



sufficient worker participation. Mechanisms for the breaking of deadlocks with employers need to be implemented to ensure that employment equity committees have any meaningful contributions.

Codes of Good Practice need to be established for the interpretation of the EEA, specifically to avoid confusion in interpreting "consultation".

- The Department of Labour should communicate with both employers and shop stewards so as to ensure that there is consensus as to the content of the employment equity report.
- Wherever possible, shop stewards should form part of employment equity committees.

## **8. SUBMISSION MADE BY SOLIDARITY**

### **8.1 Background:**

Solidarity is one of the oldest trade unions in South Africa and dates back to the 1902. The main industries in which Solidarity is particularly active are "metal and engineering, mining, the electrical industry, telecommunications, the chemical industry, agriculture and general industries, among them tertiary institutions, aeronautics and other specialised areas".<sup>12</sup>

### **8.2 Submissions made by Solidarity:**

The submissions made by Solidarity dealt with four thematic areas namely, the employment equity report and national policy, white females and affirmative action, young people and affirmative action and white males and the Code of Good Practice.

The basis for national policy on employment equity is the employment equity completed by the EEC. The basis for public hearings on the progress of affirmative action is based on these reports. So it is clear that these reports are very important. However, this is particularly problematic as there are various issues relating to the questionable statistical basis for the data. Moreover, these problems relate to the amounts of reports which are analysed annually, the amount of employees covered annually and that a large number of government institutions that did not submit reports to the EEC. External reports have also suggested that employment equity has progressed further than what is submitted by the EEC.

It was submitted that white females should not be removed from designated groups which employment equity targets. While there was a large growth of white women in top level management in 2006, this does not illustrate a general trend. If one is to view the full spectrum of senior management, the converse is indeed true. There has been a marked decrease in the amount of white females being employed in the senior management echelons. In fact, if one is to view the period from 2001 to 2006, there has been a decrease in the amount of white women being employed. Furthermore, case law entrenches the fact that white women suffered discrimination under Apartheid, though not as much as black people.

The designated groups under employment equity should be extended so as to include young people. Research conducted into public opinion as to whether this is indeed true, indicated that 53% of young people believed that the youth should be exempt from affirmative action.

With regard to white men, large companies often exceed their employment equity targets, which leads to discrimination against white men. There has already been an exceptional decrease in the amount of white men who are being employed in the skilled and unskilled levels of the labour market.

### **8.3 Recommendations:**

- Solidarity recommended that the employment equity report not be used as the basis for the determinant of national policy.

<sup>12</sup> <http://www.solidaritysa.co.za/Home/home.php>



That the inclusion of white females in employment equity be maintained, as has already been decided by the courts.

That the designated group be augmented to include young people entering the labour market for the first time.

- That a code of good practice be developed to counter discrimination against any non-designated groups.

## **9. SUBMISSION BY THE COMMISSION FOR EMPLOYMENT EQUITY ON WORKPLACE DISCRIMINATION**

### **9.1 Background**

The Portfolio Committee on Labour had requested interested parties and stakeholders to make submissions on workplace discrimination as it manifests in organisations in both the public and the private sectors. The Commission for Employment Equity (CEE) made its submissions like other interest groups in this regard. This brief gives a report on the content of a submission by this Commission. The brief will also highlight inferred recommendations, as they do not come out clearly in the submission.

In terms of the Employment Equity Act 55 of 1998, employers with 150 or more employees (i.e. large employers) are required to report annually to the Department of Labour. Employers with fewer than 150 employees (i.e. small employers) are required to report every two years. A further requirement is for employers with fewer than 50 employees but have a turnover exceeding that of a small business (as stipulated in schedule 4 of the Act) to report. Employers who are not designated to report in terms of the aforementioned requirements have the option to voluntarily comply with the reporting requirements.<sup>13</sup>

The Commission for Employment Equity was established in terms of section 28 of the Employment Equity (EEA) Act 55 of 1998.

The function of the Commission is to advise the Minister of Labour on:

- Codes of Good Practice issued by the Minister in terms of section 5 of the Act.
- Regulations made by the Minister in terms of section 55.
- Policy and any other matter regarding the Act.
- Awarding achievements of employers in furthering the purposes of the Act.
- Any matter relating to the application of the Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors.
- The performance of any other prescribed function.<sup>14</sup>

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### **9.2 Summary of the submission made by the CEE:**

#### **9.2.1 Workplace discrimination still prevalent**

The Commission highlights the fact that discrimination in the workplace still exists, even as the country is more than ten years into democracy. There is still gross under-representation of the designated groups, e.g. Black people, women and people with disabilities. Discrimination on grounds of race, gender, HIV status and disability still persists in the workplace. This scenario is highlighted in the following examples:

##### **9.2.1.1 The Commission for Conciliation, Mediation and Arbitration (CCMA) and the Employment Equity Act**

<sup>13</sup> Commission for Employment Equity Annual Report 2006/07

<sup>14</sup> [http://www.labour.gov.za/statutory/statutory\\_display.jsp?statutorydisplay\\_id=10332](http://www.labour.gov.za/statutory/statutory_display.jsp?statutorydisplay_id=10332)



Although the Employment Equity Act 55 of 1998 empowers the CCMA to deal with cases of workplace discrimination, the CCMA powers are limited to conciliating on matters relating to discrimination. Failing the conciliation process, these matters are then taken to the Labour Court for adjudication and final judgment. This procedure is itself discriminating to a certain extent, as most people cannot afford the cumbersome and lengthy legal process of the Labour Court. In turn, this leads to employers treating their employees with impunity.

