



REPORT OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

National Hearing on Unfair Discrimination in the Workplace

**8 March 2016;
25 April 2016**

“South Africa remains one of the most unequal countries in the world, and the occurrence of discrimination in the workplace remains considerably high.”

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After 22 years of democracy, now is the opportune time to reflect on the country's progress in eliminating discrimination in the workplace, and to evaluate the continuing challenges that lie ahead.

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Table of Contents

Acknowledgments	5
Executive Summary.....	6
INTRODUCTION.....	10
MANDATE OF THE SAHRC	12
METHODOLOGY	12
1. THE RIGHT TO EQUALITY	14
1.1 The centrality of the right to equality	15
1.2 The meaning of “special measures”.....	16
2. CONTEXT: AN OVERVIEW OF EQUALITY IN SOUTH AFRICA.....	18
3. UNDERSTANDING DISCRIMINATION.....	20
3.1 Defining unfair discrimination.....	21
3.2 Multiple, compound and intersectional discrimination.....	22
3.3 Fair versus unfair discrimination	23
3.4 Forms and manifestations of discrimination.....	23
4. ANALYSIS OF UNFAIR DISCRIMINATION TRENDS IN THE WORKPLACE IN SOUTH AFRICA	26
4.1 Employment Equity	29
4.1.1 <i>Analysis of Employment Equity progress made to date: An overview</i>	31
4.2 Grounds of unfair discrimination in the workplace in South Africa	32
4.2.1 <i>Race, Colour and Ethnicity</i>	33
4.2.2 <i>Nationality and social origin</i>	36
4.2.3 <i>Sex and Gender</i>	38
4.2.4 <i>Unpaid care, domestic work and family responsibilities</i>	38
4.2.5 <i>Sexual Orientation and Gender Identity</i>	43
4.2.6 <i>Disability</i>	46
4.2.7 <i>HIV and Aids Status</i>	53
4.2.8 <i>Age</i>	56
4.2.9 <i>Language, culture and religion</i>	58
4.2.10 <i>Sexual harassment</i>	61
4.2.11 <i>Equal pay for work of equal value</i>	64
5 CONCLUSION OF UNFAIR DISCRIMINATION TRENDS IN THE WORKPLACE IN SOUTH AFRICA	66
6 MOVING TOWARDS A MORE EQUITABLE WORKPLACE ENVIRONMENT IN SOUTH AFRICA.....	70
7 RECOMMENDATIONS	74
7.1 Department of Labour	75
7.2 National Economic Development and Labour Council.....	77
7.3 Department of Public Service and Accountability.....	77
7.4 Commission for Conciliation, Mediation and Arbitration.....	79
7.5 Trade Unions.....	79
7.6 Employers	80
8 CONCLUSION	82
ANNEXURE A: TERMS OF REFERENCE.....	86
i. Rationale for the investigation.....	87
ii. Scope and objectives	87
iii. Composition of the Panel	88
iv. Identified respondents and stakeholders	88
ANNEXURE B: MECHANISMS FOR REDRESSING UNFAIR DISCRIMINATION.....	90

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By bringing diverse people together, the workplace helps to break down prejudices and stereotypes that give rise to exclusionary practices in all spheres of life.

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Executive Summary

Executive Summary

South Africa's colonial and apartheid legacy manifested in a system of social relations driven by notions of superiority and inferiority on the basis of inherent characteristics such as race, gender, and disability, amongst others. In marking a stark break from the past, the Constitution of the Republic of South Africa, 1996 (Constitution) was conceptualised with the principles of equality and social justice at its core.

South Africa is hailed as having one of the most progressive Constitutions in the world and has adopted a comprehensive legal framework aimed not only at prohibiting discrimination but at actively enhancing the attainment of equal opportunities. Despite this, South Africa remains one of the most unequal countries in the world, and the occurrence of discrimination in the workplace remains considerably high, emphasising that the enactment of legislation and policies alone is not enough to prevent and eliminate discrimination in practice. In considering the far reaching implications and the prevalence of substantial inequalities, the South African Human Rights Commission (SAHRC or Commission) hosted a national hearing on unfair discrimination in the workplace between March and April 2016.

Essentially, the inquiry found that unfair discrimination in the workplace remains pervasive in South Africa and includes both barriers of entry as well as discriminatory practices within the workplace itself. Although longstanding grounds of discrimination such as race, gender and disability persist, the changing nature of the workforce and social relations over time have given rise to newer forms of discrimination, including on the basis of HIV and Aids status, age, sexual orientation and gender identity, language, religion and culture. Discrimination, in this way, is a moving target and requires constant attention and evaluation to ensure that no one is left behind in the efforts to combat discriminatory practices and achieve the goal of equal rights and dignity for all.

Some of the key findings include, *inter alia*, the following:

- i. Significant advances and gains made in labour practices since 1994, but unfair discrimination is still pervasive in the workplace;
- ii. The historical divisions of the past are still reflected in socio-economic inequalities and workplace relations;
- iii. There is a lack of understanding by key role players as to the meaning and complexity of unfair discrimination in its entirety;
- iv. There is a lack of awareness and/or sufficient attention paid to other forms of systemic discrimination taking place in the workplace;
- v. Greater social relations, the position of different groups within society, and the occurrence of discrimination more specifically are inherently linked to historical circumstances as one of the key driving factors;
- vi. The attention given to employment equity and non-discrimination in the workplace by the various stakeholders tends to focus on the historical context of the country and labour force almost exclusively. While the Commission acknowledges that an assessment of labour relations and discrimination within this context is an imperative, the exclusive concentration on these factors consequentially neglects new and emerging forms of discrimination;
- vii. There is limited, and in some instances, no interaction between the relevant role players;
- viii. Many instances and specific manifestations of unfair discrimination continue to occur inconspicuously and remain largely unreported;
- ix. The effective implementation of laws and policies is lacking, and institutional capacity at various levels appears to be constrained and inadequate;
- x. One of the biggest driving factors of unfair discrimination is a lack of awareness and information; and
- xi. The workplace remains a key point of entry for rectifying inequalities and eliminating harmful stereotypes and prejudices which continue to fracture the greater social fabric of the country.

Discrimination is difficult to combat due to its nature as a phenomenon which is deeply entrenched in social relations, behaviours and value-systems. It frequently manifests in ways that are not easily visible. Its resilience and often inconspicuous character remains a serious challenge to the attainment of the unified society envisioned in the Constitution and is not reflective of the views and attitudes of a small handful of people, but rather of society as a whole.

While improving representation and integration is a crucial first step, more is needed to eliminate discrimination in the workplace. A narrow focus on equality through an assessment of employment equity targets is unlikely to drive enough real change on the ground. Therefore, the approach to monitoring must move beyond a quantitative model in line with numerical targets, towards a deeper evaluation to include the substantive elements of equality, including the institutional culture of an organisation, the daily lived experiences of different groups, as well as the effectiveness of equity plans in adequately capacitating individuals and promoting their advancement. Lasting transformation at a substantive level is not an easy fix, but a complex, moving and multidimensional process that requires a sustained commitment. The Commission has drafted appropriate recommendations in line with its mandate to promote the protection, development and attainment of human rights for all persons. Through this process, it aims to contribute towards the progressive realisation of a more equal society, in which freedoms and opportunities are available to all regardless of the inherent characteristics of people.

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INTRODUCTION

INTRODUCTION

Before 1994, the institutionalised system of segregation under apartheid was based on oppression and discrimination. While racial discrimination was the most obvious manifestation, other forms of discrimination inherently developed, resulting in a system of privilege and disadvantage. In marking a stark break from the past, the Constitution of the Republic of South Africa, 1996 (Constitution) was conceptualised with the principles of equality and social justice at its core.

In line with this, a number of laws and policies aimed at preventing unfair discrimination and promoting the achievement of equality have been developed and implemented. This notwithstanding, deeply entrenched inequalities and patterns of discrimination persist in South Africa, including in the workplace.

The workplace is an important and strategic platform for combating discrimination in society more broadly.¹ By bringing diverse people together, the workplace helps to break down prejudices and stereotypes that give rise to exclusionary practices in all spheres of life. In addition to this, equitable employment opportunities may serve to reduce poverty and the disadvantages resulting from inequality. The elimination of workplace discrimination is thus linked to sustainable development objectives.

In considering the far reaching implications and the prevalence of substantial inequalities, the South African Human Rights Commission (SAHRC or Commission) resolved to host a national hearing on unfair discrimination in the workplace. This decision must be considered against the backdrop of the United Nations Sustainable Development Goals (SDG), which strongly focus on poverty alleviation, reduced inequalities and decent work and economic growth, together with South Africa's National Development Plan (NDP) which aims to eliminate poverty and reduce inequalities by 2030.

After 22 years of democracy, now is the opportune time to reflect on the country's progress in eliminating discrimination in the workplace, and to evaluate the continuing challenges that lie ahead. Through this process, the Commission aims to develop a deeper understanding of the extent to which discrimination in the workplace persists, as well as the forms and manifestations such discrimination takes. This information will serve to inform future interventions that will contribute towards the progressive realisation of a more equal society, in which freedoms and opportunities are available to all.

1 ILO "Time for Equality at Work" (2003), p 2.



MANDATE OF THE SAHRC

METHODOLOGY

MANDATE OF THE SAHRC

The Commission is an independent National Human Rights Institution (NHRI) established in terms of Section 181 of the Constitution to support constitutional democracy. In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:

- a. Promote respect for human rights and a culture of human rights;
- b. Promote the protection, development and attainment of human rights; and
- c. Monitor and assess the observance of human rights in the Republic.

In terms of the Constitution and the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act), the Commission is empowered to, among other things, carry out research; investigate and report on the observance of human rights in the country; educate on human rights related matters; monitor implementation of, and compliance with, international and regional conventions; and review laws and policies relating to human rights; and it may make recommendations.²

METHODOLOGY

A mixed methods approach was utilised whereby the Hearing process was conducted in two key phases, namely the conducting of a number of public hearings and the subsequent analysis of information received together with additional desktop research.

The Hearing was hosted on 8 March 2016 and reconvened on 25 April 2016. All stakeholders were invited to make written submissions and were subsequently requested to appear before the Hearing Panel to make oral presentations under oath or affirmation. After that, the Panel was able to pose questions to acquire additional information or clarity on information arising from submissions.

This process was inquisitorial in nature as the primary objective was to create a greater understanding of the issues under examination.

Following the conducting of the public hearings, an analysis of information received in addition to analysis of secondary sources through desktop research was conducted. These sources included, among other things, SAHRC materials; domestic and international legal frameworks; reports produced by relevant organs of state, civil society organisations, international and regional bodies; media reports; as well as other topical research reports on discrimination and inclusive labour practices.

More information on the scope and objective of the Hearing, as well as the list of participants in the process, may be viewed in the Terms of Reference attached hereto as Annexure A.

2 Section 13.



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THE RIGHT TO EQUALITY

1. THE RIGHT TO EQUALITY

1.1 The centrality of the right to equality

The right to equality forms a central component of international, regional and domestic law instruments, and is closely linked to the realisation of all other rights and freedoms. As explained by the United Nations Human Rights Committee, “*Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights*”.³

The basic concept of social justice is intertwined with aspirations of equality and non-discrimination. The achievement of a just society based on fundamental rights and freedoms as envisioned by the Constitution is therefore dependent on the promotion and achievement of equality. Moreover, the preamble of the Universal Declaration of Human Rights (UDHR)⁴ recognises that inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world, recognising the interdependency between the right to equality and human dignity. There are several conceptions of “equality”, and one of the most significant distinctions is likely to be between so-called “formal” and “substantive” equality. Formal equality refers to the belief that all persons must be treated equally, regardless of distinguishing characteristics or circumstances. This form of equality, therefore, focuses on the neutral conception of a particular law, policy or action. Substantive equality, on the other hand, acknowledges that different groups of persons may be differently situated and that actions and policies may disproportionately impact certain groups. This form of equality, therefore, includes a consideration of the social and economic disparities, amongst others, and places emphasis on the actual effect of such conduct, rather than on its conception. Substantive equality, therefore, advances the idea that different persons and/or groups may require different treatment to achieve true equality and equal opportunities.

The right to equality, therefore, incorporates two dimensions. First, the right to equal protection and benefit of the law, and secondly the right to full and equal enjoyment of all rights and freedoms. It, therefore, demonstrates the need for equality regarding both policy and practice as well as in terms of outcome. The realisation of the right to equality, therefore, requires more than the mere absence of unfair discrimination but seeks to advance those who continue to suffer from disadvantage and inequitable opportunities.

In many ways, formal and substantive equality may seem to be opposing or mutually exclusive principles. However, the realisation of the right to equality in its fullest form requires that they complement each other. Furthermore, achieving equality requires the examination of the context of an alleged rights violation, and its relationship to systemic forms of domination within a society. Substantive equality aims to address structural and entrenched disadvantage at the same time as it aspires to maximise human development.⁵ This right is, therefore, a broad and all-encompassing right that requires an examination of the nexus between the numerous variables which have contributed to the vast inequalities still prevalent in South African society today.

3 Human Rights Committee, General Comment 18: Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), at para 1.

4 10 December 1948.

5 Ibid.

1.2 The meaning of “special measures”

In recognising that the various social and economic discrepancies, amongst others, impact on the ability of groups of persons to access facilities, services and opportunities on an equitable basis, the legal framework, both at an international as well as domestic context, provides for the design and implementation of “special measures”.

The objective of special measures is to alleviate or remedy disparities in the enjoyment of rights and freedoms, which disparities are often structural and may arise as a result of historical circumstances.⁶ While special measures should not be interpreted as applying separate rights to specific groups, they aim to correct past disparities and prevent further imbalances from arising. Special measures, therefore, recognise that the prevention of discrimination alone is insufficient to achieve equality once deep-seated and long-standing deprivation has occurred. In this way, special or “affirmative action” measures aim to bring disadvantaged, vulnerable or marginalised groups on par with the rest of society.

The conception of the Constitution emphasises the need for restitution by seeking to heal the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights. In this way, the promotion of substantive equality has been enumerated in section 9 of the Constitution, which states that:

“...To promote the achievement of equality, legislative and other measures designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

In further supplementing this provision, the Employment Equity Act (EEA)⁷ was promulgated with the main focus to promote equal opportunity and fair treatment in employment. In line with the Constitution, the Act allows for remediative measures to be taken to improve representivity and, therefore, aims to address disparities in employment, occupation and income for certain groups of persons.

Special measures must be grounded on the principles of fairness and proportionality and are temporary in nature. Therefore, such measures should cease to continue after the objectives for which they have been taken have been achieved, while their manifestation may include legislative, administrative, budgetary and regulatory instruments as well as plans, policies, programmes and preferential regimes, amongst others.

6 Committee on the Elimination of Racial Discrimination “General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination” (Seventy-fifth session, August 2009), para 22.

7 55 of 1998.

Special measures in and of themselves do not constitute unfair discrimination. Such measures are therefore not an exception to the prohibition against non-discrimination but rather, as explained by the Committee for the Elimination of Racial Discrimination (CERD Committee), “are integral to its meaning”.⁸ In confirming this, the judgment in the *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs*⁹ case held that:

*“Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result.”*¹⁰

Further, the Constitutional Court, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*,¹¹ explained that a substantive notion of equality frequently includes remedial or restitutionary elements. In explaining the basis for this, the Court stated that:

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”

8 Committee on the Elimination of Racial Discrimination “General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination” (Seventy-fifth session, August 2009), para 20.

9 *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*, 2004 (7) BCLR 687 (CC).

10 *Ibid.* para 74.

11 1999 (1) SA 6 (CC) para 60.



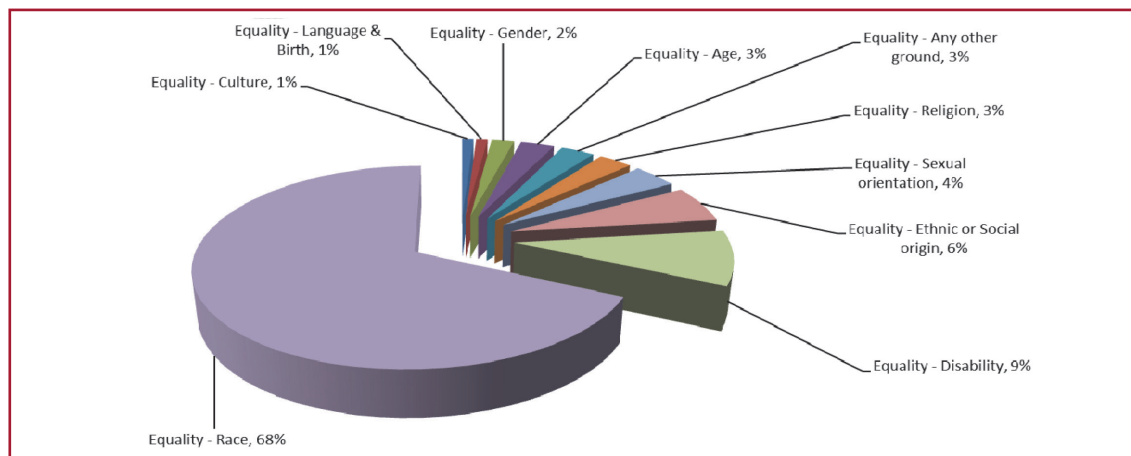
2 **CONTEXT: AN OVERVIEW OF EQUALITY IN SOUTH AFRICA**

2. CONTEXT: AN OVERVIEW OF EQUALITY IN SOUTH AFRICA

South Africa's colonial and apartheid legacy manifested in a system of social relations driven by notions of superiority and inferiority on the basis of inherent characteristics such as race, gender, and disability, amongst others. While the Country has recently celebrated 22 years of democracy, numerous social and economic challenges remain in post-apartheid South Africa. Although various strides have been made since 1994 towards the fulfilment of human rights, there remain significant impediments to the realisation of the society envisaged by the Constitution. Income inequality has widened, suggesting that a number of structural barriers to social cohesion remain¹² and deep economic divisions continue to be based on social characteristics including race and gender.

Currently, South Africa stands as one of the most unequal countries in the world. In 2013, it was reported that, notwithstanding some efforts aimed at transformation, the income gap has not only widened overall in the world but also between previously advantaged and previously disadvantaged South Africans.¹³ Essentially, this means that people disadvantaged by colonialism, apartheid, patriarchy and other forms of subjugation are, as a group, worse off in relation to their advantaged counterparts than they were in 1994. Within groups, income inequality is growing, suggesting that policies and programmes aimed at its reduction appear to be having the effect of being '*bottom heavy*', not translating into changes in lived experiences of the vast majority of South Africans.¹⁴

Complaints received by the Commission are one of the most direct sources of information regarding perceived violations of the right to equality. In the period between the 1 April 2015 and the 31 March 2016, of the 4613 complaints received by the Commission, 749 complaints raised allegations of a violation of the right to equality. This represents the single largest proportion of complaints received overall (16%), and the number of equality-related complaints has been increasing year-on-year over the previous four financial years. The graph below reflects the equality-related complaints received for the 2015/16 financial year, broken down into grounds of unfair discrimination.



**BREAKDOWN OF EQUALITY COMPLAINTS RECEIVED
IN THE PERIOD 1 APRIL 2015 TO 31 MARCH 2016 (TOTAL = 749)**

The data presented above does not constitute an extensive explanation of the overall context of equality in South Africa and is not confined to allegations of discrimination which have taken place in the workplace. However, this data is significant in reflecting the wider challenge of discrimination and inequality in South Africa and serves as an indication of the general trends, therefore providing a context for the Inquiry into the prevalence of unfair discrimination in the workplace.

12 Central Intelligence Agency. (2014). The CIA World Fact book 2014.

13 South African Institute for Race Relations. (2014). South Africa Survey 2013.

14 Terreblanche, S. (2012). Lost in Transformation: South Africa's search for a New Future since 1986.



3 UNDERSTANDING DISCRIMINATION

3. UNDERSTANDING DISCRIMINATION

3.1 Defining unfair discrimination

Without discussing the legal framework in detail, South Africa has enacted a wide number of legal and policy documents aimed at preventing unfair discrimination and promoting equality in general, as well as in the employment sector specifically. In addition to this, a number of policy documents, codes of good practice and guidelines have been enacted to guide employment equity and eliminate discrimination relating to specific grounds, such as gender and disability. Perhaps the most significant piece of legislation is the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹⁵ which is further supplemented in the employment context by the Basic Conditions of Employment Act (BCEA);¹⁶ EEA and the Employment Equity Amendment Act (EEAA).¹⁷

There are several definitions applied to the term “discrimination”, which is particularly outlined in legalistic terms. The term “discrimination” is defined in PEPUDA as being any:

“act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -

- (a) imposes burdens, obligations or disadvantage on; or*
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”*

Simply put, and as explained by Currie and de Waal, it refers to differential or unequal treatment of persons based on inherent characteristics, such as those listed in section 9(3) of the Constitution, but may also include other analogous (or unlisted) grounds.¹⁸ Unfair discrimination, therefore, refers to the differential treatment of a person based on inherent characteristics which has the potential to impair a person’s dignity without a legitimate reason. Alternatively, unfair discrimination may also arise where law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalisation against persons or groups that have been subjected to past discrimination, therefore having an unfair impact.¹⁹

While definitions such as the above provide useful guidance, discrimination itself needs to be recognised as a social phenomenon and a process and must be considered within the specific historical, social, political and cultural context in which it arises. Moreover, while particular emphasis is placed on individual or isolated events of discrimination, further recognition must be given to the fact that such events essentially form a continuum, where the impact becomes compounded.

Discrimination, in essence, is about social exclusion, reinforcing perceptions of inferiority or difference. It may be argued that in many instances discrimination is about the perception of human traits, i.e. what people are thought to be or represent, rather than what they actually are, and is therefore predominantly founded on misperception, prejudice, and stereotypes. Prejudices and stereotypes are formed on preconceived ideas, thoughts or expectations of a person or groups, largely representing generalised, inflexible and inaccurate perceptions, and are intrinsically related to the manifestation of discrimination and other forms of intolerance.²⁰

15 52 of 2002.

16 75 of 1977.

17 Employment Equity Amendment Act, 47 of 2013.

18 Currie & de Waal “The Bill of Rights Handbook” (Fifth Edition), p 243.

19 Currie & de Waal “The Bill of Rights Handbook” (Fifth edition), p 244.

20 Keene “Social Bias: Prejudice, Stereotyping, and Discrimination” (Volume 1, Number 3) Journal of Law Enforcement, p 1-2.

The concept of gender, for instance, refers to the socially constructed roles of men and women and includes the way men and women are expected to think and act. These assigned roles and expectations are not objectively linked to the actual characteristics or abilities of each sex, and therefore give rise to prejudices which become deeply embedded into the social culture. Similarly, with regard to disability, while physical or mental impairment may objectively exist, this impairment becomes a handicap due to the way in which society is constructed. For example, the fact that an individual in a wheelchair is unable to access a building is not a result of his or her physical impairment, but rather a result of the manner in which the building has been constructed. Race and ethnicity, too, while formed on the basis of biological or physical differences, have arisen as social and ideological concepts which draw distinctions between persons from different groups, regardless of their actual characteristics and abilities. Therefore, while some inherent characteristics may be objectively present, it is the social construction of these traits which give rise to exclusion, disadvantage, and discrimination.

Negative perceptions formed against different categories of persons give rise to an “us” versus “them” mentality, and frequently drives social behaviour and the level of social interaction, or lack thereof. There is a tendency of persons to maintain social distance from groups of persons perceived in a negative light, which is both as a result of prejudice or stereotypes and also serves to reinforce them.

