

# REASONABLE ACCOMMODATION

A NEW NATIONAL STRATEGIC FRAMEWORK PROVIDES DIRECTION

By: Dr Laurentia Truter

Persons with disabilities do not always have access to appropriate, affordable, or adequately timed reasonable accommodation support measures. Even where accommodation measures are in place, they are often unsuitable or fail to address the particular barrier the person is experiencing, resulting in unfair discrimination. The reasonable accommodation measure that a person with a disability may require varies and is often related to the stage of life or circumstances they find themselves in. Measures must thus be tailor-made in line with, for example, the person's age, gender, culture, and the severity of their impairment.

Although it may sound simple, the need for, the cost, and the return on investment for the individual and society of putting effective reasonable accommodation measures in place have passed by many organisations. Many employers, in particular, find the concept of reasonable accommodation challenging to implement in the workplace, even though it is intrinsically necessary if one wants to realise equal rights for persons with disabilities.

The Department of Women, Youth and Persons with Disabilities recently published the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (the Framework) to assist in the promotion of the rights of persons with disabilities. This article provides an overview of this new Framework.

## What is the scope and purpose of this new Framework?

It applies to both the public and private sectors, including civil society, regardless of the size of an operation. It acts as a guideline at this point, supporting other existing legislation that makes the provision of reasonable accommodation measures compulsory, such as the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (PEPUDA) and the Employment Equity Act, 1998 (EEA). The Framework may well be published as Regulations under PEPUDA in the foreseeable future, giving it legislative authority. South Africa foresees disability legislation; thus, the Framework will serve as a guiding document for any such disability legislation drafted. Employers and businesses

will do well to acquaint themselves with the principles and their obligations as so-called 'duty bearers'.

In terms of the EEA, reasonable accommodation applies to all Designated Groups, namely 'Black' People, women, and persons with disabilities. The Framework, however, focuses specifically on persons with disabilities. Its objectives include cementing reasonable accommodation as a fundamental human right of persons with disabilities, necessary to enforce their dignity, respect and equal opportunities. According to the Framework, disability discrimination includes the denial of reasonable accommodation support, where required.

## When must reasonable accommodation measures be in place?

The legal obligation to make reasonable accommodation available arises when a person with a disability voluntarily discloses a disability-related accommodation need or when such a need is reasonably self-evident. Persons with hidden disabilities have the right to keep their disability status confidential, but cannot then expect to benefit from reasonable accommodation measures.

## Who qualifies for reasonable accommodation?

Three basic criteria, based on disability, determine the necessity for reasonable accommodation:

- ① The person must have an impairment that may be physical, sensory, neurological, intellectual, psychosocial in nature or a combination of these.
- ② The impairment must be long-term, recurring or episodic, including progressive conditions. Long-term means the impairment is likely to last for over 12 months or life.
- ③ The impairment must be substantially limiting in nature; in other words, restricting a person's ability to participate and/or limiting daily activities.

One will thus need to consider the nature, duration and all the effects of the impairment and whether it limits a person's ability to perform essential functions of a job or daily activities independently. The Framework corresponds with the definition of persons with disabilities as set out in the EEA. However, whereas the EEA requires all three aspects of the criteria to be present to qualify as part of this Designated Group, the Framework expressly covers temporary disabilities under its scope, as well as perceived disabilities. Persons with disabilities include 'people who have perceived and actual physical, psychosocial, intellectual, neurological and sensory impairments which, as a result of various attitudinal, communication, physical and information barriers, are hindered in participating fully and effectively in society on an equal basis', in line with the social model of disability.

## Is a person's disability status protected?

Information relating to disability status and reasonable accommodation needs are confidential and must be protected. It should only be accessible and shared on a need-to-know basis to ensure non-discrimination and/or if objective safety concerns exist related to a specific individual or accommodation need. When gathering information from elsewhere or disclosing information related to a person with a disability to anyone else, the person's explicit and informed written consent is necessary. So as not to fall foul of the law, employers and other entities need to consider the provisions of the Protection of Personal Information Act, 2013 (POPIA), which classifies health and disability-related information as special personal information worthy of additional protection.