#### **9.2.1.2 Most complaints anonymously lodged with the CEE**

The Commission is inundated with anonymous complaints on workplace discrimination from employees who are afraid of victimisation. This exacerbates the plight of employees whose cases cannot be followed up because the complainants are anonymous. The requirement to first exhaust internal dispute resolution procedures before referring the matter to the CCMA for conciliation and to the Labour Court for adjudication compounds the problem.

#### **9.2.1.3 Psychometric tests culturally biased**

Most people applying for employment and promotions find themselves excluded from fair chances of employment and advancement due to the euro-centric nature of the psychometric tests. The law requires psychological, medical or any assessment to be reliable, fair and valid to be applied to persons for testing.

#### **9.2.1.4 Misuse of Broad-based Black Economic Empowerment (BBBEE)**

There are BBBEE candidates (partners) who are used by their companies as ambassadors to endorse that these companies have adopted employment equity when they have not. This practice promotes workplace discrimination in the name of "good business sense".

#### **9.2.1.5 Racial prejudice within the corporate sector**

The Commission reported that Black people were under-utilised and ignored in the corporate sector so as to justify claims about skills shortage in the country. They cite an incident at Alexander Forbes, a company that appointed a White executive chairman to coach a Black seasoned chief executive officer (CEO). The Commission believes that this practice indicates a strategic demotion. The following statistics illustrate racial prejudice: Blacks (i.e. Africans, Coloureds and Indians) represented 31.3% of all employees promoted at the Top Management level. Black females represented 7.5% (i.e. African female 3.4%, Coloured female 1.3% and Indian female 2.8%). Black males represented 23.8% (i.e. African male 14.3%, Coloured male 3.7% and Indian male 5.8%). Whites represented 65.7% of all employees promoted at this level. White females accounted for 17.8% and White males accounted for 47.9%. Foreign nationals represented 3% of all employees promoted at this level. Foreign females accounted for 0.3% and foreign males accounted for 2.7%. Whites are more than two times the number of Blacks promoted at this level and more than three times that of Africans. More White females were promoted at this level than African males and females combined. The recruitment of White males at this level is nearly three times that of Africans.<sup>15</sup>

#### **9.2.1.6 False claim of discrimination against Whites**

The Commission highlights the following scenario to disprove that Whites are discriminated against when it comes to employment opportunities due to affirmative action:

Blacks (i.e. Africans, Coloureds and Indians) represented 22.2% of all employees at the Top Management level. Black females represented 6.6% (i.e. African female 2.9%, Coloured female 2% and Indian female 1.7%). Black males represented 15.6% (i.e. African male 8.4%, Coloured male 2.7% and Indian male 4.5%). Whites represented 74.9% of all employees at this level. White females accounted for 14.7% and White males accounted for 60.2%. Foreign nationals

<sup>15</sup> Commission for Employment Equity Annual Report 2006/07



represented 2.9% of all employees at this level. Foreign females accounted for 0.3% and foreign males accounted for 2.6%.

At the Top Management level, Black representation is approximately a quarter of the Economically Active Population (EAP), which stands at 88.2%. White representation at this level on the other hand is about eight-and-a-half times their EAP which is 12.8%. The representation of women is less than half of their EAP, which is 45.8%. White women representation at this level is nearly two-and-a-half times their EAP and White men are five times above their EAP. At approximately seven times away from their EAP, proportionally Africans are the least represented at this level. Foreign national representation at this level stands at 2.9%.

Blacks (i.e. Africans, Coloureds and Indians) represented 26.9% of all employees at the Senior Management level. Black females represented 8% (i.e. African female 3.6%, Coloured female 2.1% and Indian female 2.3%). Black males represented 18.9% (i.e. African male 9.8%, Coloured male 3.7% and Indian male 5.4%). Whites represented 70.9% of all employees at this level. White females accounted for 19% and White males accounted for 51.9%. Foreign nationals represented 2% of all employees at this level. Foreign females accounted for 0.4% and foreign males accounted for 1.6%. White representation at the Senior Management level is about six times their EAP, with White men standing at approximately seven times and White women at approximately four times their EAP. Blacks are three times below their EAP. At this level, Africans are about six times below their EAP. African women are about 12 times below their EAP.<sup>16</sup>

#### 9.2.1.7 Discrimination against Black women in general and Africans in particular

There is a serious under-representation of Black women, especially Africans, coupled with the overwhelming representation of White women. The Commission believes that this situation provides anecdotal evidence of underlying racial discrimination. The Commission asserts that in the name of women emancipation, other women are preferred more to others. The Commission asks whether White women should still continue to be included in the definition of the designated group. The Commission reports that in November 2007 it will be holding public hearings to look at barriers and best practices on employment equity. Here is the picture painted by the Commission:

