



***LEGAL COMPANION:
ASSESSMENT CENTRES AND THE
SOUTH AFRICAN LAW***

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The *Legal Companion* was written by a task team consisting of Sonette Lancaster and Sandra Schlebusch.

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- Wilma Botha – Consultant in private practice
- Anne Buckett – Precision ACS
- Stacy Isaacs – ABSA
- Kevin Distiller - Evalex
- Petrus Nel – ACSG committee member, UJ
- Anthony Wilson – Consultant in private practice



PREAMBLE

Ever since their introduction into the business environment during the 1950s, Assessment Centres have grown in respect of applications, supporting theory and empirical research. This is also the situation in South Africa, where Assessment Centres are widely used in various environments and several research studies have been conducted over the years. Assessment Centres are currently used for the purposes of selection and / or development in talent management and / or organisational development within organisations. Although several guidelines and codes are available to assist with the ethical design and implementation of Assessment Centres within these environments, there was a need for a guiding document dealing with the South African laws that impact ethical Assessment Centres. The *Legal Companion* addresses this need.

SECTION A – THE *LEGAL COMPANION* IN PERSPECTIVE

Positioning the *Legal Companion*

1. INTRODUCTION

An Assessment Centre practitioner (AC practitioner) follows a multi-faceted approach when assessing individuals for selection, diagnosis and / or development purposes.

This places the AC practitioner in a number of interlinking relationships, which may involve unique obligations. These obligations may arise from either the prevailing legislative framework within which the AC practitioner operates, or as a result of ethical and/or moral obligations that rest on the AC practitioner.

Regardless of the nature of these obligations, it is essential for responsible AC practitioners to comply with their legal obligations and ensure that their practice is conducted ethically and responsibly.

The *Legal Companion* accordingly aims to extrapolate the legal framework within which an ethical and responsible AC practice is operated, from the initial establishment of a practice to the delivery of a complete AC-related service to an AC client.

2. THE LEGAL COMPANION STRUCTURE

The applicable legislation is discussed in three sections. The first section positions ACs according to their definition and role-players. The second starts with a discussion of the legislation with a direct bearing on ACs from inception to evaluation and continues by identifying the stages of AC design and implementation, linking each stage to applicable legal provisions. The last section highlights the legislation applicable to the business of being an AC practitioner.

Legislation is discussed by indicating its purpose, highlighting the applicable content and explaining its implications for ACs.

3. HOW TO USE THE LEGAL COMPANION

This *Legal Companion* does not constitute legal advice and cannot possibly encapsulate every aspect and application of South African (or international) law. It can, however, serve as a guide to AC practitioners in terms of the legal frameworks within which the AC practice functions in South Africa. Responsible AC practitioners can therefore familiarise and align themselves with the salient aspects of the



legislation mentioned in the *Legal Companion* and obtain professional legal advice where and when required.

AC practitioners should be aware that when they practise internationally, they need to adhere to the legislative framework of the foreign country in which they conduct the AC and, in some cases, also comply with locally applicable international law. Before conducting ACs across borders, they therefore need to familiarise themselves with the legal requirements of the countries involved.

4. THE RESPONSIBILITY OF AC PRACTITIONERS

The responsibility for lawful conduct rests first and foremost on each AC practitioner. All AC practitioners are therefore responsible for familiarising themselves with the applicable legislation and ensuring compliance with legislation. *Ignorance does not equal innocence.*

5. LEGAL COMPANION REVIEW SCHEDULE

This *Legal Companion* is intended to be a living document that can be expanded on and amended, for example when new applicable legal fields are identified and laws are amended. To that end this document was intentionally designed to have a broad scope.

To maintain its relevance and responsiveness, this *Legal Companion* will be regularly reviewed and revised by the ACSG as needed. Interested parties are invited to forward inputs, comments and suggestions to the ACSG at any time.

6. DEFINITIONS

The following definitions relate to the *Legal Companion*.

1. **Access to own AC information** – the AC participant is provided with his or her own AC results
2. **AC client** – the person who requests the services of an AC provider, e.g. the hiring manager
3. **AC data management** – the complete set of activities intended to improve AC data quality, including data capturing, storage, retrieval, quality control and data security
4. **AC design** – the creation of all aspects comprising an AC (e.g. focal constructs, norms, simulation design, sequence of simulations and processes, and feedback)
5. **AC developer or designer** – the person who conducts relevant research and designs the AC accordingly
6. **AC focal constructs** – the focus areas (the behavioural constructs) of the assessment taking place during the AC. Focal constructs are the constructs that are being assessed, for example the dimensions, competencies, roles, tasks and strategies.
7. **AC implementation** – the roll-out of an AC within the targeted organisation or environment
8. **AC participant** – the individual participating in the AC with the purpose of being assessed by the assessors / observers for selection or developmental purposes
9. **AC practitioner** – the person acting in any of the following roles: AC provider; role-player; AC designer or developer; assessor / observer; AC administrator



10. **AC provider** – the person who promotes, offers or supplies AC products and services to AC clients
11. **AC staff** – includes assessors / observers; role-players; AC developers or designers; AC administrator(s); AC administrative staff; providers of feedback; data management staff
12. **AC stakeholders** – participants (those who are assessed during the AC), AC clients (who requested the AC for some reason) and AC practitioner (as explained above)
13. **AC standardisation** – consistently conducting the AC in the same way (timing, sequence, instructions, resources, conditions, scoring, feedback, etc.) over time
14. **Adverse impact** – generally the results of selection instrument(s) differ for different ethnic / cultural, gender and age groups
15. **Appropriate feedback** – sharing contextualised and relevant information about the AC with affected parties (e.g. the participant or the client). This may include, but is not limited to applicable AC results, implications of the results and recommended actions.
16. **Assessment Centre (AC)** – a *standardised* simulation-based assessment process during which one or more participants complete multiple assessment exercises and are observed by multiple assessors / observers who are competent in observing and evaluating individual participants' behaviour during the assessment exercises against a number of predetermined, job-related behavioural constructs / focal constructs.

17. **Assessment matrix** (sometimes referred to as a competency-simulation matrix) – a matrix indicating the link between the focal construct being assessed and the assessment instrument. In other words, it indicates during which instrument each focal construct is assessed.
18. **Assessor / Observer** – a person who observes, notes / records, classifies and evaluates the behaviour of AC participants across focal constructs such as competencies and tasks. By implication the term may include AC administrators.
19. **Competency** – a group of visible behaviours that are required to successfully perform a job and are usually linked to the strategic intent / goals of an organisation. The behaviours are verifiable and can be reliably and logically grouped together.
20. **De-identify / anonymise** – regarding personal information of a data subject, this means to delete any information that:
 - a. identifies the data subject;
 - b. can be used or manipulated by a reasonably foreseeable method to identify the data subject; or
 - c. can be linked by a reasonably foreseeable method to other information that identifies the data subject.
21. **Dimension** – an aspect or a feature required by the job incumbent to perform the target job
22. **Distributive fairness** – the perceived impartiality with which rewards and costs are shared by AC participants where equity exchange is based on merit (e.g. contribution and performance)

23. **Equal opportunity** – the right to be treated without discrimination on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth
24. **Equal treatment** – the belief that, with regard to their rights, all people are equal
25. **Equitable** – characterised by the fair, just and reasonable treatment of all citizens
26. **Evaluative material** – an evaluation or opinion prepared for the purpose of determining the suitability, eligibility, or qualifications of the person to whom the evaluation or opinion relates:
 - i. for employment or for appointment to office;
 - ii. for promotion in employment or office, or for continuance in employment or office;
 - iii. for removal from employment or office;
 - iv. for the awarding of a scholarship, award, bursary, honour or
 - v. similar benefit; or
 - vi. to decide whether any scholarship, award, bursary, honour, or similar benefit should be continued, modified, cancelled, or renewed.
27. **Impartiality/objectivity** – basing decisions on objective criteria, judging all participants fairly, without partiality, bias or external influence
28. **Interactional fairness** – impartiality in the interpersonal treatment of people when procedures are applied and outcomes are distributed
29. **Legal instrument** – a written **legal** document that records the formal execution of **legally** enforceable acts or agreements and secures their

associated **legal** rights, obligations and duties. Examples include certificates, deeds, bonds, contracts, wills, legislative acts, notarial acts and any law passed by a competent legislative body.

30. **Norm** (sometimes referred to as a benchmark) – a reference point against which things may be compared; something that is usual or standard.
31. **Plagiarism** – taking another person’s work and or ideas and claiming that it is the result of one’s own efforts (own skill, expertise, experience and labour)
32. **Procedural fairness** – acting with impartiality throughout the entire AC process
33. **Proper protection of intellectual property** – the degree of precaution a prudent person would take to ensure that the rights of the owner of the intellectual property are adhered to
34. **Psychological act** – ‘the determination of intellectual abilities, aptitude, interests, personality make-up or personality functioning ...’ (Health Professions Act 56 of 1974 (Notice R993, 2008))
35. **Psychological constructs** – intellectual abilities, aptitudes, interest, personality make-up or personality functioning (Health Professions Act 56 of 1974 (Notice R993, 2008)).
36. **Racial discrimination** – ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’ (https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/racial-discrimination_en).

37. **Reliability** – indicates whether the measure is dependable, stable and / or consistent over time
38. **Role-player** – a person who plays the part of a specific character during an interactive simulation in order to elicit competency-related behaviour from a participant
39. **Simulation** – an exercise simulating a typical situation that a job incumbent needs to effectively deal with. It elicits participant behaviours linked to focal constructs being assessed during the simulation. Participants' behaviour during the simulation must be visible and they must construct their own responses to the stimuli presented during the simulation.
40. **Skills** – the learned ability to perform specific tasks to achieve required results
41. **Validity** – an indication of whether the measure assesses the attribute / construct it is supposed to measure and whether decisions based on the measure will be correct
42. **Work-related behaviour constructs** – the kinds of behaviour shown by incumbents of the AC target job that are required for job success, as indicated by the job analysis

Positioning Assessment Centres

7. ACs DEFINED

An AC is a standardised assessment process during which one or more participants complete multiple behavioural simulation exercises and are observed by several assessors who are trained to observe and evaluate each AC participant against a

number of predetermined, job-related behavioural constructs. An AC may also include assessments such as psychometric tests, interviews and questionnaires (Schlebusch & Roodt, 2020). For a process to be labelled an AC, the following ten elements need to be present (Meiring & Buckett, 2016):

1. *Job-related behavioural focal constructs*

A systematic process of job analysis should be conducted to identify the competencies, attributes, characteristics, qualities, skills, abilities, knowledge and tasks that are required for success in the target job. These should form the focal constructs that the AC will be assessing.