“Negative perceptions formed against different categories of persons give rise to an “us” versus “them” mentality, and frequently drives social behaviour and the level of social interaction, or lack thereof.”

3.2 Multiple, compound and intersectional discrimination

Our understanding of discrimination is usually divided into different grounds in an attempt to simplify the understanding and analysis of the phenomena. However, while discrimination and related intolerance are largely assessed in terms of specific grounds or traits, a greater cognisance needs to be held that people sometimes belong to multiple disadvantaged groups at the same time, for example, women with disabilities or migrants from a religious or ethnic minority. Persons belonging to multiple categories, therefore, experience the consequences of discrimination differently.

Persons falling within these categories of experiences are likely to suffer from discrimination more often, and the effects of which are frequently more intense in nature. In fact, the International Labour Organisation (ILO) has found that those experiencing discrimination on several grounds are disproportionately represented amongst the unemployed or those in poorly remunerated or precarious employment.²¹

The ILO also explained that, globally, institutional and evidentiary processes focus on single-ground discrimination, which is partly due to a lack of awareness and understanding of multiple, compound and intersectional forms of discrimination. However, it is also recognised that in these situations, identifying a particular ground of discrimination may present a challenge, and it becomes difficult to separate grounds due to the realisation that various grounds are so closely intertwined in lived reality. It is vital, therefore, to acknowledge the fact that discrimination cannot be considered in light of individual characteristics in isolation as this would serve to distort the peculiar nature of the experience of persons suffering from multiple, compound or intersectoral forms of discrimination.²²

21 ILO “Equality at Work: The Continuing Challenge” (2011), at p 17.

22 Makkonen “Multiple, Compound and Intersectional Discrimination: Bridging the Experiences of the Most Marginalised to the Fore” (2002), Institute for Human Rights, Abo Akademi University, p 9 – 13.

3.3 Fair versus unfair discrimination

Section 9 of the Constitution guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law. Moreover, section 9 goes on to explain that equality includes the full and equal enjoyment of all rights and freedoms, and explicitly prohibits unfair discrimination on a number of listed grounds.²³ These 16 grounds are further reflected in PEPUDA, and discrimination based on one or more of these grounds are considered to be automatically unfair unless it can be established that such discrimination is fair. This consideration is particularly important given the country's history of assigning privilege according to race, gender, disability, and other characteristics. In addition to the listed grounds, differentiation on an unlisted ground may also constitute unfair discrimination but must be shown to be unfair and to have significantly impaired the dignity of the person involved.

However, it must be noted that not all forms of discrimination are unfair and only conduct which is considered to unduly impose burdens or withhold benefits or opportunities on one or more prohibited ground (including unlisted grounds) is considered to be unfair. The EEA sets out two forms of discrimination which are not unfair, namely affirmative action measures which are consistent with the purpose of the Act, and conduct which distinguishes, excludes or prefers any person on the basis of an inherent job requirement.²⁴ In addition to this, discrimination that is compulsory by law (for example the prohibition against employing persons below the age of 15 years), as well as discrimination based on productivity (for example, where benefits such as increases or bonuses are based on job performance), are also considered to be fair.

3.4 Forms and manifestations of discrimination

Discrimination takes place in different forms, and both direct and indirect forms of unfair discrimination are prohibited. Direct discrimination relates to a law, policy or conduct which is inherently unfair, and explicitly treats a person or category of persons less favourably due to an inherent characteristic. Direct discrimination may additionally take place through associative and perceptive discrimination. Associative discrimination arises whereby a person is discriminated against because they associate with another person who possesses an inherent characteristic, whereas perceptive discrimination takes place where a person is perceived as possessing a particular characteristic, whether or not they actually possess it (such as sexual orientation or HIV and Aids). While direct discrimination may manifest in a multitude of ways, it is important to note that instances of harassment and victimisation are included.

Indirect discrimination, on the other hand, is much more complex and difficult to identify. Notwithstanding that a law, policy or conduct may appear to be neutral and purport to treat all persons equally, it may have a discriminatory or negative impact on a particular person or category of persons.

Discrimination may further take place at different levels, including individual and institutional. While individual discrimination refers to individual perceptions and conduct that discriminates, institutional discrimination relates to policies or practices which unfairly and disproportionately restrict access to goods, services or opportunities for particular groups of people. In further understanding the different forms of discrimination, it must be noted that discrimination does not need to be intentional. In this regard, a distinction is drawn between blatant and structural (or latent) discrimination.

23 Race, sex, gender, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

24 Section 6(2).

The latter form does not necessarily refer to intentional displays of prejudice, but rather refers to a system of inequality ingrained in society on the basis of certain grounds (such as race or gender) which arise as a result of an array of dynamics (including historical, cultural and institutional amongst others).²⁵

With structural discrimination, rules, norms, routines, practices and behaviour (whether formal or informal) have become deeply embedded into the culture of an institution or even in society at large and, often covertly, have the effect of maintaining current power relations. Although such activities may be neutrally conceptualised, they nevertheless create obstacles to equal opportunities for certain groups, therefore perpetuating disadvantage and marginalisation. Although structural discrimination is often less obvious or visible in society, the so-called normalisation of this system perpetuates practices of discrimination and exclusion, meaning that the individual may not be aware of the fact that his/her conduct is discriminatory and offensive.

Unfair discrimination in the workplace is therefore about the differential or less favourable treatment of a candidate or employee because of characteristics that are not related to his/her merit or the inherent requirements of the job. It may arise in a variety of workplace-related activities, including access to employment; particular occupations; training and vocational guidance and terms and conditions of work. According to the United Nations Global Compact Labour Principles,²⁶ the latter category includes the following, among other things:

- recruitment;
- remuneration;
- hours of work/holiday;
- maternity protection;
- security of tenure;
- job assignments;
- performance assessment and advancement
- training opportunities;
- promotion prospects;
- occupational health and safety; and
- termination of employment.²⁷

25 Keith Lawrence and Terry Keleher "Structural Racism" accessed at: <http://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf>

26 International Labour Organization "The Labour Principles of the United Nations Global Compact: A Guide for Business" (2008).

27 Ibid, p 31.

“

Unfair discrimination in the workplace is therefore about the differential or less favourable treatment of a candidate or employee because of characteristics that are not related to his/her merit or the inherent requirements of the job.

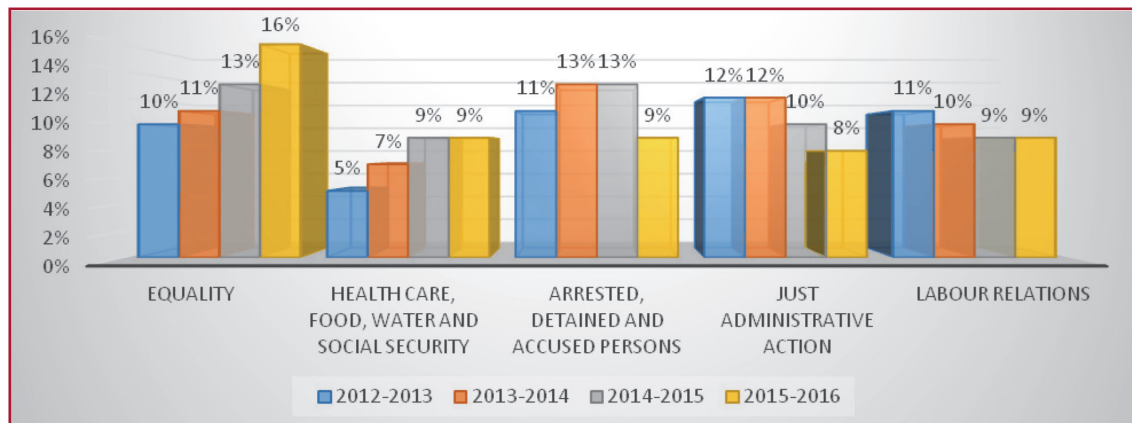
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4 ANALYSIS OF UNFAIR DISCRIMINATION TRENDS

4. ANALYSIS OF UNFAIR DISCRIMINATION TRENDS IN THE WORKPLACE IN SOUTH AFRICA

The Commission compiles statistics on complaints trends on an annual basis, which it publishes in its Annual Trends Analysis Report. Cumulatively, complaints lodged with the Commission relating to equality and labour relations have consistently formed part of the top five rights violations at the Commission, as reflected in the graph below. Although this data is not disaggregated to reflect the occurrence of complaints dealing with unfair discrimination in the workplace specifically, it is indicative of the general trends.



COMPLAINTS TRENDS AT THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION: 2012 - 2016

With regard to the Commission for Conciliation, Mediation and Arbitration (CCMA), the total number of complaints lodged have been consistently increasing over the last few years, as indicated in the table below. Cases of unfair discrimination have doubled in the past three financial years. While this is not necessarily indicative of the increasing discrimination trends in the workplace, it highlights that employees appear to be more aware of their rights and are empowered to take action against prohibited conduct.

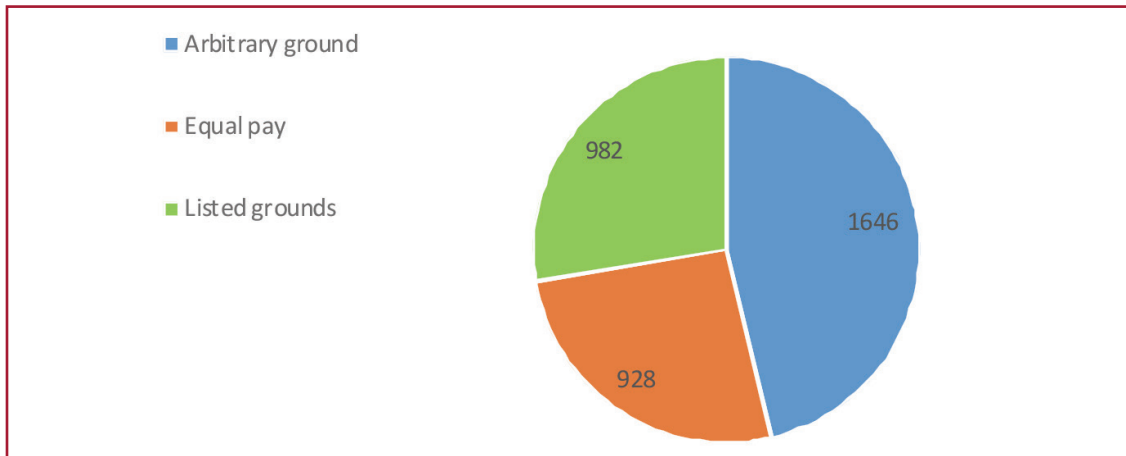
TABLE: TOTAL NUMBER OF CASES REFERRED TO THE CCMA FOR 2013/14, 2014/15, 2015/16:

April 2013 to March 2014	April 2014 to March 2015	April 2015 to March 2016
170 915	171 998	179 591

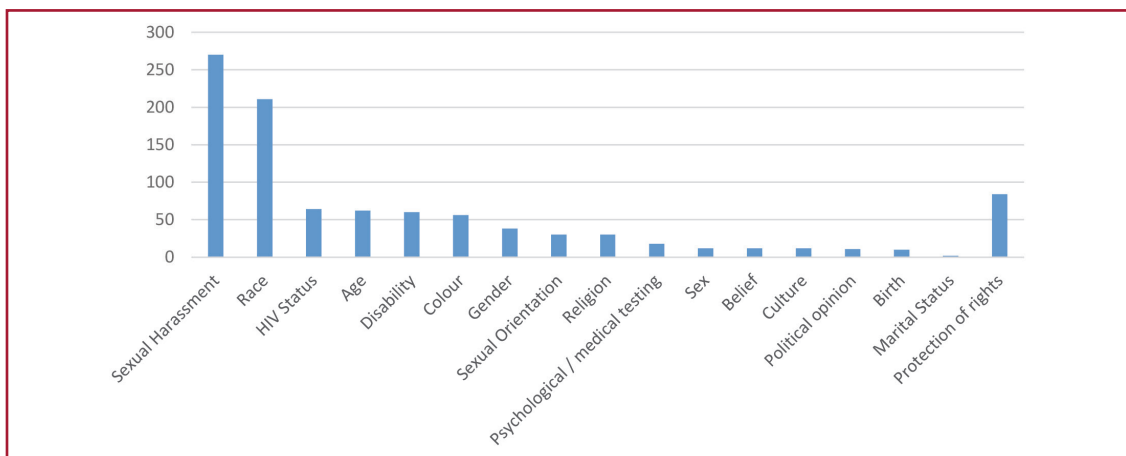
TABLE: NUMBER OF UNFAIR DISCRIMINATION CASES REFERRED TO THE CCMA FOR 2013/14, 2014/15, 2015/16:

Financial year	Number of cases dealing with unfair discrimination	Percentage of total number of cases referred to the CCMA
April 2013 to March 2014	1 432	1%
April 2014 to March 2015	1 636	1%
April 2015 to March 2016	2 722	2%

The CCMA provided statistics for the period from August 2014 to March 2016. The statistics illustrate that the majority of matters dealing with unfair discrimination have been complaints relating to equal pay for work of equal value, followed by arbitrary grounds of unfair discrimination. Of the listed grounds, however, sexual harassment and race have consistently been the highest, with HIV and Aids status, age, and disability forming the top 5 rights violations on average over this period. Colour, gender, sexual orientation and religion also consistently appear in the complaints.



UNFAIR DISCRIMINATION COMPLAINTS TRENDS AT THE CCMA:
AUGUST 2014 TO MARCH 2016



UNFAIR DISCRIMINATION COMPLAINTS ON LISTED GROUNDS AT THE CCMA:
AUGUST 2014 TO MARCH 2016

While the abovementioned statistics are indicative of the types of unfair discrimination cases being referred, they are not necessarily reflective of the reality on the ground due to a variety of reasons, including a lack of awareness of rights and a lack of referral of cases by employees. This lack of referral may be due to the internal resolution of complaints, or non-reporting. The latter situation is likely to occur on a greater basis for employees in vulnerable positions or precarious employment, including domestic and farm workers where employment is largely not formalised and monitored, while migrants are also especially at risk.

On an annual basis, the Public Services Commission (PSC) collects information on grievances lodged by employees in the public sector, with allegations of unfair treatment forming the second-highest: accounting for approximately 22% of all complaints lodged in the 2014/15 financial year.²⁸ The vast majority of grievances lodged on the basis of unfair treatment relate to sexual harassment, and although the timeline for the resolution of complaints is set for 60 days, the public service frequently lags behind in meeting this.

28 8405 grievances were lodged with departments in the public service, whilst 872 grievances were lodged directly with the PSC.

While these statistics are not disaggregated to the phase of employment at which the alleged act of unfair discrimination arises, they are unlikely to fully reflect the full prevalence of discrimination which occurs at the recruitment level in particular. The reasons for this are that it is easier to identify instances of discrimination against an employee or group of employees in the workplace itself. On the other hand, applicants who are unsuccessful at the recruitment stage are usually unaware of the reasons, which may very well be linked to a stereotypical attitude of the employer or interviewer. Discrimination at this stage is also much more difficult to prove. For example, a candidate whose physical appearance or mannerism is not gender-normative, or a person with dreadlocks may be unsuccessful during the interview phase due to an entrenched perception that such a person does not conform to the heterosexual or corporate image of the company. Similarly, racial or gender stereotypes may also come into play during this phase, even when the interviewer may not be aware of his/her prejudicial attitude.

Ultimately, while these statistics provide a brief glimpse into the kinds of trends we are observing in the workplace, they must be read with a consideration of the variable factors that may influence the situation in reality, including a lack of awareness and under-reporting.

The sections to follow will outline progress made in relation to employment equity and will, after that, be followed by a brief examination of unfair discrimination in the workplace on various grounds. It must, however, be reiterated that the purpose of this report is to provide an overall view of the trends of unfair discrimination in the workplace, and due to the complexity of the issues, this report does not constitute an extensive examination of the issues identified.

4.1 Employment Equity

As a result of the employment and educational policies of apartheid, employment, occupational and income disparities were created. These disparities inevitably created a system of disadvantage for certain categories of persons that persist. Consequentially today, poverty disproportionately impacts certain groups. Apart from entrenching income inequalities, poverty has negative impacts on the ability of persons to access quality education, healthcare and other social services, which in turn reduces the opportunities available for individuals to advance themselves and break the cycle of poverty. Therefore, these disadvantages are unable to be reversed or rectified by the future prevention of unfair discrimination alone, but require the implementation of special measures designed to uplift previously disadvantaged groups.

In light of this, the Employment Equity Act, No 55 (EEA) was enacted in 1998 to facilitate transformation in the workplace through both the elimination of unfair discrimination as well as through the implementation of affirmative action measures to enable equitable representation of different race and gender groups. The EEA was later supplemented by the Employment Equity Amendment Act and Regulations to address issues such as the inclusion of arbitrary grounds in unfair discrimination, and the incorporation of the concept of equal pay for work of equal value, amongst other things.

Deeply entrenched social patterns of behaviours which have been built up over a long period tend to determine the way we think and the way we act in our everyday lives. What needs to be acknowledged, however, is that these thought processes are informed by a history of social interactions which, in the South African context specifically, incorporated qualities of subordination and differential treatment on the basis of race, gender, disability and class in particular. Therefore, even today, it is common for general social perceptions and institutional cultures to reflect the values and norms of the dominant social group.

It is in acknowledging this reality that the need for changing demographics within institutions is of paramount importance to transform institutional and social cultures away from one that maintains the status quo of dominance and exclusion, to one that enables diversity to thrive. In addition to this,

employment equity must be properly aligned with education and skills development initiatives that are capable of adequately capacitating persons from designated groups.

Employment equity, therefore, has two main objectives. The first is to increase the employment opportunities for previously disadvantaged groups and in this way to contribute towards the attainment of equality more broadly in society by allowing them to break the cycle of poverty. Secondly, employment equity leads to the improved integration of diverse groups in the workplace. As it was explained earlier in the report, stereotypes and prejudices are often preserved by the fact that different groups maintain social distance. Therefore, through increased interaction between different groups of persons in the workplace, employment equity can contribute towards the breaking down of these stereotypes, thus tackling discrimination at its core.

Section 15 of the EEA sets out affirmative action provisions to ensure that *“suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.”* For the purpose of the Act, “designated groups” refer to black people (including Africans, Coloureds and Indians), women and persons with disabilities who are citizens of the country. These groups are recognised as being previously disadvantaged.

Importantly, the EEA requires that there must be no absolute barrier to the employment and advancement of people who are not from designated groups,²⁹ and in this regard, while it allows for preferential treatment and numerical goals, it explicitly prohibits the application of quotas or caps.³⁰ However, while affirmative action does not constitute unfair discrimination in principle, the implementation of such measures may amount to unfair discrimination in some instances, such as where a candidate appointed is not suitably qualified.³¹ Numerous cases heard by the courts in South Africa have provided clarity around the conceptualisation and implementation of special measures in line with constitutional objectives, while a number of other aspects still stand to be tested. The objective of this report, however, is not to examine the scope and boundaries of employment equity specifically, and it is therefore not necessary to elaborate on the findings of the courts.

“Importantly, the EEA requires that there must be no absolute barrier to the employment and advancement of people who are not from designated groups, and in this regard, while it allows for preferential treatment and numerical goals, it explicitly prohibits the application of quotas or caps.”

All designated employers,³² in terms of the EEA, are required to develop Employment Equity Plans which set out, *among other things*, affirmative action measures to be implemented; numerical goals; timelines, as well as other measures consistent with the purpose of the Act. Each employer’s operation is unique, and as such, the pace and/or timeframes for achieving acceptable employment equity outcomes must be assessed on a case-by-case basis.

29 Section 15(4).

30 Section 15(3).

31 PSA obo Tlowana v MEC of Agriculture (2012).

32 As defined by the EEA as follows:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;
- a municipality, as referred to in Chapter 7 of the Constitution;
- an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

While the Department of Labour (DoL) is unable to provide assessment and guidance to each business, it purports to do so through the production of EEA regulations, codes of good practice and other policy documents.³³

4.1.1 Analysis of Employment Equity progress made to date: An overview

In considering the progress made in achieving employment equity in the workplace, the Commission reviewed the Annual Report of the Commission for Employment Equity (CEE) for the 2015/16 financial year, together with additional submissions made by the various stakeholders at the Hearing. Although this portion of the report will not attempt to duplicate or repeat the work undertaken by the CEE, it aims to provide a brief overview of the status of employment equity in the country to date.

The CEE Annual Report examines progress made regarding employment equity in the workplace on designated employers, and in undertaking such analysis, the workforce population distribution is analysed on the basis of data received from Statistics South Africa on the Economically Active Population (EAP). The EAP includes people between the ages of 15 and 64 years of age who are either employed or are seeking employment. It, therefore, provides an indication of the number and proportion of persons from different racial and gender groups in the employment market and is utilised in identifying numerical targets and in assessing the achievement of equitable representation of different groups.

Overall, the 2015/16 CEE Report highlighted the fact that progress is being made for designated groups particularly at professional and technically skilled levels, reflecting the fact that a pipeline of designated individuals is beginning to form. However, it voiced concern over the fact that these advancements are not being effectively translated into equity advancements at management level. The concept of a “glass ceiling” therefore consistently emerges where it is difficult for designated individuals at a professional level to advance further.

In general, the trends highlighted the fact that the public sector appears to be more responsive to change, showing more progress regarding employment equity targets than the private sector. Overall, the CEE recognised that the pace of transformation in South Africa remains slow, and although the proportion of designated groups in employment is increasing, white employees, and males, in particular, remain dominant relative to the economically active population (EAP).

In the public sector, the target of 50% representation of black people in management positions was met in 1999, and the 30% target for women in management was met in 2005 and subsequently revised to 50% in 2007. As at December 2015, the percentage of women in management positions stood at 40%. Despite having set a target of 2% in 1995, the employment of persons with disabilities remains extremely low, currently standing at 1% overall,³⁴ with 1.7% of senior management positions held by persons with disabilities in the public sector.

“Despite having set a target of 2% in 1995, the employment of persons with disabilities remains extremely low, currently standing at 1% overall, with 1.7% of senior management positions held by persons with disabilities in the public sector.”

33 Including:

- Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans, 1999/2000; and
- Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices, 2005.

34 The Employment Equity Act, 1998.

Despite the numerous policies and prescripts outlined above, the Department of Public Service and Administration (DPSA) noted that one of the biggest challenges facing transformation in the public sector is non-compliance, as well as problems with the disaggregation of data. Additionally, there is a general lack of a uniform approach to gender and disability mainstreaming in departments notwithstanding the policies developed which have intended to serve as guiding frameworks.

In seeking to address these challenges, the DPSA has introduced a number of tools aimed at monitoring implementation, including through the JobACCESS and Gender Equity Strategic Frameworks. These form part of the Management Performance Assessment Tool of the Department of Planning, Monitoring and Evaluation (DPME). A review of the Performance Management Development System (PMDS) was still underway at the time the submission was made. The Department has developed a sexual harassment report which aims to identify and analyse trends in this regard, as well as the efficacy of the complaints handling process. In terms of the Public Service Act,³⁵ the Minister of Public Service and Administration is further empowered to take disciplinary steps against a head of department who does not comply with the provisions of the Act, Regulations, determination or directive.

