

RESEARCH BRIEF ON
GENDER AND EQUALITY
IN SOUTH AFRICA
2013 - 2017



Research Brief on Gender and Equality in South Africa 2013 - 2017



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Abbreviations and Acronyms

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CGE	Commission for Gender Equality
DOJCD	Department of Justice and Constitutional Development
EEA	Employment Equity Act, 55 of 1998
GBV	Gender-Based Violence
HIV	Human Immunodeficiency Virus
HRC	United Nations Human Rights Council
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NDP	National Development Plan 2030
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
NIS	National Intervention Strategy
NPA	National Prosecuting Authority
NTT	National Task Team on Gender and Sexual Orientation-Based Violence
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SOGIE	Sexual Orientation, Gender Identity and Expression
Stats SA	Statistics South Africa
UN	United Nations

1

INTRODUCTION

South Africa remains the most unequal country in the world, measured in terms of income and wealth.¹ Inequality often overlaps with poverty, socio-economic disadvantage, and race. When inequality manifests as unfair discrimination, vulnerable groups such as women or those who do not conform to traditional gender roles, face multiple forms of discrimination in addition to suffering from societal norms and structures that perpetuate disadvantage for those who are 'different'.

Historically, in South Africa and globally, women have been marginalised and regarded as unequal compared to their male counterparts in terms of social and power relations. In response to gendered inequality, the founding provisions of the Constitution of the Republic of South Africa, 1996, explicitly provide for a democratic state based on, amongst others, the value of 'non-sexism'.² Nevertheless, structural gender divisions of labour, both paid and unpaid, continue to lie at the heart of many cultural and social practices in South Africa. Women are often defined in relation to motherhood, and are regarded as socially responsible for caring for others and the provision of basic services such as water, sustenance and education. As a result, women often suffer disadvantage in the formal economy and labour market, while those who perform unpaid 'women's work' bear a disproportionate – and largely unacknowledged – burden.³ In addition, poverty remains a persistent contributing factor to gender inequality, particularly for women residing within rural areas of South Africa. This is one of the reasons why women are so often rendered vulnerable as victims of exploitation, violence, and ill health including increased susceptibility to HIV/AIDS.

However, gendered inequality does not only exist as between women and men. Currently, and despite constitutional and legislative protections, serious violations of the rights to life and dignity of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community occur frequently in South Africa. Gender Based Violence (GBV) is directed against women and girl-children as well as against persons based on their sexual orientation, gender identity and expression (SOGIE). Consequently, this research brief aims to address not only the current state of the equality rights of women in South Africa, but also – to a more limited extent⁴ – that of the LGBTI community.⁵

Ultimately, this research brief does not aim to provide a comprehensive overview of gender equality in South Africa. It presents an outlook on some of the key challenges that have arisen in the period between 2013 and 2017, bearing in mind that further focus will be placed on gender equality in a separate, forthcoming research brief. In addition, selected developments and responses to these equality-related challenges are highlighted. Furthermore, the South African Human Rights Commission (SAHRC or Commission) is cognisant of the important mandate of the Commission for Gender Equality, and this research brief is consequently limited in scope to those areas that fall within the SAHRC's own mandate.

1 Stats SA *Millennium Development Goals 1: Eradicate Extreme Poverty and Hunger 2015* (2015) x; World Bank *GINI Index* (2014) <<http://data.worldbank.org/indicator/SI.POV.GINI>>.

2 S 1(b) of the Constitution.

3 See generally B Goldblatt 'Gender, Poverty and the Development of the Right to Social Security' (2014) 10 *International Journal of Law in Context* 460.

4 This is due to the gender binary approach evident from the existing national and international legal framework relevant to gender equality.

5 With a focus specifically on gender identity and GBV directed against lesbian women – see section 8 below.

2

THE MANDATE OF THE SAHRC

The SAHRC is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The Commission does so through a number of means, one of which is by conducting research.⁶

3

APPLICABLE LEGAL FRAMEWORKS

3.1 South African legal and policy framework

The Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. It does so by providing for equality of all before the law, allowing for positive redress measures to advance previously disadvantaged persons, and by prohibiting unfair discrimination by the state and by individuals. In addition, the Constitution includes provisions that consider the need for the state to actively advance equitable access to land (section 25(5)); housing (section 26(2)); health care; food, water and social assistance (section 27(2)); and equity in education (sections 29(1)(b) and 29(2)(a)).

Various statutes aim to give effect to the constitutional right to equality, the most prominent of which for purposes of this research brief are the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) and the Employment Equity Act, 55 of 1998 (EEA). PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims at the 'eradication of social and economic inequalities'.⁷ In terms of section 13 of PEPUDA, discrimination based on the prohibited ground of gender is considered unfair, unless it is established that the discrimination is fair. Section 8 of PEPUDA stipulates that no person may unfairly discriminate against any person on the ground of gender, and goes on to list various prohibited forms of gender-based discrimination. For purposes of this research brief, the following provisions of section 8 are pertinent:

- (a) gender-based violence; ...
- (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; ...
- (g) limiting women's access to social services or benefits, such as health, education and social security; ...
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

6 S 184(2)(c) of the Constitution.

7 See Preamble to PEPUDA.

Following a review of PEPUDA, numerous suggestions for its improvement were made. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the Department of Justice and Constitutional Development (DOJCD). The Commission, as Chair of the Equality Review Committee, will be monitoring this process closely.

Another important Act that will be referred to throughout this research brief is the Employment Equity Act. The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action to ensure redress and equitable representation in the workforce. Section 28 of the EEA established the Commission for Employment Equity (CEE) which submits an annual report and advises the Minister of Labour on matters relating to the realisation of the objectives of the EEA.

3.2 International and regional legal frameworks

As a state party to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW), South Africa must take action against all forms of discrimination against women, in order to realise substantive equality.

South Africa has also ratified the African Charter on Human and Peoples' Rights (the African Charter), which contains numerous provisions directly relevant for equality and non-discrimination, including Article 2 which requires that 'every individual shall be entitled to the enjoyment of rights and freedoms... without distinction of any kind', and Article 3(1) which states that 'every individual shall be equal before the law'. Article 13(2) provides for equal access of citizens to public services, while Article 13(3) states that 'every individual shall have the right of access to public property in strict equality of all persons before the law'. The duties set out in the Charter include the duty of individuals to 'respect and consider his [sic] fellow beings without discrimination'. The equality of peoples is further recognised in Article 22 that guarantees the right to economic, social and cultural development of all peoples with due regard to their freedom and identity to 'equal enjoyment of the common heritage of mankind'. South Africa has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), which provides for the protection of women and girl-children, as well as for the eradication of discrimination against women. Significant aspects of the Women's Protocol include the elimination of harmful cultural practices (Article 5), the right to peace (Article 9), and a comprehensive list of reproductive rights for women in Article 14.