2. *Clear link between the focal constructs and the assessment techniques*

An *assessment matrix* should be compiled to indicate during which assessment technique each focal construct will be evaluated.

3. *Multiple assessment techniques*

During the AC, each focal construct should be effectively evaluated by applying more than one assessment technique.

4. *Simulation exercises*

To be called an AC, a process should involve at least two simulations. A simulation is an exercise simulating a typical situation that the target job incumbent is expected to deal with effectively. The type of AC simulation is determined by the job analysis. When participating in a simulation, AC participants need to show overt *behaviour* (what they say and do) linked to the focal constructs being evaluated during the simulation. The AC participants also need to construct their own behavioural response to the stimuli provided during

the simulation and should not simply choose from a list of options presented to them.

5. *Multiple observers*

During the AC, each AC participant should be evaluated by more than one observer and the observer team should, as far as is practically possible, be demographically diverse in respect of gender, race and age.

6. *Competent assessors / observers*

Only individuals who have been trained and declared competent for a specific AC should function as observers. The same applies to the simulation role-players. Observers and role-players should undergo regular refresher training on their specific ACs.

7. *Behaviour observation and noting / recording*

AC observers must use a systematic procedure to accurately capture AC participant behaviour during various simulations. This might entail capturing AC participant comments verbatim and taking detailed notes (the behavioural approach) or using behavioural checklists.

8. *Behaviour classification and evaluation*

Observers need to classify the observed and recorded AC participant behaviour under the simulation's specific focal constructs on the rating form structured specifically for that simulation. Once the behaviour has been classified, a rating according to the applicable rating scale and norm is attached to the AC participant behaviour.

9. Data integration

The classified AC participant behaviour must be integrated by the team of observers in order to allocate an overall evaluation per focal construct (dimension / competency / role / task) for each AC participant. This can be done during a consensus discussion between the observers and / or a statistical integration process.

10. Standardisation

All AC participants must have the same opportunity to demonstrate behaviour related to the AC's focal construct. To achieve this, all AC procedures must be controlled and administered in the same way. This standardisation relates to the instructions for the exercises, time limits, exercise materials, conditions (e.g. the facilities used), role-player behaviour, the number of AC participants in group exercises, questions asked by observers and role-players during simulations, the sequence in which exercises are administered and the scoring procedures.

An AC can be conducted for various purposes, including selection (called an Assessment Centre (AC)), the diagnosing of areas of strength and development to inform individual personal development plans (IPDPs) and organisational interventions (called a Diagnostic Centre (DC)), and development (called a Development Assessment Centre (DAC)).

In this document the abbreviation AC will be used to refer to an assessment centre used for any of the possible purposes.



8. Various AC stakeholders

The many AC stakeholders include organisational line managers, the AC participants' subordinates, human resource practitioners and other service providers, such as psychometric test distributors (Code of Ethics for ACs in SA, 2018).

However, we will focus on the following stakeholders:

- AC participants who attend the AC to be evaluated;
- AC clients who requested the AC for whatever reason; and
- AC practitioners who design, implement and manage the various types of ACs, the AC observers and AC simulation role-players.

9. ASSESSMENT CENTRE GUIDING DOCUMENTS

The ethical implementation of ACs is guided by various professional guidelines. The guidelines applicable to South Africa are:

- *The Best Practice Guidelines for the Use of Assessment Centre Method in South Africa* (5th ed.), compiled by a South African Assessment Centre Study Group (ACSG) Task Team (Meiring & Buckett, 2016);
- *The Code of Ethics for Assessment Centres in South Africa*, compiled by an ACSG Task Team (SA ACSG, 2018); and
- *Public Guidelines for Assessment Center Operations: Guidelines and Ethical Considerations for Assessment Center Operations*, compiled by an International Task Force (2015).

Although not necessarily part thereof, the guidelines and code produced by the various task teams form an important basis for AC practitioners' compliance with the South African legal framework. For example, compliance with the provisions of the



guidelines and code would go a long way towards ensuring that AC practitioners also comply with the law in general.

In addition, there are guidelines that direct psychometric and other tests, which also have applications for ACs. These are:

- International Test Commission Guidelines for Test Use, compiled by the International Test Commission, 2013
- Guidelines on the Security of Tests, Examinations and Other Assessments, compiled by the International Test Commission, 2006
- Guidelines on Computer-based and Internet-delivered Testing, compiled by the International Test Commission
- General Data Protection Regulation (GDPR), 2018

These guidelines are subordinate to South African legislation and should therefore be interpreted within the context of the South African legislative framework.

10. DO PSYCHOLOGISTS CONDUCT ACs?

According to the Health Professions Act 56 of 1974 (Notice R993, 2008), the word 'psychology' refers to the profession of a person registered under the Act as a psychologist, psychometrist or other related profession. In the Act's Scope of Profession, the:

evaluation of behaviour, or mental processes, or personality adjustments of individuals or of groups of persons, through the use or interpretation of any psychological test, questionnaire, instrument, apparatus, device or similar method for the determination of intellectual abilities, aptitude, interests, personality make-up or personality functioning ...

are considered to be acts pertaining to the profession of psychology. Any psychological test, questionnaire, instrument, apparatus, device or similar method that taps into *psychological constructs* must therefore be used, interpreted and controlled by psychologists.

In *Best practice guidelines for the use of assessment centre method in South Africa* the following is stated in this regard (Meiring & Buckett, 2016:10):

The AC is not a test but rather a method of assessment that focuses on work-related behavioural observation and consists of a number of steps completed in sequential way. As such, it is not a psychological test. ACs use competencies, skills and work-related behavioural constructs, rather than psychological constructs, that emanate from the job analysis and the study of work-related constructs. These work-related tasks and behaviours form the foundation of the AC method.

Therefore, the AC method is not considered a purely psychological test.

However, if psychological constructs are measured as part of the AC by means of, for example, personality assessment, then the psychometric test used to measure personality must conform to the requirement for certification with the HPCSA. In these instances, the use of these assessments is reserved for psychologists and the HPCSA Scope of Practice criteria apply. According to the Health Professions Act (Act No. 56 of 1974) only registered psychologists are permitted to perform psychological acts which, in relation to evaluation, testing, and assessment, are defined in and elaborated on in Section 37 (2) (a), (b), (c), (d), and (e). These psychological acts relate to psychometric measuring devices, tests, questionnaires, techniques or instruments that assess intellectual or cognitive ability or functioning, aptitude, interest, personality make-up or personality functioning.

An AC that focuses solely on overt behaviour linked to competencies and tasks can therefore be administered by AC practitioners who are not registered as psychologists. However, such AC practitioners must possess the appropriate competence (Meiring & Buckett, 2016).

SYNTHESIS

The *Legal Companion* was compiled to assist AC practitioners to deliver ethical and legally compliant ACs. Furthermore, it aims to help AC practitioners to operate responsible AC practices. The document is structured in such a way as to first describe an AC and the AC role-players. This is followed by a discussion of legislation that directly impact ACs and an indication of the implications for AC design and delivery. Thirdly, legislation applicable to the business of being an AC practitioner is highlighted.

The *Legal Companion* is not intended to provide legal advice, but serves as a guideline for use by AC practitioners in terms of the legal frameworks within which the AC practice functions in South Africa. It is a living document and to maintain its relevance and responsiveness, it should be regularly reviewed and revised by the ACSG as needed. The *Legal Companion* should be read along with other professional guidelines and codes of ethics, specifically *The Best Practice Guidelines for the Use of Assessment Centre Method in South Africa* (5th ed.), compiled by a SA Assessment Centre Study Group (ACSG) Task Team (Meiring & Buckett, 2016), and the Code of Ethics for Assessment Centres in South Africa, compiled by an ACSG Task Team (SA ACSG, 2018).

SECTION B – ASSESSMENT CENTRES: FROM INCEPTION TO EVALUATION AND VALIDATION

11. INTRODUCTION

Should an AC participant institute legal action against an AC client, the latter will probably require that the practitioner provide proof of adherence to legal requirements.

For an AC to adhere to South African legal requirements, the AC practitioner needs to show the following for the specific AC:

- Reliability and validity for the specific purpose, including the target population
- No unfair discrimination against any AC participant or group of AC participants
- Delivery on claims and promises made to the AC client.

11.1 THE ADDIE AND AC DESIGN MODELS

To be able to show adherence to the above, the AC has to be conceived, designed and implemented in a systematic way. This can be achieved by implementing the four stages in the development of the model proposed by authors such as Mager and Pipe (1997), and Michalek and Yager (1997), as cited in Schlebusch & Roodt, 2020. The four stages are depicted in Figure 1 below.