While the recruitment and up-skilling of designated groups is an essential component of achieving substantive transformation, the CEE has stressed the imperative of addressing the cultural transformation of organisations to promote and maintain diversity and address potentially hostile environments which act as barriers to equality and respect. Without seeking to capacitate designated groups adequately and to simultaneously address the institutional culture and indiscriminately embed forms of discrimination and power relations, there is a risk of achieving superficial compliance without really embracing the spirit and objective of transformation.

What is required, according to the CEE, are leaders *“that are hungry for a new paradigm that enables the organisation to flourish in the complexity of rapidly evolving global cultures...”* In seeking to promote the advancement of substantive transformation in the workplace, the CEE emphasised the need for rigorous monitoring and engagements with employers on the implementation of the EEA. The CEE intends to spend more time engaging with employers and different interest groups in an attempt to identify and understand persisting barriers, and to incorporate the so-called “softer issues” into its report, rather than limit reporting to an analysis of statistics alone. While the Commission is supportive of the expressed intention of the CEE and DoL to increase monitoring activities, it is cognisant of the challenge faced by the Department in that it currently employs an insufficient number of labour inspectors to undertake the monitoring of the implementation to the extent required.

There is a general perception that employment equity appears to be breeding more exclusion, with many feeling that absolute barriers for advancement exist, particularly for non-designated groups such as white males. However, the EEA prohibits the imposition of quotas and absolute barriers. In closing its submission at the Hearing, the CEE emphasised that there is no easy fix, and we are confronting deep-seated, complex and highly personal attitudes and assumptions. It emphasised that the first step to addressing these attitudes and assumptions is to open a dialogue.

4.2 Grounds of unfair discrimination in the workplace in South Africa

Rather than focusing the scope of the Hearing on listed grounds, it was purposely left broad to enable stakeholders to identify the systemic forms of discrimination in the workplace. However, in conducting an analysis of the complaints statistics submitted to the Commission together with supplementary desktop research, it emerged that a number of grounds and forms of discrimination were not raised during this Inquiry, but nevertheless appear to be systemic in nature.

35 The Public Services Act, 1994.

In recognition of this fact, and in light of the Commission's mandate to research and educate on human rights, the sections that follow go beyond the scope of the submissions received at the Hearing in an attempt to present a holistic picture. However, it must further be noted that the variable factors influencing the awareness and reporting of discrimination in all its forms and manifestations, the sections that follow do not necessarily reflect an extensive examination of all of the grounds of discrimination which may occur in the workplace.

4.2.1 Race, Colour and Ethnicity

Challenges relating to racial discrimination continue to be one of the greatest facing South African society. Before examining this form of discrimination, it is necessary to reiterate the fact that race and ethnicity³⁶ are inherently social constructs through recognition of the fact that social inequalities, attitudes and arrangements maintain a distinction predominantly on the basis of physical characteristics (such as skin colour, hair texture or facial characteristics), or traditional associations, rather than any potential biological distinction.³⁷

"Race", "colour" and "ethnicity" all broadly refer to constructs of identity and may at times overlap. While these terms are frequently used interchangeably, they are essentially distinct concepts and relate to very particular forms of discrimination. Caution must, therefore, be taken to guard against the conflation of these terms generally under the concept of "racial discrimination", which may create a situation whereby the peculiarities found within each becomes neglected in practice.

The International Convention for the Elimination of All Forms of Racial Discrimination³⁸ (ICERD) has affirmed the principle that human beings are equal in dignity and rights, and that the existence of racial barriers is incompatible with the ideals of any human society. It further emphasises the fact that the doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous. In recognition of the ideals of equality, dignity and freedom afforded to all persons irrespective of race, colour and ethnicity, the legitimisation and institutionalisation of racial supremacy and discrimination under the system of apartheid, was declared a crime against humanity by international bodies. Despite the country's efforts to create a stark break from this past, the country is still plagued by the effects, and racism continues to permeate at all levels of our society.

South Africa hosted the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, and in 2009 the Durban Review Conference highlighted concern over the number of issues and challenges that still need to be addressed to prevent, overcome and eliminate this form of discrimination.

Globally, as a result of historical oppression and discrimination, a large proportion of persons who still suffer from racial or ethnic discrimination today tend to be poor, and South Africa is particularly characteristic of this. Historically, the majority of Africans were denied equitable access to socioeconomic services and were provided with inferior educational and employment opportunities, in addition to being geographically segregated in largely underdeveloped areas. This history has given rise to a reality whereby the sustained patterns of inequality in the country are inextricably linked to race.

36 According to the Oxford English Dictionary, "ethnicity" refers to "*The fact or state of belonging to a social group that has a common national or cultural tradition.*"

37 The Commission notes that the notion of race as biological markers is widely rejected, but that it is not necessary to engage on this point further for the purpose of this report.

38 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

As described by the International Labour Organisation (ILO), “[c]enturies of unequal treatment in all spheres of life, combined with persistent and deep ethnic, socio-economic inequalities, explain their low educational and occupational attainments. Lower achievements, in turn, make them vulnerable to ethnic stereotyping, while social and geographical segregation perpetuates ethnic inequalities, reinforcing perceptions of “inferiority” or “distastefulness...”³⁹

The challenge of racial discrimination, in particular, remains a perennial obstacle to the achievement of rights and freedoms all over the world, and in South Africa, constitutes one of the greatest prevailing challenges to the country’s new constitutional dispensation.

Regarding employment demographics on the basis of race, South Africa has made progress in increasing the representation of different racial groups and is, therefore, showing improvement in the goal of achieving a more diverse workforce. However, previously disadvantaged groups, Black and Coloured, in particular, are still predominantly concentrated in low skilled, or low-income positions, while the vast majority of person’s unemployed continue to be Black and Coloured.⁴⁰ Given the country’s history, these realities are not surprising.

Despite frequent arguments that a lack of skill amongst designated groups contributes to the hindrance of a more progressive advancement, the CEE has identified a trend that preference is still given to white employees for recruitment, promotion and training opportunities. The DoL explained that the proportion of opportunities to provide training to the different racial and/or gender groups appears to correlate to the demographics of the labour force. As the current labour force is significantly out of proportion with the EAP, this illustrates that opportunities are not necessarily being provided for in line with the objectives of the EEA.

Due to their continued invisibility in South Africa, the Khoi and San persons bear specific mention in this report. Under apartheid, the Khoi-San people were forcibly classified as “Coloured”. Not only did this classification deny them their right to identity and culture, but it resulted in their virtual political and social invisibility. However, despite the advent of democracy and the recognition above, the legal and political framework continues to fail to officially recognise the identity of indigenous communities as separate and distinct groups, with their continued classification as “Coloured” in post-apartheid South Africa. A country report produced by Konrad-Adenauer-Stiftung e.V in 2013, raised issues relating to the impact of the failure to recognise indigenous communities as a distinct group in employment and recruitment opportunities, particularly under the affirmative action framework. The paper suggests that the Khoi-San, as a political minority in South Africa, may be seriously marginalised from gaining access to employment opportunities due to their lack of recognition under the Constitution and due to their classification as “Coloured”.

The Khoi and San peoples arguably remain some of the poorest and most vulnerable groups in society today. Given the historical and pervasive discrimination, marginalisation and rights violations faced by them, the implementation of special measures are required to redress both the past injustices and the continued disproportionate impact felt by these communities. However, without official recognition of Khoi and San persons as a distinct group, there is no official data against which the progressive realisation of rights can be measured. The Commission, therefore, takes this opportunity to reiterate its call to the Government of South Africa to take urgent steps to address the current situation in relation to the Khoi and San persons in South Africa.

39 ILO “Equality at Work: Tackling the Challenges” (2007), p24.

40 Statistics South Africa “Quarterly Labour Force Survey: Quarter 1: 2016”.

Despite the transition to a democratic order based on principles of freedom, equality and dignity, South Africa is still struggling to recover from its devastating and divisive past. The impoverishment of African people under the apartheid regime has given rise to a cycle of poverty, and although advancements have been made, many previously disadvantaged groups continue to face a paucity of access to basic services, including a poor level of basic education and inequitable access to tertiary level education. The development of policies aimed at preventing or eliminating the occurrence of racial discrimination alone is therefore insufficient. The realisation of substantive equality in the country is dependent on measures which transcend this to actively advance the achievement of economic equality in the long term through ensuring equitable access to employment, and to employment opportunities for previously disadvantaged individuals. Apart from the continuous barriers of entry into and advancement within the employment sector, the institutional culture of an organisation or entity itself may be particularly alienating to previously disadvantaged and marginalised groups. An analysis of the submissions received together with the complaints statistics of the Commission worryingly reflects the fact that previously disadvantaged groups, and black individuals in particular, continue to face high levels of harassment, and differential or undignified treatment, both in the workplace and in society in general.

As indicated earlier in the report, approximately 16% of complaints received by the Commission in the 2015/16 financial year alleged a violation of the right to equality. Of these, around two-thirds were classified as race-related complaints. Notably, the Commission has observed high levels of the use of derogatory and offensive racial slurs, including “kaffir”, “monkey”, “baboon”, “bushie”, “coolie”, amongst others, even in the workplace. The Commission strongly condemns such intentional displays of racism that seek to undermine the values upon which our new democracy is founded on, and reiterates that such conduct constitutes hate speech. The perpetuation of language which unequivocally seeks to belittle, humiliate, subordinate and dehumanise persons by race alone cannot be condoned under any circumstances and must be strongly rejected by all persons in the country.

“The perpetuation of language which unequivocally seeks to belittle, humiliate, subordinate and dehumanise persons by race alone cannot be condoned under any circumstances and must be strongly rejected by all persons in the country.”

In dealing with racism in the workplace, the recent Constitutional Court judgment in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*⁴¹ reiterated the devastatingly harmful impact of the use of such derogatory and morally condemnable terms. The Court emphasised the fact that the word “kaffir” is the “*embodiment of racial supremacy and hatred all wrapped up in one*,”⁴² showing the lowest form of contempt for African people. Despite this, such instances are often trivialised, viewed with indifference, and in some instances, are still treated as the “norm” in the South African society.

In considering the deeply harmful impact of such language, the Court reiterated that such “*injurious disregard for human dignity and racial hatred spewed by an employee against his colleague in a workplace, ordinarily renders the relationship between the employee and the employer intolerable.*”⁴³

Race relations, therefore, remain a serious challenge to the social fabric of the country, and while access to employment is increasing, there is still a long way to go before true equality can be achieved. In quoting Chief Justice Mogoeng in the SARS matter, “*there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality.*”⁴⁴

41 [2016] ZACC 38.

42 Para 9.

43 Para 46.

44 Para 1.

4.2.2 Nationality and social origin

Migration is a complex, global phenomenon, defined by the Office of the High Commissioner for Human Rights (OHCHR) as a “megatrend” and a fundamentally human process. While many people migrate voluntarily in search of new opportunities, many others are compelled to do so as a result of generalised violence, persecution, human rights violations, armed conflict, xenophobia, environmental degradation or due to poverty and a lack of decent work.

The ILO has explained that the plight of migrant workers is of growing concern as they face a number of employment restrictions and are mostly concentrated in the so-called 3D jobs – dirty, dangerous and degrading, regardless of their level of skill. The circumstances of migrants in an irregular situation (i.e. undocumented migrants) are of particular concern. Undocumented migrants are more vulnerable to abuse and exploitation and find it more difficult to enforce their rights or to seek redress for violations. Moreover, migrants, in general, are often significantly more vulnerable as they commonly face multiple and intersecting forms of discrimination, including race, religion, and gender, amongst others.⁴⁵ In addition to this, migrants often face language and cultural barriers which hinder their effective integration and access to information. Migrants often face barriers to entry into formal employment, which may arise as a result of national laws and policies, and those within the employment sector may face discriminatory attitudes and harassment, along with differential treatment and working conditions, and at times, are unable to access the same employment and social benefits as other workers.⁴⁶

Many international migrants are forced into the informal economy as a result of challenges relating to access to financial services and in obtaining the relevant documentation from officials to enable them to seek formal employment. Research done in South Africa by the Migrating for Work Research Consortium (MiWORC) found that international migrants are more willing to take jobs that locals are not willing to take, or are employed in the informal work sector and face difficult and precarious conditions of employment. This research was further confirmed in the draft Report of the Ad Hoc Committee on Probing Violence Against Foreign Nationals. The report found that high levels of exploitation of migrant workers by organised business exist, where such exploitation is largely as a result of the fact that migrants are generally not unionised or are often undocumented. Trade union bodies at the Hearing also reiterated concerns around the abuse and exploitation of migrant workers regarding lower wages, longer working hours, poor conditions and a lack of representation, and called for greater vigilance and protection.

Certain employment sectors, such as domestic labour in private households and farms, employ large numbers of migrants. Although these sectors are regarded as reflecting high levels of discrimination, exploitation and a general disregard for labour regulations, they are particularly difficult to monitor due to their non-public nature.

In South Africa, many migrants from other countries are employed in the domestic work sector, while the majority of nationals employed are in fact migrants from other parts of the country, mostly from rural areas. Migrating for Work Consortium⁴⁷ (MiWORC) has documented that the majority of domestic workers interviewed in a study conducted have no written contracts, and instances of discrimination and exploitation were high and included physical and verbal abuse, sexual exploitation and general discriminatory maltreatment. However, despite this, most workers are reluctant to lodge complaints or raise concerns with employers out of fear of losing their jobs.

45 ILO “Equality at Work: Tackling the Challenges” (2007), p 30 – 33.

46 ILO “Equality at Work: The Continuing Challenge: (2011), p 34 – 39.

47 Migrating for Work Research Consortium “Getting the house in order: Foreign migrant workers in the domestic work sector in South Africa” (2015).

The immigration system in South Africa makes it difficult for immigrants to obtain work permits, and international migrants are therefore often faced with little choice but to enter the job market illegally, thus exposing them to exceptionally high levels of exploitation and discrimination. Despite the fact that the Refugee Act, 130 of 1998 (Refugees Act) allowed for the right of refugees and asylum seekers to work, recent amendments⁴⁸ have seen a regression through the imposition of some restrictions on this right with serious implications for workers falling within this category.

In terms of the 2016 Refugee Amendments Bill,⁴⁹ refugees and asylum seekers entering the country may apply for the right to work in the Republic. This application must be made at the time of applying for refugee status. Regarding the proposed amendments, the right to work is limited to the formal employment sector, and an applicant must provide a letter from an employer within 14 days of lodging an application.⁵⁰ The right to work, however, may be denied in situations where a means test has verified that an asylum seeker can sustain himself and his family for a period of four months whilst awaiting the outcome of an asylum application; where the applicant is offered shelter and basic necessities by the United Nations High Commissioner for Refugees (UNHCR); or its participating partners during this period; or where the applicant has failed to produce a letter of employment.

This essentially excludes refugees and asylum seekers from undertaking piecework; work in the informal sector or self-employment of any kind, severely increasing the likelihood of unemployment, rendering families dependent on the social welfare system of the State, and confining them to a state of poverty and vulnerability. With workers dependent on receiving a letter of employment to legally enter the employment sector and sustain their families, they are placed in a precarious situation where they may be willing to accept lower wages and poor working conditions in exchange. A violation of these provisions (including where an asylum seeker or refugee conducts work-related activities where a work permit has not been granted, or where he or she enters the informal labour market) constitutes a criminal offence and may result in some penalties, including the withdrawal of an asylum seeker permit. These provisions, therefore, have the potential impact of criminalising poor and vulnerable migrants who seek to make a living and sustain themselves outside of the formal employment market and give rise to the possibility of withdrawing protected status from such persons. The exclusion of such persons from the employment market also limits their ability to integrate into society effectively and therefore hinders the achievement of sustainable social cohesion.

International migrants who are not asylum seekers or refugees are not subjected to similar restrictions, and these provisions are therefore contrary to international law⁵¹ as well as the right to equality as guaranteed by the laws of South Africa. The 2015/16 CEE Annual Report reflected an increase in the number of foreign workers employed by designated employers. In response to this, the DoL was conducting research on the impact of migrant labour on the implementation of the EEA at the time of drafting this report. This research, it was anticipated, will take account of both the implementation of affirmative action measures as well as on the need to eliminate unfair discrimination against foreign nationals in the workplace. In conducting this research, the DoL is urged to regard the relevant international instruments which regulate the rights of migrants and migrant workers in particular and should apply close attention to the vulnerabilities facing migrant workers, especially those in low-skilled or precarious employment with a view to enhancing protections and the elimination of discrimination.

48 Refugees Amendment Bill, 2015.

49 16 September 2016.

50 Section 22(8).

51 Article 17 of the UN Refugee Convention obliges states to provide "*the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment*". Moreover, Article 18 further extends this obligation to self-employment which includes *inter alia* agriculture, industry, handicraft and commerce and to establish commercial and industrial companies.

4.2.3 Sex and Gender

Equality legislation, including section 9(3) of the Constitution, include both sex and gender as listed grounds for the prohibition of discrimination, and it is, therefore, necessary to commence this section with an explanation of the distinction between the two concepts.

The term “sex” is generally used to refer to the physical and biological differences between men and women, while “gender”, on the other hand, refers to the socially constructed differences. These include economic, social and cultural attributes and opportunities associated with being male or female. Gender attributes include the distinct roles, responsibilities and expectations placed on males and females in society, which include things such as how they should dress, behave or work, and consequentially involve a relationship and power dynamic. According to the United Nations, these differences often determine the type of activities undertaken by men and women, access to and control over resources and decision-making opportunities, which differences and inequalities are shaped by the history of social relations. Gender roles may vary amongst different cultures and are susceptible to change over time.⁵²

Historically, women have been marginalised and regarded as unequal compared to men regarding social and power relations, which has given rise to significant social, cultural and economic inequalities. Women and girls from previously disadvantaged groups are disproportionately affected by poverty and its underlying determinants because of the historical classification of races and the challenges associated with deconstructing the legacy of apartheid. Therefore, there is a need for a deeper understanding of the structural barriers which discriminate against women and prevent them from living an existence which is equal in opportunities and outcomes to their male counterparts.

The importance of the promotion and achievement of gender equality is reflected in acknowledging the fact that all of the United Nation’s Sustainable Development Goals (SDGs) now include gender-responsive targets, and Goal 5 in particular aims to achieve gender equality and empower all women and girls. This goal includes specific targets aimed at ensuring full and effective participation and equal opportunity, while further seeking to recognise the value of unpaid care and domestic work.⁵³

Discrimination on the basis of sex or gender manifest in many different ways, including in participation rates in the workplace; access to decision-making positions; remuneration; maternity and paternity benefits; family responsibilities and expectations; while women in particular face high levels and risks of sexual harassment. In addition to this, widespread discrimination or occupational segregation on the basis of gender still exists, reflecting persistent stereotypes relating to the type of work that is deemed “appropriate” for men and women.

4.2.4 Unpaid care, domestic work and family responsibilities

Women remain the primary role players for household chores and family responsibilities, which are defined or understood as constituting “unpaid work”. However, unpaid work is often undervalued, with the emphasis placed on economic productivity. The social expectations significantly impair the ability of women to access employment opportunities at an equitable level. This fact is reflected in the reality that women are disproportionately represented in part-time employment, as well as the fact that when paid and unpaid work is combined, women generally work longer hours on average than their male counterparts.

52 UNStats “Gender Statistics Manual” (as accessed at <http://unstats.un.org/unsd/genderstatmanual/Print.aspx?Page=What-are-gender-stats>); UNFPA “Frequently asked questions about gender equality” (as accessed at <http://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality>)

53 M Beisheim ‘Reviewing the Post-2015 Sustainable Development Goals and Partnerships. A Proposal for a Multi-level Review at the High-level Political Forum’ SWP Research Paper 2015/RP1. Stiftung Wissenschaft und Politik (2015)

“Women remain the primary role players for household chores and family responsibilities, which are defined or understood as constituting “unpaid work”. However, unpaid work is often undervalued, with the emphasis placed on economic productivity.”

The perpetuation of access inequality as a result of women’s responsibility as child bearers and caretakers also negatively impacts on the likelihood of women progressing within an organisation to reach decision-making and management positions. This is a good example of the manner in which structural discrimination perpetuates gender inequality in the workplace. By recognising that it is not the fact that women, biologically, are bearers of children, but rather the fact that they maintain the socially assigned role of family care-givers and household chore undertakers, together with the inflexible nature of employment structures that hinder their ability to obtain equitable employment opportunities or to advance in the workplace. Although there is a greater recognition of the manner in which initiatives such as flexible working hours or the ability to work from home (i.e. telecommuting) are able to contribute to the achievement of gender equality in the long term, the vast majority of employers do not offer flexible working arrangements which would allow women the ability to balance work with family responsibilities.

In addition to this, the lack of available or affordable child care services also impacts on women’s ability to access equitable work opportunities, particularly for those in lower earning jobs. This realisation has led to an increased effort by employers worldwide to consider and implement child care facilities within organisations.

Finally, the deeply embedded stereotypes of women as the primary carers of the family are reflected in maternity and paternity benefits globally, giving rise to discrimination, while further hindering the advancement of gender equality in the long term. This issue will be discussed in a separate section below due to its complexity.

4.2.4.1 Maternity and Paternity

Maternity and paternity protection is a fundamental labour right, which is a precondition for gender equality, and non-discrimination in employment and occupation.⁵⁴

In recognising that combining work, personal and family life (COMB) forms one of the ten substantive elements of the Decent Work Agenda of the ILO. These rights are entrenched in order to “enable women to combine their reproductive and productive roles successfully; to prevent unequal treatment at work due to their reproductive role and to promote equal opportunities and treatment in employment and occupation without prejudice to health or economic security.”⁵⁵ In addition to this, maternity and paternity labour rights seek to challenge the stereotypical gender roles by promoting equal opportunity and treatment of both men and women with regard to family responsibilities.

Without going into too much detail, maternity and paternity labour rights incorporate numerous elements, including the fact that all workers should be entitled to rights and protections; leave entitlements; social and medical benefits; employment protection and non-discrimination (including protection during recruitment; protection against unfair dismissal; the right to return to work and to be treated fairly upon return); health protection at work; as well as additional protections for nursing mothers.

⁵⁴ ILO “Maternity and Paternity at Work: Law and Practice across the World” (2014), p 2.

⁵⁵ Ibid, p 2.

Maternity and paternity benefits can result in discrimination for both men and women, although in different ways. For women, the lack of or limited paid maternity leave may result in economic insecurity, which carries a disproportionate burden for poor households, and may further have the result of discouraging women from becoming pregnant altogether. According to a recent study undertaken by the Department of Women (DoW), 63% of women surveyed have been entitled to maternity leave, compared to just 31% of men, despite the law guaranteeing such benefits.⁵⁶ While the DoW's report did not provide further detail, people in precarious or relatively unregulated sectors of employment (such as domestic work, for example), are likely to be the most affected, along with migrants and other vulnerable groups.

Other organisational policies about pregnancy may result in indirect forms of discrimination, such as the disqualification of women from receiving promotions, raises or bonuses for the period during which they have taken maternity leave, regardless of their performance or whether they would otherwise have qualified for such benefit. This disqualification is further indicative of the form of structural discrimination faced by women in particular.

In South Africa, a woman is entitled to a minimum of four months unpaid maternity leave in terms of the Basic Conditions of Employment Act (BCEA), during this period she may claim benefits from the Unemployment Insurance Fund (UIF). In addition to this, many employers offer extended maternity leave which may include a portion of paid leave, which is regulated by internal policies.

Employers are not only prohibited from discriminating against women as a result of their pregnancy, but are required to take protective measures against any risk to the health and well-being of the mother and child through reasonable accommodation. This includes allowing a pregnant woman to take maternity leave early, or through adjusting her work tasks to avoid risk.