Lastly, South Africa was instrumental in the drafting the Southern African Development Community's Protocol on Gender and Development, and signed the Protocol in 2008. The Protocol highlights a regional commitment to gender equality and recognises the importance of gender equality for development.

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CONCEPTUALISING EQUALITY

The following research brief aims to provide a facts-based account of the state of gender equality in South Africa. Nonetheless, it is useful to provide a brief overview of some key equality-related concepts that are often used in legislation and by government, judges, human rights practitioners, civil society actors and academics.

Gender equality can be thought of in a ‘formal’ or ‘substantive’ sense. *Formal gender equality* refers to laws and policies that appear gender neutral by treating everyone the same. Such laws and policies may in fact cement existing gender inequalities since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words, unequal structures, hierarchies and power relationships that underlie our society and economy and that prejudice women and persons based on their SOGIE – are therefore left unaddressed. As the Constitutional Court has stated, ‘[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality’.⁸ The idea of formal equality remains useful in cases of *direct discrimination* based on gender or gender identity, but falls short in dealing with cases of *indirect discrimination*, where equal treatment prejudices those who are different. Formal equality is similarly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa’s huge income gap and grossly unequal distribution of wealth and land.

Whereas formal equality tries to ensure equal treatment for all regardless of their identities, substantive equality aims to achieve *equal outcomes* by treating people and groups differently.⁹ Different treatment is justified where some people are discriminated against on the basis of their identities or characteristics. This is reflected in the constitutional endorsement of positive redress measures, or ‘affirmative action’, in section 9(2). This places an obligation on the state to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education. Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the state to achieve substantive equality.

Closely related to affirmative action is the concept of *reasonable accommodation*. Reasonable accommodation is defined in the EEA as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’. In terms of PEPUDA, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on, amongst others, the ground of gender. As explained by former Chief Justice Langa:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.¹⁰

8 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O’Regan).

9 This is supported by the definition of ‘equality’ in PEPUDA: “equality” includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.

10 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 73.

However, when equality of outcomes is advocated for, it must be remembered that equal outcomes can be achieved without addressing structures of society that perpetuate discrimination.¹¹ For example, a woman might be employed at the same level as her male counterpart, but to procure the job in question she might have had to conform to male working patterns that do not acknowledge her unpaid work related to motherhood or other caring responsibilities.¹² In cases of gender discrimination, reasonable accommodation might require an underlying societal norm to be changed, whereas in other instances a specific adjustment may need to be made to accommodate difference in a particular instance.¹³ Substantive equality should therefore encompass more than equality of outcomes.¹⁴

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Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits. For example, whereas a woman may face direct and indirect discrimination, a Black woman may be discriminated against on the bases of gender and race, whereas a Black homosexual woman faces discrimination based on gender, race and sexual orientation, and a poor Black lesbian faces additional discrimination on the ground of socio-economic disadvantage. In South Africa, poverty and socio-economic disadvantage intersect directly with race due to the legacy of apartheid, and affect women disproportionately.¹⁵

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11 S Fredman 'Substantive Equality Revisited' (2014) *University of Oxford Legal Research Paper Series No 70* 1, 14.

12 Ibid.

13 Ibid 30.

14 Ibid in general.

15 Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56; Stats SA *Poverty Trends in South Africa An Examination of Absolute Poverty between 2006 and 2011* (2014) 27, 40; Stats SA *Quarterly Labour Force Survey: Quarter 2: 2016* (2016) 62; Stats SA *Living Conditions Survey 2014/15* (2016) 15.

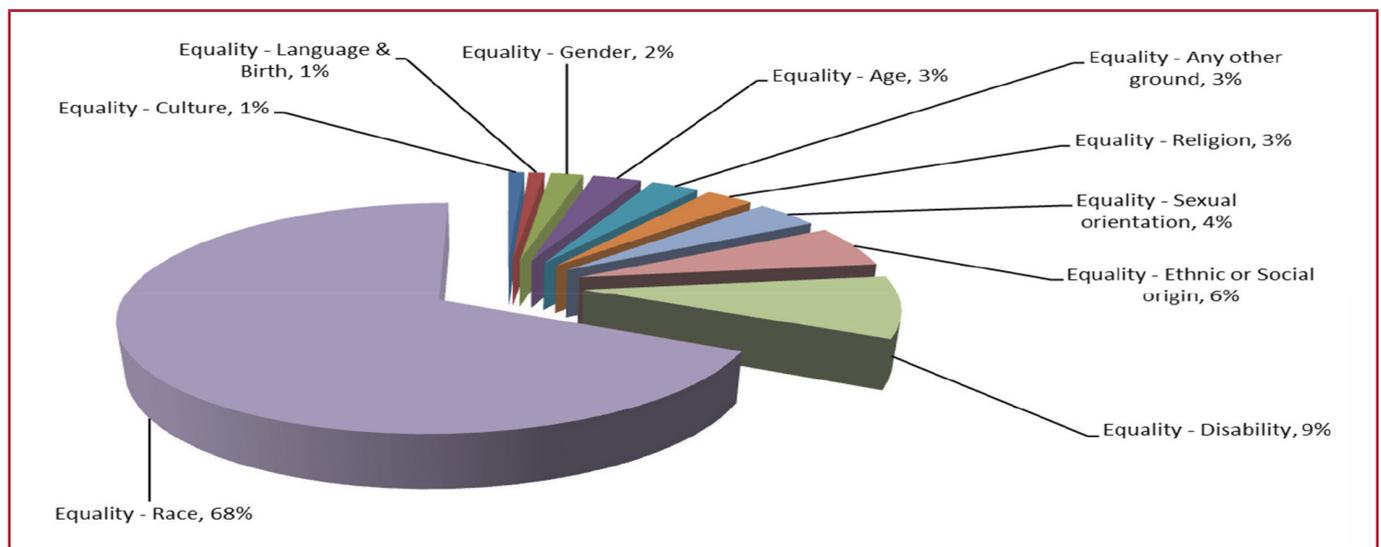
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EMERGING TRENDS IN GENDER EQUALITY

5.1 Complaints received by the SAHRC

In terms of the complaints received by the SAHRC, violations of the right to equality continue to be the highest recorded grievance.¹⁶ In the financial year ending 31 March 2016, 16 percent of the total complaints received alleged a violation of the right to equality. A total of 749¹⁷ equality-related complaints were received. It is noted that gender-based complaints directed to the SAHRC are low in number because of the referral of cases to the Commission for Gender Equality (CGE).

Equality-related complaints from the public received by the SAHRC 1 April 2015 – 31 March 2016



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¹⁶ South African Human Rights Commission *Annual Trends Analysis Report* (2016) 31.