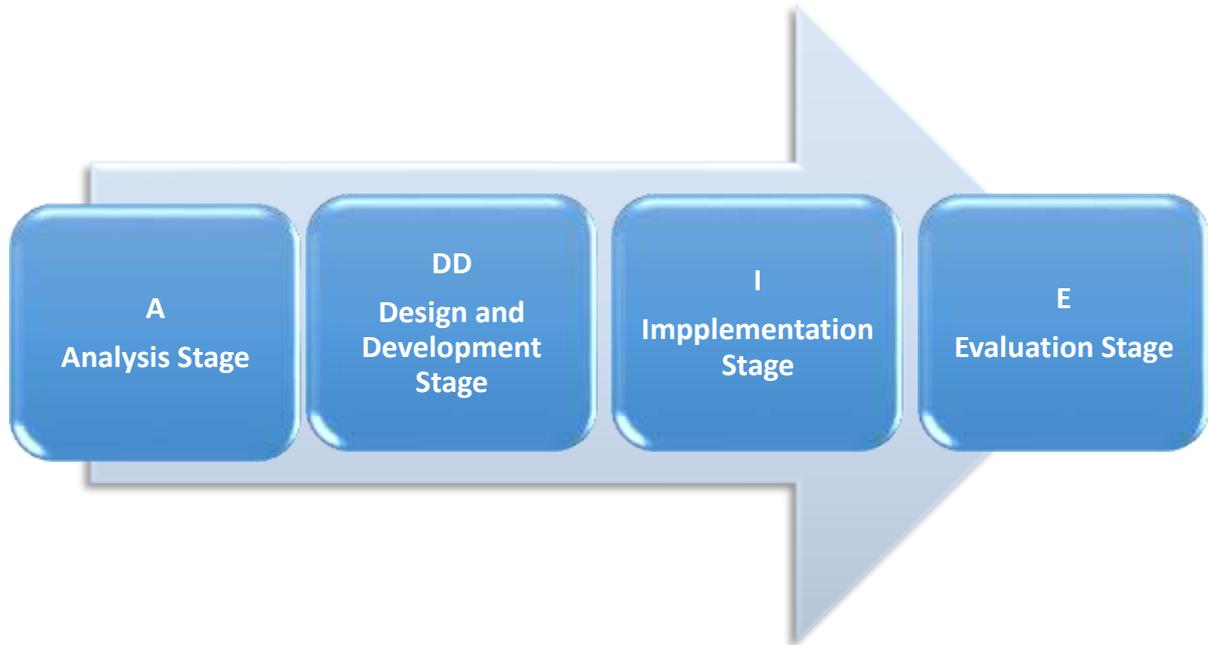


Figure 1: The ADDIE model

Although the stages in the ADDIE model provide a systematic guideline to be followed when conceptualising and developing an AC, it is not sufficiently comprehensive to guide the AC designer in designing and implementing an AC that adheres to the legal requirements indicated above. The model is therefore further expanded to include validation in the last stage, and each stage is divided into steps. The resulting 12-step AC design model (Schlebusch & Roodt, 2020) is depicted in Figure 2.

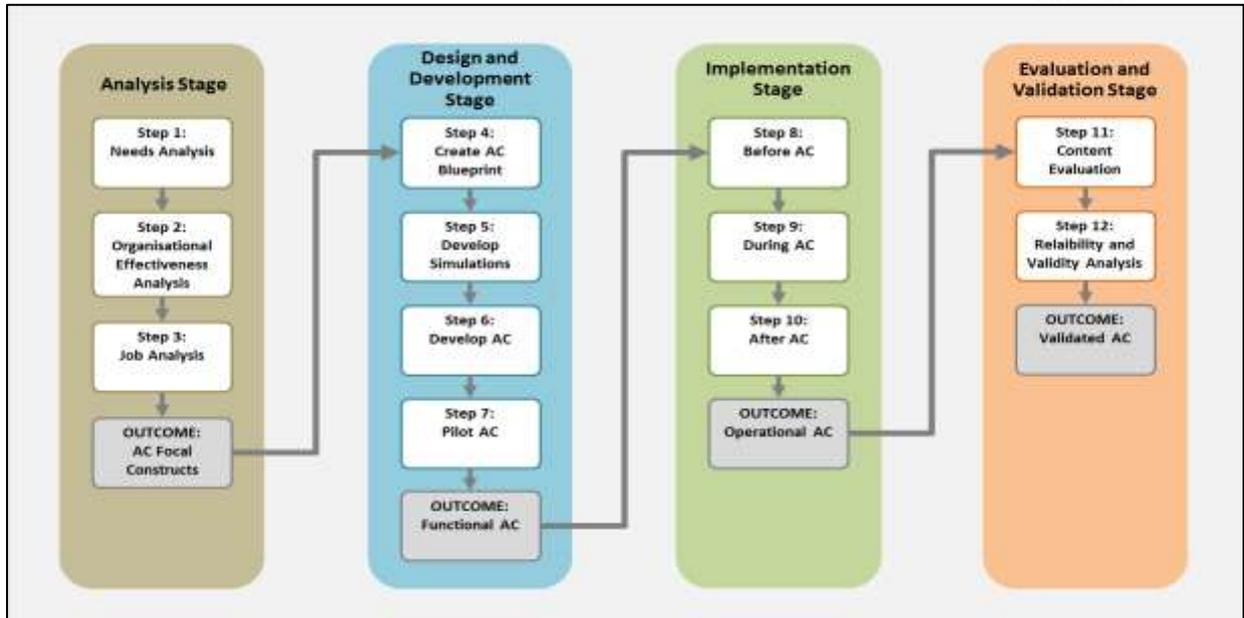


Figure 2: The AC design model

Each of the 12 steps has specific outcomes, culminating in the outcomes of each stage. The outcome of each stage is depicted in Figure 3.

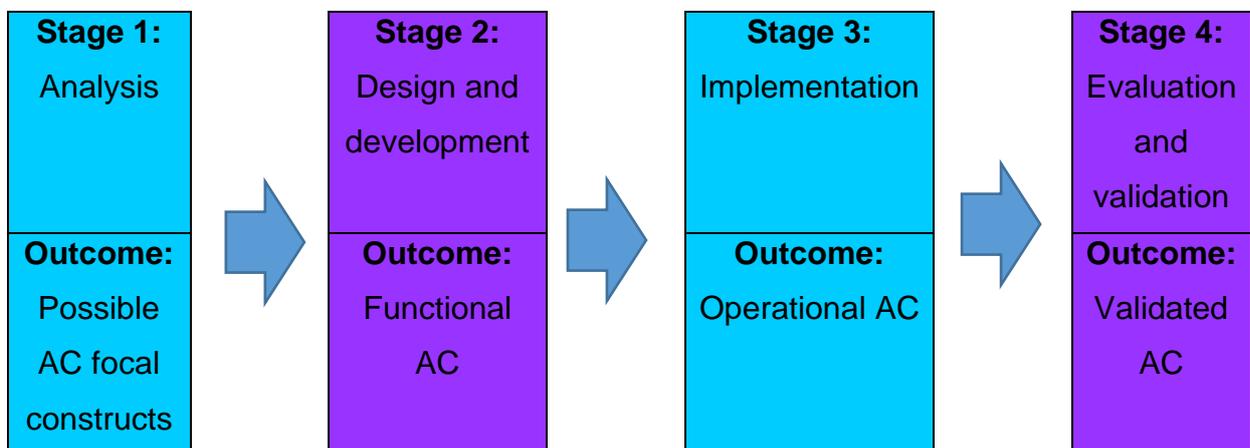


Figure 3: Outcome of each stage in the AC design model

12. DESCRIPTION OF EACH STAGE IN THE AC DESIGN MODEL

12.1 STAGE 1: AC ANALYSIS STAGE

The analysis stage serves to develop an understanding of the client organisation and its dynamics and challenges, as well as a clear understanding of what the AC target job entails. Other possible assessment techniques and instruments are compared with the AC method to determine its suitability, and a business case that clearly indicates the organisational need that will be addressed by the proposed AC is compiled. During this stage, the proposed AC's competencies, tasks and simulations (or other possible focal constructs) are identified by doing a job analysis. This stage could provide possible focal constructs and other information that can be used to design the proposed AC.

12.2 STAGE 2: AC DESIGN AND DEVELOPMENT STAGE

Stage 2 is about translating the information obtained during the analysis stage into simulations and a functional AC. This is done firstly by compiling an AC blueprint that serves as a map to guide the design and development of the proposed AC. Based on this blueprint, simulations are developed and tested to ensure their effectiveness before they are sequenced into an AC and piloted to produce a functional AC, ready for implementation.

12.3 STAGE 3: AC IMPLEMENTATION STAGE

During the AC implementation stage, the functional AC is implemented in the AC client organisation. A pool of competent assessors / observers and role-players is established and the AC is conducted according to the AC administration manual. The outcome of this stage is an operational AC, that is, an AC that has been implemented in the client organisation.

12.4 STAGE 4: AC EVALUATION AND VALIDATION STAGE

The purpose of the AC evaluation and validation stage is to determine the reliability and validity of the AC, as well as whether it has delivered the envisioned value to the AC client organisation. The results of this stage will indicate whether an AC adhered to the requirements as stated in the EEA, whether any unfair discrimination took place and whether the AC delivered on the promises that the AC practitioner made to the AC client. The outcome of this stage is a validated AC.

13. APPLICABLE LEGISLATION

The four stages in the AC Design model, as depicted in the adapted ADDIE model (Figure 4) will be used to discuss the applicable South African legislation. In some cases, legislation or specific acts may be contradictory. Generally, acts that were formulated specifically for constitutional purposes, such as the Labour Relations Act or the Protection of Personal Information Act, are higher in respect of hierarchy than those designed to complement them. The opening sections of an act will guide the reader with regard to which act will prevail. All juristic or private citizens have to comply with national, provincial and municipal legislation, except where the application of an act has been specifically excluded in respect of certain individuals or juristic entities. However, where ethical codes and guidelines determine more stringent requirements, those must be complied with.

