



Commission for Gender Equality
A society free from gender oppression and inequality

Report on Gender Transformation

Public and Private Sectors

2022/23

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Publisher: Commission for Gender Equality.

Copy Editor: Expert English Editors CC

Design, Layout & Printing: Shereno Printers cc

RP113/2023

ISBN: 978-0-621-51070-6

Title of Publications: **Gender Transformation in the Public and Private Sectors 2022/2023**

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Acronyms

CGE Act	Commission for Gender Equality Act (Act 39 of 1996), as amended
CGE	Commission for Gender Equality
Constitution	Constitution of the Republic of South Africa, 1996
B-BBEE	Broad-Based Black Economic Empowerment
B-BBEEA	Broad-Based Black Economic Empowerment Act (Act 53 of 2003), as amended
BCEA	Basic Conditions of Employment Act
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
EAP	Economically Active Population
EEA	Employment Equality Act (Act 55 of 1998), as amended
ILO	International Labour Organisation
LGBTQIA+	Lesbian, gay, bi-sexual, transgender, queer/questioning, intersex, asexual, and others
LRA	Labour Relations Act (Act 66 of 1995)
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000)
PPPFA	Preferential Procurement Policy Framework Act (Act 5 of 2000)
PWD	Persons with disabilities
SDG	United Nations Sustainable Development Goals, 2015
SMME	Small and Medium Enterprises
WEPs	United Nations Women Empowerment Principles

1 Introduction

The Commission for Gender Equality (“the Commission”) is an independent statutory body created in terms of Chapter 9 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). In terms of Section 187 of the Constitution, the Commission is mandated to promote and protect gender equality in government, civil society and the private sector. To this end, the Commission for Gender Equality Act,¹ as amended (“CGE Act”), gives the Commission the power to monitor and evaluate policies and practices of organs of State at any level, statutory bodies and functionaries, public bodies and authorities and private businesses, enterprises and institutions, to promote gender equality and make any recommendations that the Commission deems necessary.

2 Background

Transformation in the workplace is a process to change the racial, gender and economic status of the workplace to reflect the demographics of South Africa's population.² Various pieces of legislation have been enacted to transform South African businesses and society to ensure that all enjoy equal opportunities and fair treatment and thereby promote equality and dignity. These pieces of legislation aim to promote equal opportunities for people who have been historically disempowered owing to apartheid policies.³

Before the enactment of the Constitution, Black people (namely, African, Coloured people and Indian people) were precluded from participating in the economy and pursuing a better life simply because of the colour of their skin. Women and persons with disabilities (PWD) were often unfairly discriminated against with respect to employment opportunities. The Employment Equity Act⁴ (“EEA”) was promulgated to ensure people are treated equally. Where Black people, women and PWD (the designated groups) are under-represented in the workplace, employers should address this imbalance by implementing corrective measures to accelerate equality.⁵

In addition to one of the most progressive constitutions in the world, South Africa has a plethora of transformation-related legislation to enable the economic empowerment of its citizens, specifically those previously and currently disadvantaged as a result of the apartheid policy of economic exclusion.⁶ Currently, the transformation laws are managed by three government departments: employment equity is the domain of the Department of Employment and Labour (“DOLE”), Broad-Based Black economic empowerment (B-BBEE) is assigned to the Department of Trade and Industry (DTI), and the Preferential Procurement Policy Framework Act⁷ (“PPPPFA”) falls under the National Treasury. This spread of responsibility leads to complications and the

1 Act 39 of 1996.

2 <https://www.skills-universe.com/2018/05/15/what-is-transformation/>.

3 Ibid.

4 Act 55 of 1998.

5 Supra (Note 2).

6 <https://www.iol.co.za/business-report/empowerment-legislation-needs-change-for-radical-economic-transformation-9600827>.

7 Act 5 of 2000.

inconsistent application of laws across the departments.⁸

In 2018, it was reported that more than a hundred employers faced litigation in the Labour Court of South Africa for not complying with transformation legislation, and could walk away with a slap on the wrist.⁹ The DOLE put 72 Johannesburg Stock Exchange-listed companies on review in the 2017/18 period for failing to adhere to their Employment Equity Plans.¹⁰

The B-BBEE Commission had found that most entities that had findings against them for non-compliance opted to comply with the B-BBEE Commission's recommended remedial action. Only three cases had been referred to the South African Police Service or the National Prosecuting Authority for criminal investigation.¹¹ Approximately ten cases had been referred to other regulatory entities, including the Companies and Intellectual Property Commission. More than R100 million has been paid in redress to Black people found to have been disadvantaged by misaligned B-BBEE deals.¹²

B-BBEE had previously been hampered because many government entities had been unaware that B-BBEE legislation pertained to them, the legislation's proposed beneficiaries (Black people) were often unaware of their rights under the Broad-Based Black Economic Empowerment Act¹³ ("B-BBEEA"), the private sector often received poor advice from B-BBEE advisers, and there had been an element of mendacity within the private sector in some instances.¹⁴

The Commission identified many challenges and policy shortcomings from the above sources regarding transformation. Therefore, the Commission deemed it necessary to consult the entities, examine compliance and review the transformation legislation to advance equality in the employment and economic sector.