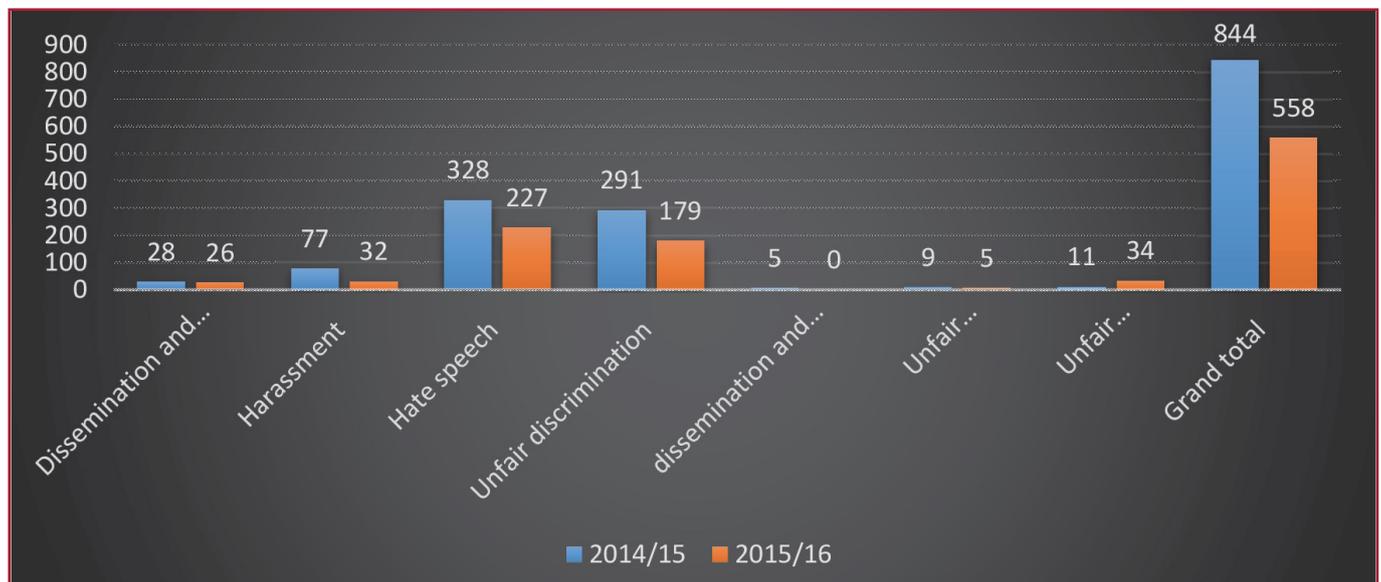
¹⁷ Ibid.

5.2 Equality Courts

The Equality Court was established in terms of PEPUDA to provide legal protection and recourse when violations of the right to equality occur. The Equality Courts hear matters regarding unfair discrimination on any of the prohibited grounds stipulated in PEPUDA, as well as matters concerning hate speech and harassment as prohibited by PEPUDA.¹⁸

In terms of the nature of complaints, it appears that complaints related to hate speech were especially prevalent, accounting for over 40 percent of overall grievances. Complaints of unfair discrimination represented the second largest proportion of Equality Court matters at 32 percent.¹⁹ Unfortunately, disaggregated data indicating the ground on which hate speech or discrimination in Equality Court matters occurred, is not provided by the Department of Justice. Most Equality Court matters pursued by the SAHRC involved hate speech and discrimination based on race.

Department of Justice: Equality Court Complaints 2015/16²⁰



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The Equality Courts hear matters regarding unfair discrimination on any of the prohibited grounds stipulated in PEPUDA, as well as matters concerning hate speech and harassment as prohibited by PEPUDA.

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18 Ss 10 and 11 of PEPUDA.

19 Department of Justice and Constitutional Development *Annual Report (2015/16)* 34.

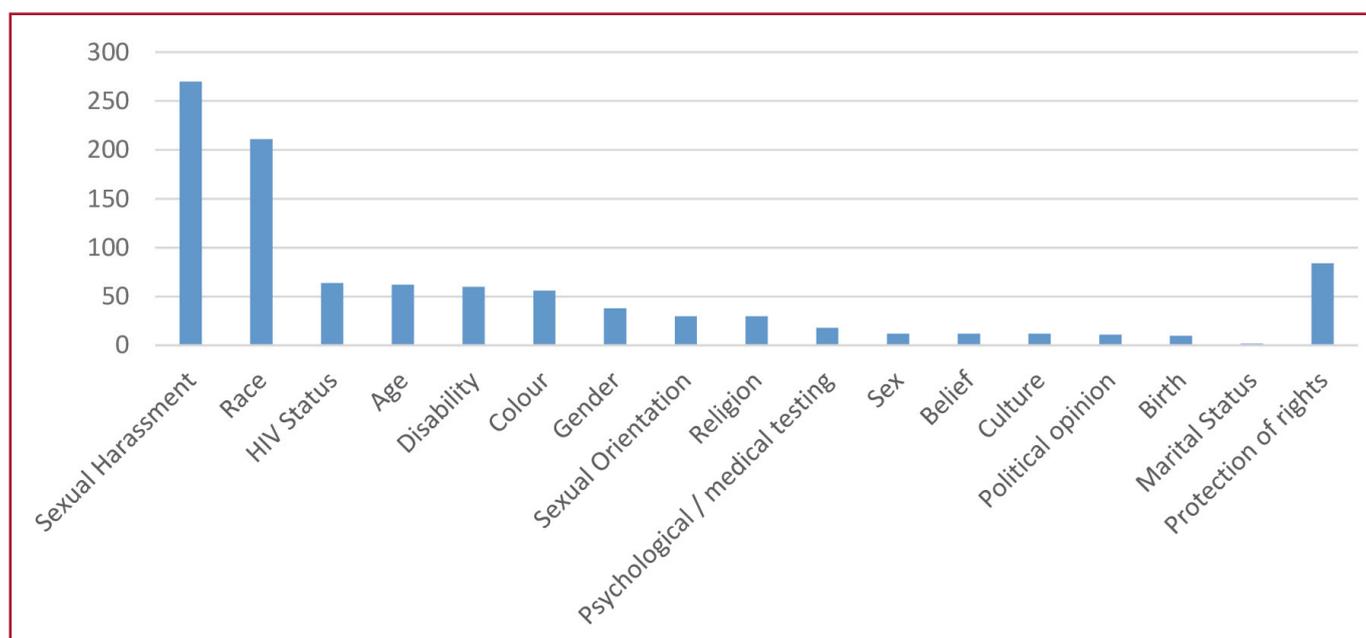
20 Figure reproduced from Department of Justice and Constitutional Development *Annual Report (2015/16)* 34.

5.3 Unfair discrimination in the workplace

PEPUDA defines ‘harassment’ as ‘unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to... sex, gender or sexual orientation...’.

The highest recorded forms of unfair discrimination experienced in the workplace are racism and sexual harassment.²¹ According to the CCMA, the prohibited grounds of sexual harassment and race have consistently been the highest, with HIV and AIDS status, age, and disability rounding up the top five grounds of violations on average over this period.²²

Unfair discrimination complaints on listed grounds at the CCMA: August 2014 to March 2016



On an annual basis, the Public Service Commission collects information on grievances lodged by employees in the public sector, with allegations of unfair treatment forming the second highest, accounting for approximately 22 percent of all complaints lodged in the 2014/15 financial year while rising to 24.5 percent of the total number of grievances lodged for 2015/16.²³ 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 deadline.