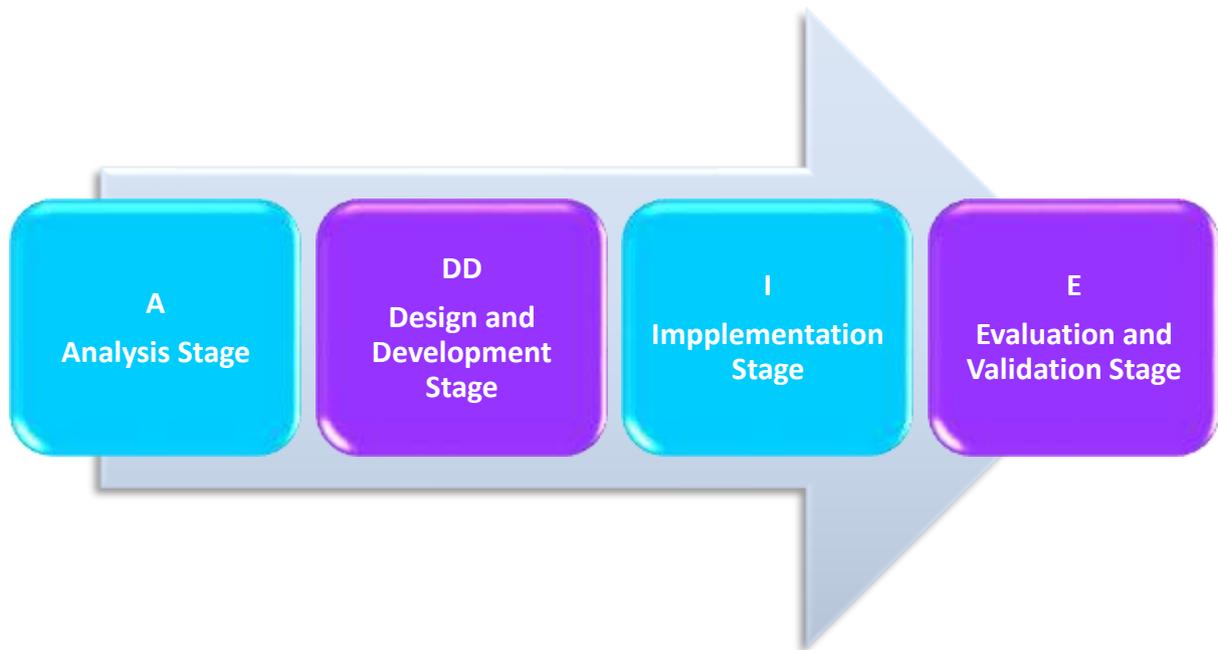


Figure 4: Adapted ADDIE model

The following is a summary of the applicable legislation per stage:

Table 1: Summary of applicable South African legislation per stage

Stage	Applicable South African legislation
Stage 1: Analysis	<ul style="list-style-type: none"> • Constitution of South Africa, 1996 • Employment Equity Act (EEA), 55 of 1998 • Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
Stage 2: Design and Development	<ul style="list-style-type: none"> • Constitution of South Africa, 1996 • Employment Equity Act (EEA), 55 of 1998 • Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 • Copyright Act, 98 of 1979
Stage 3: Implementation	<ul style="list-style-type: none"> • Constitution of South Africa, 1996 • Employment Equity Act (EEA), 55 of 1998 • Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 • Protection of Personal Information Act (POPI), 4 of 2013

Stage	Applicable South African legislation
	<ul style="list-style-type: none"> • Promotion of Access to Information Act (PAIA), 2 of 2000 • Electronic Communications and Transactions Act (ECTA), 25 of 2002
Stage 4: Evaluation and Validation Stage	<ul style="list-style-type: none"> • Constitution of South Africa, 1996 • Employment Equity Act, 55 of 1998 • Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 • Protection of Personal Information Act (PoPI), 4 of 2013 • Consumer Protection Act (CPA), 68 of 2008 • Contract Law

Whether an AC is off-the-shelf or custom designed, a multitude of legislative principles come into play. Since ACs are mostly used in the employment context, the provisions of the Constitution of the Republic of South Africa, 1996 and the provisions of the acts referred to below, should be considered at all times.

While the legal instruments may not all be applicable to all AC practitioners all the time, AC practitioners must be aware of all the legal instruments that may impact on their practice and of what is required for compliance therewith. Failure to do so would amount to conducting a business fraught with risk and irresponsible practices.

13.1 Constitution of South Africa, 1996

Since the Constitution is the supreme law of the Republic, the obligations imposed by it must be fulfilled and any law or conduct inconsistent with it is invalid.

13.1.1 Applicable content

Several sections in the Constitution can be applicable to the use of ACs and AC providers are advised to always consider the following sections in particular:

Table 2: Applicable sections of the SA Constitution

Section	Content
Section 6	Respect all official languages (Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu) and promote their use.
Section 7	The Bill of Rights enshrines the democratic values of human dignity, equality and freedom.
Section 8	The Bill of Rights binds every natural and juristic person to the extent that rights and duties therein may be applicable.
Section 9	Every person is equal before the law and should share in the enjoyment of full and equal rights. This section also prohibits direct or indirect discrimination by any person against another on certain prohibited grounds (including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth).
Section 15	Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
Section 23	Everyone has the right to fair labour practices.

13.1.2 Implications for ACs

The abovementioned rights are in most cases expanded on in other legislative instruments. However, the acts of every citizen, including AC practitioners and the juristic entities they operate and/or work for are bound by the overarching rights in the Constitution and should recognise and promote these rights. These rights should therefore also be promoted and adhered to with respect to all AC participants, whether they are the AC client's current or potential employees, or current or potential beneficiaries.

Some of the following legislative instruments that have been enacted in South Africa give practical force and effect to the rights that are listed above and may directly or indirectly apply to the practice of an AC practitioner.

The Constitution of South Africa impacts the endeavours of all AC stakeholders during all four stages of the adapted ADDIE model, depicted in colour in Figure 5.

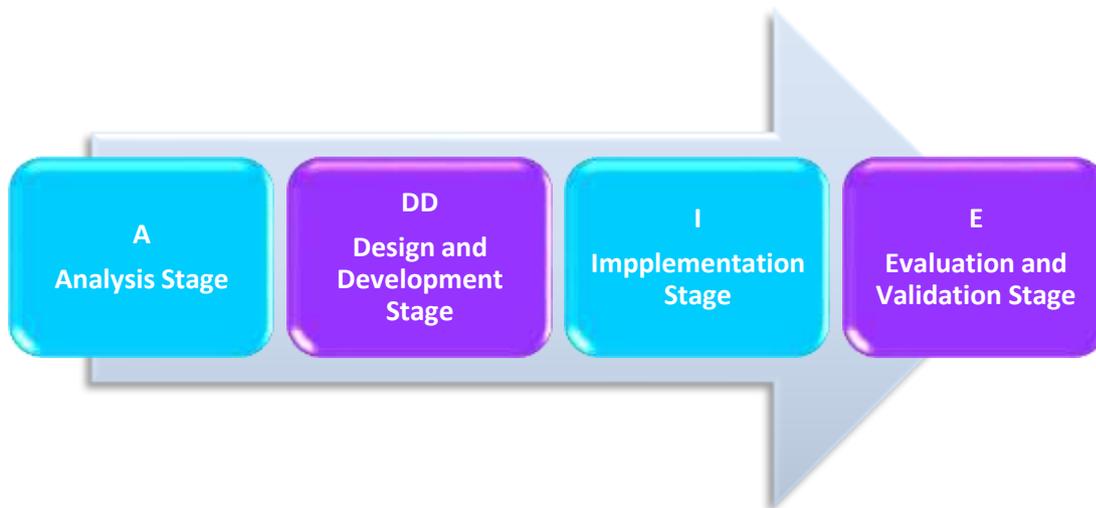


Figure 5: Adapted ADDIE stages impacted by the Constitution of South Africa

13.2 Employment Equity Act (EEA), 55 of 1998

The purpose of this Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment by eliminating unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups to ensure their equitable representation in all occupational categories and levels in the workforce.

13.2.1 Applicable content

Table 3: Applicable content of the EEA

Section	Content
Section 5	Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
Section 6	No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary grounds. It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
Section 8	Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used <ul style="list-style-type: none"> (a) has been scientifically shown to be valid and reliable; (b) can be applied fairly to all employees; and (c) is not biased against any employee or group.
Section 9	For purposes of sections 6 and 8, 'employee' includes an applicant for employment.
Section 11	Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.
Section 59	Any person who discloses any confidential information acquired in the performance of a function in terms of this Act commits an

offence. A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R30 000,00.

In addition, specific sections of the Act apply to specific stages in the AC design model. It is evident that this Act in its totality will impact the way in which responsible AC practitioners conduct ACs.

13.2.2 Implications for ACs

This section clearly places the burden of proof on the employer. When the employer (AC client) is challenged on account of unfair discrimination after using an AC, the AC client will surely involve the AC practitioner in the process of showing that no unfair discrimination took place.

The unavoidable consequence of this Act is that AC practitioners will have to start gathering and collating research evidence on their AC's focal constructs and, where possible, on related performance or outcomes measures. The AC practitioner will also have to ensure that job profiles and criteria for appointment, development, placement, etc. relate strictly to the inherent requirements of the AC's target job.

AC practitioners should be able to prove that they conduct their ACs in an unbiased and fair manner so that no person or group can accuse the AC client and / or practitioner of any procedural injustice or unfair discrimination. ACs have to be designed and executed in a manner that will enable and promote validation research on ACs.

Section 8 of the Act should always be complied with if the AC to be used in the workplace is to be seen as amounting to the lawful testing of an employee in the work environment.

Given the stipulations of the Employment Equity Act, the need for standardisation of ACs becomes important in order to ensure that the AC, the taking thereof or the results are equally applied to all AC participants. As also posited above, the provisions of the Employment Equity Act echo the values of fairness and equal treatment of all citizens entrenched in the Constitution. This has a direct impact on ACs which, like any other test, by their very nature discriminate against AC participants in order to identify the individuals who are most and least likely to succeed. AC practitioners should therefore be particularly careful to comply with the dictates of all relevant legal instruments.

Whether an AC and its application comply with the requirements of this Act is a question of law and fact and must be determined based on the scientific data available regarding the context of the job requirements and the prevailing legislation.

The EEA impacts the endeavours of all AC stakeholders during all four stages of the adapted ADDIE model, as depicted by the stages represented in colour in Figure 6.