#### Top Management: Total % change for women from 2000 to 2006:

- Women representation increased by 9.2%.
- African women representation increased by 1.7%.
- Coloured women representation increased by 1.3%.
- Indian women representation increased by 1.2%.
- White women representation increased by 4.5%.
- Foreign nationals representation increased by 2%.<sup>17</sup>


The Commission has noted that the representation of people with disabilities continues to reflect ingrained stereotypes whereby in the 100 companies listed in the Johannesburg Stock Exchange (JSE), there is hardly any chief executive officer (CEO) with a disability. Representation of people with disabilities is highly concentrated at the unskilled occupational level. The following table reflects this scenario:

**Table 1: Total number of employees with disabilities by occupational level, race and gender**

Occupational level	Male	Female	Foreign nationals	Total
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<sup>16</sup> Commission for Employment Equity Annual Report 2006/07

<sup>17</sup> CEE Presentation to PC on Labour on Annual Report 2006/07, dated 05/09/2007



	African	Colored	India n	White	African	Colored	India n	White	Male	Female	
Top management	7	6	7	123	4	3	0	27	2	0	179
	3.9%	3.4%	3.9%	68.7%	2.2%	1.7%	0%	15.1%	1.1%	0%	100%
Senior management	28	5	15	145	7	2	6	57	6	2	273
	10.3%	1.8%	5.5%	53.1%	2.6%	0.7%	2.2%	20.9%	2.2%	0.7%	100%
Professionally qualified and experienced specialists and mid-management	55	40	24	376	25	11	15	131	10	2	689
	8.0%	5.8%	3.5%	54.6%	3.6%	1.6%	2.2%	19.0%	1.5%	0.3%	100%
Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents	621	165	98	995	137	120	33	468	77	3	2 717
	22.9%	6.1%	3.6%	36.6%	5%	4.4%	1.2%	17.2%	2.8%	0.1%	100%
Semi-skilled and discretionary decision making	1 502	209	74	463	331	195	62	416	203	0	3 455
	43.5%	6.1%	2.1%	13.4%	9.6%	5.6%	1.8%	12%	5.9%	0%	100%
Unskilled and defined decision making	2 552	173	20	92	176	122	8	38	1 362	2	4 645
	54.9%	3.7%	0.4%	2.0%	5.9%	2.6%	0.2%	0.8%	29.3%	0%	100%
Total permanent	4 765	598	238	2 194	780	453	124	1 137	1 660	9	11 958
	39.9%	5%	2%	18.4%	6.5%	3.8%	1%	9.5%	13.9%	0.1%	100%
Non-permanent employees	71	14	2	23	60	19	2	12	1	0	204
	34.8%	6.9%	1.0%	11.3%	29.4%	9.3%	1%	5.9%	0.5%	0%	100%
Grand total	4 836	612	240	2 217	840	472	126	1 149	1 661	9	12 162

Source: Commission for Employment Equity Annual Report 2006/07

### 9.3 Recommendations

The CEE did not come up with recommendations but they can only be inferred from their report and submission as follows:

- To still have workplace discrimination thirteen years into democracy is not fair, a mechanism has to be devised to address this situation.
- There is a need to extend the CCMA powers beyond conciliation so that the drawn out process of adjudication by the Labour Court could be circumvented. This process seems unfair to most labour complainants who cannot afford the lengthy legal process. Employers also get away with impunity.
- Anonymity of complaints to the Commission highlights the underlying fear of victimisation by employers. The internal dispute resolution process does not help either because power relations come into play. Policy formulation in this regard needs attention
- Psychometric testing in the workplace should be adaptive to the local environment.
- There has to be a mechanism to prevent the use of BBBEE partners as an endorsement of equity when companies subtly prevent equity by using Black people to isolate other fellow Black candidates.



There has to be a mechanism to prevent the overlooking of Black people accessing employment in the corporate sector to entrench the perception that there are skills shortages in the country.

- Affirmative action should be revised to exclude White women because they have been overly affirmed at the expense of other designated groups.
- Disabled people need urgent attention in terms of employment equity.

## 10. SUBMISSION MADE BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

### 10.1 Background

The South African Human Rights Commission (SAHRC) was established in terms of the Constitution (Act 108 of 1996) so as to strengthen democracy and promote a culture of human rights in South Africa. In terms of Section 184 of the Constitution the SAHRC is required to perform the following functions:

- Strengthen the culture of human rights and respect for human rights
- Promote the protection, development and attainment of human rights
- Monitor and assess the observance of human rights in South Africa

The SAHRC is guided by the Bill of Rights, the Human Rights Commission Act and the promotion of Equality and Prevention of Unfair Discrimination Act. The legal framework gives the SAHRC the authority to ensure compliance with equality legislation, make a national assessment of the extent of discrimination, refer cases of discrimination to the equality courts, conduct investigations and consult with relevant stakeholders.