21 Commission for Conciliation, Mediation and Arbitration *Submission to the panel for the South African Human Rights Commission National Hearing on Unfair Discrimination in the Workplace* (2016).

22 Ibid.

23 Public Service Commission *Fact Sheet for the Grievance Resolution in the 2015/16 Financial Year* (2016) 17. <<http://www.psc.gov.za/documents/reports/2016/FACT%20SHEET%20ON%20GRIEVANCE%20RESOLUTION%20FOR%20THE%202015%20-%202016%20FY.pdf>>.

6

GENDER AND ACCESS TO THE LABOUR MARKET,
DIVERSE STREAMS OF INCOME AND EDUCATION

The fact that women have historically been marginalised and regarded as unequal compared to men in terms of social and power relations has given rise to significant social, cultural and economic inequalities. Women and girls from previously disadvantaged groups are today still disproportionately affected by poverty and its underlying determinants because of the legacy of apartheid:²⁴

Poverty headcount based on sex²⁵

In terms of household income, it is concerning that men earn almost twice what women earn on an annual basis,²⁶ with 56.01 percent of households in the lowest expenditure per capita quintile headed by women.²⁷ In terms of available data, reasons for this include under-representation of women in the workplace and a lack of access to alternative streams of income. However, it is encouraging to note that the participation rate of women in the workplace is gradually increasing, with approximately 43.8 percent²⁸ of South Africa's workforce now being female.²⁹ However, transformation is painstakingly slow, as can be seen from the data set out below.

24 Presidency of the Republic of South Africa *South African CEDAW Report* (2008) 6, 20; Government of the Republic of South Africa *CESCR State Report* (2017) 7, 21.

25 Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56.

26 Stats SA *Living Conditions Survey 2014/15* (2016) 14.

27 Ibid 20.

28 Department of Women *Report on the Status of Women in the South African Economy* (2015) 66. This figure refers to the proportion of the employed population, while women make up 45.2 percent of the 'narrow' labour force, which includes those employed as well as those actively seeking employment (52).

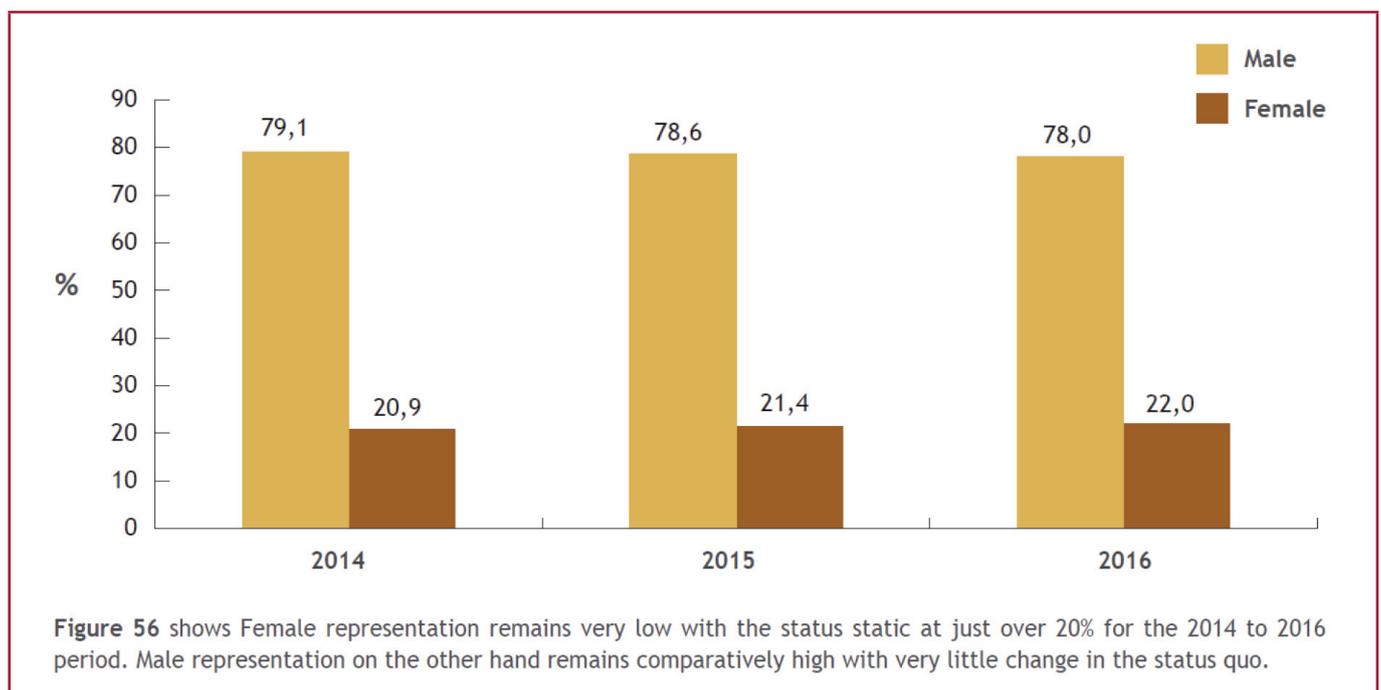
29 Ibid 66.

6.1 Systemic inequality as a result of the sexual division of labour

Section 8(i) of PEPUDA prohibits unfair discrimination based on gender, including systemic inequality of access to opportunities by women as a result of the sexual division of labour.

Women remain underrepresented at top and senior management levels based on CEE data. At top management level, women constitute a mere 20.7 percent in the private sector, and 30.8 percent in the public sector.³⁰ At the senior management level, men are similarly over represented at decision-making levels in both the public (60.7 percent) and the private sector (68.5 percent), and this is evident in all provinces.³¹ Negligible increases in female representation at top management level from 2014 to 2016 indicate that there continues to be a lack of opportunities for women at the top and senior management levels, which in turn reflects systemic inequality and indirect discrimination.

Workforce profile at top management level by gender: 2014 - 2016³²



In addition, trends indicate that White male dominance is prevalent at the top levels across all sectors in the country, with a particular focus on the private sector.³³ According to 2016/17 CEE data, more than two-thirds majority male representation exists in the private sector (76.3 percent), as compared to 73.3 percent in local government and 62.6 percent in national government.³⁴ According to the same data, the sectors that are most in need of transformation by gender and race are the agricultural sector, which has an overwhelming concentration of White males at top management level (72.6 percent, increased from 72 percent in 2015/16); retail and motor trade/repair service with 62.7 percent White males at top management level (decreased from 64 percent in 2015/16); wholesale trade/commercial agents/allied services with 59 percent White males at top management level (decreased from 59.8 percent in 2015/16); and mining and quarrying at 56.3 percent (decreased from 59.9 percent in 2015/16).³⁵

30 Commission for Employment Equity *Annual Report 2016/17* (2017) 14.

31 Ibid 18-19.

32 Figure reproduced from Commission for Employment Equity *Annual Report 2016/17* (2017) 55.

33 Ibid 16.

34 Ibid.

35 Ibid 14.

Slight decreases in these sectors indicate persistent inequality and reflects both systemic challenges as well as the intersection of gender and race as grounds for indirect discrimination.