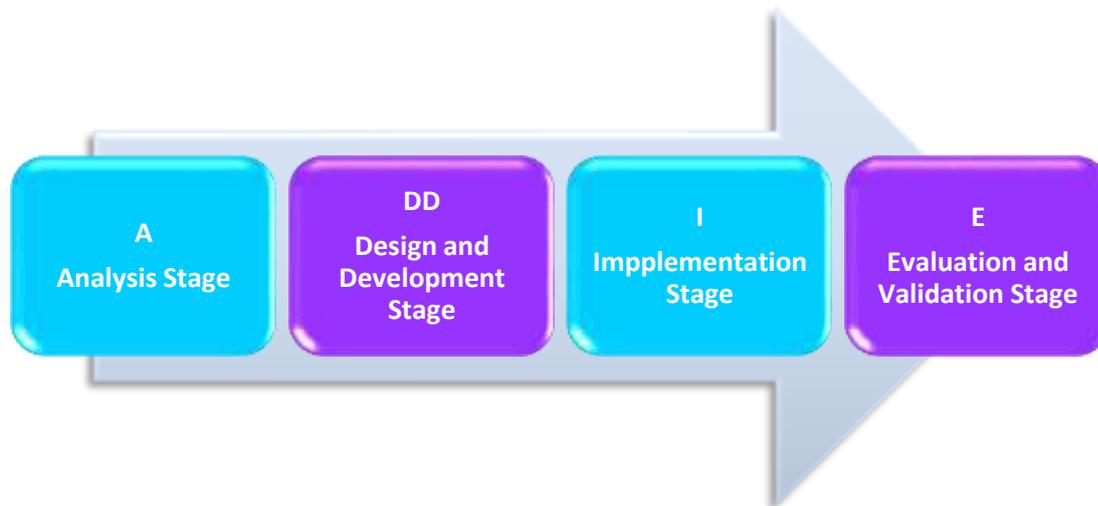


Figure 6: Adapted ADDIE stages impacted by the EEA

13.3 Promotion of Equality and Prevention of Unfair Discrimination (PEPUD) Act, 4 of 2000

This Act endeavours to facilitate the transition to a democratic society that is united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

13.3.1 Applicable content

Table 4: Applicable content of the PEPUD

Section	Content
Section 7	Subject to section 6, no person may unfairly discriminate against any person on the basis of race, including engagement in any activity that is intended to promote, or that has the effect of promoting exclusivity based on race and/or the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate, but is actually aimed at maintaining exclusive control by a particular race group.
Section 8	Subject to section 6, no person may unfairly discriminate against any person on the basis of gender. This includes systemic inequality of access to opportunities by women as a result of the sexual division of labour.
Section 13	If a complainant makes out a prima facie case of discrimination, the respondent must, based on the facts before the court, prove that the discrimination did not take place as alleged, or that the conduct was not based on one or more of the prohibited grounds. If discrimination did take place it is presumed to have been unfair, unless the respondent can prove otherwise.

Schedule:	Labour and employment
Illustrative list of unfair practices in certain sectors (Section 29)	<ul style="list-style-type: none"> • Creating artificial barriers to equal access to employment opportunities by using certain recruitment and selection procedures • Applying human resource utilisation, development, promotion and retention practices that unfairly discriminate against persons from any group

13.3.2 Implications for ACs

Under this Act, the burden of proof rests on the respondent(s) (the AC client and / or practitioner). In the case of alleged discrimination, the respondent must show that the discrimination was in fact fair and was not based on any of the *prohibited grounds*. This means that (a) any job analysis is done with due regard to measures preventing discrimination on any prohibited basis; (b) as a preventative measure, the AC practitioner must ensure that all employment decisions based on AC outcomes are made on the basis of valid evidence (i.e., can be substantiated by providing appropriate data); and (c) in the case of a potential discrimination claim, AC clients and / or practitioners must be able to defend themselves in court and must be able to provide valid evidence disproving discrimination. These two points emphasise the need for keeping sound assessment records (Roodt, 2020).

The PEPUD impacts the endeavours of all AC stakeholders during all four stages of the adapted ADDIE model, as depicted by the stages represented in colour in Figure 7.

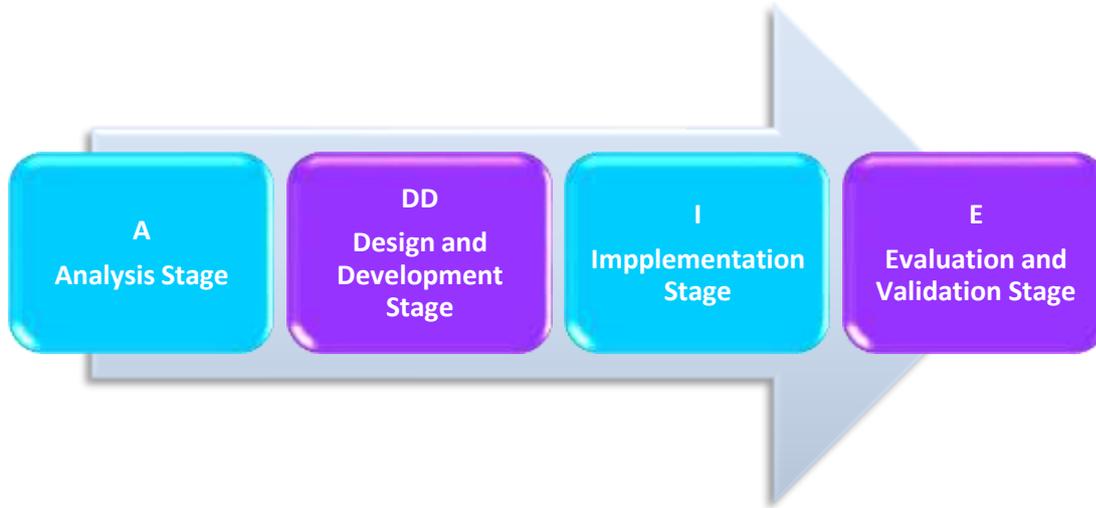


Figure 7: Adapted ADDIE stages impacted by the PEPUD

13.4 Copyright Act, 98 of 1978 and intellectual property

Intellectual property rights (IPRs) apply to things that are intangible. They protect innovations and reward innovative activity. The agreement on Trade-Related Aspects of Property Rights (TRIPS) is an international legal agreement between all the member nations of the World Trade Organization (WTO) and is the most over-arching instrument on the regulation and protection of all types of intellectual property. The agreement sets minimum standards with which all the countries signatory to the WTO must comply. As a member of the WTO, South Africa must comply with all aspects of this agreement. Intellectual property rights (IPR) enable the private appropriation of economically useful knowledge and thus are commonly viewed as stimuli for invention and innovation. IPRs exist in various forms and serve to protect different aspects of knowledge. The most prevalent forms of IPRs include patents, trademarks, copyrights, trade secrets, utility models, designs and plant breeders' rights.

13.4.1 Purpose of the Copyright Act

- To regulate copyright
- To provide for matters incidental thereto

13.4.2 Applicable content

Table 5: Applicable content of the Copyright Act

Section	Content
Section 2	<p>Original literary works are eligible for copyright, but shall not be eligible unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.</p> <p>A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.</p>
Section 6	<p>Copyright in a literary work vests the exclusive right to do or to authorise the doing of any of the following acts in the Republic:</p> <ul style="list-style-type: none"> • Reproducing the work in any manner or form; • publishing the work if it was unpublished; • performing the work in public; • broadcasting the work; • making an adaptation of the work; • doing, in relation to an adaptation of the work, any of the acts specified above.
Section 12	<p>Copyright shall not be infringed by any fair dealing with a literary work for the purposes of research or private study by, or the personal or private use of, the person using the work for</p>

the purposes of criticism or review of that work or of another work, provided that the source shall be mentioned, as well as the name of the author, if it appears on the work.

The copyright in a literary work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.

The copyright on a literary work that is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

The copyright in a literary work shall not be infringed by using such work, to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.

Section 21

Subject to the provisions of this section, the ownership of any copyright conferred by section 3 or 4 on any work shall vest in the author or, in the case of a work of joint authorship, in the co-authors of the work.

Where a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work by virtue of section 3 or 4, subject to any agreement excluding the operation thereof and subject to the provisions of section 20.

Section 23

Copyright shall be infringed by any person not being the owner of the copyright who, without the licence of such owner, does or causes any other person to do, in the Republic, any act which the owner has the exclusive right to do or to authorise.

Without derogating from the generality of subsection (1), copyright shall be infringed by any person who, without the licence of the owner of the copyright and at a time when copyright subsists in a work —

- imports an article into the Republic for a purpose other than for his private and domestic use;
- sells, lets, or by way of trade offers or exposes for sale or hire in the Republic any article; or
- distributes in the Republic any article for the purposes of trade, or for any other purpose, to such an extent that the owner of the copyright in question is prejudicially affected.

13.4.3 AC application

Insofar as an AC designer uses his own intellectual muscle to collate or create the necessary assessments to predict performance against specified job requirements or profiles, ownership or copyright may very well exist in these designs if they are unique and justify protection.

For copyright to subsist in a work, it must be original. This does not necessarily mean that it must be an entirely novel or unique invention or design, but it must be a work product of that person's own skill, expertise, experience and labour and not a copy of previous work. An idea or information cannot be subject to copyright unless that idea or information is expressed in writing. A combination or compilation of ideas or information can also be subject to protection. This may mean that a particular simulation or AC design, or a compilation of assessments to form a particular AC that may be repeatedly applied in similar circumstances, may be subject to protection under the Copyright Act or the common law. It is the process and manner in which the AC is put together and the process in which it is compiled to meet a specific client requirement that is subject to copyright and not necessarily the 'tools' used therein, as these 'tools' may also be subject to copyright individually. Ideally, when the tests and materials of others are used, they should be acknowledged.

Contrary to popular belief, a copyright does not have to be registered to enjoy protection against infringement or unlicensed use. Copyright infringement means using or copying the work of another person, or any form or part thereof.