### 10.2 Summary of the Submission made by the SAHRC

The presentation focused particular attention on the Equality Act but noted that the Act is not fully operational as the regulations have not been passed by Parliament. In terms of the Employment Equity Act discrimination in the workplace is addressed by the Commission for Conciliation, Mediation and Arbitration (CCMA). In some cases certain acts of workplace discrimination is not covered by the Employment Equity Act. A dual jurisdiction was noted between the Equality Act and the Employment Equity Act. Areas that fall out of the scope of the Employment Equity Act can be addressed by the Equality Act and the Equality Courts. It was noted that the Employment Equity Act is very specific in that it focuses on certain acts of discrimination in the workplace. The Equality Act is much broader and also addresses related areas of discrimination. Greater clarity is required with regard to court interpretations of both the Employment Equity Act and the Equality Act. The Equality Courts are currently underutilised highlighting the need for greater training and knowledge sharing regarding the importance of the Equality Courts. It was noted that the Equality Courts can also be used to address cases of workplace discrimination. The SAHRC called for greater harmonisation of the Employment Equity Act and the Equality Act with regard to workplace discrimination. THE SAHRC noted in their presentation that progress has been made with regard to combating discrimination and inequality but stressed that legislation is one element of a broader strategy. It is important for society to realise that discrimination should not be tolerated. Discrimination does not have any place in a society built upon the principles of human rights, equality, dignity and freedom.

### 10.3 Recommendations

- Greater training and information sharing is required with regard to the Equality Act, particularly with regard to how the Act can be used to correct incidents of discrimination in the workplace.
- There needs to be greater cooperation between the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Equality Courts. Similarly the Employment Equity Commission and the Equality Commission should work closely together.
- The Equality regulations should be finalised and promulgated as soon as possible.



## **SUBMISSION MADE BY THE WOMEN'S LEGAL CENTRE (WLC) AND THE RURAL EDUCATION AWARENESS AND COMMUNITY HEALTH (REACH)**

### **11.1. Background**

The Women's Legal Centre (WLC) is a non-profit law centre whose objective is to promote the human rights of poor women through the advancement of greater equality. The Rural Education Awareness and Community Health (REACH) is a non-profit organisation that focuses on sexual harassment and sexual violence on the farms in the Overberg region of the Western Cape. The focus of the joint submission centred on the compliance with the Employment Equity Act in terms of the prohibition of sexual harassment as contained in the Employment Equity Act.

### **11.2. Summary of the Submission made by the WLC and REACH**

The joint presentation focused on sexual harassment in the workplace with particular emphasis on vulnerable farm workers. Understanding sexual harassment should be understood in the context of an apartheid history, power imbalances and vulnerability of agricultural workers especially women. It is important to note that agricultural working communities face particular social challenges of access to education, health services and housing. Section Six of the Employment Equity Act provides a list of general prohibitions with regard to discrimination in the workplace. It was noted that all stakeholders have a responsibility to eliminate discrimination in the workplace. Sexual harassment constitutes discrimination with rural women being particularly vulnerable to abuse. Harassment on farms is becoming more widespread as farm workers have very little access to information regarding their rights, the support network for rural women workers are weak and workers have poor access to legal recourses. The presentation highlighted the prevalence of sexual harassment of even children under the age of 13. A large portion of cases received by the Women's Legal Centre focuses on sexual harassment. The presentation noted that in September 2005 a Code of Good Practice on the handling of Sexual Harassment was promulgated. It was noted that the code is not binding and acts as a guide. Section five and six of the Employment Equity Act should be resourced and properly enforced. It is important for the employer to take reasonable steps so as to ensure that a worker is not put in a vulnerable position. The presentation noted that there needs to be a greater focus on sexual harassment in the workplace and legislation should be preventative rather than reactive. Legislation should protect women against violence including sexual harassment.

### **11.3. Recommendations:**

- The mandatory Employment Equity Form should include sexual harassment as a form of unfair discrimination. Employers should report on compliance with regard to sexual harassment.
- The responsibility of the employer should be clearly outlined and should include: advising the victim of the procedures available and offering counselling.
- The Labour Inspectorate should ensure that information is available to workers and visibly displayed.
- Inspectors from the Department of Labour should monitor sexual harassment in the various workplaces with particular attention to vulnerable agricultural workers.
- The Department of Labour should work closely with non-governmental organisations so as to ensure a common approach to combating sexual harassment within the broader framework of the Employment Equity Act.

## **12. SUBMISSION MADE BY BUSA**

### **12.1 Background:**

BUSA represents a number of employers' associations and professional bodies, including chambers of commerce and unisectoral organisations. BUSA seeks to ensure that organised



business plays a constructive role in South Africa's economic growth, in attaining its development and transformation goals, and in creating an enabling environment within which businesses from all sectors can thrive and expand and be competitive both nationally and internationally.

## 12.2 Summary of the submission made by BUSA:

BUSA noted that since 1994, most medium and large companies have revised their internal policies and procedures to conform to equity legislation. BUSA notes in its submission that most companies have introduced anti-discrimination policies and procedures that adopt a "zero tolerance" approach to discrimination in recruitment, selection, appointment and promotion practices. However, notwithstanding this, the Commission for Employment Equity reports that 73% of persons employed in permanent positions are black compared with 87% in non-permanent positions. BUSA reported that there has been a steady increase in the number of black executives at top management level. In 2000, there were 12.7% black persons in senior management positions. By 2006, this figure had increased to 22.2%. This indicates some degree of progress; however there is room for improvement in this regard.