The multiple forms of discrimination that women other than those from the White population group face, is again illustrated by the fact that White women have the most representation in all sectors at top management level compared with women of other race groups.³⁶ This is evident in several sectors including the community, social and personal services sector (15.3 percent) which predominantly comprises government, and the catering/accommodation/other trade sectors (21.8 percent).³⁷ Interestingly, in educational institutions, White women (34 percent) are the highest represented group at the senior management level (but not at top management level) and exceed the representation of 25.2 percent White males.³⁸ An increase in the number of foreign nationals is noted, especially among men within educational institutions.

6.2 Systemic inequality limiting access of women to land rights and alternative streams of income

Section 8(e) of PEPUDA prohibits unfair discrimination on the ground of gender, including ‘any policy or conduct that unfairly limits access of women to land rights, finance, and other resources’. Land presents one potential alternative avenue of income to that derived from work, and an inability by women to access this stream of income due to discriminatory practices again points to systemic inequality. Furthermore, prevalence of income derived from pensions, social insurance and family allowances may indicate a systemic inability to access more mainstream sources of finance, resources and income. This is demonstrated by the fact that income from these sources represented a larger share (over 50 percent) than income from work in the three lowest income per capita deciles, whereas it accounted for less than 10 percent of income for each of the upper three deciles.³⁹

Statistics South Africa’s *Living Conditions Survey* indicates that men earn more income from imputed rent on an owned dwelling than women, with male-headed households earning an average of R 23 047 in this respect, compared to the average of R14 871 earned by female-headed households.⁴⁰ Additionally, in terms of complaints received by the CGE, annual trends for the financial year 2013/14 indicate that the highest identified ground for complaints received was for matters relating to estates. These complaints made up 12 percent of the 894 complaints received by the CGE.⁴¹ Although estates do not necessarily include land and other forms of immovable property, this trend indicates that inheritance and property-related disputes are among the highest structural issues affecting women.

Due to the lack of avenues for income, it is found that female-headed households are more dependent on social grants since income from pensions, social insurance and family allowances make up 14 percent of income of female-headed households, compared to 5.8 percent of income for male-headed households.⁴² Consequently, the prospect for those living in female-headed households of accessing opportunities such as education, or basic services, remains slim. This trend is also contrary to section 8(g) and (h) of PEPUDA, which prohibits unfair discrimination on the ground of gender in the forms of, amongst others, the denial of access to opportunities for women, including access to services, and the limitation of women’s access to social services or benefits.

36 Ibid 15.

37 Ibid.

38 Ibid 20.

39 Stats SA *Living Conditions Survey 2014/15* (2016) 18.

40 Ibid 14.

41 Commission for Gender Equality *Annual Report 2013/14* (2014) 49.

42 Stats SA *Living Conditions Survey 2014/15* (2016) 14.

6.3 Equal access to education

Section 29 of the Constitution guarantees the rights to basic and further education. The importance of quality education to unlock the potential of people and to provide economic opportunities cannot be overstated. Therefore, the state's obligation to provide access to quality education is an exceptionally important one. Furthermore, section 8(g) of PEPUA specifically prohibits unfair discrimination based on gender in the form of limiting women's access to education.

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The importance of quality education to unlock the potential of people and to provide economic opportunities cannot be overstated ... However, in South Africa, the education system is subject to significant challenges...

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However, in South Africa, the education system is subject to significant challenges, including, but not limited to, education of a poor quality, a lack of access to adequate infrastructure (including water and sanitation), a high ratio of learners to educators, strikes by educators, protest action by communities that result in malicious damage to school property and prevents learners from attending school, a lack of access to learning materials and a low number of learners that pass grade 12 and are able to study further in either technical colleges or a university.⁴³

6.3.1 Equality in accessing education

Although access to basic education is relatively high for most South Africans,⁴⁴ fees constitute a significant barrier to education. Section 5 of the South African Schools Act, 84 of 1996 states that no learner may be refused admission into a public school due to the inability to pay school fees. In addition, government has compiled a list of no-fee schools, where students who are unable to afford any form of school fees can access education. The number of learners attending no-fee schools is unequally distributed provincially, with 92.5 percent of learners in Limpopo and 79.1 percent of learners in Eastern Cape attending no-fee schools, contrasted with 41.6 percent of learners in Gauteng and 43 percent of learners attending no-fee schools in the Western Cape.⁴⁵

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Although access to basic education is relatively high for most South Africans, fees constitute a significant barrier to education.

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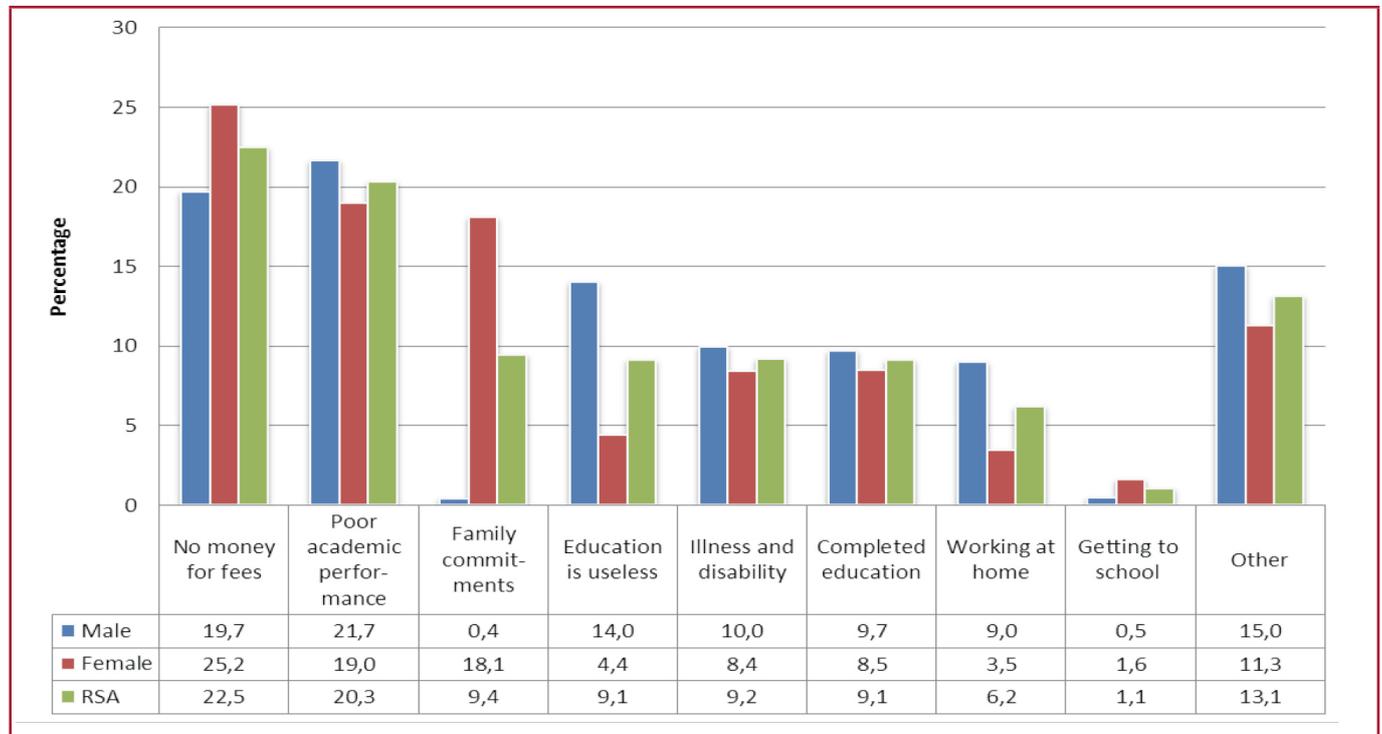
⁴³ S Franklin & D McLaren (Studies in Poverty and Inequality Institute) *Realising the Right to a Basic Education In South Africa* (2015) 126-144; 146.