Plagiarism is a serious form of copyright infringement that can lead to damages, claims and allegations of copyright infringement. This may result not only in legal repercussions, but may also cause serious reputational damage that cannot be remedied at a later stage.

AC practitioners should be mindful of this not only when designing their own simulations and ACs, but also when using the work of others in compiling ACs (for example, when using a specific sequence of assessments and other activities during an AC; using specific assessment instruments to assess specific focal constructs; and using simulation content, concepts and ideas). In certain cases, and specifically for research purposes, AC practitioners also collect data of AC participants. Such research can exist in any form, but in all cases compliance with copyright and intellectual property laws must be ensured and written informed consent must be obtained from the AC participants and AC client prior to the research being conducted.

The copyright act impacts the endeavours of all AC stakeholders during two of the four stages of the adapted ADDIE model, as depicted by the stages represented in colour in Figure 8.

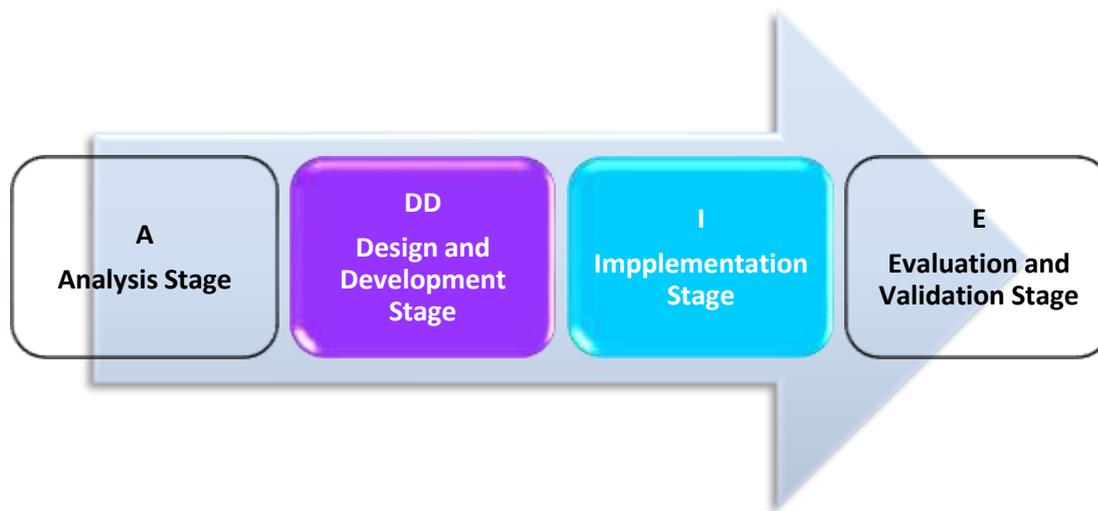


Figure 8: Adapted ADDIE stages impacted by the Copyright Act

13.5 Protection of Personal Information Act (POPI), 4 of 2013

The Preamble to the Protection of Personal Information Act 4 of 2013 states that it stems from Section 14 of the Constitution, which provides that everyone has the right to privacy, including the right to protection against the unlawful collection, retention, dissemination and use of personal information. In line with international standards, the Act aims to regulate the manner in which personal information may be processed by establishing conditions that prescribe the minimum threshold requirements for the lawful processing of personal information.

13.5.1 Applicable content

Table 6: Applicable content of the POPI Act

Section	Content
<p>Section 1 – Definition</p>	<p>'personal information' means information relating to an identifiable, living, natural person and, where applicable, an identifiable existing juristic person, including, but not limited to:</p> <ul style="list-style-type: none"> • information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; • information relating to the education or the medical, financial, criminal or employment history of the person; • any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person; • the biometric information of the person; • the personal opinions, views or preferences of the person; • correspondence sent by the person that is implicitly or explicitly of a private or confidential nature, or further correspondence that would reveal the contents of the original correspondence; • the views or opinions of another individual about the person; and • the name of the person if it appears with other personal information relating to the person or if the disclosure of

the name itself would reveal information about the person.

Section 4

The conditions for the lawful processing of personal information by or for a responsible party are the following:

- 'Accountability', as referred to in section 8
- 'Processing limitation', as referred to in sections 9 to 12
- 'Purpose specification', as referred to in sections 13 and 14
- 'Further processing limitation', as referred to in section 15
- 'Information quality', as referred to in section 16
- 'Openness', as referred to in sections 17 and 18
- 'Security safeguards', as referred to in sections 19 to 22
- 'Data subject participation', as referred to in sections 23 to 25.

Section 5

A data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information, including the right:

- to be notified that personal information about him, her or it is being collected as provided for in terms of section 18; or his, her or its personal information has been accessed or acquired by an unauthorised person, as provided for in terms of section 22;
- to establish whether a responsible party holds personal information of that data subject and to request access to his, her or its personal information as provided for in terms of section 23;

- to request, where necessary, the correction, destruction or deletion of his, her or its personal information as provided for in terms of section 24;
- to object, on reasonable grounds relating to his, her or its particular situation, to the processing of his, her or its personal information as provided for in terms of section 11 (3) (a);
- not to be subject, under certain circumstances, to a decision which is based solely on the basis of the automated processing of his, her or its personal information intended to provide a profile of such person as provided for in terms of section 71; and
- to institute civil proceedings regarding the alleged interference with the protection of his, her or its personal information as provided for in section 99.

Section 8 The responsible party must ensure that the conditions set out in this chapter, and all the measures that give effect to such conditions, are complied with at the time of the determination of the purpose and means of the processing and during the processing itself.

Section 9 Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject.

Section 10 Personal information may be processed only if, given the purpose for which it is processed, it is adequate, relevant and not excessive.

Section 11 Personal information may be processed only if:

- the data subject consents to the processing;

- processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- processing complies with an obligation imposed by law on the responsible party;
- processing protects a legitimate interest of the data subject;
- processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

The responsible party bears the burden of proof for the data subject's consent as referred to in subsection (1) (a).

The data subject or competent person may withdraw his, her or its consent at any time, provided that the lawfulness of the processing of personal information before such withdrawal or the processing of personal information in terms of subsection will not be affected.

A data subject may at any time object to the processing of personal information in the prescribed manner, on reasonable grounds relating to his, her or its particular situation, unless legislation provides for such processing.

If a data subject has objected to the processing of personal information the responsible party may no longer process the personal information.

Section 12

Personal information must be collected directly from the data subject, except if:

-
- the information is contained in or derived from a public record or has deliberately been made public by the data subject;
 - the data subject has consented to the collection of the information from another source;
 - collection of the information from another source would not prejudice a legitimate interest of the data subject;
 - collection of the information from another source is necessary to maintain the legitimate interests of the responsible party or of a third party to whom the information is supplied; or
 - compliance is not reasonably practicable in the circumstances of the particular case.

Section 13

Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party.

Steps must be taken to ensure that the data subject is aware of the purpose of the collection of the information.

Section 14

Records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed, unless:

- retention of the record is required or authorised by law;
 - the responsible party reasonably requires the record for lawful purposes related to its functions or activities;
 - retention of the record is required by a contract between the parties thereto; or
-

- the data subject has consented to the retention of the record.

Records of personal information may be retained for periods in excess of those stated above for historical, statistical or research purposes if the responsible party has established appropriate safeguards against the records being used for any other purposes.

A responsible party that has used recorded personal information of a data subject to make a decision about the data subject, must:

- retain the record for such period as may be required or prescribed by law or a code of conduct; or
- if there is no law or code of conduct prescribing a retention period, retain the record for a period that will afford the data subject a reasonable opportunity, taking all considerations relating to the use of the personal information into account, to request access to the record.

A responsible party must destroy or delete a record of personal information or de-identify it as soon as reasonably practicable once its authorisation to retain the record has expired.

The destruction or deletion of a record of personal information must be done in a manner that prevents its reconstruction in an intelligible form.

The responsible party must restrict processing of personal information if:

- its accuracy is contested by the data subject, for a period enabling the responsible party to verify the accuracy of the information;
- the responsible party no longer needs the personal information for achieving the purpose for which it was collected or subsequently processed, but it has to be maintained for purposes of proof;
- the processing is unlawful and the data subject opposes its destruction or deletion and instead requests the restriction of its use; or
- the data subject requests the transmission of the personal data to another automated processing system.

Personal information may, with the exception of storage, be processed only for purposes of proof, or with the data subject's consent, or for the protection of the rights of another natural or legal person, or if such processing is in the public interest.

Where processing of personal information is restricted, the responsible party must inform the data subject before lifting the restriction on processing.

Section 16

A responsible party must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary.

In taking such steps, the responsible party must consider the purpose for which personal information is collected or further processed.

Section 17

A responsible party must maintain the documentation of all processing operations under its responsibility.

Section 18

If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of:

- the information being collected and, where information is not collected from the data subject, the source from which it is collected;
- the name and address of the responsible party;
- the purpose for which the information is being collected;
- whether or not the supply of the information by that data subject is voluntary or mandatory;
- the consequences of failure to provide the information;
- any particular law authorising or requiring the collection of the information;
- the fact that, where applicable, the responsible party intends to transfer the information to a third country or international organisation and the level of protection afforded to the information by that third country or international organisation; and
- any further information, such as the existence of the right to object to the processing of personal information or the right to lodge a complaint to the Information Regulator and the contact details of the Information Regulator, which is necessary, considering the specific circumstances in which the information is or is not to be

processed, to enable processing in respect of the data subject to be reasonable.

The above steps must be taken before the information is collected if the personal information is collected directly from the data subject, unless the data subject is already aware of the information referred to in that subsection or, in any other case, before the information is collected or as soon as reasonably practicable after it has been collected.

Section 19

A responsible party must secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent:

- loss of, damage to or unauthorised destruction of personal information; and
- unlawful access to or processing of personal information.

In order to give effect to the above, the responsible party must take reasonable measures to:

- identify all reasonably foreseeable internal and external risks to personal information in its possession or under its control;
- establish and maintain appropriate safeguards against the risks identified;
- regularly verify that the safeguards are effectively implemented; and
- ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

The responsible party must have due regard for generally accepted information security practices and procedures that may apply to it in general, or be required in terms of specific industry or professional rules and regulations.