BUSA further noted that the number of women in top management positions has increased by 9.2%. It pointed out that companies appear to be making an effort to appoint women on to their boards. Even though 24.5% of South African boards have 2 or more women directors and 43.4% of these boards have no women directors at all, the situation has improved considerably since 2004 when more than half of all boards had no women directors. The representation of women on the boards of JSE-listed companies increased by 1.1% to 10.3%. State-owned enterprises continue to make more progress than their private sector counterparts where women occupy 31.3% of all director positions.

Notwithstanding the fact that there has been progress in promoting equity in the workplace, BUSA is concerned that not all companies have demonstrated a commitment to promoting employment equity and eradicating discrimination in the workplace. The reasons for this lack of progress can be attributed to one or more of the following:

- A lack of finding creative ways of addressing transformation challenges.
- Government's inability to create effective monitoring systems to assess the progress made in transforming organisations.
- The complacency of some businesses in not effectively transforming their companies. This is illustrated by the fact that there has been a decrease in the number of black persons employed in companies. This figure has gone down from 78% in 2005 to 73% in 2006 and the number of black professionals and black middle managers has decreased from 44.1% in 2000 to 36.5% in 2006.
- In many instances, a lack of progress can be equated to a lack of strong leadership in the transformation arena.
- Inadequate reviewing of processes and policies that directly impact on the elimination of discrimination and that promote transformation.
- Too many instances of justifying non-compliance instead of finding ways to comply. The lack of appropriately skilled black people is often cited as the reason for non-compliance. However, very little effect has been made in certain areas to develop appropriately skilled people.
- A lack of attention to addressing gender imbalances. Although the number of women in executive management positions has increased, the indications are that women are losing ground in this category. The Business Women's Association (BWA) 2006 census report shows that 16.8% of executive management positions were held by women in 2006, compared to 19.8% in 2005. This decline is significant given the substantial increase in the overall number of executive management positions (from 5558 in the 2005 census to 7890 in the 2006 census). In 2005 and 2006, of the 362 directorships held by women, 48.1% were held by black women. This is in sharp contrast to the race split in executive management positions, which shows that 77% of all women executives and managers are white.





There has been a decrease in the employment of persons with disabilities from 1% to 0.7%.

Many developmental opportunities are missed through inept or inadequate planning.

### 12.3 Recommendations:

In preface to its recommendations, BUSA noted that it supports government policy and legislation that seek to promote transformation and equity in the workplace. It remains committed to playing a facilitative role in speeding up the transformation process. Key recommendations include the following:

- Business leaders to renew their commitment to accelerate transformation and eradicate discrimination in the workplace.
- There is a need to develop better monitoring systems through co-regulation, self-regulation and public-private sector partnerships. BUSA believes that it has a value-adding role to play in this regard.
- The introduction of specific sector-based initiatives.
- The development of transformation guides.
- The implementation of annual "BUSA Transformation Awards" to recognise good practice.
- Improved links between businesses and unemployed persons, particularly unemployed graduates.
- Capacity building initiatives for previously disadvantaged business groups.

## SECTION B

### 13. OUTLINE OF KEY ISSUES

The various submissions that were made have highlighted certain areas of concern when dealing with discrimination in the workplace. Whilst these areas of concern might not be common to all the submissions, general trends have been identified as problems within the South African labour market.

Firstly, there seems to be a lack of Codes of Good Practice in various sections within the labour market. These aim to regulate the conduct of various institutions in the workplace and are seen as best practice models through which individuals and organisations should operate. However, various submissions have pointed out that there exists a lack in the adoption of these Codes. The Workplace Dignity Institute highlighted that because of a lack of a Code of Good Practice to address workplace violence, incidences here of have been relatively high. COSATU also highlighted the lack of a Code of Good Practice to establish best practice rules in enforcing EE effectively. Solidarity on the other hand had already drafted their own Codes of Good Practice in dealing with white men and employment equity. It seems that whilst the legislative framework is in place, there are certain gaps that seem to be manipulated by large employers to flout the provisions of the EE legislation.

Almost all of the organisations that made submissions highlighted problems in the prevailing legislative framework. It is generally accepted that the legislative framework does make great strides in realising equity in the labour market. However, there are certain areas of concern that allow for the perpetuation of discrimination in the workplace. SWOP highlighted that an enquiry needs to be launched into the efficacy of the employment equity principles and to what extent these principles have further perpetuated inequalities in the labour market. The CEE further highlighted that there exists a relative amount of overlap within various pieces of legislation and the measures that they provide to address discrimination in the workplace. These overlaps have been used by large employers to side-step certain obligations that have been placed upon them. Similar problems were highlighted by the SAHRC who noted that there existed a dual jurisdiction within certain pieces of legislation, particularly the Equality Act and the Employment Equity Act. The SAHRC felt that greater clarity was needed as to the judicial interpretations of both of the acts, whilst there has been a lack of attempts to harmonise both pieces of legislation. Furthermore, and more importantly, the SAHRC noted that the regulations



could possibly provide more clarity on the implementation of EE) have as yet not been passed by Parliament and that this at best was problematic. COSATU highlighted the problems with the legislative framework by referring particularly to the problematic establishment of employment equity committees and large disparities in income differentials. Moreover, Solidarity intimated that certain amendments to EE legislation was needed so as to include young people as a targeted group. The ALP however stated that whilst South Africa has a comprehensive legislative framework to deal with discrimination against workers affected by HIV/AIDS, certain gaps still remain that allow workers to fall victim to discrimination and that these need to be addressed urgently. Given the serious imbalances in the labour market that the EE legislative framework wishes to address, it is clear that certain stumbling blocks still exist and that they are being abused by large employers.

