or a restitution.*

From the preceding it is, therefore, plain that it will be regarded as *prima facie* evidence that a registered person who makes use of an instrument that has not been

---

classified by the Psychometrics committee is guilty of unprofessional behaviour. Should it be found during a formal enquiry that such a person has indeed made use of an unclassified assessment device (as defined in section 37 which will be discussed below), her or his professional future — and occupational in a totally different field — will be severely jeopardised. Being suspended from practice — even if only for a year — is bound to result in a situation in which an experienced professional may find him or herself in a worse position in the profession than a newly qualified person.

The possibility exists that exposing employees to the dangers associated with the use of unclassified tests may well constitute grounds for an unfair labour practice suit against an employer who requires the use of such a device.

### **Penalties for practising as a psychologist or as an intern-psychologist, or for performing certain other acts while unregistered**

The preceding text dealt with a number of matters that relate to the use of psychological tests in some detail. The section of the Health Professions Act (56 of 1974) that provides the most detailed description of the scope of the profession of psychology is section 37. In view of the length of this section, it has been included as an endnote, [ii]<![endif]> rather than as part of the text.

There are a number of matters arising from section 37 that are of particular importance:

1. 1. This section defines the scope of the profession of psychology, and clearly proclaims that unregistered persons may not perform the acts described.
2. 2. The activities that this section seeks to regulate are very wide, but it must be understood that the converse does not hold true, i.e. there are practical limitations in the sense that not all psychologists are allowed to perform all the activities that are included in the scope of the profession. If a psychologist is accused of unprofessional conduct on the basis of having performed any given psychological act [16]<![endif]>, the burden of proof in respect of adequate training and sufficient experience rests on the professional. It is standard practice for a psychologist who appears before a disciplinary hearing to have to explain where, when, how and by whom he or she was trained to perform a certain psychological act or procedure, as well as where the clinical/practical experience for the performance thereof was gained.
3. 3. It has to be borne in mind that the current training model in South Africa produces professional psychologists who are registrable in one of five categories: clinical psychologist, counselling psychologist, industrial psychologist, research psychologist [17]<![endif]> or educational psychologist.

---

[17]<![endif]> *The Board has resolved that research psychologists are entitled, in the normal course of their work, to use psychological test within the ambit of the ethical rules, their training and experience, but that it is not permissible for research psychologists to render clinical, diagnostic*

Broadly speaking, the implication is that the nature of the university training that he or she received, and the kind of the internship that he or she completed, jointly determine the scope of practice of the individual psychologist. In general terms, an industrial psychologist may, therefore not perform an act which is specifically associated with the profession of a clinical psychologist. Barring a *bona fide* emergency situation, a person performing an act for which he or she has not been properly trained and adequately experienced, is likely to be found guilty of unprofessional conduct, and the penalties discussed earlier in this document will then apply.

4. 4. In many respects, section 37 was drafted to define those acts which may not be performed by people not registered as psychologists or psychometricians [18]<![endif]>, regardless of their professions or the nature of the training that they might have undergone. The application of any assessment device by any person is bound to be regarded as falling under the purview of subsection 37 (1) (b) (i), namely mentally examining a person. Subsection 37 (1) (b) (iv) (aa) relates to diagnoses of a person's mental state on the basis of information supplied by him or her, and the final part of subsection 37 (1) is clear in the sense that a person who does anything of the nature mentioned above *shall be guilty of an offence and on conviction liable to a fine or imprisonment for a period not exceeding twelve months, or to both such fine and such imprisonment.*
5. 5. Although the notion of diagnosis of a mental state or mental examination may appear not to fall within the ambit of what usually happens in the field of human resources management, it is important that careful account be taken of subsection 37 (2) in which a list of acts appears that are *deemed to be acts specially pertaining to the profession of a psychologist*. In other words, if these acts are shown to have been performed by a person who is not registered as a psychologist, he or she could be found guilty in a criminal court and sentenced as shown in the previous paragraph.

Subsection 37 (2) (a) includes activities such as the *evaluation of behaviour or mental processes ... of individuals or of groups of persons, through the interpretation of tests for the determination of intellectual abilities, aptitude ...* Similarly, subsection 37 (2) (c) refers to the *evaluation of ... behavioural and cognitive processes ... of individuals or groups of persons by the usage and interpretation of questionnaires, tests, projections or other techniques or any apparatus, whether of South Africa origin or imported, for the determination of intellectual abilities, aptitude, personality make-up, personality functioning ...*

---

*and/or psychotherapeutic/counselling services* (Open letter to all psychologists from the Chairman of the Board, dated 15 September 1999).

[18]<![endif]> A major consideration at the time when the Act was originally drafted and promulgated in 1974 was to protect the population of the country against exploitation by charlatans. The

Another issue which constitutes the basis for prosecution is to be found in subsection 37 (2) (d) in which exercising control over any prescribed test, questionnaire, or other technique, apparatus or instrument for the determination of intellectual abilities and aptitudes, among others, can constitute the basis for a criminal case against a person who is not registered as a psychologist.

6. Subsection (3) permits an intern-psychologist to perform his or her duties, and subsection 37 (4) contains a series of exclusions and exceptions for people who work in various professions, but the exceptions are narrowly circumscribed and do not provide any means to enable a non-psychologist to make use of those assessment procedures contemplated in the act.

## 7. **Conclusion**

I have shown that there are two broad legislative strands that impinge upon the use of all types of approaches for the assessment of people. The first strand concerned the implications of the Constitution which safeguards a considerable number of human rights. It has to be borne in mind that the Constitution is the supreme law of the country, and that any other legislation that is found to be in contradiction with the Constitution is automatically *ultra vires*. Many of the human rights that appear in the Bill of Rights of in Chapter II of the Constitution are non-derogable.