Section 21

A responsible party must, in terms of a written contract between the responsible party and the operator, ensure that the operator processing personal information for the responsible party establishes and maintains the security measures referred to above.

The operator must immediately notify the responsible party if there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person.

Section 72

A responsible party in the Republic may not transfer personal information about a data subject to a third party who is in a foreign country unless:

- the third party who is the recipient of the information is subject to a law, a set of binding corporate rules or a binding agreement that provides an adequate level of protection that effectively upholds principles for reasonable processing of the information that are substantially similar to the conditions for the lawful processing of personal information relating to a data subject who is a natural person and, where applicable, a juristic person, and includes provisions that are substantially similar to those in this section relating to the further transfer of personal information from the recipient to third parties who are in a foreign country;

-
- the data subject consents to the transfer;
 - the transfer is necessary for the performance of a contract between the data subject and the responsible party, or for the implementation of pre-contractual measures taken in response to the data subject's request;
 - the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the responsible party and a third party.
-

13.5.2 Implications for ACs

The Act covers all information that clients (or, in this context, AC practitioners) might collect, retain or archive on any individual who works for or applies to work for an employer. This includes both personal and special personal information.

Within an employment context, this includes applicants and former applicants for positions (both successful and unsuccessful applicants), former or current employees, temporary employment services staff, casual staff, staff on secondment and those in work experience placements.

AC practitioners must obtain informed consent for the use of personal information from job applicants or employees whose personal information will be obtained during the AC process and must process and destroy information that may fall within the definition of personal information, or any document containing or indicating such personal information, in a lawful manner and ensure that they do not infringe on the rights of the data subject from whom they gathered data.

An AC practitioner may, with the consent of the data subject, put personal information to further use, for example for research and related purposes. In the absence of specific consent from the data subjects for the further use of their data, a responsible party may use the personal information if it is compatible with, or in accordance with the purpose for which it was collected in the first place.

AC practitioners must secure the integrity and confidentiality of personal information in their possession or under their control by taking appropriate, reasonable technical and organisational measures to prevent loss or damage, disclosure to another person, unauthorised destruction, unlawful access to or processing of personal information.

An AC practitioner must conduct an analysis of the personal information collected and retained in the process from the beginning to the end of the assessment process, paying special attention to:

- i. The purpose for the collection of the information
- ii. The sources of and quality of the information
- iii. What the information is used for
- iv. Why and for how long records are retained
- v. The security measures to protect the information
- vi. The consents on record
- vii. What constitutes special personal information and how it is treated.

AC practitioners must

- conduct risk assessments on the measures to protect their data subjects' personal information;
- ensure that their policies comply with the POPI Act;
- ensure that they make contractual arrangements with third parties to whom they supply personal information;
- provide training on compliance with POPI to their employees, consultants or contractors; and

- establish adequate policies and procedures to comply with the eight conditions stipulated in the Act.

Failure to comply with this act can lead to criminal charges. POPI mentions various criminal offences relating to non-compliance, infringements or breach of confidentiality. The regulator may impose an administrative fine not exceeding R10 million. Some offences attract imprisonment not exceeding 10 years, with or without a fine.

The POPI Act impacts the endeavours of all AC stakeholders during two of the four stages of the adapted ADDIE model, as depicted in the coloured stages in Figure 9.

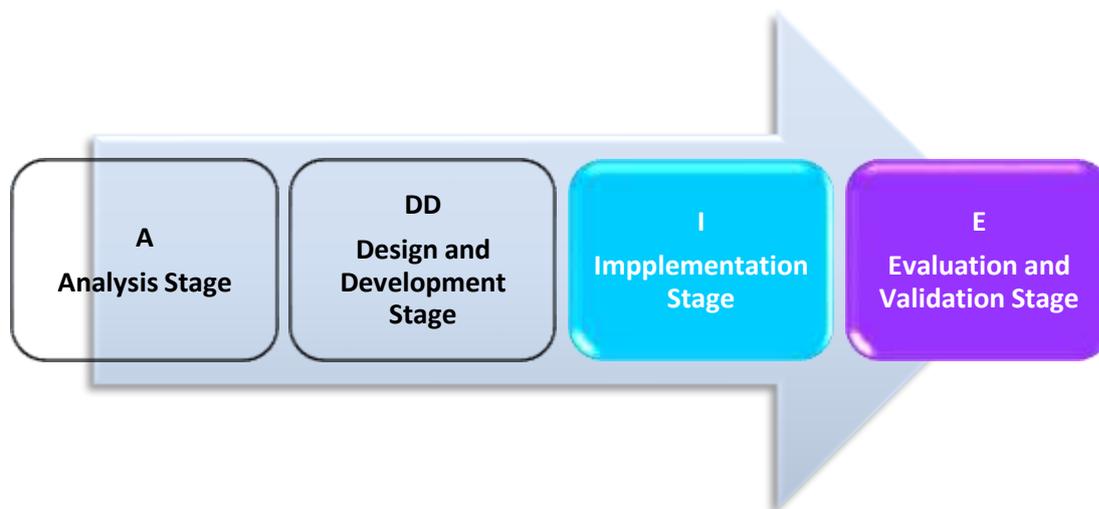


Figure 9: Adapted ADDIE stages impacted by the POPI Act

SYNTHESIS

The design and delivery of ACs are directly impacted by various legal instruments. It is clear from the above-mentioned legislation that the responsibility to prove



adherence to legal requirements rests on the AC client and AC practitioner. This means that the AC practitioner must follow a comprehensive systematic process of AC design, development, execution and evaluation, and has to keep accurate and comprehensive records of all AC-related activities.

SECTION C: THE AC PRACTITIONER AS AN INDEPENDENT SERVICE PROVIDER

14. INTRODUCTION

AC practitioners can be independent service providers, or be in full-time employment in an organisation. The legislation discussed in the *Legal Companion* thus far applies irrespective of the AC practitioner's employment status. However, additional legislation applies to AC practitioners in private practice. Since the aim of the *Legal Companion* is to assist AC practitioners to deliver ethical and responsible ACs to AC clients, it is prudent to also discuss the additional legal instruments and their implications for the AC service provider.

15. THE AC PRACTITIONER IN PRACTICE

The first relationship that is explored in the *Legal Companion* is the AC practitioner's relationship with the public at large, the government structures of the Republic and the professional bodies to which AC practitioners potentially belong.

Before opening a practice, an AC practitioner must establish whether he / she is allowed to practise as an AC practitioner in South Africa. If an AC practitioner intends to design his / her own ACs, which may include psychological or psychometric tests, that AC practitioner is required to hold and maintain current registration as a psychologist and / or psychometrists in independent practice with the Health



Professions Council of South Africa (HPCSA). Such a practitioner also needs to comply with the ethical rules and standards of the HPCSA and ensure that he / she performs only such acts as he / she is allowed to perform in terms of the Scope of Practice published under the Health Professions Act, 1974 (as amended).

The next step for AC practitioners is to establish through which vehicle their practice will be operated. South African law provides for several vehicles that may be used for operating a business. The options are as follows:

15.1 Sole proprietorship

This is a business that is owned and operated by an individual in his / her own name. The owner is the business and the business is the owner, and therefore no separate legal personality is established. The benefits of being a sole proprietor is that there are no formal requirements to prepare and submit annual financial statements and no onerous partnership or shareholders' agreements, and that you need not share your profits with any other person. As a sole proprietor, it is also very simple to open and close a business. The disadvantages are that the owner is legally liable in his / her own name for any business debts and the owner's own property is at risk if he / she defaults on any financial obligations. A sole proprietor must register as a provisional taxpayer in terms of the Income Tax Act, 1962 (as amended) and must submit tax returns bi-annually. Tax is payable on the gross income of the business / individual. In addition, even a person trading as a sole proprietor still has to comply with the employment laws if he / she intends to employ staff. This is a very simple form of doing business and is not recommended if a person wants to operate a formal business and not merely offer consulting services.

15.2 Partnership

This is a more formalised business structure. Although a legal personality is formed in the partnership through the signing of a partnership agreement, the partners remain

personally liable for the debts of the partnership in the proportions that their partnership interest is held. A partnership offers the benefit of joint liability and responsibility, support between the partners and increased service capacity. There are no formal or legal requirements regarding the preparation and submission of annual financial statements in respect of a partnership. The disadvantages include that the partners are legally liable in their own names for any debts incurred by the business and their estates are not exempt from claims by creditors on defaults on any financial obligations or damages claims. Partners must be registered as provisional taxpayers in terms of the Income Tax Act, 1962 (as amended) and must submit tax returns bi-annually. Tax is payable on the profit of the business, but is determined as if in the hands of individual partners in their proportional interest in the business. Normally VAT is payable on all VAT-registered business. Furthermore, partners have to comply with the relevant employment laws if they intend to employ staff. Many partners in a partnership take out personal liability insurance and life insurance to cover the remaining partner in the event of one partner's death or disability. A partnership is dissolved in accordance with the terms recorded in the partnership agreement and / or upon the death of one of the partners.

15.3 Private company

The Companies Act, 2008 describes more than one form of private company and distinguishes between for-profit and not-for-profit companies. These descriptions are self-explanatory. The most commonly utilised entity is a private limited liability entity or proprietary limited entity. Professional practitioners often prefer personal liability entities or incorporated entities. Registration of a legal entity or company requires the reservation of a name, a memorandum of incorporation, shareholder's agreements and other similar agreements and legal documents to be entered into. Formal accounting and other records have to be kept for a period of seven (7) years. Certain obligatory meetings have to be held annually and financial statements must be prepared, audited and submitted. These entities must register for the payment of

income tax and must pay several types of tax, including but not limited to income tax on profits, secondary tax on companies (on dividends declared), capital gains tax, and value-added tax (VAT). The advantage of entities of this nature is that directors and shareholders, despite having fiduciary duties towards the entity, can generally not be held personally liable for the entity's debts. Conversely, these entities are difficult to establish and difficult to dissolve.