⁴⁴ Ibid 117.

⁴⁵ Stats SA *General Household Survey 2015* (2016) 2.

At the peak schooling years of 7-15 years, 22 percent of learners who left school prematurely, the majority of whom is female, cited a lack of money as the reason for doing so.⁴⁶ Significantly, 9.4 percent of those who prematurely left school, cited family commitments, such as getting married, minding children or pregnancy, as the reason for doing so. Of these, the vast majority is female.⁴⁷

Percentage distribution of main reasons given by persons aged 7 to 18 years for not attending an educational institution, by sex, 2015⁴⁸



Unintended teenage pregnancy remains a serious challenge that hampers access to education for teenage learners.⁴⁹ Although most young fathers expressed feeling a sense of responsibility towards their child and a willingness to be involved in the child’s life, young fathers are generally unable to provide financial assistance.⁵⁰ As a result, unintended teenage pregnancies place additional burdens on the female learner, over and above the physiological and biological burdens that pregnancy imposes. This explains why a much larger percentage (18.1 percent) of female learners leave their studies on the grounds of family commitments compared with 0.4 percent of male learners.⁵¹

In a survey prepared by Stats SA on educational levels in South Africa, just over 1 million (1 023 000) women who are Black aged 20 years and older answered that their education was ‘none’ compared to 528 000 Black men and just 8 000 White women.⁵² Overall, over 1 million women compared to 635 000 men have received no education.

46 Ibid.
 47 Ibid.
 48 Figure reproduced from Stats SA *General Household Survey 2015* (2016) 11.
 49 Department of Basic Education *Teenage Pregnancy in South Africa - With a Specific Focus on School-Going Learners* (2009) <<http://www.education.gov.za/Portals/0/Documents/Reports/Teenage%20Pregnancy%20Report,%2028%20August%202009.pdf?ver=2011-01-18-113756-500>>.
 50 Ibid.
 51 Stats SA *General Household Survey 2015* (2016) 2.
 52 Ibid 78.

Those who have received no education are primarily constituted by the Black population group, which again indicates the intersectionality of systemic discrimination on multiple grounds (in this case, sex and race). Approximately 17 percent of Black women aged 15 years and over do not have an education level over Grade 7, compared to almost 12 percent of Coloured women, seven percent of Indian women and less than two percent of White women.⁵³ The above figures clearly show the racial legacy of apartheid, but also indicate that increased access to education since 1994 has not ensured equal access to education.

6.3.2 Equality in education

Even where education is accessed, discrimination on the ground of gender and gender identity persists. For instance, the SAHRC instituted proceedings in the Seshego Equality Court (Limpopo) on behalf of a transgendered secondary school learner.⁵⁴ The case arises from allegations of humiliation and harassment based on the gender identity of the learner, which created a hostile and intimidating environment for her. The proceedings were instituted to procure relief for alleged unfair discrimination, harassment, and hurtful speech and the court found in favour of the Commission. In a landmark ruling, the Seshego Equality Court ordered the Limpopo Department of Education to pay R60 000 in personal compensation to the learner in question. Of concern is the fact that the Equality Court, referring to itself as a forum that ‘deals with facts’, referred the complainant ‘in the male form’, despite the fact that she identified as a woman.⁵⁵ Whereas the transgender learner was directly discriminated against based on her gender identity, the inability to understand or reasonably accommodate non-binary gender identities, as displayed by both the school authorities and the Equality Court itself, reflects indirect discrimination and systemic inequality in the form of a hierarchy of social norms that do not fully recognise those who do not conform to traditional gender identities.⁵⁶

Codes of conduct are important mechanisms through which learning institutions can create a learning environment consonant with constitutional values, and should cater for the reasonable accommodation of difference on gender, racial, religious or cultural grounds.⁵⁷ In 2016, considerable attention was given to dress code policies at schools that unfairly discriminate against students on multiple grounds of race and sex. The Commission noted with concern the allegations of marginalisation and discriminatory treatment of Black female learners at Pretoria High School for Girls, the Sans Souci High School in Cape Town, Saint Michael’s School for Girls in Bloemfontein, as well as other incidents and allegations emanating from other schools.⁵⁸

53 Ibid.

54 *Mphela and Others v Manamela and Limpopo Department of Education* (unreported case), Seshego Equality Court.

55 Ibid.

56 In a context other than education, the Legal Resources Centre launched an application in the Western Cape High Court seeking to compel the Department of Home Affairs to amend the sex description of three transgender women on the national population register and on their birth certificates, and issue them with new identity numbers in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003. The Department refused to do so as the women were married in terms of the Marriage Act 25 of 1961, which only recognises heterosexual marriages. In a significant judgment, the Western Cape High Court held that the Department’s conduct infringed the applicants’ constitutional rights to administrative justice, equality and dignity, and was inconsistent with the state’s obligations as set out in s 7(2) of the Constitution. The Department was accordingly ordered to reconsider the applications in terms of the Alteration Act in the light of the High Court’s finding that the solemnization of marriages under the Marriage Act had no bearing on the matter. See *KOS and Others v Minister of Home Affairs and Others* (2298/2017) [2017] ZAWCHC 90 (6 September 2017).