## What is "reasonable accommodation"?

Reasonable accommodation refers to 'necessary and appropriate modifications and adjustments, including assistive devices and technology that assure persons with disabilities' participate on an equal basis with others in all human rights and fundamental freedoms'. It includes measures to make the physical environment accessible, provide access to information and communication, and accommodate specific sensory requirements such as lights, noise and spatial stimuli to improve the independence of persons with disabilities. Thus it will provide access and participation to quality education and work.

When considering the need and type of any reasonable accommodation, Employers must give regard to the person's specific impairment and the particular daily activity, task or the inherent requirement of the job at hand. It must assess any attitudinal or environmental barriers that may exist and undertake their removal.

According to the Framework, there is an inextricable link between reasonable accommodation, universal access and universal design principles. Universal access entails the removal of cultural, physical, social and other barriers that exclude persons with disabilities. In contrast, universal design involves 'the design of products, environments, programmes and services from the very beginning to be used by all to the greatest extent possible without the need for adaptation or specialised design'.

## What are the categories and types of reasonable accommodation measures identified in the Framework?

The Framework distinguishes the differences between reasonable accommodation as:

No-tech	These measures include allowing flexi-time work or additional preparation time, as well as policy and protocol adjustments.
Low-tech	These measures are technologically unsophisticated or straightforward, for example, replacing a doorknob with an accessible door handle or providing a magnifier to a person with a sight impairment.
High-tech	These measures require advanced or sophisticated devices, for example, providing screen reading software with synthesised speech to someone with a visual or learning disability, as well as other assistive devices.
Live assistance	This includes making personal assistants available such as guides, lip speakers, sign language interpreters, note-takers or the provision of guide or service animals.

## Can an employer deny reasonable accommodation?

An employer can deny a request for reasonable accommodation if it causes 'unjustifiable hardship'; however, evidence of this is necessary. Unjustifiable hardship is an action that requires significant or considerable difficulty or expense. It involves considering, amongst others, 'the effectiveness and efficiency of the reasonable accommodation and the extent to which it would seriously disrupt the operation of a business or create a disadvantage'. Expense on its own is not an excuse as an absolute defence against providing reasonable accommodation. Depending on an organisation's size and gross income, the type of measure, and the extent to which an organisation provides it, may differ. Other considerations include the impact of failing to provide accommodation for the person with the disability, the systemic patterns of inequality in society and the furtherance of constitutional rights. Whether the defence of unjustifiable hardship will be successful depends on the merits of each case.

## What are the responsibilities of the so-called 'duty bearers' in terms of the Framework?

From reading the Framework, it seems that it targets organisations in the public and private sector who are 'providers of services', whereby access to their services must be readily available. At the same time, it includes references to employers and related labour legislation. It states that the private sector must provide access to everyone concerning its 'environment, products and services' equitably. Further clarification is probably necessary, but it is safe to assume that reasonable accommodation measures cannot be limited to strict service rendering only.

General responsibilities include:

- > A plan to implement reasonable accommodation(s) that ensures everyone can access their environment, products, and services equitably, without unfair discrimination.
- > Providing persons with disabilities with information on the reasonable accommodation support available and how they can access it.
- > Bearing the cost of any functional assessment to determine the most feasible measure to be put in place, if necessary.
- > Engaging with professionals, including social workers and medical service personnel. However, this relates to obtaining private information to make an informed decision with written consent.
- > Ensuring that the time frame between identifying the type of support a person requests and providing it is minimal.
- > Providing written reasons for declining a request for reasonable accommodation or an assistive device. Organisations must retain records of such.
- > Following declining a request for reasonable accommodation, the person with a disability must have the opportunity to make representations to an Accounting Officer or a similar such person.