The Constitution provided for the development of national legislation relating to labour matters (subsection 23 (5)). This was done mainly by means of the Labour Relations Act and the Employment Equity Act. This legislation emphasises fair employment practices and the development of equity in the workplace. More specifically, the EEA includes a section that governs the use of psychological tests and other similar assessment devices in the sphere of work.

I have contended that the only tenable interpretation of the underlined phrases in the preceding paragraph is to include any form of adjudging, appraisal, assessment, evaluation, valuation, grading, ranking, classifying, categorising, placing, positioning, or rating insofar as it deals with workers — and obviously job applicants. Such procedures must be *scientifically* shown to be reliable, valid, and unbiased. Similarly, the manner in which the results are used has to be adjudged as fair. These constraints are particularly applicable as far as the designated groups — blacks, women, and disabled people — are concerned.

Claiming that an instrument/device used for assessment is not a psychometric measure is perfectly irrelevant and such an argument will not bear scrutiny in a Labour Court. To profess that any device is a clinical one, and that it therefore does not have to comply with normal psychometric requirements as understood under Classical Test Theory, will also be of no avail as far as the provisions of the labour legislation in South Africa are concerned.

---

protection, it was held, could be attained by ensuring training standards, and by taking the necessary disciplinary steps to ensure that psychologists adhere to the Act and the Code of Ethics.

The situation, as far as the use of assessment devices is concerned, is further complicated in South Africa by the second strand of legislation, namely the Health Professions Act, and especially section 37 of the Act.

In terms of the provisions of the Health Professions Act, a Professional Board for Psychology has been established, and the Board has duly, and legitimately, established a Psychometrics Committee. The Psychometrics Committee recommended, and the Board resolved, that it would constitute unprofessional conduct on the part of a registered psychologist to use tests that had not been classified by the Psychometrics Committee. If found guilty, a registered person may well find him or herself in a situation in which his or her name is removed from the role, resulting in a loss of the capacity to earn a living by means of his or her profession.

In view of the fact that the scope of the profession of psychology is defined in great detail in section 37 of the Act, it is self-evident that a person who is not registered, and who performs any act specially defined as belonging to the profession of a psychologist, is likely to be found guilty of a criminal offence in a court of law. In view of the fact that the Board has resolved that the use of an unclassified instrument is unlawful, there cannot be any doubt that the use of such an instrument by an unregistered person will have an exacerbating effect on the sentence passed on the person when found guilty.

The seriousness of the matter is bound to be heightened by the likelihood that a person found guilty of using an unclassified assessment device has a good chance of also being summonsed to appear in the Labour Court on the grounds of unfair labour practice or infractions of the EEA provisions relating to the psychometric qualities of assessment devices.

Seen against the foregoing, it would be prudent, I believe, for any supplier of an instrument that has not yet been classified by the Psychometrics Committee of the Professional Board for Psychology to take the necessary steps to apply for classification. Once the application has been made, the Board is usually prepared to deal with the matter as if the classification has already been done. By the same token, it is important to gather as much systematic research information as possible about all assessment devices to ensure that the producer, supplier, and/or user has sound grounds to defend his or her organisation should it be decided to take a matter to court under section 8 of the EEA.

Trying to defend the value of an instrument on the opinions of experts — no matter how competent they may be — will inevitably yield results that are less than satisfactory in the absence of sound research results. With all due respect, the judgements are more likely, under such circumstances, to depend on the stage-presence of the experts, the verbal proficiency of the barristers and, ultimately, the impressions of the judge. Such a situation cannot serve the workers in the country, the advancement of science, sound human resources management, or equitable jurisprudence.

## 8. **8.Acknowledgement**

My sincere thanks to Professor Marinus Wiechers, former Principal and Vice-chancellor of the University of South Africa, and to Mr Johann Coetzer, Senior Manager (Professional Boards) of the Health Professions Council of South Africa, who were prepared to read and to comment on this document, and to allow me (and potential readers) to benefit from their vast expertise, insight and wisdom. Obviously, any errors that remain in the document are the responsibility of the author.

---

[i]<![endif]>

It is worth noting that the only case in which assessment procedures have been directly implicated that has appeared in the a Labour Court subsequent to the promulgation of the LRA and the EEA, is that of Naidu vs. Southern Life Association Ltd. (an insurance company based in Cape Town). Naidu was retrenched (made redundant) as a result of Southern having been taken over by another insurance company. In determining which senior managers were to be retrenched in the redesigned structure, the organisation, among other approaches, used a consulting psychologist who made use of a number of tests and an assessment centre approach. Naidu took the matter to the Labour Court in Durban, citing the use of the assessment procedures as constituting unfair labour practice. The case was set down for three days in early September 1999, but the full evidence could not be heard in the time available.

The hearing was postponed for a date to be arranged. As a result of the pressures on the Labour Courts, the resumption of the trial was eventually set for 27, 28, and 29 January 2000. I am informed that the judge promised that he would pass judgement within 10 days, but at the time of writing (11 February, 2000) the judgement is not yet available.

Senior Council (the senior barrister) for the complainant is, at this stage, quite convinced that the judgement will be in favour of his client. This view is supported that the defendants, after the first three days of trial, approached the complainant with an offer to settle the matter out of court.

It is of great significance to note that while a good deal of argument centred on the nature of the instruments used — especially the extent to which they complied with the provisions under section 8 of the EEA — a good deal of argument was also devoted to inconsistencies in the procedures that had been followed by the defendants. These inconsistencies, it was held, fell foul of the Constitutional provision that *everyone has the right to administrative action that is lawful, reasonable and procedurally fair* (Chapter 2, section 33).

As soon as the judgement becomes available, I shall elaborate on this section if it appears relevant to do so.