Almost all the presenters illustrated that there still exists a low level of awareness amongst employees with regard to employment equity. The ALP advanced that a low level of awareness existed in particularly medium to small employers who failed to inform employees about the HIV/AIDS policy. Moreover, the effective implementation of EE legislation amongst these employers remains problematic. COSATU concurred, but expanded by highlighting instances where employers had distanced (to a certain degree) themselves from these processes by outsourcing this function to external service providers, thereby excluding shop stewards in this integral process. Moreover, it is often the most vulnerable workers who are exploited. These marginalized groups have poor access to legal resources and employers make no effort to inform workers about EE and workplace discrimination. This has led to incidences of sexual harassment amongst children as young as 13 years in the country.

The low level of awareness of employment equity and workplace discrimination is directly linked to the capacity of the Department of Labour (DOL). COSATU submitted that the DOL does not possess the capacity to properly monitor the level to which EE is employed and advanced in the labour market. Moreover, because of this apparent lack of oversight, the DOL is unable to institute enforcement mechanisms so as to ensure meaningful participation in the employment equity process. The BMF has also criticized the capacity of the DOL by highlighting the need for more effective punitive measures for large employers who continually flout EE legislation and include fines in their annual budgets. The BMF further criticized the DOL for its operational and human resources capacities which create environments where continued discrimination is allowed to exist, specifically on vulnerable groups. The WLC and REACH submitted that the DOL should extend their capacity to specifically cater for workers who are situated in rural areas around the country. This extended capacity can be achieved through strategic partnerships with NGO's whose core focus is to cater for rural workers.

Interaction with certain judicial bodies also proved to be a common theme in various submissions. The BMF highlighted the inability of the CCMA to effectively deal with instances of covert discrimination in workplaces. This has directly resulted in a lack of confidence by workers in the organisation in addressing discrimination. The CEE submitted that whilst the CCMA has been mandated to intervene in matters relating to discrimination, the organisations power is limited to mere conciliation. Matters are inevitably referred to the Labour Court to be dealt with on a more specialised basis, however, employees are often treated with impunity or lack the financial resources to proceed with the matter so far. The SAHRC noted that whilst there exists a distinct overlap in the legislative framework, the Equality Courts were currently under-utilized and that these judicial mechanisms are more effective in dealing with instances of workplace discrimination by catering for class action suits.

Finally, various organisations that made submissions relied on various statistical sources to highlight problems relating to workplace discrimination and employment equity. However, a measure of subjectivity was used in interpreting the statistical data thereby resulting in various opinions on the state of EE in the labour market. This serves to highlight the lack of a comprehensive statistical audit as to the extent to which EE has been achieved.

#### 14. UNDERLYING FACTORS



The submissions highlight a number of underlying factors that serve as causal factors or factors that impede discrimination experienced in the South African labour market. These causal factors are briefly discussed below.

The submissions point to a lack of appropriate policy and procedural contexts for dealing with discrimination in the workplace in many organisations. This lack of a policy and procedural framework for addressing discrimination and devising appropriate interventions, has served to exacerbate discrimination experienced in the workplace. In addition to this, many organisations have a predominant organisational culture and management style that serve to create an enabling environment within which discrimination can take place. This coupled with a lack of appropriate policies and procedures can lead to situations where employers turn a blind eye to adhering to legislation pertaining to discrimination in the workplace. In such a context, employees are often reluctant to articulate experiences of discrimination and often remain silent without seeking recourse.

The submissions highlight the fact that transformation in South Africa is taking place at a very slow pace. Much work still needs to be done in terms of transforming corporate South Africa and in creating greater equity in the labour market. Businesses and institutions across the country have been slow to give effect to affirmative action. This situation is compounded by the fact that the Department of Labour does not have the capacity to adequately oversee the implementation of employment equity principles. In addition to this, the Commission for Employment Equity has failed to issue national guidelines for public and private institutions with regards to the setting of numerical targets and benchmarks for employment equity, notwithstanding the fact that it is required to do so in terms of section 29 of the Employment Equity Act. The Commission has also not been able to develop adequate punitive measures for companies that fail to comply with the provisions of employment equity legislation. Many companies therefore opt to not transform their organisations, given that they are prepared to pay the current fine levy for non-compliance. In some instances the work of employment equity committees is impeded by non-consultation between management and unions and the fact that worker participation in employment equity committees is not encouraged. Workers are, at times, not consulted with regards to employment equity decisions.