*"Reasonable accommodation refers to necessary and appropriate modifications and adjustments."*

- > Making budgeting for reasonable accommodation expenses a normal part of doing business.
- > Putting effective monitoring and evaluation processes in place to ensure the implementation of reasonable accommodation measures with accountability for non-delivery.
- > Reporting on reasonable accommodation support as part of standard business management processes. Annual reports, for example, should include feedback about measures put in place.

In particular, all public and private sector institutions according to the Framework must:

- > Develop an application guideline with qualification criteria for reasonable accommodation support as an integral part of their standard operating procedures.
- > Keep an updated database of applications for reasonable accommodation support and their outcomes.
- > Put in place relevant and appropriate service level agreements with service providers rendering reasonable accommodation support services.
- > Provide professional assessments where necessary to determine and cater for the exact requirements of persons with disabilities.
- > Work in collaboration with organisations supporting persons with disabilities to assure effective service delivery, economic empowerment and employment opportunities for persons with disabilities.

## What is a Universal Design Access Plan?

In reference, the Framework alludes to Universal Design Access Plans (UDAP). The mandate for such plans stems from PEPUDA - Chapter 5, which provides for the drafting and implementation of 'equality plans'. Firstly, organisations must analyse their services and/or products and identify barriers to non-compliance with national standards. From there, they must design and implement an equality plan to address the areas of non-compliance, which must include reasonable accommodation measures. UDAPs will demonstrate progressive implementation of universally accessible services, including reasonable accommodation support to employees and customers or clients. Within the employment context, some of the possible topics for inclusion into a UDAP are how the employer will:

- > Address the needs of persons with different types of disabilities;
- > Achieve employment equity targets on disability and reasonable accommodation;
- > Procure, utilise, maintain, transfer and dispose of assistive devices;
- > Fairly recruit and select people with disabilities for employment;
- > Ensure non-discrimination in job profiles and specifications;
- > Provide disability sensitisation and awareness for its workforce;
- > Ensure training opportunities and equal career advancement for employees with disabilities; and
- > Fairly terminate employment in cases of incapacitation of disabled and non-disabled employees.

## What avenues are available to an aggrieved person with a disability?

Persons with disabilities have access to the National Consumer Commission, a relevant service Ombudsman, the CCMA in the context of an employment relationship, the South African Human Rights Commission and the Equality Court. Each is applicable according to the circumstance at hand, where a public or private entity denied a request to provide a reasonable accommodation measure or if a measure is inadequate for addressing the need or removing an identified barrier. Case law concerning physical access in the built environment demonstrates that the courts will protect persons with disabilities as so-called 'rights holders', including determining that the non-provision of reasonable accommodation constitutes unfair discrimination. Examples of these judgements will feature in later issues of TFM Magazine.

## In conclusion

The newly published Framework summarises various important principles aimed at securing an open, inclusive and accessible society for persons with disabilities by providing adequate and effective reasonable accommodation measures, which is laudable and necessary. It includes helpful information and guidance. However, whether it will bring about a change of heart and mind, thus increase reasonable accommodation measures, remains to be seen. It is conceivable that many organisations will see the drafting and implementation of UDAPs as yet another administrative duty placed on already burdened entities in a poor economic climate, thereby missing an opportunity to pursue and realise disability equity in a practical manner.



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Source of reference:

Notice 605 of 2021, Government Gazette 45328 of 15 October 2021. Promotion of Equality and Prevention of Unfair Discrimination Act, Section 25(4) - "All Ministers must implement measures within the available resources which are aimed at the achievement of equality in their areas of responsibility by (a) eliminating any form of unfair discrimination...; and (b) preparing and implementing equality plans in the prescribed manner..." and Section 26 - "It is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by - (a) adopting appropriate equality plans...; (b) enforcing and monitoring the enforcement of the equality plans; and (c) making regular reports to the relevant monitoring authorities..."