The Annual Performance Plan 2022/2023 requires the Commission to conduct transformation hearings on applying, implementing and reviewing employment equity and other transformation legislation in the public and private sectors. The Transformation Hearings:

- Assess compliance with employment equity legislation and its policies;
- Assess compliance with other transformation legislation and their policies;
- Assess the impact of transformation legislation and policies on PWD, women and other previously disadvantaged people¹⁵ in the public and private sectors;
- Address institutional and systematic barriers to economic and gender diversity in the workplace regarding the progress of women and PWD;
- Raise awareness of relevant international commitments to gender transformation and the importance of compliance;
- Raise and address transformation policy gaps and implementation challenges;
- Make findings and recommendations of the necessary improvements and corrections to

8 Supra (Note 6).

9 <https://www.news24.com/SouthAfrica/News/White-men-still-rule-despite-legislation-aimed-at-transforming-race-balance-20180701>.

10 Ibid.

11 <https://m.polity.org.za/article/sa-south-africa-is-making-slow-progress-on-economic-transformation-but-there-is-work-to-be-done-b-bbee-commission-2018-09-26>

12 Ibid.

13 Act 53 of 2003.

14 Supra (Note 11).

15 The previously disadvantaged persons include the persons listed in the definition of "broad-based Black economic empowerment, section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE) provides that: "broad-based Black economic empowerment" means the viable economic empowerment of all Black people, in particular women, workers, youth, persons with disabilities and people living in rural areas.

improve policy implementation;

- Consult and liaise with relevant stakeholders for their input on the above; and
- Monitor the implementation of the Commission's recommendations by each entity.

In the financial year 2022/2023, the Commission identified four entities to partake in this process, namely the Department of Small Business Development (DSBD), the Department of Water and Sanitation (DWS), Clover (Pty) Ltd and Bird & Co (Pty) Ltd. It proceeded to conduct transformation hearings with the public and private entities. The following entities participated in the transformation hearings in the 2022/2023 period:¹⁶

- Department of Small Business Development
- Department of Water and Sanitation
- Clover (Pty) Ltd

In its process, the Commission applied transformation legislation as a primary source. These include the following:

- EEA, as amended, and its regulations;
- PPPFA, and its regulations;
- B-BBEEA, as amended, and its regulations;
- Skills Development Act,¹⁷ as amended;
- Skills Development Levies Act,¹⁸ as amended;
- Amended Agri BEE Sector Code, 2017;
- Promotion of Equality and Prevention of Unfair Discrimination Act¹⁹ ("PEPUDA");
- Labour Relations Act²⁰ ("LRA"); and
- Basic Conditions of Employment Act.

Employers are bound by these statutes to create equal employment opportunities for women and PWD, and to remove the barriers to their entry, advancement, development, remuneration and retention in the workplace. The EEA is the foundation for a range of policies, commissions and activities to achieve equitable representation in the workplace, as the EEA:

- Promotes skills development for the disadvantaged;
- Establishes the Commission for Employment Equity to ensure employers promote equal opportunity and eliminate discriminatory hiring practices;
- Makes employers responsible for training and developing women in the workplace;
- Removes obstacles to promoting women;
- Obliges employers to narrow wage gaps between employees of different genders who perform similar work; and
- Promotes flexible working hours, time off during pregnancy and the improvement of maternity and childcare facilities.

¹⁶ Bird and CO's participation to this process is discussed infra.

¹⁷ Act 97 of 1998.

¹⁸ Act 9 of 1999.

¹⁹ Act 4 of 2000.

²⁰ Act 66 of 1995.

3 Rationale

The procedure for the determination of any investigation is provided for in Sections 10 to 15, 17 and 18 of the CGE Act and regulated in terms of the procedure set out therein read in conjunction with the relevant CGE Complaints Handling Manual, a public document gazetted in July 2016. All persons will be subject to the procedures set out in the CGE Act, including Commissioners and officials of the Commission, entities and individuals subject to an investigation, and any other person or organisation appointed to assist or participate in an investigation.

Section 12(4)(b) of the CGE Act provides that the Commission may:

“Require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a sheriff, to appear before it at a time and place specified in such notice and to produce to it specified articles or documents in the possession or custody or under the control of any such person: Provided that such notice shall contain the reasons why such person's presence is needed and why any such article or document should be produced.”