57 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

58 SAHRC Media Statement: *Difference, diversity & reasonable accommodation of difference in South African Schools* (7-09-2016); SAHRC Media Statement: *School rules and codes of conduct are subject to the supremacy of the Constitution* (26-07-2017). More instances of racism in language and dress code policies, as well as in racist statements made by teaching staff, have emerged since the last media release by the SAHRC. See, for example, Times Live ‘St John’s College: Teacher Found Guilty of Making Racist Remarks has Resigned’ (27-07-2017) *Times Live*.

Indirect discrimination and systemic inequality also persist in higher education. In 2014, the Commission convened a National Hearing on transformation in South African public universities. The decision was taken following the receipt of a number of complaints on transformation issues in universities, which in the Commission's view required a holistic examination of transformation in institutions of higher learning in South Africa. The Commission found that discrimination on the grounds of gender, race, disability and socio-economic status continues, and that unsatisfactory transformation has occurred at the management, staff and student levels.⁵⁹

If operationalised, Chapter 5 of PEPUDA could contribute to addressing indirect discrimination and systemic inequality in education, through the obligation it lays upon all sectors of society to promote equality. This would, in turn, help prevent systemic inequality and discrimination from leading to instances of direct discrimination in education, as occurred in the case of the transgender learner as well as various incidents in higher education.⁶⁰

7

GENDER AND DISCRIMINATORY CULTURAL PRACTICES

Section 8(d) of PEPUDA prohibits 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'. This provision highlights the tension that often exists between the cultural rights recognised in the Constitution,⁶¹ and the right to equality, particularly in the context of gender.

7.1 Maiden bursaries, *ukuhlolwa* and virginity testing

Some interpretations of traditional culture and religious morals strongly link female value to virginity, with the implication that the inherent value of women is perceived as irrevocably diminished after certain forms of sexual activity. An additional erroneous belief is that virginity testing decreases HIV/AIDS transmission and teenage pregnancy. The above beliefs are clear indications of patriarchy and are often based on the belief that pregnancy is the sole responsibility of a female engaging in sexual activity, rather than a responsibility equally shared between women and men.⁶²

Linked to the above beliefs are the invasive and discriminatory practices and 'inspections' (such as *ukuhlolwa*) where a young woman is required to 'prove' her virginity.⁶³ The recent linking of virginity to access to education through so-called 'maiden bursaries' was considered in 2016 by the CGE. The CGE investigated the award of bursaries in the uThukela district by the district council in KwaZulu-Natal. These bursaries included the requirement that recipients be 'proven' to be virgins; the bursary would be withdrawn on the 'failure' of such 'tests'.⁶⁴

59 SAHRC *Transformation at Public Universities in South Africa* (2016) viii.

60 Ibid viii. Highly publicised incidents in higher education are based on race, but given the intersectionality of race and gender, a duty to promote equality could help address systemic inequality and discrimination on multiple grounds.

61 Ss 30-31 of the Constitution.

62 SAHRC *Harmful Social and Cultural Practices – Virginity Testing? Children's Bill [B70 – B2003] Submission to the Select Committee on Social Services (NCOP)* (2005) 6-7.

63 Ibid 7-10.

64 Commission for Gender Equality *The Maiden Bursary Investigative Report* (2016) 21.

The CGE concluded that such tests were unconstitutional in violating the rights to equality, dignity and privacy, and that ‘any funding by an organ of state based on a woman’s sexuality perpetuates patriarchy and inequality in South Africa’.⁶⁵

7.2 Ukuthwala

Ukuthwala is a traditional form of marriage involving the abduction of young girls with the intention of making the girl a wife. Traditionally, the practice involves negotiations between the man and the girl’s family in the form of an arranged marriage and does not include violence or rape.

However, the meaning of ‘consent’ – and whether the ability to consent rests with the girl or her family – remains uncertain.⁶⁶ The traditional form of *ukuthwala* can also be used as a means by which two consenting individuals can force their families to accept their relationship through culturally legitimised customary marriage. In addition, communities that practice *ukuthwala* value the custom for cultivating social cohesion, leading to longevity of marriages, and preventing girls from having children out of wedlock.⁶⁷ However, the DOJCD notes that the abuse of this practice ‘increasingly involves the kidnapping, rape and forced marriage of minor girls as young as twelve years’.⁶⁸ Rights that may be potentially violated include those to equality; human dignity; freedom and security of the person; as well as the rights of access to health care services and justice. In addition, where *ukuthwala* is directed against girl-children under 18 years of age, children’s rights are violated. In *Jezile v S and Others*,⁶⁹ the Western Cape High Court confirmed a conviction of one count of human trafficking and three counts of rape related to the abuse of *ukuthwala*. The SAHRC has likewise strongly condemned the abuse of the practice of *ukuthwala*,⁷⁰ and has held that it should not apply to children.

8

GENDER-BASED VIOLENCE

Gender Based Violence (GBV) is explicitly prohibited as a form of gender-based discrimination by section 8(a) of PEPUDA. GBV remains a persistent problem in South Africa, with Stats SA estimating that 21 percent of women over the age of 18 years have experienced violence by a partner.⁷¹ The high levels of GBV that women face are also reflected in violence directed against sexual and gender minorities and people with non-normative bodies. In particular, ‘corrective rape’ results in significant harm to lesbian, gay and transgender persons.⁷² In March 2011, the Minister of Justice and Constitutional Development mandated the establishment of a National Task Team (NTT) to develop a National Intervention Strategy to address the issue of corrective rape.⁷³

⁶⁵ Ibid 22.

⁶⁶ L Mwambene & H Kruuse ‘The Thin Edge of the Wedge: ukuthwala, alienation and consent’ (2017) 33 *South African Journal on Human Rights* 25 42-43.

⁶⁷ Ibid 41.

⁶⁸ Department of Justice and Constitutional Development *What is Ukuthwala?* (2015) <http://www.justice.gov.za/brochure/ukuthwala/2015-Ukuthwala_leaflet-Eng.pdf>.

⁶⁹ *Jezile v S and Others* 2015 (2) SACR 452 (WCC).

⁷⁰ SAHRC *South African Human Rights Commission (SAHRC) NHRI written submission to the Universal Periodic Review (UPR) Mechanism* (2011) <<http://www.sahrc.org.za/home/21/files/SAHRC%20NHRI%20UPR%20Submission%20FINAL%202011.pdf>>.

⁷¹ Stats SA *South Africa Demographic and Health Survey* (2016) 54.

⁷² K Thomas *Homophobia, Injustice and ‘Corrective Rape’ in Post-Apartheid South Africa* (2013) 3; P Strudwick ‘Crisis in South Africa: The Shocking Practice of “Corrective Rape” - Aimed at “Curing Lesbians”’ (4-01-2014) *The Independent*; K Nandipha ‘“Corrective rape”: Lesbians at the Mercy of Powerless Men’ (15-07-2013) *Mail & Guardian*.

