



27 July 2015

(Final Draft) Updated position statement on the Amendment Section 8 of the Employment Equity Act No 55 of 1998. (This Act has been updated in the Government Gazette 37871 dated July, 2014)

Introduction

We refer you to our previous position statements dated 22 September 2014 and 20 October 2014.

The various position statements acknowledge the following:

- That many Psychologists and businesses were caught by surprise in August 2014, with the promulgation of the Amendment (Section 8) of the EEA No 55 of 1998 and the HPCSA List of assessments acceptable for use in South Africa – also in view of the fact that there had not been communication about or consultation with stakeholders about the publication of this list.
- That these laws were probably passed by the Department of Labour with the intention of streamlining or clarifying the previous Section 8 of the EEA.
- That the Department of Labour has to rely on the effectiveness and efficiency of the HPCSA (Professional Board of Psychology's Psychometrics Committee) processes to ensure the effective and fair implementation of these laws.

ATP strongly subscribe to:

- The importance of using assessments according to ethical, scientific or any other principles of internationally accepted best practice
- The value of having assessments evaluated in terms of their quality, in line with international best practice
- The need to categorise assessments in terms of the accessibility to individuals with different levels of qualification

An Update

In General:

As of the last position statement in October 2014, there has been a great amount of activity around the test certification process and the issues surrounding the Employment Equity Act.

ATP meeting with the HPCSA (Psychometrics Committee (17 October 2014) :

On 17 October 2014, members of the ATP Executive Committee met with the Psychometrics Committee of the Professional Board for Psychology at Emperor's Palace in attempt to gain clarity on the questions posed in the previous position statement and to determine how we can work more closely with the Board around test certification. We also made a plea for a moratorium or amnesty period until such time as the Board has the capacity to certify tests in terms of the EEA. The Board acknowledged the contributions of members of ATP to the proposed document for the new test certification process, and indicated that there was a Stakeholder meeting planned for March 2015 to ensure collaboration with various stakeholders. They indicated that they did not have the power to institute a moratorium on the addition to the EEA, as that was under the jurisdiction of the Department of Labour.

In light of the outcomes of the discussion, the ATP Executive Committee obtained legal advice as to the way forward. At a General Meeting of ATP members, we decided to take a two-pronged approach to resolving the issues presented by the new EEA. Firstly, it remained important to work with the Board in whatever way possible to assist in getting in place the new certification process. Secondly, parallel to the collaborative process, a legal application was launched, requesting that point (d) on the EEA be put aside until such time as the new certification process is in place, and the Board has the capacity (in terms of systems, processes and staff) to run this process effectively.

On 23 December 2014, the sheriff served the ATP's application on the three respondents, namely the President, the Minister of Labour and the HPCSA. Legal process dictated that the next step would be to await answering affidavits from each respondent to determine whether the case would be opposed or unopposed.

HPCSA Board of Psychology Stakeholder Meeting

On 5 March 2015, the Board held a Stakeholder meeting regarding the test certification process. Many academic institutions, professional societies, test publishers, and government institutions were represented, but there were relatively very few representatives from industry. The meeting was extremely positive, and appeared to present many constructive outcomes for the future of test certification. The Board even indicated that they were contemplating granting an amnesty period for test certification to assist with the backlog, but that this would have to be approved by Council and the Department of Labour. Unfortunately, there has been no feedback to Stakeholders since this meeting more than four months ago (in which period, the Board has met twice).

ATP Legal Process:

In June, we finally received answering affidavits from the Minister of Labour (also representing the President) and the HPCSA. These both oppose the application, meaning that we now have to prepare an answering affidavit to these before possibly going to court. We were hoping that the amnesty period suggested by the Board at the Stakeholder meeting would perhaps allow us to set aside this costly venture, but there has been no further feedback on this matter and there appears to be no progress from the Board on that front.

Current Situation:

Before the promulgation of the new EEA in 2014, the HPCSA (Board of Psychology) only certified a few assessments in a 4 or 5 year period. They blame test publishers and distributors for this state of affairs. We do not believe that this statement is fair or accurate.

With the publication of the list of tests in the Government Gazette dated 15 August 2014, many clients and other stakeholders found themselves non-compliant overnight with regards to the addition of clause (d) in the EEA. In many cases, these clients and stakeholders were compliant with clauses (a), (b) and (c) of the EEA, but the addition of clause (d) caught many off guard, as there had been no communication or consultation with stakeholders prior to the official and legal publication of the lists of tests deemed acceptable for use by the HPCSA.