Many submissions attest to the fact that that racial discrimination, gender discrimination and discrimination directed at persons with disabilities and persons with HIV and AIDS, continue to be rife in the South African labour market. At times, this discrimination takes the form of income differentials. Racial discrimination emerges as a key form of discrimination in many organisations and many companies appear to lack the motivation to transform their organisations from a race perspective. Employment equity interventions have tended to focus on top-level management, often at the expense of middle and lower levels of the labour market. Income differentials in the labour market as a result of apartheid continue to exist, with black workers located at the very bottom of salary scales. In many organisations, there is a serious lack of professional African employees as well as a lack of adequate representation of black women.

Discrimination based on gender is also still very rife in many South African organisations. This takes the form of attitudinal stereotyping, insensitivity to gender issues, sexual harassment and income differentials. Women are sometimes excluded from certain sectors of the labour market based on their "unsuitability" for certain job requirements. The lack of childcare facilities in many workplaces, given the fact that women are predominantly the primary childcare givers, is also highlighted as a form of discrimination.

Workplace discrimination against persons with disabilities also emerged as a key cause for concern in many submissions. A target of 2.5% has been set for the employment of persons with disabilities in the South African public service. In its submission, the Department of Public Services and Administration noted that this target has still not been met. This is problematic, given that the public sector should set an example to the rest of the labour market. Submissions also raise the fact that many places of work have not been sufficiently



restructured to cater for persons with disabilities and many buildings remain inaccessible to persons with disabilities.

Some submissions pointed to the fact that the casualisation of labour has been an increasing trend in the recent past. This is because casual workers do not fall within the ambit of the labour legal framework insofar as healthcare and other benefits are concerned. Casual workers such as migrant workers, domestic workers and farm workers are therefore rendered particularly vulnerable to abuse and discrimination.

The fact that many vulnerable workers who are subjected to workplace discrimination do not have access to legal recourse exacerbates their vulnerable status. In some instances employers play on the lack of recourse to legal and other forms of intervention and blatantly defy the provisions of labour legislation. The Employment Equity Act empowers the Commission for Conciliation, Mediation and Arbitration to deal with cases of workplace discrimination. Failing the conciliation process, such cases are referred to the Labour Court for adjudication and final judgement. This procedure is in itself discriminating as many people cannot afford this lengthy legal process.

Submissions also point to the fact that many workers are not aware of their rights in the workplace. In addition to this, workers do not seem to have a high level of all of awareness of employment equity. In some instances employers appear to be reluctant to educate employees about employment equity in a concerted manner. The lack of worker awareness serves as a serious impediment to eradicating workplace discrimination.

## 15. RECOMMENDATIONS

The current conditions in the labour market clearly do not match the policy priorities of transformation. Submissions from the above organisations highlight a broad range of challenges with regard to equity in the labour market and the nature of work in South Africa. The various submissions emphasize that employment equity covers questions of race, gender, HIV/ AIDS status, disability, public-private sector transformation, psychometric testing, designated groups, representivity, awareness and training. The following recommendations are a result of the Committees deliberations and dialogue with various stakeholders during the hearings:

- There is a need for greater compliance with employment equity legislation, particularly with regard to race and gender. Employment equity is relevant for both the private and public service. BUSA noted that the approach should not be punitive but rather involve consultation and consensus. Employers should be encouraged to strengthen the process of transformation. Recognising that transformation is a national priority, employers that do not comply with the legislation should be faced with a compliance cost. With regard to the reporting requirements employers with less than 150 employees report every two years while employers with more than 150 employees report every year. It is important that the reporting requirements are streamlined, simplified and customer friendly. Employers and unions should ensure that workplace employment equity committees should be established and meaningful participation by workers, unions and management should be sustained. The objective of these measures is not to increase the cost of doing business in South Africa but rather to encourage transformation. Business organisations and trade unions should be consulted so as to ensure consensus and minimise resistance to change. The submission by the Sociology of Work Unit noted that employment equity should also take into account pay differentials and the inequalities that pay differentials creates in the workplace. It is important that pay differentials do not contribute to greater inequity in the society which in turn will erode the gains that we have made in employment transformation. Skills development and codes of good practice was echoed throughout the different submissions as initiatives that serve to reinforce transformation. The Sector Education Training Authorities (SETA's) and sector business chambers can play an invaluable role in skilling people so as to ensure meaningful transformation. The Committee will



continue its ongoing dialogue with the Department of Labour on the impact of the skills strategy. The Committee will also continue to provide oversight over the SETA administration. As noted by Cosatu employment recruitment should be transparent, training should be accelerated and tokenism monitored. Government, organised labour and business should find common solutions through strengthening channels of communications. Institutions like Parliament and NEDLAC can play an important role in building consensus with regard to employment equity.