Despite this legal protection, however, the Hearing proceedings highlighted the fact that discrimination in instances of pregnancy was consistently raised as a prominent form of discrimination taking place on a large scale. According to submissions, common forms of discrimination include instances where employers are disinclined to appoint female employees due to the cost and operational inconvenience which may ensue should the employee become pregnant. Existing female employees are often discouraged from falling pregnant, and are regularly treated differently after returning to work from maternity leave.

The situation in South Africa in relation to the structure of maternity and paternity benefits are generally reflective of the global picture and tend to perpetuate the gender role of women as primary caregivers. Women are guaranteed a certain period of maternity leave while men are afforded a very limited amount of paternity leave. In terms of the BCEA, all persons are entitled to three days family responsibility leave per 12-month cycle, this leave encompasses the right to paternity leave for fathers. The current situation therefore not only inhibits progress towards a more gender equal society regarding unpaid work and family responsibility roles, therefore discriminating on the basis of sex, but also has the impact of discriminating on the basis of sexual orientation and family structure, with male same-sex couples or single fathers facing difficulties.

A recent Labour Court decision in the case of *MIA v State Information Technology Agency (Pty) Ltd*⁵⁷ dealt with a challenge to the discrimination faced by homosexual fathers in relation to the maternity and paternity benefits afforded in terms of the law. In this case, the employer argued that the BCEA provisions apply specifically to female employees, and was largely based on the fact that pregnancy and giving birth gives rise to physiological effects that prevent biological mothers from working during some stages of pregnancy and in the post-partum period.

56 Department of Women "Report on the Status of Women in the South African Economy" (2015), p 65.

57 (D 312/2012) [2015] ZALCD 20.

The Labour Court found that this right was not only conceptualised with the objective of providing for the health of the biological mother but incorporates the best interest of the child. On this basis, it found no reason why an employee in the position of the applicant should not be entitled to “maternity leave” for the same duration as leave to which a biological mother is entitled.

Although this case has essentially broken new ground in the move towards gender equality and non-discrimination in South Africa, it is noted that legislation governing these issues will need to be amended to reflect the changing social reality in South Africa. In addition to this, there have been numerous calls made in South Africa for a revision of parental benefits in line with international trends where there has been a move away from “maternity” and “paternity” terminology, towards a gender neutral concept of “parental”. Many states have begun implementing laws which provide for a prescribed amount of parental leave, the leave may be shared between parents in accordance with their own preference. A growing awareness is also being given to the fact that the first 24 months of a child’s life are vital for early childhood development, and many systems now provide for a set number of parental leave days which can be divided within the first two years.

The Commission notes the tabling of a bill before Parliament during 2015 which aims to provide for ten days paid paternity leave. While this is a positive step by encouraging a renewed debate around the issues, it falls short of international standards and trends, and more needs to be done to move the country towards gender equality and the empowerment of women in particular. In this regard, the Commission calls for a revision of current laws and policies in line with international standards, which includes equality on the basis of gender and sexual orientation.

4.2.4.2 Overview of gender equality in the workplace

Overall, it is encouraging to note that the participation rate of women in the workplace is gradually increasing, with approximately 43.8%⁵⁸ of South Africa’s workforce now being female,⁵⁹ although women are still less likely to become economically active than men.⁶⁰ Women who are formally employed often face what is commonly referred to as the ‘triple burden’ of employment, housework and childcare,⁶¹ while research has shown that the vast majority of work undertaken by females in South Africa is of an unpaid and unregulated nature.⁶² This triple burden places women and girls in positions of vulnerability, exacerbated by precarious and often untenured employment, with the potential for sexual harassment and exploitation multiplied exponentially.⁶³

Broadly, the participation rate of women in the labour force has been gradually increasing, and economically active women are also more likely to have a higher level of education than their male counterparts. However, despite the improvement in access to education for women, they still reflect a lower level of economic activity than men with the same level of education⁶⁴ and continue to be concentrated at the lower levels of employment. Therefore, while it is positive to note the increased access to education at all levels for women, more needs to be done to ensure that this is translated into equitable access to and opportunities within the employment market.

58 This figure refers to the proportion of the employed population, while women make up 45.2% of the “narrow” labour force, which includes those employed as well as those actively seeking employment.

59 Department of Women “Report on the Status of Women in the South African Economy” (2015), p 52.

60 According to a report released by the Department of Women, 51.9% of women became economically active in 2015, compared to 65% of men. Ibid, p 55.

61 Orthy, A.B. (2012). Employment of Women and the Scope of the Triple Burden.

62 Bibler, S. & Zuckerman, B. (2013). The World Bank and women’s unpaid care work in select sub-Saharan African countries. UNU-WIDER Working Paper No. 2013/131.

63 Ibid.

64 Ibid, p 55.

The Department of Women (DoW) has found that women are less likely to be employed in high-skilled occupations, and are concentrated in the service sectors (including community, social and personal; wholesale and retail trade; and elementary and domestic work). This finding reflects the reality that employment across industries is still largely divided along gender lines, indicating a greater need for stereotypes to be broken down.

In terms of earnings, women are still significantly more disadvantaged than men, being more likely to be located within the lower earning categories.⁶⁵ Statistics South Africa's most recent 'Monthly earnings of South Africans' (published in 2010), shows the inequalities with regards to earnings, with women in paid employment earning only 77.1% of what men earned. The DoW has noted that this gap is increasing, from 18% in 2001 to 20% in 2005.⁶⁶ While the reasons vary and include occupational choices, level of education, interruption of employment for women as a result of household and family responsibilities, amongst others, it is probable that discrimination contributes to the continued wage gap in the country. In addition to this, a larger portion of women are reported to work part-time, which could be indicative of the lack of flexibility to accommodate household and family responsibilities, contributing to the continuing inequality of women in the employment sector.⁶⁷

With regard to conditions of employment, women are less likely to be employed in the informal market and to work long hours. Women are also more likely to have written contracts, medical aid contributions and leave entitlement, but they are also more likely to be employed in limited duration contracts which are associated with little protection and insecure working conditions. As referred to earlier, a large percentage of women are employed in private households as domestic workers (14.3%) and are particularly vulnerable to exploitation, discrimination and abuse. The fact that employment is located within private homes means that employment conditions are more difficult to regulate and monitor, and recognition of the lack of collective bargaining power of domestic workers has led to the implementation of a minimum wage in this sector.

The CGE undertook a series of public hearings in each of the nine provinces since 2010. The hearings examined selected employers in both the public and private sectors in an attempt to obtain a greater understanding of the challenges facing employers and women in the achievement of gender equality in the workplace. While many of the findings were specific to entities or provinces in particular, others were systemic. In brief, the CGE found that the employment sector is making strides with regard to gender equity, but problems with women advancing to more senior positions are still a challenge; there is a lack of effective gender mainstreaming, together with non-compliance with policies and transformation obligations. Gender stereotypes persist with some jobs being only available for men or women exclusively, and while some employers provide childcare facilities and had begun to implement other initiatives such as flexitime, many others either struggled with the implementation or had not yet considered such mechanisms. Overall, some advancements have been made but a number of gaps remain, particularly in addressing structural barriers to the achievement of substantive equality. What is required, therefore, is greater attention to the more subtle forms of discrimination that persist and a move away from the emphasis placed on policy conception towards implementation and outcome.

65 In fact, the DoW has found that despite the fact that women make up 43.8% of the employed, they represent 51.2% of employees in the bottom 3 wage categories, and only 26.8% in the top category. 51.2% of women earn no more than R2500 per month compared to 33.2% of males.

66 Department of Women "Report on the Status of Women in the South African Economy" (2015), p 68.

67 Department of Women "Report on the Status of Women in the South African Economy" (2015), p 65.

4.2.5 Sexual Orientation and Gender Identity

The Commission recognises that discrimination on the ground of sex, gender, sexual orientation and gender identities are distinct and manifest in different ways, but also notes that there are many overlapping challenges, particularly as a result of gender roles in which expectations are developed in line with traditional conceptions of masculinity and femininity. In this regard, while these grounds may be considered as closely linked, cognisance must also be taken in recognition of the unique challenges and experiences of lesbian, gay, bisexual, transgender⁶⁸ and intersex⁶⁹ (“LGBTI”) communities.

Increased attention is being given to the peculiar form of unfair discrimination perpetrated against LGBTI persons globally at all phases of employment.⁷⁰ LGBTI persons face multiple forms of discrimination in the workplace, ranging from rejection at the recruitment phase to bullying and harassment within the workplace. The discrimination includes offensive or stereotypical jokes, name calling, being asked invasive questions about their private life or having to “prove” their masculinity or femininity in order to be accepted. In addition, LGBTI persons may be passed over for promotion, denied equitable benefits in the workplace (for example, with regard to parental benefits), and in extreme circumstances, are faced with dismissal as a result of their sexual orientation or gender identity.⁷¹

Discrimination on the basis of this characteristic is often based on gender stereotypes, which assign dominant (i.e. masculine) or submissive (i.e. feminine) roles to men and women, whereas LGBTI persons are often regarded as not portraying an image which is in line with social expectations. It is the so-called non-conformity with heteronormativity that often leads to discrimination, ostracism and harassment. As a result, LGBTI persons frequently feel the need to conceal their sexual orientation or gender identity, whereas studies have shown that many tend to stay away from formal employment altogether, rather taking up freelance or informal work in an attempt to avoid negative and harmful workplace environments.⁷²

It must be noted that although the regularity of discrimination against LGBTI persons is recognised at a global level, the submissions received during the Commission’s Inquiry did not refer to discrimination on this ground at all. Therefore, this portion of the report is based exclusively on desktop research conducted by the Commission and was included due to the equality trends identified through the Commission’s work, as well as the complaints statistics submitted by stakeholders.

4.2.5.1 Prevalence of discrimination against LGBTI persons in the workplace in South Africa

In the South African context specifically, patriarchy and culture still play a strong role in society, and in driving heterosexual norms and behaviours. As a result of this, LGBTI persons face discrimination based on interpretations of traditions, culture and religious practices and beliefs, with homosexuality frequently being viewed as a moral sin, “un-African” or otherwise abnormal. This widespread but inaccurate belief manifests itself within the broader framework of gender-based violence within the country, where individuals frequently find themselves subjected to high levels of sexual harassment and “corrective rape” being carried out in society broadly.

68 USAID/UNDP explains that “Transgender” refers to “*individuals whose gender identity and/or expression of their gender differs from social norms related to their gender of birth.*”

69 According to the United Nations Office for the High Commissioner of Human Rights (“OHCHR”), “Intersex persons are born with a wide range of natural variations in their sex characteristics that don’t fit the typical definition of male or female, including sexual anatomy, reproductive organs or chromosome patterns.”

70 ILO “Equality at Work: Tackling the Challenges” (2007), p 42.

71 ILO “Discrimination at Work on the Basis of Sexual Orientation and Gender Identity: Results of the ILO’s PRIDE Project” (as accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_368962.pdf).

72 Ibid.

In 2012, the ILO commenced with the “Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)” project, which included research conducted in South Africa. In the Country Report⁷³ published in 2016 after conducting numerous surveys, interviews as well as desktop research, the ILO found that while much progress had been made in the country with regard to the protection and promotion of the rights of LGBTI persons, those in the workplace still face significant challenges.

Ultimately, heteronormative cultures, which dictate the way a person is expected to act, look and sound, replicates gender normative stereotypes which are deeply embedded into the perception of “professionalism” in the work environment. For example, discrimination occurs in instances where an employer feels that an individual’s “gender expression”, which includes factors such as clothing, mannerism and voice, do not “match” their legal gender identity or portray the correct image. The dress code is found to be particularly problematic, with the expectation of compliance with a heteronormative appearance. This acts as a barrier to entry into employment, as well as a barrier for advancement within an organisation. While this form of discrimination may arise within any employment context, it is especially prevalent in sectors which are dominated by a particular gender, such as the mining or manufacturing sector where gay, bisexual and transgender men may face negative attitudes as a result of the perceived lack of masculinity.

The PRIDE project found that stereotypes, prejudices and negative responses to gender non-conformity were prevalent across sectors and included, amongst others, assumptions of sexual promiscuity. Many participants spoke of the impact of this on integration and participation in workplace activities, providing examples of the refusal by heterosexual colleagues to share rooms during workplace retreats due to the perception of LGBTI persons as “sexual predators”. Not only is this misconception harmful to workplace cohesion and productivity, but has a serious impact on a person’s dignity and sense of belonging.

Safety was identified as a fundamental concern for LGBTI persons in the workplace, with many reporting high instances of harassment in different forms, and sexual harassment in particular. Many lesbian and bisexual female workers relayed accounts of being approached by male colleagues with offers of sex to turn them straight, while male colleagues also tended to sexualise and objectify women who are attracted to and have sex with other women. This is extremely degrading. Within some organisations, participants felt that stereotypical and derogatory statements had become the norm and were generally accepted.

Despite the fact that legislation enables same-sex partners to be recognised and granted equal benefits, this has not yet translated into a reality. Examples include medical aid and provident fund forms that are restricted to men and women, not providing for other gender identities, and which further does not provide for LGBTI relationships. LGBTI persons are at times excluded from family leave entitlements on the basis of family structure as well.

4.2.5.2 Transgender and inter-sex discrimination

Transgender people report the most severe forms of workplace discrimination, according to the ILO.⁷⁴ In South Africa, non-discrimination policies tend to focus on male and female, conflating issues of sexual orientation and gender identity and therefore neglect specific concerns of transgender and intersex persons.

73 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016).

74 ILO “Discrimination at Work on the Basis of Sexual Orientation and Gender Identity: Results of the ILO’s PRIDE Project” (as accessed at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_368962.pdf).

This, it is suggested, may be as a result of the lack of information and awareness of transgender and intersex rights in South Africa.⁷⁵

“Transgender people report the most severe forms of workplace discrimination, according to the ILO”

While individuals who identify themselves as transgender or intersex also experience the forms of discrimination discussed above, such as bullying, harassment and barriers due to non-gender normative appearance and mannerism, they also experience additional forms of discrimination. For example, employers often do not have policies or procedures in place to deal with issues relating to persons transitioning from one sex to another, and identity cards, pay slips and other formal documents are unable to be amended to reflect the changed sex and name of an employee. In addition to this, employers and co-workers are unaware of, for example, the correct use of pronouns (i.e. “he” or “she”) for colleagues who are in the process of, or have completed the transition. They frequently continue to refer to a person by their former name, thus denying their true identity.

Society, and in this context, the workplace, are still constructed in a way that is divided between men and women rather than being gender-neutral, for example with the allocation of bathrooms or locker rooms. Transgender and intersex people are at times discouraged from using the bathroom of the gender they most identify with and are discriminated against in the application of certain employee benefits which still reflect gender roles and stereotypes. For example, transgender women (i.e. men who are or have transitioned to become a woman) are sometimes denied access to maternity benefits and are only granted paternity leave.

Due to the lack of information and awareness of the issues more broadly, transphobic work environments appear to be commonplace and transgender and intersex people find themselves faced with an increased level of vulnerability to bullying, harassment and social exclusion. While South African labour and anti-discrimination laws explicitly protect the rights of LGBTI persons, the ILO report indicated that perhaps one of the biggest challenges in addressing transgender and intersex discrimination in the workplace lies in the fact that many employers and employees alike do not know where to find information on dealing with these issues.⁷⁶

4.2.5.3 Conclusion

Overall, discrimination against LGBTI people continues at an alarming rate in South Africa, although these issues generally do not receive enough attention, especially within the context of the workplace. In particular, there is a severe lack of awareness on transgender and intersex issues.

Race, gender, age and sexual orientation are intersecting forms of discrimination, where young black lesbian women and transgender men are extremely vulnerable.⁷⁷ Even in the absence of substantial discrimination, the information obtained from participants in the ILO’s research revealed that *“there is a pervasive culture of silence and of not rocking the boat”*,⁷⁸ with many employees afraid to question or argue with policies or practices out of fear of harassment, victimisation or dismissal.

75 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 22.

76 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 47.

77 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 15.

78 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 33.

This finding has been reiterated by a report released by Human Rights Watch,⁷⁹ where it highlighted the fact that many LGBTI people are reluctant to file complaints about discrimination in the workplace as a result of a lack of confidence in the grievance mechanism or fear of loss of economic livelihood.⁸⁰

According to the ILO, LGBTI along with HIV/Aids discrimination and stigma are “*still on the margins of what is regarded as belonging to the sphere of labour rights*”.⁸¹ Although trade unions appeared to be supportive of the ILO PRIDE project, the union movement tends to perpetuate rather than challenge the status quo. Many trade union participants explained that the internal culture of trade unions themselves were often patriarchal and close-minded, with some even suggesting that unions have declined to take up discrimination issues dealing with LGBTI at the CCMA. NEDLAC was found to be particularly supportive of the initiative, although business (as a key partner and driver of equality in the workplace) tends to focus on issues relating to race in particular, and gender and disability to a lesser extent, thereby neglecting other grounds of discrimination which include LGBTI issues. Essentially, trade unions and employers lack awareness and are confused about how to address LGBTI workplace issues because of the lack of clear policies and guidelines.

However, there is a growing awareness of these issues in the workplace through various initiatives, such as the Unison Project coordinated by the Foundation for Human Rights (FHR), which focuses on the rights of LGBTI workers in the public sector.

In conclusion, the ILO found “...*the violence and bullying reported by LGBT workers is of serious concern and is evidence of a broad dearth of initiatives and interventions in South African workplaces to make these spaces safe, inclusive and welcoming environments for LGBT people.*”⁸²

The Commission is highly supportive and commends the initiatives adopted by various bodies. However, it also noted with serious concern that, despite high instances of occurrence, it received no submissions relating to unfair discrimination on the ground of sexual orientation and gender identity. In fact, this ground has consistently formed one of the top grounds for complaints lodged with the CCMA over the last few years. While progress appears to be taking place, which is largely as a result of individual and organised activism, there is an urgent need for more work to be done on this issue, particularly by the DoL and Trade Union bodies.

4.2.6 Disability

4.2.6.1 Defining “disability”

There is currently no single and universally accepted definition of the term “disability”, and in fact the United Nations, in the Convention on the Rights of Persons with Disabilities (CPRD) intentionally avoids providing a definition. Instead, the UN recognises that it is an evolving concept. The CPRD does, however, provide significant guidance as a starting point in the following ways:

79 Human Rights Watch ‘We’ll Show You You’re a Woman’: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa (2011) (as accessed at <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>).

80 Ibid.

81 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 41.

82 ILO “PRIDE at Work: A study on discrimination at work on the basis of sexual orientation and gender identity in South Africa” (2016) p 15.

- i. It notes that “... disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others”.⁸³
- ii. It then states that persons with disabilities include: ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.⁸⁴

The concept of disability has evolved, moving away from the so-called “medical model” which defined disability in terms of the physical or mental conditions intrinsic to the individual which reduces the quality of life and results in a disadvantage. Rather, it is now recognised that disability is caused by the way in which the physical and social environment is organised, rather than a result of a person’s impairment or difference. It is the interaction between a person’s impairments with the attitudinal and environmental barriers that hinders their full and effective participation on an equal basis with others, and therefore this social construction is the cause of the abnormality of disabilities. For example, the existence of a hearing impairment is not responsible for the disadvantage caused to the person, but rather the lack of alternative language skills or resources. Similarly, the disadvantage to persons in wheelchairs is not a result of the physical impediment itself, but rather because infrastructure and transportation services have not been designed in a manner which accommodates the needs of persons in wheelchairs. The social model thus focuses on the removal of such obstacles or barriers through the rearrangement of both the physical and attitudinal construction of society.

4.2.6.2 Overview of discrimination on the ground of disability

As a result of historical discrimination, the status of persons with disabilities in the country remains stark and generally reflective of the trend worldwide, with this category of persons facing disproportionately high levels of unemployment or being employed in low-status jobs and receiving lower than average remuneration. It is estimated that on average, eight in ten persons with disabilities are unemployed, “making discrimination in terms of the denial of employment opportunities one of the most daunting challenges faced by persons living with disabilities in South Africa.”⁸⁵ Moreover, the vast majority of persons with disabilities in South Africa who have been excluded from engaging fully in the economy are likely to experience severe poverty, deprivation, lack of access to most essential services, social marginalisation, and a high-level vulnerability to HIV/AIDS infection.⁸⁶

“It is estimated that on average, eight in ten persons with disabilities are unemployed, “making discrimination in terms of the denial of employment opportunities one of the most daunting challenges faced by persons living with disabilities in South Africa.”

83 Preamble, Convention on the Rights of People with Disabilities.

84 Article 1, Convention on the Rights of People with Disabilities.

85 SAHRC “Promoting the Right to Work of Persons with Disabilities: Toolkit for the Private Sector” (2015), p 8.

86 Adapted from Kotze, H. (2012). Status of Disability Rights in Southern Africa: Introduction. Open-Learning, Open Society Institute for Southern Africa, p5. UNAIDS explains that persons with disabilities are vulnerable to HIV/Aids infection due to poverty, severely restricted access to education, information and healthcare as well as a lack of access to resources to facilitate safer sex, whereas women and girls with disabilities are more vulnerable to violence and abuse. UNAIDS “GAP Report 2014: People with disabilities”, p 5 (as accessed at http://www.unaids.org/sites/default/files/media_asset/11_Peoplewithdisabilities.pdf).

This reality is the result of the interplay between a number of factors which include barriers to access to education (and therefore high levels of illiteracy), as well as a lack of other forms of training and skills development opportunities; lack of accessible infrastructure, technologies and information; lack of available transportation; poor funding; a lack of reasonable accommodation in employment; and limited access to formal employment and other income-generating opportunities.

Notwithstanding the recognition that the availability of accurate data about persons with disabilities is important in measuring the realisation of rights and persistent challenges, there are limited and contradicting available statistics in the country. As a result of these differing definitions, there is currently no clear picture as to the prevalence of persons with disabilities in the country, making a proper assessment difficult. However, it is estimated that between 7.5%⁸⁷ and 10.3%⁸⁸ of persons in South Africa have some form of an impediment.

Statistics also indicate that the rate of disabilities is more prevalent among females compared to males.⁸⁹ And the highest proportion of persons with disabilities was Black Africans followed by the white population group. Disability was also more prevalent in rural provinces such as the Free State and Northern Cape, suggesting a link to poverty and the lack of access to adequate transportation, healthcare and other essential services.

Employment is vital to the empowerment and the realisation of inherent dignity and self-worth for persons living with disabilities through enabling individuals to be economically self-sufficient and ease their full integration into society. Despite this, the Commission has previously found that there is low labour market absorption of persons with disabilities in South Africa.⁹⁰

The CRPD places numerous obligations on States parties, including the requirement for state parties to “undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.”⁹¹ This includes the provision of reasonable accommodation of people with disabilities, which can be understood as the “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”.⁹²

In addition to this, section 9 of PEPUDA outlines the prohibition of discrimination against people with disabilities and states that no person may be unfairly discriminated against on the ground of disability.⁹³ Given these provisions, PEPUDA places an obligation on all sectors of society to remove any barriers that may hinder persons with disabilities from access to equal opportunities and equal outcomes.

87 Statistics South Africa ‘National Census’ (2011)

88 According to the Country Baseline Report submitted to the UN in 2013 Department of Women, Children and People with Disabilities, Note 91 above.

89 Statistics South Africa ‘National Census’ (2011)

90 Department of Women, Children and Persons with Disabilities “Baseline Country Report” (2013); World Health Organisation and World Bank “World Disability Report” (2011).