Most test distributors are willing to submit their assessments to the HPCSA, but the definitions (e.g., what is not a psychological test?) and the criteria for evaluation have not been clear and consistent, the qualifications of evaluators in terms of psychometric knowledge have not been transparent and the Board has been announcing a new test certification process for years. Therefore, many test publishers have held back and hesitated because it was not clear whether an assessment that was certified using the old process would have to be resubmitted (and be subject to a hefty fee of R10000 per instrument again) for the new process? The major problem throughout has been a serious lack of any communication, with no or little feedback - often for years - following assessments that were submitted for evaluation.

A number of tests included on the lists of tests provided by the HPCSA providing for Section (d) in the EEA would not necessarily answer to the (a), (b), or (c) requirements of the law in present-day South African context. This inconsistency has created misunderstanding, misperceptions, fear and anxiety amongst those very people who ethically use assessments in their services. Many reacted to the EEA and the HPCSA List of assessments by going back to old and even discontinued assessments just to make sure the tests used are "on the list" - as though proof of the reliability and validity (a), ability to use fairly (b) and possible bias (c) in tests – still required by the EEA – are now less important!

The scientific information made available by using tests that meet the requirements set by the EEA (clauses a to c) and in keeping with internationally accepted best practice, can be used as a springboard for personal development, career-related decisions and optimising performance of individuals, groups and organisations. The absence of such scientific-based information may contribute to ineffective decision making with regard to personal development opportunities, capacity building, and effective appointments, promotions and guidance of individuals towards optimising their development and performance.

For ATP members specifically, the new EEA, and the importance of ethically and professionally supporting our clients by means of making available scientific-based assessment information for decision making, created a new urgency for members of ATP to submit assessments for certification. Currently, more than 9 months after submission of various assessments, no feedback, no response and no updates have been received from the HPCSA (Board of Psychology) as to the status of these submissions, apart from one update obtained in person from a visit to the Board. We believe that this in itself again demonstrates clearly that the HPCSA (Board of Psychology) does not function effectively and cannot support the requirements of the EEA fairly to all who are required to comply with these laws.

The well-substantiated request we have made was for the HPCSA (Board of Psychology) to provide a moratorium to allow themselves some time to work with their members to put in place and effective, efficient and professional system supported by competent individuals in various support roles to ensure fairness in the process. Whereas this request was not granted when first presented, it has unfortunately led to it having to be presented within a legal framework to allow an objective consideration of evidence put presented in support of this request in a court of law.

Closing thoughts and appeal to regulating bodies:

In view of the positive role that assessments can potentially play, the concerns that ATP has raised with regards to the promulgation of these laws include the following:

- The importance of the HPCSA (Board of Psychology) fully understanding the impact of their inaction/actions on the South African public and industry and the work done by their members
- The expected role of the HPCSA (Board of Psychology) in working with (rather than against) their members and other stakeholders
- The need for the HPCSA (Board of Psychology) to provide clear definitions, effective and speedy evaluation of assessments and guarantees of respecting confidentiality and intellectual property
- The critical practical requirement for the HPCSA (Board of Psychology) to regularly, correctly and timeously update their list of assessments to reflect the current status – in ongoing recognition of the investments made by members and stakeholders
- The urgent need for the HPCSA (Board of Psychology) to employ and continuously improve capacity with regard to skilled, respected and acknowledged evaluators of the assessments submitted.
- The responsibility and sensitivity required of the HPCSA (Board of Psychology) to integrate South Africa's unique history and needs with international trends in terms of the use, research and application of assessments.

The above points are specifically made in light of very limited evidence before the promulgation of the Amendment (Section 8) of the EEA No 55 of 1998 and the HPCSA List of assessments acceptable for use in South Africa of the HPCSA (Board of Psychology) effectively, fairly, speedily and pro-actively providing systems and procedures to implement the requirements of test certification. With the additional pressure on their systems created by the new EEA, there is great concern as to whether they have the capacity (in terms of systems and staff) to support the requirements of these laws and that they will work collaboratively with their stakeholders rather than against them to effectively implement the new requirements.

To summarise, ATP in principle has no objection to the inclusion of Clause (d) of the EEA, nor to the objective that psychological tests be evaluated then certified before use. We happily support these. We do, however, strongly object to the lack of communication, definitions, and transition arrangements made in respect of implementation of the legislation. This is why we request time for the HPCSA to put a proper, effective, well-functioning system into place in order to proceed.