- There is a need to review the current enforcement framework. Businesses that see enforcement measures and non compliance fines as part of a cost structure should be discouraged from such practices. The enforcement mechanisms and non compliance fines should be set at a level whereby it deters businesses from avoiding the requirements of the Act. The fine structure should be reviewed so as to ensure operational effectiveness. Similarly the enforcement framework should be simplified, time frames shortened and the process should be user friendly. While fines are a measure to ensure compliance, the enforcement strategy should also include self regulation and a more active monitoring role played by organised business and trade unions. Moral persuasion can also encourage compliance. As noted by BUSA, organised business can play a role in strengthening enforcement and ensuring compliance with the labour inspectorate. The Commission for Employment Equity also proposed that the powers of the CCMA be extended beyond conciliation and in the context of high labour court costs. **This recommendation requires further consideration. XXXX**
- It is important that the Department of Labour improves the capacity of the labour inspectorate to ensure implementation of the legislation. The Inspection and Enforcement Services Unit of the Department of Labour has an important role to play with regard to ensuring compliance with employment equity legislation. It is noted that employers should be compliant with labour legislation and sectoral determination within 90 days of inspections being conducted. Inspectors should be properly equipped to engage both employers and trade unions in meeting the requirements of the act, increasing the number of companies under review and settling investigations within the target time frame. The Committee notes the important role of the labour inspectorate in giving effect to the Employment Equity Act and ensuring that the Act does not become a "paper tiger". There should be regular inspections of enterprises by the Inspectorate.
- The state of the South African labour market and racial representation of the labour force highlights the structural challenges in transforming the labour market. The March 2007 Labour Force Survey quantifies the profile of the labour market. The submission by Solidarity questioned the data used by the Commission for Employment Equity in the 7<sup>th</sup> Annual Report. There should be greater collaboration between Statistics South Africa and the CEE so as to work towards a comprehensive statistical audit. A comprehensive audit should also take into account the state of employment equity in the small business sector. In the absence of a comprehensive statistical audit the data of the CEE 7<sup>th</sup> Annual Report provides a relevant description of the current trends.
- The area of employment equity awareness was raised as a concern by all submissions but particularly by the Black Management Forum, COSATU, Human Rights Commission and Business Unity South Africa. Employment Equity awareness should include education, training, showcasing best practice and equipping shop stewards to contribute to workplace transformation. The Committee endorses the recommendations made by the various submissions to strengthen awareness amongst workers, employers, organised labour and business organisations. Awareness campaigns are not a once off event but should be an ongoing process with stakeholders publically renewing their commitment to transformation.
- The current levels of abuse and violence in the workplace is totally unacceptable and has no place in our society. As the Workplace Dignity Institute noted there is a need for



the strengthening of a human rights culture in both our communities and in the workplace. The establishment of a human rights culture requires all stakeholders to put in place a Code of Good Conduct, a workplace violence policy, the establishment of support services and procedures to address such eventualities. Organised business and the Department of Labour can play a key role in both establishing a framework and developing a culture of human rights in the workplace. As noted by the Women's Legal Centre and the Rural Education Awareness and Community Health, sexual harassment is linked to the issue of power and violence in the workplace. Poor access to legal resources for workers particularly those in vulnerable sectors including agricultural and domestic workers make these workers vulnerable to abuse. The Employment Equity Form should include information on sexual harassment and the Labour Inspectorate should monitor sexual harassment in the workplace. Employers have a responsibility to ensure a safe working environment and provide support to workers.

- Employment equity should not be seen in isolation from other transformation initiatives. These interrelationships make policy and legislative harmonisation very important. The Black Management Forum noted a link between the Broad Based Black Economic Empowerment strategy of the Department of Trade and Industry and employment equity. There should be greater dialogue between the Department's of Labour and Trade and Industry. The Black Management Forum also highlighted the overlapping mandates of the Chapter 9 institution i.e. public institutions established under Section 9 of the Constitution. It should be noted that Parliament has conducted an extensive review of the Chapter 9 institutions and made substantial recommendations on the harmonisation of Chapter 9 Institutions. As noted by the Human Rights Commission another area that requires greater legal clarity is the relationship between the Equality Act and the Employment Equity Act. The relationship between the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Equality Courts should be explored with greater dialogue between the Department's of Justice and Labour. While supporting greater cooperation it is important that the respective roles are clear and specific for each institution.
- With regard to designated groups the Black Management Forum noted the substantial improvement of the representation of white women in the labour market and recommended a "sunset" clause for this category as a designated group. In contrast, the Solidarity submission proposed the continued inclusion of white women as a designated group and recommended the expansion of designated group to include young people. **Position of Committee XXXXX** The Commission for employment equity also highlighted the need to focus on the representation of disabled people.
- Discrimination experienced by workers with HIV/ AIDS negatively impacts on employment equity as illustrated by the submission of the AIDS Law Project. Civil society, organised labour and business can play an important role in highlighting the concern, creating greater awareness and lobby for greater support.
- The ultimate objective of labour market policy should be to increase employment levels and ensure decent work. It is important to remember that equity and transformation is a vehicle to restoring the dignity of people.

## 16. REFERENCES

- Commission for Employment Equity Annual Report 2006/07.
- Commission for Employment Equity: Presentation to PC on Labour on Annual Report 2006/07, dated 05/09/2007.
- [http://www.labour.gov.za/statutory/statutory\\_display.jsp?statutorydisplay\\_id=10332](http://www.labour.gov.za/statutory/statutory_display.jsp?statutorydisplay_id=10332)