91 Article 4.

92 Article 2 of the United Nations Convention on the Rights of Persons with Disabilities (2007).

93 Including: a) Denying or removing from any person who has a disability any supporting or enabling facility necessary for their functioning in society; b) Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; and c) Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

Many buildings remain inaccessible to persons with disabilities, and it is concerning to note that a wide number of new buildings are in fact not compliant with building regulations insofar as accessibility for persons with disabilities is concerned. It would, therefore, appear that the government officials who are responsible for the approval of building plans are failing to enforce regulations or to conduct the relevant monitoring of building plans and sites to ensure that all buildings are compliant and accessible. This lack of enforcement, the Commission notes, is likely to be a combination of both a lack of awareness of the requirements by the relevant building control officer as well as a general lackadaisical approach to enforcement. This approach is particularly disappointing in considering the longer-term implications this has on the ability of the State to enable the full and equal participation of persons with disabilities in all aspects of life.

While the Commission does note that the costs associated with renovating existing buildings may be particularly high, it strongly cautions against the invocation of this reality as a reason for the continued failure to progressively achieve targets. While changes to physical infrastructure cannot be expected to occur overnight, private and public sector employers must take measures to include this objective into medium-to long-term strategic planning documents, along with the assignment of appropriate levels of the budget to enable the progressive implementation of required structural reforms.

The DPSA conducted an initial survey of all persons with disabilities in 2014 to assess the extent to which reasonable accommodation has been provided in the public service. It has further begun to monitor developments with regard to the provision of reasonable accommodation and assistive devices (RAAD in the public service through an annual reporting mechanism. Although the policy, as well as the reporting on compliance, is still new, it is intended to establish baseline information on the progress made and persisting challenges.

To date, two reports have been compiled for the 2014/15 and 2015/16 financial years. The outcome of the 2014/15 report showed that the provision of RAAD was not uniform across the public sector, with some departments providing reasonably and others providing RAAD excessively and without following policy guidelines.

Notwithstanding the fact that a directive was issued by the Minister of Public Services and Administration for compliance with the policy on reasonable accommodation and assistive devices in 2015, it is disappointing to note that the reporting by provincial and national departments is generally poor.

Overall, only 1.19% of employees with disabilities were provided with RAAD in the 2015/16 financial year, although no information was provided as to the percentage of employees who actually require the provision of RAAD. The DPSA, therefore, found that this can indicate one of two possibilities. The first is that employees with disabilities do not necessarily require the provision of RAAD and are therefore not creating extra cost, or, the Public Service is not doing enough to provide RAAD.

The report produced by the DPSA draws a conclusion that there appears to be a strong relationship between the provision of RAAD and the representation of employees with disabilities, indicating that Gauteng and National departments provided the highest number of diverse RAAD to employees, many of which have also succeeded in meeting or exceeding the 2% target of employment of persons with disabilities. However, without further information on the extent of need in comparison to the actual provision, the Department will not be in a position to accurately assess progress made and compliance with the policy, and substantial amendments to the reporting process will, therefore, need to be implemented in future.

Social attitudes and stigmatisation of persons with disabilities remain prevalent in modern-day South Africa suggesting that there is still a long way to go in terms of achieving equity for persons with disabilities. Existing social and cultural norms are geared towards achieving and maintaining very specific physical characteristics, and a portrayal of persons with disabilities as sick, weak or incapable of caring for themselves tends to marginalise persons with disabilities neglect to regard them as productive and equal members of society.⁹⁴

In a survey conducted by DPSA on the movement of persons with disabilities in the public sector, respondents highlighted persistent negative stereotypes, stigma and perceptions as the primary drivers of unfair discrimination experienced by persons with disabilities. During this survey, respondents described being victimised by other employees, constantly being reminded of being lucky to have a job, and are frequently disrespected by subordinates. The responses also highlighted perceptions that employers tend to prefer certain types of disabilities over others, particularly those which will not cause a significant financial burden on the employer, and felt that the private sector is generally more accommodating to persons with disabilities.

Submissions received during the Inquiry highlighted that the employment of persons with disabilities in more senior positions has resulted in a significant change in the culture of institutions by creating a greater awareness of the impact of policies and practices for persons with disabilities. In addition to this, negative stereotypical beliefs about the lack of productivity and ability of persons with disabilities to perform were essentially broken down.

Thus one of the most severe forms of discrimination perpetrated against persons with disabilities is the enduring stereotypes which present them as unproductive or unable to work and perform regular tasks, while the perception of high costs associated with employment often acts as a serious deterrent from recruitment and retention practices.⁹⁵

4.2.6.3 Employment equity amongst persons with disabilities

Across all sectors, persons with disabilities make up 1.2% of the workforce, and has, in fact, decreased over the last financial year in Top Management; Senior Management and Professionally Qualified levels, while a slight increase was seen at the Skilled Technical Level. The conclusion that may be drawn from this indicates that in addition to the fact that persons with disabilities are not advancing to more senior positions, a number appear to be leaving the labour market altogether. Gender inequality is also visible in analysing the available figures, with the employment of males with disabilities being consistently higher than females with disabilities across all levels of employment, despite the fact that available statistics show a greater prevalence of disability in women across the country. What is concerning in analysing the data, is that a significant drop in the employment of persons with disabilities can be observed at national government (reduction from 1.9% to 1.3%),⁹⁶ educational institutions (reduction from 1.5% to 0.3%)⁹⁷ and State-Owned Companies (SOC),⁹⁸ (reduction from 2.7% to 1.9%) between the 2014/15 and 2015/16 financial year.

94 Ibid. Krahe B and Altwasser C. (2006). Changing Negative Attitudes towards Persons with Physical Disabilities: An Experimental Intervention, *Journal of Community & Applied Social Psychology*, 16, p. 59–69.

95 ILO “Equality at Work: Tackling the Challenges” (2007), p 45.

96 The number of persons with disabilities employed dropped from 3,018 to 2,285.

97 The number of persons with disabilities employed dropped from 4,237 to 1,121.

98 The number of persons with disabilities employed dropped from 4,634 to 3,636.

Following the adoption of the White Paper on Transformation, the government committed to achieving a minimum of 2% representation of persons with disabilities. Despite this commitment, representation in the public service stood at approximately 0.09% in 1999, and 0.16% in December 2005, and increased to 0.6% as at December 2014. Although a variety of policies and tools developed by the Department of Public Service and Administration (DPSA) has led to an increase, the pace has not been fast enough to enable the public service to reach the 2% employment equity target after 20 years.

While the public sector has set a target of 2% for the employment of persons with disabilities, private sector entities are required to identify their own targets. However, while EAPs have been determined for other designated groups which may provide a guideline for targets, there is no EAP for persons with disabilities, which may make the determination of appropriate targets difficult. Nevertheless, in practice, it appears as though entities in the private sector, while not bound by the 2% target set for the public service, generally use this as a benchmark in setting their own targets. According to the CEE Annual Report for 2015/16, approximately 1.2% of persons employed in the private sector are persons with disabilities, reflecting an increase of 0.1% from the 2014/15 financial year (approximately 7,280 people).⁹⁹

Over the 2015/16 financial year, the private sector reflected a growth over and above the increased number of persons with disabilities to have entered the labour market during this period. This could potentially illustrate a significant movement of persons away from other employers and into the private sector. On the other hand, the increased figure could also be the result of increased compliance in the number of designated employers having submitted reports to the CEE. While too many variables are present to draw a more definitive conclusion, the fact that the private sector remains the biggest employer of persons with disabilities reflects the critical role the private sector plays in advocating and driving change about the employment of persons with disabilities in the country.

The advancement of employment equity for persons with disabilities is, however, difficult to measure with accuracy due to the fact that there is no EAP for this population group. Consequentially, even the current targets set for the public sector at 2% seems to have been identified arbitrarily, and the need for disaggregated data is therefore required. This gap has been identified by the DoL, which has reportedly engaged with Statistics South Africa (StatsSA) to compile this data.

4.2.6.4 Albinism as a particular form of disability

Although the purpose of this report is not to examine the multiple forms of disability, persons with albinism are often grouped within the broader category of persons with disability, and therefore remain largely invisible when compared with other better-known forms of disability. According to a country report submitted to the Human Rights Council Advisory Committee, there is still a general lack of understanding of persons with albinism and what the condition entails.

The Office of the High Commissioner for Human Rights (OHCHR) defines albinism as “*a rare, non-contagious, genetically inherited condition present at birth... found in both genders, regardless of ethnicity and in all countries of the world.*” It goes on to explain that “*Albinism results in a lack of pigmentation (melanin) in the hair, skin and eyes, causing vulnerability to the sun and bright light. As a result, almost all people with albinism are visually impaired and are prone to developing skin cancer.*”¹⁰⁰

99 This figure constitutes around 76.6% of all employed persons with disabilities in the Country, being more or less proportionate to the overall employment rate of all persons in the private sector (according to the CEE Annual Report for 2015/16, 76% of all persons employed in the Country are concentrated in the private sector).

100 OHCHR “Persons with albinism”, A/HRC/24/57 (12 September 2013), at para 10 – 11.

Discrimination against persons with albinism is particularly harsh, as they are often associated with harmful myths as being sorcerers or “cursed”. These myths give rise to frequent attacks and abductions. The OHCHR has noted that on a global level, and particularly in the African context, persons with albinism face considerable structural discrimination and marginalisation, often being rejected and ostracised by society. In addition to this, harassment and bullying, as well as the visual impairment of persons with albinism, means that many drop out of school, and therefore often have low levels of education.¹⁰¹ They further face significant barriers to employment, both as a result of this structural discrimination, as well as a result of the persistent harmful stigmas attached to this condition. However, there is limited research or data in respect of the challenges and forms of discrimination faced by persons with albinism, both inside and outside of the workplace, and more needs to be done in this area.

4.2.6.5 Conclusion on the analysis of unfair discrimination on the ground of disability in the workplace

Considerations of unfair discrimination on the ground of disability are frequently restricted to a question of reasonable accommodation and do not always seek to include other aspects of discrimination against persons with disabilities, including the lack of capacity development or opportunities for progress and the perpetuation of negative stereotypes in the workplace.

The life circumstances of this group are so inhibited by lack of education and by stereotypes about what they can or cannot do that their opportunities relative to the non-disabled are severely compromised. Years after the enactment of the EEA, the situation has hardly changed for persons living with disabilities, indicating that legislation alone is not sufficient to achieve equity. The need for affirmative programmes that are developed to facilitate the entry and the sustained participation of persons with disabilities in competitive employment ought to be recognised as a priority.

Moreover, negative stereotypes are further maintained through the lack of awareness around disability, including the prevalence of disability in the country, and types of disabilities. This lack of awareness has essentially led to an absence of effective disability mainstreaming in all government and private sector policies and processes, both within the employment sector as well as more broadly in line with the development agenda. In this regard, the initial failure of the State to adequately incorporate initiatives aimed at addressing challenges faced by persons with disabilities into the NDP, giving only cursory attention to the need for integration, is indicative of the inherent challenges facing mainstreaming efforts in the country.

Some of the main barriers for persons with disabilities to equitable opportunities in the workplace have been identified as the following:

- i. Reluctance of employees to declare disability;
- ii. Inaccessible buildings;
- iii. Inaccessible public transport;
- iv. Lack of reasonable accommodation;
- v. Insufficient knowledge of disability mainstreaming;
- vi. Lack of equitable opportunities for persons with disabilities to advance in the workplace;
- vii. A lack of a sufficient pool of suitably qualified individuals applying for positions, or, difficulties in identifying suitably qualified persons with disabilities; The perceived cost of reasonable accommodation and assistive devices, which is particularly expensive for small businesses; and
- viii. Discrimination based on stereotypes and negative stigma.

101 Ibid para 68.

Collaborative private industry bodies such as the South African Employers for Disability (SAE4D) can serve an important function by providing a platform to engage and debate on critical issues; to raise awareness, thus contributing to combatting the negative stereotypes and promoting social integration; and to encourage partnership in the development of innovative solutions.

Overall, while the Commission is supportive of the initiatives undertaken to date, it observed that there is a lot more that can be done in both the public and private sector to drive transformation and increase the representation of persons with disabilities in the workplace. Despite the numerous measures aimed at promoting equality, the country has made limited progress more than 20 years into democracy, with the continued widespread perpetuation of injustices, disempowerment and marginalisation of persons with disabilities. Although considerable emphasis has been given to discrimination relating to race issues and gender equality, amongst others, discrimination on the basis of disability continues to reside on the margins of our understanding as a society.

4.2.7 HIV and Aids Status

At a global level, around 33.3 million people are living with HIV or Aids, and 90% of those of working age are engaged in some form of employment.¹⁰² Apart from having severe implications on the health and well-being of persons, the implications of the pandemic are broad reaching and have become major contributors to poverty and discrimination.¹⁰³

Persons living with HIV or Aids are often unable to access employment and are faced with unnecessary changing job requirements, increasingly poor working conditions, or even, in some cases, termination of employment. Despite the fact that substantial progress has been made in managing the health impact and combating ignorance and fear surrounding the disease, harmful stigmas and high levels of discrimination in the form of victimisation, social exclusion, and separation in the workplace, amongst others, persist.

HIV and Aids is increasingly being recognised as a workplace issue, not only as a result of the impact on a workforce and on productivity, but also due to the reality that the workplace is part of the larger community and therefore has a role to play in managing and mitigating the risks of the epidemic and in promoting a culture of respect for the equal treatment and dignity.

South Africa has adopted numerous legislative and policy measures aimed at protecting the rights of persons living with HIV or Aids and to prevent unfair discrimination and harassment in the workplace, including through the EEA, Labour Relations Act,¹⁰⁴ BCEA,¹⁰⁵ and the Occupational Health and Safety Act,¹⁰⁶ amongst others. In addition to these, the DoL has developed the Code of Good Practice on HIV and Aids in the World of Work and the Technical Assistance Guidelines on HIV and AIDS and the World of Work. These documents have been aligned with ILO guidelines and recommendations.

In line with the legal framework, workers are not obliged to disclose their status to an employer or co-workers,¹⁰⁷ while the Code of Good Practice prohibits the conducting of medical testing of employees unless directly linked to the ability of the employee to perform a particular task and found to be justified by the Labour Court. Alternatively, testing may be offered on a voluntary basis, but must include counselling services before and after testing is conducted.

102 http://www.unaids.org/sites/default/files/media_asset/UNAIDS_Gap_report_en.pdf.

103 ILO "Implementing the ILO Code of Practice on HIV / Aids and the World of Work" (2002), p 1.

104 66 of 1995.

105 75 of 1997.

106 85 of 1993.

107 Sections 37(1) and 63(1) of the Promotion of Access to Information Act, 2 of 2002.

Testing, when conducted, must guarantee confidentiality and must not endanger access to jobs, tenure, job security or opportunities for advancement.

In addition to this, employers must provide reasonable accommodation to persons living with HIV or Aids in the workplace for as long as they are medically fit to work, and must further take steps to ensure that workers can access employment benefits on an equitable level. In fact, a human rights-based approach to dealing with HIV and Aids in the workplace seeks to encourage the treatment of HIV and Aids just as any other illness or condition in the workplace and in this way seeks to break down fears and prejudices around the disease.

Apart from laws and policies aimed at regulating the treatment of persons with HIV and Aids in the workplace, other measures relating to the advocacy and awareness raising is also required. Employers must develop reasonable prevention policies and health interventions aimed at providing support to persons living with HIV or Aids, and must develop further policies and plans aimed at training and providing access to information for all employees, which should take gender, cultural, social and economic concerns into account.

While the legal framework extensively governs the employment practices of persons living with HIV or Aids, one of the most prevalent forms of unfair discrimination, and often most difficult to measure, is the negative stigmatisation which occurs through daily interactions in the workplace. The sections below will first seek to set out a basic understanding of stigma in the context of HIV and Aids before moving onto the analysis of workplace discrimination on this ground.

4.2.7.1 Understanding stigma in the context of HIV and Aids

HIV-related stigma is still pervasive in South African society and often takes place simultaneously with other forms of stigma, including race, gender, sexual orientation and class-based inequalities. In addition to this, HIV-related stigma is also closely associated with TB-related stigma.

“HIV-related stigma is still pervasive in South African society and often takes place simultaneously with other forms of stigma, including race, gender, sexual orientation and class-based inequalities. In addition to this, HIV-related stigma is also closely associated with TB-related stigma.”

The Centre for Sexualities, AIDS and Gender (CSA&G) at the University of Pretoria explains that stigma is developed over time, where differences of individuals or groups are noted and labelled and given a negative attribute, leading to the notion of “us and them”. The status of these individuals and groups is thus lowered, and they face discrimination and social isolation. From a psychological point of view, it enables people to distance themselves from those seen as “dangerous” or “infectious”, and thus serves as a form of social protection. This explains the so-called stubbornness of stigma and the difficulties faced in breaking down these negative stereotypes. At a social level, negative stigmatisation attempts to control human behaviour by excluding those seen as morally undesirable, it punishes people, maintaining an element of power over them.

According to the CSA&G, some of the reasons associated with a negative stigma perpetrated against persons living with HIV include fear because HIV/Aids can be fatal; because it is often incorrectly associated with stigmatised behaviour such as sex work, homosexuality and drug use; and because infection is viewed as a result of the choices made by the person who is blamed for his or her status. Persons living with HIV are often perceived to have “broken society’s moral codes” and are punished for their presumed “deviant” behaviour; and lastly, in some communities, people living with HIV are seen as a drain on limited resources.

The stigma associated with persons living with HIV and Aids can manifest in many different ways and includes external stigma, internalised stigma, anticipated stigma and courtesy stigma. These forms of stigma can be explained in the following way:

- **External stigma** is displayed through the attitudes and actions of other persons aimed at persons living with HIV and include insults, rejection, avoidance, stereotyping, discrimination, as well as physical violence.
- **Internal stigma** takes place when an individual begins to believe the negative things that other people say of think, and can be seen as thoughts and behaviours resulting from the negative perceptions associated with HIV status.
- **Anticipated stigma** is the anticipation or expectation that a person will be treated differently or poorly because of the stigmatised identity of persons living with HIV.
- **Courtesy stigma** is the stigmatisation a person perceives or experiences as a result of their association with a stigmatised individual or group.

This stigma profoundly impacts on individuals, communities and society in general, resulting in exclusion or isolation, divisions and a breakdown of communities, the internalisation of blame and shame and ultimately, undermines human rights. Recognition must also be given to other effects of negative stereotyping, which essentially serves as a serious barrier to prevention, the provision of adequate health care, and adequate psychological and social support because awareness may be accompanied by judgmental attitudes and isolation. Therefore, if an environment is discriminatory or isolating, persons living with HIV or Aids are more likely to avoid seeking or to discontinue treatment altogether, whereas those who are unaware of their status may be reluctant to get tested, risking the spread of disease further along with delayed treatment leading to declining health.

The Human Sciences Research Council (HSRC) conducted a study on HIV and TB-related stigma and discrimination in South Africa in 2014,¹⁰⁸ where data was gathered from persons aged 15 and above who are living with HIV, across 18 districts in the country. Overall a total of 10,403 people were surveyed.¹⁰⁹ While the study was not focused on stigma and discrimination in the workplace specifically, it provides a context for the prevalence of HIV and TB-related stigma and discrimination in South Africa.

The Commission recognises that challenges relating to stigma and discrimination experienced in society more broadly will ultimately be reflected in the workplace. On this basis, the broader findings relating to stigma and discrimination will be briefly highlighted to provide a context in which the examination of the issues must be considered holistically. The report highlights the following statistics:

- 36% of participants experienced some form of external stigma;
- 8% had been refused employment on the basis of their HIV status;
- 8% had their job descriptions altered on the basis of their HIV status;
- 11% had lost a job or source of income because of their HIV status;
- 31% had reported having being gossiped about, 9% having been physically harassed, and 8% having been physically assaulted as a result of perceived or actual HIV and Aids status in the preceding 12 months;
- 22% reported having experienced discrimination, but of those who had experienced this, the majority identified “being gossiped about” as the form of discrimination experienced;
- 35% of participants who reported having experienced discrimination on a ground other than HIV status identified their TB status as the reason, and 9% due to their sexual orientation;
- 43% of participants reported having feelings of internalised stigma;

¹⁰⁸ HSRC “The People Living with HIV Stigma Index: South Africa” (2014).

¹⁰⁹ The largest portion of respondents were between the age of 30 – 39 years, whereas smaller portions were youth aged between 15 – 24 years (10%) and older persons aged 50 years or above (11%).

- 42% engaged in some form of avoidance behaviour due to internalised stigma; and
- 39% reported a fear of potential stigma, with higher levels of respondents who were employed reflecting this fear.

In brief, the report found that stigma and discrimination continues to occur at a moderate to moderately high level, indicating the need for more advocacy work to be done to combat this form of discrimination.

4.2.7.2 Analysing the prevalence of HIV and Aids-related stigma in the workplace

The results of the HSRC study referred to above found that 61% of participants had no formal employment and were not looking for employment. Avoidance behaviour due to internalised stigma led to 4% of participants to stop working and an additional 5% to stop looking for work, or to decide not to apply for a promotion or training opportunity. The report further highlighted the fact that 5% of participants reported having been excluded from workplace activities, and 28% of these individuals reported that the exclusion was based on their HIV status. A total of 11% of participants reported having lost a job, with 40% of these individuals inciting their HIV status as the direct or indirect reason over the 12 months preceding the survey, where 24% of these felt that discrimination by an employer or co-workers contributed to the loss, whereas 44% attributed the loss of their job due to their own poor failing health.

Overall, the conclusion is drawn that moderate levels of stigma and discrimination in the workplace are still taking place. However, the CSA&G indicated the need for more in-depth research on this to explore which workplaces show more discrimination, and the impact of other factors such as race, class, gender, sexuality, location and access to resources, on how much discrimination people living with HIV experience in the workplace.

Following from the examination of stigma, the CSA&G emphasised that *“an investigation into HIV and TB-related discrimination in the workplace cannot only explore actual acts of overt and measurable discrimination as these may not fully explain the extent to which individuals living with HIV and TB might find a workplace an unsafe or hostile place, or engage in HIV- and TB-stigma avoidance strategies which are harmful to them.”*

It is clear that stigma is closely associated with institutional cultures and practices, not only in relation to HIV and TB specifically, but including aspects of diversity, inclusivity, exclusion and power more generally which need to be addressed to create an enabling work environment.

4.2.8 Age

The ILO has found that *“age is becoming an increasingly important determinant of people’s occupational attainment.”*¹¹⁰ Perhaps contrary to popular belief, discrimination in the workplace on the basis of age arises in the context of both older and younger workers, but the reasons, manifestations and effects differ.

Discrimination against older workers generally arises in the form of a reluctance to recruit older workers or to offer training and advancement opportunities; to be made redundant; or through applying pressure to take early retirement, for example. This form of discrimination is largely driven by negative perceptions, including the belief that: older workers are slow or less adaptable to change; that declining health will lead to a drop in productivity; that recruitment will lead to conflicts erupting between older and younger employees; and that operational costs to the employer in relation to insurance premiums will potentially increase.

110 ILO “Equality at Work: Tackling the Challenges” (2007), p 38.

Investing in the training of older employees is also viewed with reluctance as it is seen as a costly exercise, and the provision of such opportunities to younger workers is seen as being more likely to benefit the organisation in the longer term.¹¹¹ Policies and practices based on assumptions of a certain age group consequentially give rise to barriers to employment, diminishing conditions of work, limited career development, and even fewer employment protections and rights. Additionally, it may include a loss of skill and experience which may have positively contributed to the business of an employer.