⁷³ Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual,*

Hate speech on the prohibited grounds, including gender and sexual orientation, is likewise prohibited by section 10 of PEPUDA. Hate speech includes speech that is harmful or which can potentially incite harm, and which propagates hatred. The recent Equality Court case of *SAHRC v Qwelane*⁷⁴ dealt with hate speech after a 2008 newspaper column written by Qwelane, in which he stated, amongst other things, that being gay was not 'ok' and compared homosexuality to bestiality. The SAHRC received around 350 complaints following the publication.⁷⁵

The Equality Court heard comprehensive evidence regarding widespread instances of violence directed at the LGBTI community, including in the form of hate speech, assault, corrective rape (especially of lesbian women), murder and secondary victimisation by SAPS.⁷⁶ Although witnesses admitted that such instances of violence were not directly linked to Qwelane's statements, he occupied a position of power and influence (as a former ambassador for South Africa, coupled with the readership of the newspaper largely being Black residents of traditional informal settlements) and his hateful comments could thus fuel violence against an already vulnerable community.⁷⁷ The Equality Court agreed that the column constituted hate speech, and could potentially incite harm against the LGBTI community⁷⁸ (especially poor Black lesbian women who were most often victims of corrective rape). Importantly, the Equality Court noted that freedom of expression cannot protect speech which can itself be harmful to a pluralist society, and that the use of the word 'hurtful' in PEPUDA,⁷⁹ should be construed as meaning severe psychological harm.⁸⁰

Crimes against sexual and gender minorities, people with bodily variation and women have a low rate of reporting according to the 2010 Gauteng Gender Violence Prevalence Study, with only 3.9 percent of women reporting domestic violence, while only 'one in 25 rapes has been reported to the police'.⁸¹ Victims of GBV and SOGIE-based violence also face secondary victimisation when reporting these crimes, with some government officials (especially SAPS and healthcare workers) showing insensitivity or failing to pursue prosecutions.⁸² For example, evidence was heard in *SAHRC v Qwelane* that after a Black lesbian woman was raped, SAPS responded to her attempt to lay a charge by saying that lesbians are 'boys', and 'boys cannot be raped'.⁸³ Gender discrimination of this severity cannot be tolerated in a democratic and constitutional society based on equality.

Prevention and prosecution of GBV are significantly hampered by a lack of accurate disaggregated data. Although the SAHRC has welcomed the creation of a hate crime in terms of the Combatting of Hate Crimes and Hate Speech Bill 2016, the absence of disaggregated data regarding GBV directed at women and persons based on their SOGIE, and a database dedicated to the collection of such data, reduces policy effectiveness and hampers the protection of women and gender minorities from GBV.⁸⁴

Transgender and Intersex (LGBTI) Sector (2014).

74 *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017).

75 *Ibid* para 10.

76 *Ibid* paras 26, 29-34.

77 *Ibid* para 34.

78 *Ibid* para 53.

79 Which was challenged as overbroad and thus unconstitutional, *ibid* para 62.

80 *Ibid* paras 45, 65.

81 Gender Links and the Medical Research Council *The War at Home: Preliminary findings of the Gauteng Gender Violence Prevalence Study* (2015) <<http://www.mrc.ac.za/gender/gbvthewar.pdf>>.

82 Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector* (2014) 3; Centre for the Study of Violence and Reconciliation *Gender-Based Violence (GBV) in South Africa: A Brief Review* (2016) 13-14. See also *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017), where secondary victimisation was recognised, and referred to the Commissioner of Police by the Equality Court.

83 *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017) para 29.

84 *SAHRC Comments on the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill* (2017) 5.

The need to gather disaggregated data is supported by the opinions of those interviewed by the SAHRC, by the NTT,⁸⁵ and also internationally through CEDAW General Recommendation 28, which calls for the accurate and efficient capturing of information about GBV.⁸⁶

9

SAHRC RESPONSES TO GENDER-BASED DISCRIMINATION AND SYSTEMIC INEQUALITY

9.1 Seminars and hearings

In considering the far-reaching implications and the prevalence of substantive inequality in South Africa, the SAHRC hosted a National Investigative Hearing on Unfair Discrimination in the Workplace between March and April 2016. The aim of the hearing was to generate a deeper understanding and awareness of the trends of discrimination in the workplace; the form and inter-relatedness of types of discrimination; as well as the challenges and barriers to equality faced by all stakeholders, including employees, public and private sector employers, trade union bodies and government departments. Essentially, the inquiry found that unfair discrimination in the workplace remains pervasive in South Africa and includes both barriers to entry as well as discriminatory practices within the workplace itself. Although long-standing 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 efforts to combat discriminatory practices and achieve the goals of equality and dignity for all.

In addition, the Commission hosted an African Regional Seminar on Sexual Orientation, Gender Identity and Gender Expression in 2016 to discuss the significant challenges still facing gender minorities in the region. The seminar served as a follow-up to the UN Human Rights Council's Resolution on Human Rights, Sexual Orientation and Gender Identity⁸⁷ and the African Commission on Human and Peoples' Rights' Resolution 275 on the Protection against Violence and other Human Rights, Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.⁸⁸

9.2 Promoting equality

Chapter 5 of PEPUDA, which is not yet operational, sets out a list of positive duties aimed at promoting equality. These responsibilities are placed both on the state as well as on private persons who directly or indirectly contract with the state or who exercise public power. Moreover, a social commitment by all persons to promote equality is similarly mandated.⁸⁹ However, challenges persist in respect of the full operationalisation of PEPUDA, whereby the promotional aspects of the Act have continued to be inoperative since its enactment in 2000. The Commission plans to recommend the proclamation of the commencement of this chapter in its forthcoming Equality Report.

⁸⁵ Department of Justice and Constitutional Development *National Intervention Strategy for Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Sector* (2014) 12.

⁸⁶ Committee on Elimination of All Forms of Discrimination against Women *General Recommendation 28* (2010).

⁸⁷ UN Human Rights Council *Resolution A/HRC/RES/17/19 - Human Rights, Sexual Orientation and Gender Identity* (17-06-2011).

⁸⁸ African Commission on Human and Peoples' Rights *Resolution 275 on the Protection against Violence and other Human Rights, Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (12-05-2014).

⁸⁹ See ss 25-27 of PEPUDA.

10 CONCLUSION

Gender inequality in South Africa remains rife. Substantive inequality is reflected at both a broad, structural societal level, and in instances of direct discrimination, as is regularly encountered in the workplace. GBV, which remains prevalent but is under-reported, also constitutes a form of direct discrimination. Systemic inequalities relating to the sexual division of labour, and the inaccessibility of other streams of income, resources, land and social services such as education, continue to prejudice women and gender minorities. A holistic approach is needed to combat gender inequalities in whichever sphere of society and the economy these may manifest. One practical step towards combatting gender inequality is for government to start capturing disaggregated data relating to SOGIE-based violence and GBV. In order to effect structural change in an effort to achieve substantive gender equality, it is similarly important for lawmakers to proclaim the commencement of Chapter 5 of PEPUDA, which recognises that the duty to promote equality rests on all those who inhabit South Africa.

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