15.4 Generally

Any entity or person who employs employees has to register those employees for unemployment insurance and must deduct 1% of each employee's salary for payment to the Unemployment Insurance Fund. A further amount equal to 1% of each employee's salary must be paid to the Fund by the employer. An employer with employees who earn more than a fixed threshold amount must also deduct and pay over the employees' income tax to SARS (PAYE). Employers are obliged to register with the Compensation Commissioner and submit records of turnover to the Commissioner. In certain cases, and subject to the size and income of the entity or business, skills development levies have to be paid, employment equity plans have to be submitted and compliance with the Broad-based Black Economic Empowerment Act and codes has to be ensured.

16. AC PRACTITIONERS AND THEIR CLIENTS

The legal relationship between AC practitioners and AC clients is governed largely by the common law of contract in South Africa. Although certain other legal instruments may be applicable, subject to the contracting parties and what was contracted for, the relationship is almost always determined by the contract.

16.1 Contract

According to South African contract law, a contract is an agreement entered into by two or more parties with the serious intention of creating reciprocal legal obligations between them. Contracts are not promises, but are agreements defined by law that establish the legal rights and duties between two or more parties. Not all contracts and agreements are legally binding. Contract law defines which agreements are—and are not—legally binding. Not all contracts are valid, even if they were voluntarily signed by all the parties involved. Although legal agreements or contracts may be verbally expressed, tacit or implied, it is always advisable to have a written agreement between parties to avoid any disputes about the terms of agreements between parties.

16.1.1 Contract validity

For a contract to be valid, the following common law legal requirements must be met:

1. *Consensus*: The parties' intentions must match (or at least appear to do so) in respect of all the material aspects of their agreement. The AC client must enter into the agreement with the mindset and intention of entering into a contract that makes provision for services to be rendered by the AC practitioner, and the AC practitioner must enter into the same agreement with the intention of providing the services that the AC client requires. The AC client and the AC practitioner must agree on the nature of the obligations established in the contract.
2. *Capacity*: In terms of capacity, both parties to the contract must have the necessary legal contracting capacity. Should a natural person act on behalf of a juristic entity, the astute AC practitioner will ensure that that person is legally able to bind the juristic entity and will establish in what capacity he

does so, i.e. as owner, agent or delegated authority, or in any similar capacity.

3. *Formalities*: When in exceptional cases agreements are required to be in a certain format (for example in writing and signed), these requirements must be respected. In the case of an AC practitioner it could, for example, be required that the individuals acting on behalf of a juristic entity client sign sureties for the timeous discharge of the entities' obligations to the AC practitioner. Such sureties should not be mere oral agreements, but must be in writing.
4. *Legality*: The agreement must be lawful—in other words, it may not be prohibited by law or common law.
5. *Possibility*: The undertaken commitments must be capable of being performed when the agreement is entered into.
6. *Ascertainable terms*: The agreement must have definite or determinate content to ensure that the commitments can be enforced.

16.1.2 Breach of contract

When an AC client and an AC practitioner conclude a contract, they acknowledge that they will have certain responsibilities towards each other and that those responsibilities may be legally enforced. If either party fails to honour its commitments, that party would have committed a breach of contract. This may, or will inevitably lead to the other party suffering damages in one way or another. Contracts may be breached by an act or omission.

Five types of breaches exist in law:

1. *Positive malperformance* relates to the quality and content of performance. The party did indeed perform, but did not perform as contracted. The quality of the assessments conducted by an AC practitioner must be of the standard agreed upon between the parties.
2. *Mora* refers to a delay in the performance of a contractual duty without a lawful excuse, or wrongful failure to perform timeously, typically non-performance or non-payment by a date agreed upon.
3. *Repudiation* occurs when a party demonstrates, through words or conduct and without lawful excuse, an unequivocal intention to no longer be bound by the contract. For example, if either one of the parties to the Service Level Agreement demonstrates the intention to not abide by the contract, he / she would have repudiated the agreement between the parties.
4. *Prevention of performance* occurs when the fault of one party renders it impossible for the other party to perform its obligations. For example, if the AC client fails to provide the AC practitioner with access to subject matter, experts or job specifications, or lacks certain qualities that are requisite for the job, the AC practitioner will not be able to perform his / her obligations in terms of the contract.

16.1.3 Remedies for breach of contract by either party

South African law recognises four types of remedies, namely:

1. *Specific performance*: An aggrieved party may claim specific performance. The court has discretion to either grant or deny the order for specific performance. This is done by submitting an application to the court for an

order 'forcing' the repudiating party to perform the obligations as per the contracted terms.

2. *Exceptio non adimpleti contractus*: This remedy can be used when a party has performed inadequately with regard to the obligation, i.e. in cases of positive malperformance. The defective performance must be repairable, for example, if the AC practitioner does not perform proper assessments and this leads to the appointment by the AC client of an AC participant who is not competent for the job concerned, the AC client might suffer financial loss and would be able to seek a remedy of this nature.
3. *Cancellation*: This is an exclusive remedy that is available only if the breach is serious or leads to material loss. This remedy will permit either party to cancel the contract. The parties can include a cancellation clause in their contract stipulating the terms of cancellation (upon agreement / signature of both parties, etc.). The breach must be so serious that the other party cannot be expected to continue with the contract. However, if the breach does not affect the crux of the contract, the aggrieved party may use the remedy for specific performance and claim for damages. Upon cancellation, each party must return what has been accrued.
4. *Damages*: This claim compensates for financial loss suffered as a result of the breach. Either party can use this remedy, which can be used in addition to other remedies, if they had suffered any financial loss. For example, if the AC practitioner is in *mora* (unlawful delay in delivering the service of assessment), the AC client can claim for damage (financial loss suffered as a result of the delayed performance) and for specific performance by the AC practitioner as stipulated in the agreement.

16.1.4 Implications for ACs

The terms of any agreement between an AC practitioner and an AC client will always be subject to South African law, unless it is concluded in a different jurisdiction and it is specifically agreed that that jurisdiction's law will apply. Legislative provisions are therefore incorporated even if not expressly recorded between the parties and remain subject thereto.

However, parties should contractually provide for copyright and an indication of how rights will be dealt with in terms thereof, which is largely determined in the common law and not statutorily.

16.2 Professional indemnity insurance

Professional indemnity is aimed at providing protection against financial loss resulting from a legal liability to a third party. Anyone who offers services or advice in a specialised field could be held accountable if they fail to adhere to the generally accepted standards of their profession or industry.

Since AC practitioners are exposed to significant risk in all aspects of the AC practice, as can be seen above, it is imperative for them to have professional indemnity insurance.

16.2.1 Implication for ACs

Regulations published on 30 August 2010 (R654, G.33400) under the Health Professions Act require private health practitioners practising for their own account to obtain professional indemnity insurance from an insurer registered under the Short-term Insurance Act.

Professional indemnity insurance provides cover for financial damage or loss caused to the victim by unintentional errors and omissions by the doctor or insured qualified and non-qualified employees and staff. It also covers the cost of defending oneself in a court of law. The plan covers liabilities for a year from the point of subscription. However, the policy does not cover criminal actions.

16.3 The Consumer Protection Act (CPA), Act 68 of 2008

15.6.1 Purpose

The Consumer Protection Act (CPA) strives to neutralise the imbalances that may exist in the bargaining powers of suppliers and consumers, and guards against concepts such as unconscionable conduct and unfair, unreasonable or unjust contract terms and prices.

The CPA is bound to have a significant impact on the way business is conducted in South Africa, and on the law of contract. The primary purpose of the Act is to protect consumers from exploitation in the marketplace and promote their social and economic welfare.

More specifically, it aims to:

1. establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient and responsible, for the benefit of consumers generally;
2. promote fair business practices; and
3. protect consumers from unconscionable, unjust, or unreasonable business practices.

15.6.2 Applicable content

The scope of the Act is very wide. It applies to:

1. most transactions concluded in the ordinary course of business between suppliers and consumers in South Africa;
2. the promotion of goods and services that could lead to such transactions; and
3. the goods and services themselves once the transaction has been concluded.

In terms of the Act, a supplier can be any person (including a juristic person, a trust and an organ of State) marketing any goods or services.

Consumer include not only the end consumers of goods and services, but also:

1. franchisees; and
2. relatively small businesses in the supply chain (asset value or annual turnover below the threshold determined by the minister).

The Act does not apply to any transaction in terms of which goods and services are promoted or supplied to:

1. the State;
2. a juristic person with an asset value or annual turnover above the threshold;
3. employment contracts;
4. credit agreements; and
5. transactions exempted by the minister.

15.6.3 Implications for ACs

As it stands, the CPA applies to the contractual relationship between the AC practitioner and the AC client. It refers directly to the promises and commitments made

by the AC practitioner to the AC client that result in AC client expectations. For example, the AC client's expectations regarding the format and detail of the AC report(s), feedback, the statistical validation of the AC, the concepts evaluated during the AC, etc.

SYNTHESIS

To deliver ethical and responsible ACs, the AC practitioner in private practice needs to adhere to the legislative requirements directly applicable to ACs, as well as legislation regulating professional practice.

The AC practitioner needs to decide on and register the vehicle that will be used for the delivery of the service, i.e. a sole proprietorship, a partnership or a private company. Irrespective of the vehicle, tax legislation will apply.

The AC practitioner needs to be knowledgeable about contract law and what constitutes contract validity and contract breach, and the legal remedies to contract breach. Professional indemnity insurance is recommended as it provides the AC practitioner with cover for financial damage or loss caused to the victim as a result of unintentional errors and omissions by AC providers and their staff. It also covers the cost of defending oneself in a court of law.

The final piece of legislation discussed in the *Legal Companion* is the Consumer Protection Act, which guides the promises and commitments that an AC provider makes to an AC client. AC providers are again cautioned against making promises and commitments on which they cannot deliver.



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