The youth, however, also face significant levels of unfair discrimination in the workplace, generally through lower wages or less favourable working conditions. Young workers are also over-represented in casual or intermittent employment arrangements which offer limited labour-related protections, training and career prospects. At a global level, as well as in South Africa specifically, young people between the ages of 15 and 24 have been disproportionately affected by the economic recession as the labour market has struggled to absorb the growing number of graduates. Uneducated or low-skilled youth face even greater difficulty in obtaining employment opportunities.¹¹² The ILO further highlights that “*unemployed young people encountering the crisis environment may lose hope of obtaining employment and detach themselves from the labour market altogether, leaving a legacy of a ‘lost generation’.*”¹¹³

In attempting to address the high levels of youth unemployment, many states have implemented policies providing for lower wages for youth in an attempt to provide an incentive to employers to recruit and train persons in this category. However, the ILO has cautioned that unless the job requires lower skills, the payment of lower wages on the basis of age alone may violate the equal remuneration for work of equal value principle.¹¹⁴

Apart from labour practices in relation to recruitment, training and conditions of employment, harassment in the workplace, which includes offensive remarks about a person’s age, also contributes to the creation of a hostile work environment and gives rise to unfair discrimination.

There is a widespread belief that earlier retirement schemes are effective in creating more space in the labour market for the employment of youth, yet the ILO has reported that empirical studies show that a steep decline in the employment rates of older persons has not necessarily translated into increased youth employment. On this basis, caution against shifting employment problems from one group to another has been raised by the ILO. An emphasis is, therefore, placed on the creation of a work environment that is welcoming to both older and young employees to move away from a system based on competition, to one of solidarity.¹¹⁵

Although age discrimination in the workplace is increasingly recognised as a systemic problem, there is a general lack of awareness, with discrimination on this ground receiving less attention than other grounds. The fact that age is not attributable to a specific or identifiable group (such as race, nationality, sex etc.) but is a continuum across all groups, together with the recognition that individuals in the same age group often exhibit different characteristics or abilities, means that discrimination may not always be as noticeable as with other grounds of discrimination.¹¹⁶ For example, while one older person may exhibit signs of declining productivity or be less adaptive to change, another may have completely different capabilities.

111 Ibid at p 38; ILO “Equality at Work: The Continuing Challenge: (2011), p 50; Equal Opportunities Commission “Exploratory Study on Age Discrimination in Employment” (2016), p 8.

112 ILO “Equality at Work: The Continuing Challenge: (2011), p 50.

113 ILO “Equality at Work: The Continuing Challenge: (2011), p 8.

114 ILO “Equality at Work: Tackling the Challenges” (2007), p 38.

115 Ibid at p 42.

116 ILO “Conditions of Work and Employment Programme on Age discrimination and older workers: Theory and legislation in comparative context” (2008), p 4 – 5.

Despite this, social attitudes against persons based on assumed age-based characteristics are often deeply embedded, and, according to the ILO, “[t]he corrosive result is that age discrimination in employment becomes more pervasive and accepted in the labour market.”¹¹⁷

The DPSA has placed emphasis on the prioritisation of youth employment and currently, sits with 25% of employees in the public service being young people. Approximately 4% of senior management positions are currently occupied by youth in the public service. There is no official policy driving youth employment in senior management positions in the public service, and the DPSA utilises the provisions of the National Youth Policy¹¹⁸ (NYP) to guide it on issues of youth development. Although mechanisms are in place within the public service to guard against the exploitation of youth regarding wages and conditions of service¹¹⁹, the Commission’s Inquiry suggested that the DPSA currently does not have a policy that specifically seeks to balance youth employment against the prevention of discrimination against older persons. In fact, the submission received from the DPSA suggests a complete lack of awareness of the prevalence of unfair discrimination against older workers.

In addition, the DoL reflected a lack of awareness of age-based discrimination in the workplace.

In the public service, 4% of cases referred to the CCMA related to unfair discrimination on the basis of age. Excluding arbitrary grounds and complaints relating to equal pay for work of equal value, discrimination on the basis of age constituted the third highest ground of unfair discrimination (after race and sexual harassment) lodged with the CCMA. Notwithstanding the fact that age discrimination has been highlighted as one of the main grounds of unfair discrimination according to the statistics received, specific policies are still lacking within the employment sector. The DoL, as the primary body responsible for driving equality within the employment sector, must take a more active role in seeking to better understand and address this form of unfair discrimination.

4.2.9 Language, culture and religion

Policies and practices in the workplace frequently translate into unfair discrimination on the grounds of language, culture and religion, both in a direct and indirect way. Although these three grounds are separate, they are also intrinsically linked and will, therefore, be considered together.

Essentially, language is more than communication, but includes identity, heritage, culture, and values as well, and is crucial in understanding the intangible aspects of culture. Language is thus one of the main mediums for the expression of culture and is, therefore, integral to maintaining and promoting respect for diversity.

Historically in South Africa, language was used as a tool of control and oppression. In light of this, issues of language may have an exclusionary effect, and in this way have the potential to further contribute to the perpetuation of racism and other forms of discrimination.¹²⁰ Therefore, the influence of language within an environment like the workplace must be considered in light of its historical context.

117 ILO “Conditions of Work and Employment Programme on Age discrimination and older workers: Theory and legislation in comparative context” (2008), p 5.

118 National Youth Policy 2015-2020.

119 Including section 41(1)(a) of the Public Service Regulations 2016, in which a job evaluation and grading system must be put into place to ensure that that work of equal value is remunerated equally. Moreover, the conditions of service in the public sector are negotiated at the Public Co-ordinating Bargaining Council.

120 Taken from submission made by Prof. Pitika Ntuli during the Commission’s Hearing on Transformation in Universities in South Africa in June 2014.

“Historically in South Africa, language was used as a tool of control and oppression. In light of this, issues of language may have an exclusionary effect, and in this way have the potential to further contribute to the perpetuation of racism and other forms of discrimination.”

The language policies of a workplace may indirectly and unfairly discriminate against employees by prescribing the official language of communication in the workplace while simultaneously prohibiting employees from utilising all other languages, even in social situations at the workplace. While the prescription of official business language policies is generally not unfair, the prohibition of the use of all other languages for general interactions within a workplace environment is likely to exceed the boundaries of acceptable workplace policy. Not only do such policies result in a violation of section 31 of the Constitution, which provides that persons may not be denied the right to practice their language, but may further essentially contribute to the establishment of a hostile and alienating environment. Instances of differential treatment in the workplace on the basis of language may also arise. For example, an employer or manager may favour an employee from the same linguistic background, or an employee who is from a linguistic background which is different from the majority of colleagues may face differential treatment or exclusion as a result.

As submitted by the CRL Commission, *“language can create an environment of inclusivity if all languages are treated equally and enjoy the parity of esteem at an institutional level.”* Therefore, while an institutional language policy may legitimately identify official languages for the purpose of conducting business, its conception and implementation should be careful to allow all employees to participate actively and feel included.

Discrimination may also occur on the basis of culture or religion, and according to data compiled by the ILO, this form of discrimination at a global level appears to be increasing somewhat dramatically. This ground of discrimination, as with others, takes on many different forms which include derogatory statements, harassment, as well as the refusal to grant leave for cultural or religious holidays, events, or practices, such as attending prayers at certain times. In addition to this, discrimination frequently arises in the failure to permit religious dress codes, including hairstyles, clothing, and jewellery associated with a particular culture or religious belief in the workplace. The failure for an employer to take into account the diverse requirements for employees of different cultural or religious backgrounds during events may also translate into discrimination. For example, a failure to cater for specific dietary requirements or scheduling strategic meetings or functions on days which overlap with religious holidays that do not form part of the state’s public holidays, could also constitute discrimination.

Part of the right to religious and/or cultural freedom in the workplace, therefore, includes the need for reasonable accommodation of diversity, as well as the right not to be forced to disclose one’s cultural or religious beliefs.

In further considering the right to reasonable accommodation, this must be balanced with grounds of operational requirements, and in some instances, a refusal to grant leave may be considered fair. In the case of *Kievits Kroon Country Estate Ltd v Johanna Mmoledi*,¹²¹ an employee requested to be granted unpaid leave for five weeks to undergo training to become a traditional healer in response to a calling from her ancestors.

121 (JA 78/10) 2012 ZA LAC 22.

Although the employer had previously accommodated her request for time off for this purpose, it denied her request for leave for the full five weeks as a result of operational requirements and capacity restraints. The employee nevertheless attended her training and was subjected to a disciplinary hearing upon her return, following which she was dismissed.

In light of the recognition that the employee's belief stemmed from deeply held cultural convictions, the Labour Appeal Court stated as follows:

“It would be disingenuous of anybody to deny that our society is characterised by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception. The Constitution of the country itself recognises these rights and practices. It must be recognised that some of these cultural beliefs and practices are strongly held by those who subscribe to them and regard them as part of their lives. Those who do not subscribe to the others’ cultural beliefs should not trivialise them by, for example equating them to a karate course. What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society.”¹²²

Moreover, numerous cases have been lodged with the SAHRC, CRL Commission as well as other bodies such as the CCMA and courts, which deal with a refusal to permit the physical expression of culture or religion through particular items of clothing, body piercings and hairstyles, amongst other things. This includes the case of the *Department of Correctional Services v Popcru*.¹²³ In this case, two employees were unfairly dismissed following a refusal to follow the instruction received by the employer to cut their dreadlocks, which were found to violate and undermine its dress code which aimed to ensure uniformity and neatness. The employees submitted that the dreadlocks were part of the process to become traditional leaders in accordance with Xhosa culture. The Court found that this was protected under the Constitution and that the absence of evidence to show an impediment to job performance or any unreasonable burden imposed on the employer gave rise to the conclusion that the dismissal was automatically unfair.

This case is a prime example of the way in which a seemingly neutral workplace policy may result in indirect and unintentional discrimination. While the dress code appears to have a reasonable or legitimate objective, it nevertheless entrenches the values and assumptions of one culture without considering the impact on others. Workplace dress codes therefore often constitute institutional discrimination. While it may be argued that the absence of such a policy may open floodgates for abuse or threaten the image of an organisation, the case of *MEC for Education, KwaZulu-Natal and Others v Pillay*¹²⁴ explained that the possibility for abuse should not affect the rights of those who hold sincere beliefs, and that the more people who feel free to express their culture and religion, the “*closer we will come to the society envisaged in the Constitution*”.¹²⁵

122 Para 26.

123 (107/12) [2013] ZASCA 40 (28 March 2013).

124 2008 (1) SA 474 (CC).

125 At para 107.

In line with a report produced by the CRL Commission on challenges faced by traditional people in the workplace, a recommendation has been made to various government departments to take cognisance of these challenges and to amend legislation and policy to address the issues identified.

One of the other contentious issues raised during the proceedings related to cultural and religious holidays and some complaints that have been lodged with the CRL Commission that dealt with the failure and/or refusal by employers to allow employees to take leave for such purposes. It was further argued that the current conception of the public holiday and labour system in the State is directly discriminatory against persons not of the Christian faith by requiring them to take annual leave to practice their own religious holidays and holy days, thus immediately placing them at a disadvantage.

In this regard, the Commission makes reference to the report produced by the CRL Commission in 2012 entitled "*Public Holidays vs. Religious/Cultural Holidays: In Pursuit of Equality Among Religious and Cultural Groups*" ("the Public Holiday Report"). Regarding this report, the CRL Commission recommended that all public holidays be reviewed and that in the interim, employees must be allowed to take leave for cultural and/or religious holidays. Although it was noted that the recommended revision of the public holiday system might take time, the CRL Commission highlighted the fact that the requirement for employees to submit annual leave so as to attend religious and/or cultural holidays automatically results in differential treatment for non-Christian faiths, whose needs are currently not being met.

While the submissions received from State Respondents did not clarify whether any progress has been made in light of the recommendations made by the CRL Commission in the two reports mentioned herein, the Commission urges the relevant departments to have regard to the role of Chapter 9 institutions, and to the positive obligation imposed under section 181(3) of the Constitution to ensure the independence, impartiality, dignity and effectiveness of these institutions. In line with this, the Commission reiterates the recommendations made by the CRL Commission and calls upon the relevant bodies to take all necessary steps in the protection and promotion of the rights of all persons in this context.

It is clear that discriminatory practices are still ongoing with regard to language, religion and culture in the workplace. What is required is a broader understanding and respect for different cultures and beliefs, not only in the workplace but in society as a whole. Religious or cultural holidays; prayer times; funeral customs, amongst other practices must be reasonably accommodated to create a welcoming and respectful work environment.

Currently, there are no formal policies guiding employers on issues relating to language, religion and culture, despite the relative importance of these issues on daily interactions within the workplace. The DoL must contribute to raising greater awareness and ensuring respectful practices through the development of formal policies or codes and advocacy initiatives, amongst other things.

4.2.10 Sexual harassment

There are currently no available statistics on the number of sexual harassment cases reported in the workplace in South Africa, and it is, therefore, difficult to accurately evaluate the extent to which it occurs, the form it most commonly takes, as well as the most affected groups. However, despite the lack of available data and notwithstanding the numerous laws and policies in place across the employment sector, it is widely acknowledged that sexual harassment is still pervasive in the workplace. In fact, sexual harassment constituted the highest number of complaints received by the CCMA over the past four financial years.

In September 2014, a mini-conference was hosted on sexual harassment in the workplace, which was attended by trade union members, workers, and representatives from labour NGOs, the Women's Legal Centre and the CCMA. This conference found that a large number of employees do not report cases of sexual harassment for a number of reasons, including fear of reprisal (including dismissal) or victimisation; fear that management, human resources and trade union representatives will not give support; lack of awareness of the grievance procedures; and self-blame, amongst other things. Men, in particular, are frequently reluctant to report cases due to fear of stigmatisation as male victims. In addition to this, the conference found that trade unions failed to make sexual harassment a priority, and, in many instances, cases against trade union representatives themselves have been reported.¹²⁶

Sexual harassment is understood as being the unwanted conduct of a sexual nature and includes physical, verbal as well as non-verbal conduct such as comments, gestures and the display of sexually explicit or suggestive material. This form of harassment ranges between conduct which is inherently intolerable, such as sexual assault, aggression and rape, to forms of conduct which are less obviously harmful. One of the key characteristics of sexual harassment is its subjective nature in that certain forms of conduct may be offensive and unacceptable to some, while tolerated and welcomed by others, and is often dependent on different cultures as well as the relationship between individuals. For this reason, the general approach has moved away from a fixed definition but emphasises the unwelcome nature of the conduct. Sexual harassment may occur through physical,¹²⁷ verbal¹²⁸ as well as non-verbal conduct, such as unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

The DoL Code of Good Practice on the Handling of Sexual Harassment Cases explains that sexual attention becomes sexual harassment if:

- a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
- b. The recipient has made it clear that the behaviour is considered offensive; and/or
- c. The perpetrator should have known that the behaviour is regarded as unacceptable.

Sexual harassment may, therefore, manifest in the form of a hostile working environment, where the conduct in question is intimidating or humiliating for the victim, or, in the form of a "quid pro quo" in which a job benefit is made conditional on the provision of sexual favours.

According to Ricardo and Barker, sexual exploitation and violence are "...driven by social norms related to gender and sexuality and the unequal power dynamics between men and women that these norms create and reinforce."¹²⁹ Therefore, it is clear that gender issues intersect intimately with relations of power, and while it is not only women who are subjected to sexual harassment, women, as well as LGBTI persons, are often disproportionately affected.

126 WageIndicator.org "Press release: Workers speak out against sexual harassment (August – September 2014) (as accessed at <http://www.wageindicator.org/main/Wageindicatorfoundation/WageIndicatorgazette/2014/workers-speak-out-against-sexual-harassment-lrw-media-statement-south-africa-august-september-2014>); Williams "Few report workplace sexual harassment" (9 September 2014) (as accessed at <http://www.heraldive.co.za/report-workplace-sexual-harassment/>).

127 This includes all unwanted physical contact of a sexual nature, including touching, strip search by or in the presence of a member of the opposite sex, assault or rape.

128 Including unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

129 Ricardo and Barker "Men, Masculinities, Sexual Exploitation and Sexual Violence" (2008) p 3 (as accessed at <http://www.hapinternational.org/pool/files/ricardobarkermenmasculinitiessexualexploitationsexualviolence.pdf>).

This is particularly the case in patriarchal societies where sexual harassment is often used as a way to reinforce culturally dominant relations of gender.¹³⁰

Moreover, experience has illustrated that certain categories of men and women are more vulnerable to sexual harassment, including youth; women who are financially dependent; casual workers and workers in the informal sector; persons of racial or ethnic minorities; sexual minorities; and migrants (particularly due to the difficulties faced in obtaining alternative employment, their social isolation, lack of language skills and financial resources).¹³¹ In addition, persons who work in organisations or teams dominated by the opposite sex are also particularly at risk. The extent to which this form of conduct occurs against men is frequently overlooked, largely as a result of the low instances of reporting. The lack of awareness and consequential inconspicuous nature of this form of unfair discrimination plays a central role in its perpetuation.

Sexual harassment complaints have consistently constituted one of the highest categories of complaints lodged by employees in the public service. The data is indicative of the probability that a lack of policy formalisation, awareness and implementation has contributed to the non-reporting of sexual harassment cases.

Upon further analysis of the data provided for the public service, the sanctions imposed range from the provision of counselling; verbal reprimands; verbal warnings; final written warnings; suspension without pay; and dismissal. Although the Commission was unable to view the particular facts of each case, it reiterates the importance of ensuring the imposition of appropriate sanctions consistently across the public sector. Additionally, the Commission notes with concern the lengthy periods of time indicated for resolution of the matters, with a large number of departments reporting over 60 days for resolution on average, and many exceeding 90 days.

While the extension of the jurisdiction of the CCMA to include all cases of sexual harassment is positive and will improve the accessibility of remedies for those subjected to sexual harassment, the Commission is also cognizant of the fact that many cases continue to be unreported. In assessing the findings made by the CGE, it is apparent that the failure to develop, or the non-implementation of effective sexual harassment policies in the workplace, significantly contributes to the prevalence of this form of harassment. Moreover, a general lack of awareness amongst employees as well as the stigma attached to sexual harassment further contribute to under-reporting, and a greater emphasis on education and advocacy is required to effectively combat this form of discrimination.

Overall, the Commission's inquiry found that sexual harassment is indeed pervasive in the workplace in South Africa, despite the existence of a multitude of laws and policies aimed at providing awareness, protection and redress. What is required, therefore, is the need not only to address and resolve individual instances of sexual harassment but for employers to take greater efforts to identify and address systemic issues on a collective and proactive basis. These efforts should not only aim to prevent sexual harassment but to raise greater awareness and drive the transformation of entrenched social patterns of behaviour which seek to exploit and victimise vulnerable groups in the workplace. In addition to this, the DoL and CEE should consider different options for measuring the prevalence of sexual harassment in the workplace, which could include the implementation of a requirement for designated employers to report on complaints handling, or the undertaking of regular surveys across small, medium and large enterprises.

130 D Smit and V du Plessis "Sexual Harassment in the Education Sector" PER / PELJ 2011, p 174.

131 ILO "Sexual Harassment at Work: National and International Responses" (2005), p 4 – 5.

4.2.11 Equal pay for work of equal value

The concept of equal pay for work of equal value is not a relatively new one but was initially formalised through the ILO Equal Remuneration Convention in 1951.¹³² The Convention was initially drafted with the aim of eliminating gender disparities in terms of remuneration, and ultimately to ensure that the work performed by men and women is equally valued.

Discrimination with regard to equal pay is both direct and indirect. It occurs directly when remuneration differs between employees in the same or similar jobs, where employees have the same level of qualifications and/or work under similar conditions. A further example would be where men and women performing the same job are provided with a different title and accompanying levels of remuneration. However, discrimination may be more subtle and extends to indirect forms under circumstances where people perform different jobs, requiring different skills, qualifications and responsibilities and under different conditions, but which jobs are essentially of equal value.¹³³ This is particularly important in acknowledging the reality that the employment sector remains largely divided between female and male-dominated occupations and the fact that as a result of the historical circumstances of women, skills, effort, responsibilities and working conditions of female-dominated occupations still largely undervalued today. Therefore, the principle of equal pay for work of equal value is considered to be an essential condition for the elimination of discrimination and structural inequalities.

Although the Convention was initially drafted with the overall purpose of promoting gender equality, this principle has evolved and now incorporates other grounds of characteristics as well. This principle has recently been incorporated into domestic law through the insertion of section 6(4) in terms of the EEAA,¹³⁴ as well as through the development of the Code of Good Practice on Equal Pay Remuneration for Work of Equal Value (2015).¹³⁵

In ascertaining the value of a job, an objective assessment must be undertaken. This assessment usually considers factors such as the responsibility; skills, qualifications and experience required; the physical, mental and emotional effort required to perform the job; as well as the working conditions (including physical environment; psychological conditions; time and geographic location in which the work is performed).¹³⁶

It is important to note that not all differences in remuneration amount to unfair discrimination, particularly when such differences are based on objective differences in the value of work performed. The DoL's Code of Good Practice sets out the criteria for determining unfair discrimination on the basis of remuneration. Firstly, the discrepancy must be linked to a particular ground, which can be one of the listed grounds such as sex, race or disability, as well as any other arbitrary ground. Further, it is not unfair if the differentiation is considered to be fair and rational. The justification may include one or a combination of the following factors:

- Seniority or length of service;
- Qualifications, ability, competence or potential;
- Performance, quantity or quality of work;
- Where an employee is demoted as a result of organisational restructuring or any other reason without a reduction in remuneration;

132 Equal Remuneration Convention, 1951, No. 100.

133 ILO "Equality at Work: Tackling the Challenges" (2007), p 23.

134 Section 6(4) of the EEA now reads as follows: "A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), in unfair discrimination."

135 Government Gazette Notice No.448, 1 June 2015.

136 Code of Good Practice on Equal Pay Remuneration for Work of Equal Value, para 5.4.

- Where an employee is employed temporarily for purposes of gaining experience or training;
- The existence of a shortage of a relevant skill in a particular job classification; or
- Any other relevant factor that is not unfair discrimination in terms of section 6(1) of the EEA.¹³⁷

According to the statistics provided by the CCMA, the vast majority of complaints about unfair discrimination were on the ground of equal pay. However, one of the main challenges facing the CCMA and employees, in general, is the difficulty in linking differentiation in pay to a ground, whether listed or unlisted. While the information provided by the CCMA did not indicate the proportion of cases which were successful, it is clear that there is an increasing awareness around this form of discrimination in general, although employees may not be aware of its objective meaning, limitations and application, indicating the need for greater education around this principle.

While the DoL cannot provide guidance or oversee job evaluations for each employer, from a more systemic level taking into account the structural inequalities between female and male-dominated jobs, in particular, the DoL, in collaboration with the Department of Women, Department of Trade and Industry and other relevant departments, should undertake a process to evaluate overall pay structures within and between certain industries to ensure that gender parity is achieved. The Commission recognises that steps have already been taken by the DoL in this regard through, for example, the introduction of a minimum wage for domestic workers. This is a valuable measure which recognises how structural gender inequalities between sectors in the employment industry can contribute to persisting inequalities and injustices in society more broadly. While the Commission is cognisant of the fact that this may be a particularly complex and long-term task, the persisting structural inequalities entrenched into the labour market are unlikely to be adequately addressed and transformed without a broader intervention at the national level.

The Commission further notes the important role to be played by trade union representatives in promoting and ensuring the elimination of discrimination in terms of remuneration through, for example, collective bargaining processes amongst others. In line with this, trade union bodies should undertake training for all representatives so as to adequately capacitate them to identify and deal with discrepancies which may give rise to unfair discrimination in the workplace.

137 *Ibid* para 7.



5 CONCLUSION OF UNFAIR DISCRIMINATION TRENDS

5. CONCLUSION OF UNFAIR DISCRIMINATION TRENDS IN THE WORKPLACE IN SOUTH AFRICA

The Commission recognises the significant advances and gains made in labour practices since 1994, but notes that unfair discrimination is still pervasive in the workplace. Overall, the historical divisions of the past are still reflected in socio-economic inequalities and workplace relations.

Discrimination is a complex phenomenon, compounded by historical circumstances, transforming social realities, a lack of awareness, gaps in the legal framework, inconsistent or inadequate levels of monitoring and enforcement, as well as an overall lack of will to transform persisting attitudes and forms of behaviour. The Commission notes that there is a lack of understanding as to the meaning and complexity of unfair discrimination in its entirety. Many stakeholders perceived the issue narrowly in terms of unjust treatment (directly), and generally neglected considerations of indirect or institutional manifestations of discrimination.

Moreover, some submissions received from trade union bodies focused almost solely on racial discrimination. When submissions were broader, they incorporated aspects of gender, disability and, to a lesser extent, age discrimination. This suggests a lack of awareness and/or sufficient attention paid to other forms of systemic discrimination taking place in the workplace. This lack of a broad focus is highly problematic, as, without broad representation and a deeper understanding of the different forms and manifestations of discrimination in the workplace, discriminatory policies are likely to continue unabated, albeit inconspicuously.

Greater social relations, the position of different groups within society, and the occurrence of discrimination more specifically, are inherently linked to historical circumstances as one of the key driving factors. However, discrimination in the workplace must also be understood as a moving target,¹³⁸ and even where deeply entrenched patterns of discrimination on grounds such as race, gender and disability persist, new forms and manifestations of discrimination continuously arise. The attention given to employment equity and non-discrimination in the workplace by the various stakeholders tends to focus on the historical context of the country and the labour force almost exclusively. While the Commission acknowledges that an assessment of labour relations and discrimination within this context is an imperative, the exclusive concentration on these factors consequentially neglects new and emerging forms of discrimination as we, as a society, progress.

Notwithstanding the vital roles played by each stakeholder, the Commission's Inquiry revealed that limited, and in some instances, no interaction between the relevant role players takes place. The objective of promoting equality and eliminating unfair discrimination in the workplace could be further enhanced through more regular interaction between the different bodies, all of which possess important information required in assessing progress and pervasive challenges. For example, the information obtained through complaints handling processes within trade union bodies and the CCMA could greatly inform policy makers and enforcement bodies – such as the DoL and DPSA – with regard to existing gaps and challenges, as well as new and emerging forms of unfair discrimination. Greater collaboration will, therefore, better inform policy development and other necessary interventions in the employment sector.

The National Economic Development and Labour Council (NEDLAC), was established to promote goals of economic growth, participation in economic decision-making and social equity. This body has been constructed as an alliance between the State and various relevant social partners, consisting of representatives from government, organised business, and labour and community partners.

¹³⁸ ILO "Equality at Work: Tackling the Challenges" (2007), p 15.

Legislation, policy or other relevant issues are tabled before NEDLAC for discussion and debate amongst the members with a view to addressing the challenges, make recommendations and ultimately, to reach consensus on the issues. The Commission recognises the vital role played by NEDLAC in adding value to the policy process itself, as well as in enhancing the perception of ownership of policies by social, business and labour partners, therefore enhancing the implementation of such policies in practice. However, the Commission has identified a number of challenges with regard to the membership and functioning of this body.

The institution consists of four chambers, including public finance and monetary policy;¹³⁹ trade and industry;¹⁴⁰ labour market;¹⁴¹ and development,¹⁴² and is constructed as an alliance between the State and various relevant social partners, consisting of representatives from government, organised business, labour and community partners.¹⁴³ Although provision is made for the inclusion of community partners, their participation is limited to the development chamber of NEDLAC and is therefore excluded from participation in the other chambers, including labour, highlighting a significant gap in the current process. Moreover, organised business is represented by Business Unity South Africa (BUSA) and the Black Business Council. Although the institution acknowledges that small business plays a crucial role in employment, it is currently not represented in the Council, leading to the possibility that the concerns and interests of small business are not adequately represented during legislative and policy formulation.

Although the institution is empowered to conduct research on various issues, its limited capacity negates the ability of the institution to do so broadly. In addition to this, one of the key challenges faced by NEDLAC is that it is only empowered to consider legislation and policies specifically tabled before it by the government or any of the social partners, and therefore has no authority to determine issues to be engaged on. In addition to this, while the provisions of its mandate require NEDLAC to consider all proposed labour legislation and policy, its mandate to consider social and economic policy is limited to “significant” changes. However, the meaning of the term “significant” is currently unclear, which makes the fulfilment of its mandate challenging. As a result, a number of legislative issues have, therefore, bypassed NEDLAC, despite recognition of the interrelated nature of public policy on issues such as labour and economic development. One example of this relates to the Employment Tax Incentive Bill¹⁴⁴ (“Money Bill”) which was passed without being placed before NEDLAC, despite the concerns raised over the potential displacement of older workers as a result of tax incentives provided for youth employment.

Perhaps one of the greatest weaknesses of the institution is, therefore, the fact that its role is limited to an engagement on the formulation of legislation and policy, and it, therefore, does not possess a mandate nor the capacity to conduct on-going monitoring of implementation or reviews post-implementation to identify persistent gaps and challenges in practice.

It is also clear that unfair discrimination continues to occur inconspicuously or remain unreported in many instances. Therefore, while an analysis of the available data may be indicative of the general trends, these are not necessarily an accurate reflection of the reality on the ground. This is particularly due to the fact that many new grounds of discrimination frequently emerge and are not necessarily well understood.

139 Matters pertaining to financial, fiscal, monetary and exchange rate policies, the coordination of fiscal and monetary policy, related elements of macroeconomic policy and associated institutions of delivery.

140 Matters pertaining to the economic and social dimensions of trade, industrial, mining, agricultural and services policies and the associated institutions of delivery.

141 Matters pertaining to the world of work and the associated institutions of delivery.

142 Matters pertaining to development, both urban and rural, implementation strategies, financing of development programmes, campaigns to mobilise the nation behind the RDP and the associated institutions of delivery.

143 Women’s National Coalition; South African Civic Organisation; the South African Youth Council; the National Co-operatives Association of SA, Financial Sector Campaign Coalition, and Disabled People of South Africa.

144 Now the Employment Tax Incentive Act No 26 of 2013.

A lack of awareness, in this way, significantly impacts on the reporting and the incidence of discussion and debate on these issues. What is required, therefore, is careful consideration and committed cognisance to lesser-known forms of discrimination in noting that the vulnerability of persons suffering from such forms of discrimination may be amplified due to its inherently hidden manifestation.

One of the trends established by the CCMA in its work is the frequent failure by employers to align their Human Resources Policies to the EEA. The DoL stated that it has frequently observed the failure of employers to consult properly with its employees and to conduct a proper analysis of the workforce profile and workplace environment. Moreover, even where some progress was found to have been made in terms of employment equity, in particular, numerical goals in employment equity plans were often neither considered nor aligned or informed by the EAP.

In addition to this, it was revealed that trade unions often enter into agreements with employers through the collective bargaining process which are discriminatory in implementation. In this regard, the example was provided that at an unspecified mining company, the union and employer agreed that pregnant women working underground would be moved to the surface unless a suitable position cannot be found for them. In this event, the women will be placed on early maternity leave. However, the implication that the woman will be forced to take extended maternity leave meant that only four months would be paid and the remaining time will be unpaid. In practice, many women chose not to disclose their pregnancy due to this fear, which placed their health and wellbeing in danger.

Overall the effective implementation of laws and policies is lacking, and institutional capacity at various levels appears to be constrained and inadequate. While monitoring and enforcement with existing labour and equity legislation are essential, the primary responsibility for compliance with regulations, addressing and eliminating harmful workplace cultures and practices, essentially lies with the employers themselves. While good practices are often identifiable, the sheer lack of attention given to the impact of discrimination on a vast number of employers, not only on the reputation and productivity of the business itself but on the contribution to social cohesion and equality within society more broadly is disheartening. While discriminatory trends in the workplace are likely to reflect greater inequalities and prejudices entrenched within society more broadly, the workplace remains a key point of entry for rectifying inequalities and eliminating harmful stereotypes and prejudices which continue to fracture the greater social fabric of the country.

Perhaps one of the biggest driving factors of unfair discrimination is a lack of awareness and information. Not only are individuals frequently unaware of how their behaviour or the culture of an institution may give rise to discrimination, but often employees are unaware of their rights, and the way discrimination can manifest in a workplace. Access to information is therefore essential to creating an environment in which people are empowered to enforce their rights.

“Perhaps one of the biggest driving factors of unfair discrimination is a lack of awareness and information. Not only are individuals frequently unaware of how their behaviour or the culture of an institution may give rise to discrimination, but often employees are unaware of their rights and the way discrimination can manifest in a workplace.”



6

MOVING TOWARDS A MORE EQUITABLE WORKPLACE ENVIRONMENT

6 MOVING TOWARDS A MORE EQUITABLE WORKPLACE ENVIRONMENT IN SOUTH AFRICA

South Africa has shown improvements in the elimination of unfair discrimination in the workplace through the development of a comprehensive legal framework aimed not only at prohibiting discrimination but at actively enhancing the attainment of equal opportunities. Despite this, the occurrence of discrimination in the workplace remains considerably high, emphasising that the enactment of legislation and policies alone is not enough to prevent and eliminate discrimination in practice. Through this initiative, it has become clear that a number of measures must be taken as we move towards a more equitable workplace environment in South Africa.

Firstly, designated employers within the public and private sectors must maintain a commitment towards fulfilling employment equity targets. However, given the challenges identified above, employers must ensure that employment equity plans are developed in line with the EAP and matched with adequate resources. Moreover, employment equity plans must move beyond recruitment to up-skill persons from designated groups and should be able to translate into advancement to higher levels of the workforce effectively. While the Commission notes that substantive transformation cannot happen overnight, and that movement of designated individuals into more senior positions within an organisation may take time, this aspect of transformation must be built into equity plans and aligned with a sustained commitment to achieving this objective. However, in doing so, caution must be applied to avoid excluding non-designated individuals from such opportunities disproportionately.

It must be emphasised that while improving representation and integration is a crucial first step, more is needed to eliminate discrimination in the workplace. A narrow focus on equality through an assessment of employment equity targets will be unable to drive enough real change on the ground. Therefore, the approach to monitoring must move beyond a quantitative model in line with numerical targets, towards a deeper evaluation to include the substantive elements of equality, including the institutional culture of an organisation, the daily lived experiences of different groups, as well as the effectiveness of equity plans to adequately capacitate individuals and promote their advancement. The Commission therefore strongly supports the intention of the CEE to move beyond a statistical analysis of employment equity with a view of incorporating the substantive issues.

While monitoring equality within the workplace at a qualitative level may prove challenging, trade union bodies, in particular, can play a vital role in this regard. Trade union representatives are frequently embedded within an organisation and are therefore in a unique position to monitor and evaluate the reality of discrimination as experienced by those most affected on the ground. Moreover, for workers in precarious employment (including those working on farms, in private households as well as migrants in an irregular situation), monitoring the prevalence and forms of discrimination is particularly difficult and often falls outside of the realm of work that labour inspectors are able to conduct. Trade unions, therefore, play a vital function in protecting the rights of these workers by representing concerns and interests, not only individually in assisting workers in obtaining redress, but also at a much broader level through raising awareness and driving policy change.

While labour inspectors, too, have an imperative role in monitoring transformation, they are severely underutilised as a result of the lack of capacity. The adequate resourcing of enforcement mechanisms is crucial in guarding against the achievement of formal equality alone through the adoption of laws, policies and plans without the necessary implementation to drive lasting, substantive change. Therefore, an increased capacity of labour inspectors would likely contribute positively towards increased compliance

with legal obligations, which was one of the main weaknesses consistently highlighted in the current system. However, it must be further noted that the role of labour inspectors should not be limited to monitoring compliance with equity legislation, but should include a broader function of evaluating organisational structures and policies to identify structural barriers and problematic practices which may give rise to discrimination. For example, adequate capacitation of labour inspectors regarding gender mainstreaming would assist in identifying policies or practices which act as barriers and indirectly discriminate against women in the workplace, such as the lack of flexible working hours and parental benefits.

An adequate assessment of the progress of equality measured over time is, however, largely dependent on the identification of appropriate and detailed indicators together with the collection of disaggregated data. While some data is available which enables a partial assessment, crucial factors are missing. For example, while assessing the proportion of persons with disabilities who are employed may reflect progress (or lack thereof) in promoting equitable opportunities, we will be unable to establish whether this advancement is sufficient without statistics on the EAP of persons with disabilities. Similarly, while the Commission is supportive of the DPSA's initiative in measuring the provision of RAAD within the public service on an annual basis, the current indicators are only able to determine the extent of RAAD that was provided, without also identifying the level RAAD actually required. Therefore, the assessment will be unable to measure the extent of actual compliance.

The Commission's inquiry further identified the need for legislative changes, particularly on parental benefits, immigration, and culture and religion in the workplace. However, in noting that the legislative process is lengthy, trade unions are once again able to play a crucial role in protecting the rights of workers through the collective bargaining process in particular. However, on the basis of submissions received, although it is acknowledged that there are many good practices undertaken by trade union bodies, it is also clear that there is a need for greater awareness and training of representatives and leaders to enable them to effectively understand discrimination in all its complexities and manifestations.

The government should adopt a more holistic and inclusive approach to legislative and policy development, by recognising that although legislation or policy may not directly deal with matters which fall within NEDLAC's mandate, these matters may nevertheless be impacted. Not only will the referral of matters falling within this category assist the State in developing a deeper understanding of the concerns, needs and challenges of business, labour and social partners, but it will facilitate the implementation through establishing consensus and ownership in the outcome.

Increased access to information and education initiatives aimed at raising awareness amongst all stakeholders and members of society is perhaps the most important measure in effectively combating discrimination. While legislation and greater monitoring and enforcement of obligations are crucial aspects in the fight against discrimination and inequality, what is required beyond this is a shift in mindset necessary to challenge persisting social patterns and assumptions which continue to divide our society. Without a deeper understanding of the complexities and interacting historical, social, economic, political, and cultural factors that continue to drive social relations, we are unlikely to achieve the ideal of a diverse and multicultural society not only founded on but which can achieve the principles of freedom, equality and dignity.

Discrimination must essentially be understood as a multidimensional phenomenon. Therefore, any attempt to examine or address discrimination in all its forms must factor in components that relate to inter-sectoral barriers to entry into the workplace as well as the dynamics at play within the workplace environment itself. The intersecting nature of different characteristics and factors give rise to highly complex human experiences, and discrimination, in reality, cannot be divided neatly into particular grounds that are always easily identifiable and will have a predetermined impact.

What needs to be further understood is that even a single act of discrimination does not have an isolated impact. What one person may consider to be relatively harmless may have a greater effect on a person or category of persons as a result of the culmination of discrimination over a long period. For example, the use of a derogatory term against a person from a vulnerable or marginalised group creates a ripple effect of conduct that seeks to belittle, isolate and dehumanise a particular category of persons.

*“What needs to be further understood is that even a single act of discrimination does not have an isolated impact. What one person may consider to be relatively harmless may have a greater effect on a person or category of persons as a result of the culmination of discrimination over a long period.”
workplace.”*

In light of this, a holistic approach must be applied in dealing with diversity management and the elimination of discrimination in the workplace by seeking to understand how different factors (both inside as well as outside of the workplace) interact with one another and within different categories of persons.

Finally, through the various measures and interventions, there must be increased co-operation and partnership between the various role players, each of which has a unique role. This co-operation includes the need for a greater inter-sectoral approach between the various government departments in seeking to develop sustainable solutions to tackle persisting barriers to equality. Moreover, there needs to be a concerted effort between government, business and other relevant social partners to share information to adequately identify the trends and persisting challenges that need to be addressed.



7 RECOMMENDATIONS

7 RECOMMENDATIONS

In terms of the SAHRC Act, the Commission is entitled to:

*“make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.”*¹⁴⁵

In light of all available evidence, the Commission has drafted appropriate recommendations in line with its mandate to promote the protection, development and attainment of human rights for all persons.

In considering the recommendations set out below, organs of state must recall the obligations set out in section 181(3) of the Constitution, which calls on such bodies to act in a manner that ensures the independence, impartiality, dignity and effectiveness of Chapter 9 institutions, including the Commission, and requires such organs to assist and protect these institutions. On this basis, the recommendations must be taken seriously, and the Commission calls for the on-going commitment by all Parties but also stresses the importance of co-operative governance and inter-sectoral collaboration in promoting lasting equality and eliminating unfair discrimination in the workplace.

The Commission makes the following recommendations:

7.1 Department of Labour

7.1.1 In light of the trends identified during this investigation, the DoL is required to revise its policies developed for the purpose of the prevention of unfair discrimination in the workplace and to develop new policies where a need has been identified. Specifically, the DoL must develop policies/guidelines/codes of good practice to deal with the following issues in the workplace:

- i. LGBTI persons, and transgender and intersex persons in particular;
- ii. Family responsibilities, which must include the impact of structural forms of discrimination and gender roles in access to equitable employment opportunities. Such policy should incorporate considerations on the types of mechanisms that can be implemented to promote equitable opportunities, including but not limited to flexible working hours and telecommuting options;
- iii. The development and use of language policies in the workplace;
- iv. Reasonable accommodation of religious and/or cultural diversity in the workplace;
- v. Age discrimination, which should include guidance on balancing youth employment policies with the prevention of discrimination against older workers;
- vi. Gender and disability mainstreaming in the development and implementation of internal workplace policies and practices;
- vii. Diversity management in the workplace.

7.1.2 The Minister of Labour must revise legislation relating to the provision of maternity/paternity benefits in the workplace, which revisions must incorporate considerations of gender equality; sexual orientation and family structure, amongst others.

¹⁴⁵ Section 13(1)(a).

- 7.1.3 In noting the lengthy process in undertaking legislative changes, pending the amendment of the laws above, the DoL must develop a policy aimed at guiding employers on the equitable provision of parental benefits to workers.
- 7.1.4 The DoL should undertake an assessment of the current capacity and effectiveness of the labour inspectorate, which should include recommendations with regard to the appropriate capacity required to fulfil its mandate effectively.
- 7.1.5 The assessment mentioned above must be presented to the National Treasury for consideration for the allocation of appropriate budget allocation, noting the far-reaching implications of unfair discrimination on economic development and eradication of poverty in the Country.
- 7.1.6 The DoL should further evaluate the current scope of work assigned to labour inspectors and should ensure that inspections conducted include all aspects of discrimination in the workplace, including employment equity; policy conception; gender and disability mainstreaming; complaints handling, amongst other aspects.
- 7.1.7 The DoL, in collaboration with the Department of Women, Department of Trade and Industry and other relevant departments, should undertake a process to evaluate overall pay structures within and between certain industries to ensure that gender parity is achieved.
- 7.1.8 The DoL must urgently engage with Statistics South Africa with a view to identify the EAP for persons with disabilities.
- 7.1.9 The DoL must lead discussions with the Department of Higher Education and Training (DHET), business and other relevant stakeholders to develop mechanisms to assist employers in identifying persons with disabilities with the necessary skills. Such discussions should further identify measures aimed at promoting the educational and skills development opportunities for persons with disabilities.
- 7.1.10 The DoL must develop and implement mechanisms aimed at monitoring the challenges experienced by workers in precarious employment. In noting the difficulties in monitoring this form of employment, the DoL must work closely with trade union bodies in identifying the extent to which discrimination occurs within this context with a view of developing appropriate laws and/or policies to address the challenges and/or regulate these sectors to protect the rights of workers.
- 7.1.11 The Commission notes that the DoL is currently undertaking research on the impact of migrant labour on the implementation of the EEA. In conducting this research, the DoL must take into account factors which contribute to the challenges and unfair discrimination faced by foreign nationals at all levels of employment, but with particular reference to those in precarious forms of employment.
- 7.1.12 The Minister of Labour, in terms of the NEDLAC Act, must provide clarity and specific guidelines on the meaning of “significant changes” in prescribing NEDLAC’s mandate to consider matters relating to the social and economic policy as referred to in section 5(1)(d) of the Act. It is further recommended that in developing such guidelines, the Minister must consider the interdependent nature of social and economic policies with labour related matters, and should ensure that all policies that could potentially impact on labour-related matters must be brought before NEDLAC for consideration.

7.1.13 The DoL should continue to collaborate with the CCMA and other bodies in raising awareness around unfair discrimination in the workplace and should initiate programmes specifically aimed at raising awareness on the lesser known grounds. These should include, for example, age; nationality and social origin; sexual orientation and gender identity; language, culture and religion, as well as the requirements and limitations of the principle of equal pay for work of equal value.

7.1.14 In recognition of the fact that many incidents of unfair discrimination will remain unreported, the DoL should consider developing alternative mechanisms for measuring discrimination on a periodic basis. This may include surveys and interviews with workers; consultations with social partners; and sample testing of employers with respect to policy development and complaints handling, amongst others. These measures should be designed and implemented in a manner that allows the DoL to measure existing forms of discrimination, as well as to identify new forms that may emerge in future.

7.2 National Economic Development and Labour Council

7.2.1 BUSA, as the representative for organised business within NEDLAC that is responsible for determining membership, must identify and nominate representatives from the small and medium-sized business sectors for membership in NEDLAC. Representative bodies should be identified within two months, and a nomination should be made within four months from the release of this report.

7.2.2 While the Commission notes that the NEDLAC Act and Constitution regulate membership of the body, nothing prevents NEDLAC from instituting consultations and/or collaboration with other persons and bodies which are not currently members. Therefore, in instances where policies which may potentially impact on groups of persons not represented within the relevant chambers, it should initiate a process of consultation with relevant bodies identified so as to undertake a fair and holistic process.

7.2.3 In light of the above, NEDLAC is required to consider the development of a policy to regulate the consultation and/or co-operation with non-member bodies. This should be done within six months from the date of release of this report.

7.3 Department of Public Service and Accountability

7.3.1 While the Commission is supportive of the process initiated aimed at monitoring the provision of reasonable accommodation and assistive devices (“RAAD”) to employees in the public service, the DPSA is required to revise the monitoring indicators to ensure the exercise is able to adequately assess and monitor the extent to which public sector employers are meeting reasonable expectations and requirements. This must include, for example, an evaluation of the extent to which persons with disabilities in the public sector require RAAD; the type of RAAD required; the reasonableness of the RAAD identified (and reasons thereof); alternatives considered in the event that the RAAD identified is deemed to be unreasonable; the extent of provision; and the associated cost. Such monitoring should also assess the extent to which public service employers have made budget allocations for the provision of RAAD.

- 7.3.2 In recognising the fact that many buildings in the public sector remain inaccessible for persons with disabilities, the DPSA must take all necessary steps to ensure that an assessment of all public service buildings is conducted to identify the extent to which such buildings are accessible for persons with disabilities. This assessment must be done within 12 months from the date of the release of this report, and a copy of the findings must be provided to the Commission upon completion. Such report must further identify time-bound measures to ensure that all public sector buildings are made accessible on a progressive basis so that the DPSA is in a position to fulfil its constitutional mandate to ensure that the public administration is broadly representative of the South African people¹⁴⁶.
- 7.3.3 The DPSA must further take all necessary steps (together with any other relevant state department in accordance with the principals of co-operative government) to ensure that all local, provincial, and national government officials and building control officers responsible for the inspection and approval of construction plans within their jurisdiction are appropriately trained to ensure that minimum requirements are adequately adhered to.
- 7.3.4 In relation to the above, the DPSA must take all necessary steps (together with any other relevant state department in accordance with the principals of co-operative government) to ensure that responsible local, provincial and national government officials and building control officers who have approved the construction of buildings which are non-compliant with prescribed regulations are held accountable.
- 7.3.5 The Commission welcomes the initiation of an annual reporting mechanism on sexual harassment and complaints management within the public sector. In assessing the information received from public service employers, the DPSA must determine whether a sexual harassment and complaints handling policy has been developed as well as the status of such policy (i.e. draft or final). In this regard, the DPSA must ensure that all public service employers have developed and finalised an appropriate sexual harassment policy, which has been rolled out to all employees. The DPSA should further require that all policies are revised on a regular basis.
- 7.3.6 In conducting an evaluation of sexual harassment complaints across the public sector, the DPSA must compile an annual report which, amongst other things, identifies employers in which sexual harassment appears to be pervasive; the effective resolution of complaints (including compliance with prescribed timelines); identifying systemic challenges as well as time-bound measures to address the issue. Such report must be made publically available.
- 7.3.7 In terms of the Public Service Act ("PSA"), the Minister of Public Service and Administration is empowered to take disciplinary steps against any head of department who does not comply with the provisions of the Act, Regulations, determination or directive. In this regard, the Commission notes that numerous submissions made by the DPSA highlighted systematic non-compliance by various public service employers with a number of laws, policies and directives, which negatively impacts the ability of the DPSA to conduct monitoring activities and impairs the overall efficiency of the public service. In line with the PSA, the Commission urges that the Minister take steps deemed necessary to ensure compliance and accountability for all public service employers on a regular basis.

146 Section 195 (1) of the Constitution of the Republic of South Africa. See also 'Department of Public Service and Administration Strategic Plan 2015/2020' at p.7. Available at <http://www.dpsa.gov.za/dpsa2g/documents/annualreports/Strat%20Plan%202015.pdf>.

7.4 Commission for Conciliation, Mediation and Arbitration

7.4.1 The CCMA should consider initiating training for Commissioners on different grounds of unfair discrimination where the need arises, particularly the lesser known grounds.

7.4.2 The Commission is further aware that the CCMA has launched a series of initiatives aimed at collaborating with a number of other organisations, which is highly commendable. In this regard, the CCMA should extend these initiatives to include bodies such as the DoL, the CEE and NEDLAC, amongst others, to enhance information sharing for the purpose of identifying gaps and challenges that need to be addressed.

7.5 Trade Unions

7.5.1 The Commission emphasises the important role that trade union bodies play in achieving equality and eliminating unfair discrimination in the workplace. However, it notes with concern that in some instances trade union representatives do not possess sufficient knowledge about the multiple forms of unfair discrimination that may arise in the employment context. In this regard, trade union bodies must:

- i. Undertake an assessment of current internal policies and guidelines to ensure that proper gender and disability mainstreaming has been incorporated;
- ii. Identify gaps in policies and guidelines which do not currently deal with all grounds, forms and manifestations of unfair discrimination as identified in this report. In this regard, particular attention should be given to the development and roll out of policies dealing with the lesser known grounds of discrimination including for example, but not limited to, sexual orientation and gender identity; age; HIV and Aids status; language, culture and religion;
- iii. Undertake training of all trade union representatives on the different grounds, forms and manifestations of unfair discrimination to enable representatives to adequately identify issues in the workplace, particularly the occurrence of unfair discrimination in policies and practices that are not overt in nature.

7.5.2 Trade union bodies must incorporate measures aimed at eliminating structural barriers to equality through the collective bargaining process, including, for example, the principle of equal pay for work of equal value; equitable parental rights; measures to reasonably accommodate family responsibilities; and the sharing of such responsibilities between men and women, amongst other relevant issues.

7.5.3 Trade union bodies must actively monitor the situation and treatment of workers in precarious employment, which include domestic, farm and migrant workers, amongst others and should undertake a process to collect disaggregated data and information from workers on a regular basis in order to monitor the extent to which unfair discrimination continues to occur in these situations, as well as the form such instances take.

7.5.4 Trade union bodies must play a more active role in collaborating with designated employers in the development of annual employment equity reports to ensure that reports submitted to the CEE provide an accurate reflection of the situation. Moreover, in instances where trade union bodies dispute the accuracy of reports submitted, they should consider the development of a shadow report.

- 7.5.5 Although data is easily collected on employment equity targets within an organisation to assess discrimination on the basis of representation, the measurement of unfair discrimination outside of this (which includes institutional culture more broadly) is significantly more challenging. Trade union representatives are able to play a crucial role in this regard, and should further collaborate with the DoL and CEE to collect information on the basis of various indicators identified.
- 7.5.6 Trade union bodies must further facilitate consultations between employers and employees to ensure that all concerns relating to equal treatment and the elimination of unfair discrimination are adequately addressed in both policy conception and implementation. In this regard, trade union representatives should critically assess the policies and cultures within an organisation in line with the information outlined in this report and must require employers to proactively draft and/or amend policies in line with the numerous challenges highlighted.
- 7.5.7 With regard to persons with disabilities, we recommend that trade union bodies promote the use of the Commissions' Disability Toolkit for the Private Sector amongst private sector employers.

7.6 Employers

- 7.6.1 The Commission commends the private sector employers that have shown their commitment to the rights of people with disabilities through membership of the South African Employers for Disability (SAE4D) and other similar initiatives and calls upon all private sector employers to maintain a commitment to advancing the rights of persons with disabilities. In aiming towards the establishment of a workplace environment that is welcoming to persons with disabilities and enables equitable opportunities and development, the Commission recommends the adoption and use of the Commission's Disability Toolkit for the Private Sector.
- 7.6.2 The SAE4D should regularly compile and publish reports of best practice in the elimination of unfair discrimination against persons with disabilities.
- 7.6.3 Employers, in partnership with trade union representatives, should conduct periodic organisation-wide assessments on the institutional environment and the prevalence of unfair discrimination in all its forms and manifestations. The results of this assessment should be made available to all staff, along with time-bound measures to address the issues raised.
- 7.6.4 Employers should develop diversity management policies which aim to encourage the expression of, and a respect for, diversity in the workplace. In addition to this, employers should periodically convene diversity workshops for employees at all levels which should aim to, *inter alia*, educate staff on different languages, cultures, religions, forms of expression, lifestyles, amongst other things, in an effort to combat stereotypes, promote creativity and innovation, and establish a welcoming environment for all persons.
- 7.6.5 The development of policies aimed at promoting equality and preventing unfair discrimination is not enough, but employers must take measures to ensure that policies are effectively rolled out to all staff, and are made easily accessible. This may include measures such as the completion of annual declarations, periodic training, the display of posters, amongst other measures.
- 7.6.6 Employers should ensure that all managers and human resources practitioners undergo training in gender and disability mainstreaming, as well as on unfair discrimination broadly.
- 7.6.7 Employers must ensure that appropriate complaints handling mechanisms are in place. The mechanisms must provide for confidentiality; fairness and impartiality; as well as timelines for resolution. Such measures should further include the availability of counselling services for employees in need.

“

Employers should ensure that all managers and human resources practitioners undergo training in gender and disability mainstreaming, as well as on unfair discrimination broadly.

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8

CONCLUSION

8 CONCLUSION

South Africa has been hailed as having one of the most progressive Constitutions in the world and has adopted a comprehensive legal framework along with numerous mechanisms aimed at eliminating discrimination, providing redress for violations, and monitoring and enforcing compliance. Despite these measures, South Africa is also considered to be one of the most unequal countries in the world, with inequalities actually increasing. This fact reinforces the notion that the achievement of formal equality alone is unable to translate lived realities and the achievement of substantive equality on the ground. Through this process, we are reminded that the realisation of the right to equality requires more than the mere absence of unfair discrimination, but seeks to advance those who continue to suffer from disadvantage and inequitable opportunities.

While inequalities persist, some positive progress has been made in addressing discrimination and unequal opportunities in the workplace since the attainment of democracy in 1994. A change in the demographics of the overall workforce is visible with the increased number of previously disadvantaged persons now employed. Women, in particular, have made significant advancements and have met or are close to meeting their EAP, and the educational attainments of women have also substantially improved. However, deep-seated inequalities for women persist, particularly as a result of structural barriers hampering access to equal opportunities in the workplace. Other positive measures can also be observed, such as the renewed debate around the conceptualisation of parental benefits in light of increased commitment to achieving gender equality; the formalisation of the principle of equal pay for work of equal value; increased access to justice through the extension of the jurisdiction of the CCMA; and policies and measures designed to empower and capacitate the youth.

However, a disappointing outcome is that, despite being identified as designated persons in terms of the EEA, workforce compositions have not shown a proportionate growth in the employment of persons with disabilities. In fact, while multiple policies and frameworks have been adopted for the purpose of promoting equitable opportunities and the provision of reasonable accommodation, this has not been satisfactorily implemented in practice, meaning that persons with disabilities continue to face multiple and severe barriers. It is also disappointing that while South Africa was previously considered as having extensive protections for refugees and asylum seekers, the recently proposed amendments stand to significantly transgress the situation, rendering this category of persons more exposed to exploitation and discrimination and therefore expanding their existing vulnerability as a group. In recognising that structural inequalities become amplified during times of economic instability, it is times like this that we must be exceptionally vigilant and mindful of exacerbating discrimination and exclusion.

Discrimination, in particular, is difficult to combat due to its nature as a phenomenon that is deeply entrenched in social relations, behaviours and value-systems, and frequently manifests in ways that are not easily visible. Its resilience and often inconspicuous character remains a serious challenge to the attainment of the unified society envisioned in the Constitution and is not reflective of the views and attitudes of a small handful of people, but rather of society as a whole. As a society, we need to be cognizant and attentive to changing social dynamics and the emergence of new grounds of discrimination, rather than focusing exclusively on historical manifestations. What we need now is a move away from a purely equity-based numerical analysis to include a wider examination of discrimination perpetuated in all its forms. This requires the collection of disaggregated data and the identification of appropriate indicators and monitoring mechanisms which can adapt and incorporate the continuously changing workplace dynamics, forms and manifestations of discrimination. Lasting transformation at a substantive level is not an easy fix, but a complex, moving and multidimensional process that requires a sustained commitment from all sectors of society.

In accentuating the first principle encompassed in the Universal Declaration of Human Rights, all persons are born free and equal in dignity and rights. How we treat others, whether in everyday interactions or through doing nothing to change perpetuating injustices is a reflection of ourselves as a society. Perhaps in closing, it is important to recall the words of former President Nelson Mandela in saying that *“to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others.”*

A large, stylized red quotation mark graphic consisting of two opening quote characters.

As a society, we need to be cognizant and attentive to changing social dynamics and the emergence of new grounds of discrimination, rather than focusing exclusively on historical manifestations. What we need now is a move away from a purely equity-based numerical analysis to include a wider examination of discrimination perpetuated in all its forms.

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ANNEXURE A

ANNEXURE A: TERMS OF REFERENCE

i. Rationale for the investigation

In terms of the Commission's Complaints Handling Procedure, the Commission may conduct a hearing under the following circumstances, *inter alia*:

- a. if a complaint cannot be resolved by way of conciliation, negotiation or mediation;
- b. if a hearing will offer an appropriate solution regarding the complaint;
- c. if it is in the public interest;
- d. if the complaint cannot be fairly decided on through documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint only;
or
- e. if a party requesting a hearing supplies reasonable grounds.

The complaints received by the Commission highlight systemic challenges relating to the achievement of equality in the workplace. Data and research on racial, gender and disability-based discrimination, particularly in relation to employment diversity, management diversity and wage discrepancy, is readily available. However, initial research conducted reveals that a gap exists in understanding the overall trends in discrimination in the workplace in South Africa, particularly with regard to discrimination on grounds other than race, gender and disability. Further, studies that are available do not always seek to identify issues relating to systemic forms of discrimination outside of employment equity and wage-related factors and are therefore unable to provide insight into the underlying causes and contributing factors.

In essence, the hearing will enable the Commission to develop a deeper understanding of the overall equality trends in the workplace in South Africa and will be particularly instrumental in analysing why, notwithstanding the plethora of laws and policies in place, discrimination in the workplace persists on a wide scale. The hearing will aim to examine not only the extent to which discrimination persists in the workplace, but will also endeavour to examine the prevalence of deeper forms of institutionalised discrimination, while identifying existing barriers to equality, and propose a set of practical recommendations to promote the achievement of equality and equitable opportunity, particularly for vulnerable groups in South Africa.

ii. Scope and objectives

In terms of articles 26 of the Commission's Complaints Handling Procedure, the Panel must consider information and/or evidence submitted at the Hearing together with other forms of information obtained by the Commission. Following from this, the Panel must summarise the information received and may make findings and recommendations.

In order to gain a deeper understanding of issues relating to unfair discrimination in the workplace, the Hearing will be conducted in a manner that allowed the Commission to fully explore workplace discrimination in as broad a context as possible. This will allow the Commission to fully examine the occurrence of unfair discrimination in the workplace on all grounds, including those which may not receive sufficient attention but may nevertheless occur systemically. The objectives of the Hearing are as follows:

1. Identify different **grounds of discrimination** in the workplace;
2. Identify and understand the different **forms or manifestations of discrimination**;

3. Understand the **inter-related nature** of different grounds of discrimination and the impact of multiple and simultaneous forms of discrimination;
4. Understand the **factors contributing** to the prevalence of discrimination;
5. Identify **existing barriers** to substantive equality;
6. To understand the **role of numerous stakeholders** in relation to the promotion of equality and elimination of unfair discrimination in the workplace;
7. Understand **challenges** facing stakeholders (including employees, employers, government departments and organisations) with regard to **combating discrimination** and ensuring equal treatment, access and opportunities;
8. Consider the **current regulatory regime** in order to gain a better understanding as to why these challenges persist despite a number of laws and policies being in place; and
9. To identify **challenges relating to substantive transformation** in the workplace, although the intention of the Hearing was not to engage with this issue in detail, noting the role of the Commission for Employment Equity in this regard.

While the conducting of a national inquiry into systemic human rights issues may serve a number of objectives, this Hearing is essentially aimed at identifying trends in unfair discrimination in the workplace, while further providing a platform for raising greater awareness around the issues.

iii. Composition of the Panel

In terms of Article 21(2) of the Commission's Complaints Handling Procedures, the Panel presiding over a Hearing must consist of the Chairperson of the Commission or any Commissioner designated by him or her, who must be designated as the Chairperson of the Panel; at least one additional Commissioner; and at least one natural person appointed by the Commission. For the purpose of this Hearing, the Panel comprised of the following members:

- **Commissioner Bokankatla Joseph Malatji** as the Chairperson of the Panel. Commissioner Malatji is responsible for the portfolio of persons with disability and older persons at the Commission, which formed a key component of the hearing;
- **Commissioner Mohamed Shafie Ameermia**, who is responsible for the portfolio of access to justice and housing. Commissioner Ameermia further serves on the board of the Centre for Diversity Studies at the University of Witwatersrand; and
- **Ms Trevonica Naidu**, Managing Director at Transformation Integrated Africa. She was appointed as the additional Panellist due to her vast experience in diversity (and inclusion), employment equity, transformation and human rights.

iv. Identified respondents and stakeholders

The Commission attempted to include a wide range of stakeholders so as to attain a holistic view of the matter, including relevant organs of state; civil society and community-based organisations; private sector representatives as well as trade union bodies. Participants included the following:

- Department of Labour (DoL)
- Department of Public Services and Administration (DPSA)
- Commission for Employment Equity (CEE)
- National Economic Development and Labour Council (NEDLAC)
- Commission for Conciliation, Mediation and Arbitration (CCMA)
- Commission for Gender Equality (CGE)
- Commission for the Protection of Cultural, Linguistic and Religious Rights (CRL Commission)

- Federation of Unions of South Africa (FEDUSA)
- National Council of Trade Unions (NACTU)
- Congress of South African Trade Unions (COSATU)
- South African Employers for Disability (SAE4D)
- Centre for Sexualities, AIDS & Gender (CSA&G)
- South African Disability Alliance (SADA)
- Disabled People South Africa
- Black Management Forum (BMF)

It was not possible to undertake an extensive examination of the private sector due to the numerous entities which fall under this category. However, the Commission invited submissions from the South African Employers for Disability (“SAE4D”), as a body made up of private-sector employers in order to share experiences, develop best practices, and form a common understanding of the challenges and solutions in order to promote the development and integration of persons with disabilities in the workplace.

While the Commission recognises that the views and experiences of the member companies of this body do not necessarily represent all private sector entities, the challenges, in particular, are likely to be experienced by entities across the board. Moreover, the Commission is also cognizant of the fact that the members are predominantly larger entities and therefore do not represent the peculiar views and challenges faced by small and medium-sized enterprises in South Africa. Finally, the submissions provided by SAE4D, while not an extensive overview of the initiatives or practices undertaken by the private sector in totality, provide an indication of the types of solutions being developed in this sector.



ANNEXURE B

ANNEXURE B: MECHANISMS FOR REDRESSING UNFAIR DISCRIMINATION

Internal dispute resolution mechanisms:

All employers are required to have internal complaints handling procedures in place, which prescribe the process to be followed should an employee wish to lodge a grievance. The employer is therefore required to investigate the complaint properly, and to take action or provide redress where appropriate or necessary. This is therefore often the first avenue of dispute resolution in labour-related matters. For complaints in the public sector specifically, the grievance must be lodged within 90 days of the employee becoming aware of the matter. Should the person be dissatisfied with the outcome of the investigation, the relevant executing authority (i.e. state employer) must refer the matter to the PSC.

Public Service Commission:

As mentioned earlier in the report, public sector employees may lodge a complaint directly with the PSC. According to its rules, a grievance must, as far as possible, be resolved by an employer and as close to the point of origin as possible. The PSC may consider complaints referred to it by various organs of state, as well as those referred to it directly by employees in the public sector.

Inspectorate of the Department of Labour:

The BCEA and EEA establish and regulate the function of labour inspectors, who may enter an employer's premises, question employees and make copies of documents, with or without notice or a warrant, and are empowered in terms of section 64(1)(c) of the BCEA to investigate complaints received. However, investigations conducted by the Department are generally related to the compliance with legislation and regulations, including basic conditions of employment; occupational health and safety; employment equity; and payment and compensation-related matters. Complaints of unfair discrimination are generally not dealt with by the Department itself.

Bargaining Councils:

Bargaining Councils must be accredited by the CCMA, and apart from conducting collective bargaining processes with employers, they assist in preventing and resolving labour-related disputes using conciliation and arbitration, but may only do so for certain types of complaints, including:

- Disputes relating to the interpretation of Chapter 2 of the LRA (freedom of association);
- Disputes in relation to matters giving rise to strike action or lock-outs;
- Disputes relating to essential services;
- Unfair dismissal;
- Unfair labour practice; and
- Disputes relating to the entitlement to severance pay.

Therefore only unfair discrimination disputes which fall within the above-mentioned categories may be dealt with by a relevant Bargaining Council.

CCMA

The CCMA is an independent dispute resolution body established in terms of section 112 of the Labour Relations Act (“LRA”).¹⁴⁷ The CCMA is mandated to:

- i. Conciliate workplace disputes;
- ii. Arbitrate disputes that remain unresolved after conciliation;
- iii. Facilitate the establishment of workplace forums and statutory councils;
- iv. Compile and publish information and statistics about its activities; and
- v. Consider applications for accreditation and subsidy from bargaining councils and private agencies.

In addition to this, the CCMA may provide advice or training relating to the primary objects of LRA or any other employment law, including affirmative action and the elimination of unfair discrimination. Because the proceedings at the CCMA are less formal than a court system and do not require legal representation, it serves as an important dispute resolution mechanisms for labour-related issues.

Disputes relating to unfair discrimination are generally dealt with by the CCMA and must be referred within six months after the act or omission which allegedly constitutes unfair discrimination. Apart from this, the CCMA may also consider other matters including unfair dismissal; working conditions and wages; and workplace changes, but does not deal with matters of employment equity or the Labour Relations Act. The CCMA may conciliate on these matters and may arbitrate in all sexual harassment complaints, and in unfair discrimination complaints provided the employee falls under the threshold, or, both parties consent to arbitration.


Arbitration awards are final and binding and may include reinstatement, re-employment or compensation; or an award that gives effect to a collective agreement or the provisions and objects of the LRA, which includes a declaratory order or an order for costs. Parties may take the decision on appeal to the Labour Court.

The jurisdiction of the CCMA in unfair discrimination matters has recently been extended. Previously the CCMA was only empowered to conciliate matters, and if no resolution was reached, the matter would be referred to the labour court unless parties agreed to arbitration. With the new amendments, the CCMA is empowered to arbitrate on all cases of sexual harassment and may arbitrate in unfair discrimination cases for persons falling below the minimum threshold, or, may arbitrate in these matters if parties above the threshold consent to it doing so. The power to order remedies has also been extended. Previously, the CCMA awarded compensation in line with the salary scale, which resulted in different compensation awards for the same offence. In line with the new powers, the CCMA may still compensate in line with salary scale, but may also award damages or direct the employer to take steps to prevent same or similar practices in the future.

Labour Court:

The Labour Court has a status equal to that of a High Court and has exclusive jurisdiction over some matters as set out in the LRA or other legislation (including the lodging of an appeal against a compliance order issued to an employer by the DG of the Department of Labour). In addition to this, the Labour Court has concurrent jurisdiction to the High Court on matters relating to a violation of rights involving labour relations; a dispute over the constitutionality of the conduct of the state in its capacity as an employer; as well as the application of the law for which the Minister of Labour is responsible.

147 66 of 1995.



Although decisions taken by the CCMA are final and binding, these decisions may be taken on review to the Labour Court.

The Labour Court has extensive powers to make any appropriate order on matters falling within its jurisdiction, including granting urgent interim relief; interdicts; declaratory orders; compensation and damages; cost orders; as well as ordering compliance or directing particular performance of an act necessary to remedy a wrong or to give effect to the objects of the LRA. Decisions may further be taken on appeal to the Labour Appeal Court.

Chapter 9 Institutions:

The South African Human Rights Commission, Commission for Gender Equality and the Commission for the Protection of Cultural, Linguistic and Religious Rights can receive and investigate complaints, including complaints relating to unfair discrimination.



Commissioner Bokankatla Malatji during an interview with the SABC.



From left to right: Mr Isaac Mangena, Commissioner Mohamed Ameerma, Ms Trevonica Naidu, Commissioner Bokankatla Malatji and members of the SAHRC Legal Unit.



A Department of Labour representative making a submission to the SAHRC Panel.



CRL Commission's Ms Makgoba making a submission on cultural, linguistic and religious discrimination at the workplace



According to COSATU Deputy-SG, Solly Phetoe, workers are still being discriminated against in sectors such as that of farming and domestic.



Secretary Darius Moloto making a submission to the SAHRC Hearing on Unfair Discrimination in the Workplace.



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As a society, we need to be cognizant and attentive to changing social dynamics and the emergence of new grounds of discrimination, rather than focusing on historical manifestations.

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