4 Legal framework

4.1 International instruments

4.1.1 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

In its preamble, the CEDAW recognises that “extensive discrimination against women continues to exist” and underscores that such discrimination “violates the principles of equality of rights and respect for human dignity”. Article 1 defines discrimination as “any distinction, exclusion or restriction made on the basis of sex [...] in the political, economic, social, cultural, civil or any other field”.²¹

South Africa has ratified and is a party to the CEDAW. In terms of Article 11 of the CEDAW, the South African government is obliged to take all appropriate measures to eliminate discrimination against women in the field of employment to ensure equality.

4.1.2 United Nations Sustainable Development Goals, 2015

The Sustainable Development Goals (SDG) are set by the United Nations. The goals cover a range of social and economic development issues.

SDG 5 provides for the achievement of gender equality and the empowerment of all women and girls and seeks to end all forms of discrimination against all women and girls worldwide. It recognises the value of unpaid care and domestic work through the provision of public services, infrastructure and social protection policies, and the promotion of shared responsibility within the household and the family, as nationally appropriate. It also ensures women's full and effective participation in, and equal opportunities for, leadership at all levels of decision-making in political, economic and public life.

SDG 5 also provides for the adoption and strengthening of sound policies and enforceable legislation for the promotion of gender equality and the empowerment of women and girls at all levels.

SDG 8 provides for the promotion of sustainable economic growth, inclusive, full and productive employment and decent work for all.

4.1.3 United Nations Women Empowerment Principles (WEPs)

Women Empowerment Principle²² 2 (WEP 2) provides equal opportunity, inclusion and non-discrimination and assures sufficient participation of women (30% or greater) in decision-making and governance at all levels and across all business areas.

²¹ <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> Accessed on 17/03/2020.

²² UN Women and UN Global Compact Office 'Women's Empowerment Principles', Equality Means Business, second edition 2011. 2. List of WEP are as follows; 1. Leadership promotes gender equality, 2. Equally opportunity inclusion and non-discrimination, 3. Health, safety and freedom from violence, 4. Education and training, 5. Enterprise development, supply chain and marketing practices, 6. Community leadership and engagement, and 7. Transparency, measuring and reporting.

WEP 5 provides for enterprise development, supply chain and marketing practices. It also provides for the expansion of business relationships with women-owned enterprises, including small businesses and women entrepreneurs.

WEP 7 provides for transparency, measuring and reporting, obliging the publication of company policies and implementation plans for promoting gender equality. It establishes benchmarks that quantify the inclusion of women at all levels. The benchmarks measure and report on progress, both internally and externally, using data disaggregated by sex, and that also incorporates gender markers into ongoing reporting obligations.

4.1.4 International Labour Organisation (ILO) Conventions

4.1.4.1 ILO Convention 100

ILO Convention 100 (ratified by South Africa in 1997) requires member states to pursue policies that promote equal opportunity, equal treatment in employment, and access to opportunities, including vocational training (to eliminate discrimination in employment).

4.1.4.2 ILO Convention 111

ILO Convention 111 provides for equal remuneration for men and women workers for work of equal value (ratified by South Africa in 2000). Article 2 of the Convention requires member states to promote and apply to all workers the principle of equal remuneration to men and women for work of equal value by means of national laws, recognised machinery for wage determination and collective agreements.

4.1.4.3 ILO Convention 190

ILO Convention 190 provides for the elimination and prevention of violence and harassment in the world of work. It recognises that violence and harassment in the workplace can constitute a human rights violation or abuse and that violence and harassment threaten equal opportunities and is unacceptable and incompatible with decent work. The Convention also acknowledges that violence and harassment in the workplace affect a person's psychological, physical and sexual health, dignity, family and social environment.

4.1.5 Beijing Declaration and Platform for Action²³

The Beijing Declaration and Platform for Action is “an agenda for women's empowerment” signed by all governments and is a “necessary and fundamental pre-requisite for equality, development and peace”. The Platform provides a clear, straightforward and actionable blueprint for women's empowerment. The document includes a gender analysis of problems and opportunities in 12 crucial areas of concern, and clear and specific standards for actions to be implemented by governments, the United Nations system and civil society, including, where appropriate, the private sector.

²³ United Nations, Fourth World Conference on Women, September 1995.

In addition, the Platform provides the first global commitment to gender mainstreaming through the methodology by which women's empowerment will be achieved. It states that in implementing the suggested actions, *“an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken, an analysis is made of the effects on women and men, respectively”*.

4.1.6 Discrimination (Employment and Occupation) Convention, 1958

Article 5 states that:

- (1) *“Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination”*.
- (2) *“Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination”*.

4.1.7 Convention concerning equal opportunities and equal treatment for men and women workers: Workers with family responsibilities²⁴ (not ratified by the Republic of South Africa)

Article 3 States that:

- (1) *“With a view to creating effective equality of opportunity and treatment for men and women workers, each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities.”*
- (2) *“For the purposes of paragraph 1 of this Article, the term discrimination means discrimination in employment and occupation as defined by Articles 1 and 5 of the Discrimination (Employment and Occupation) Convention, 1958.”*

²⁴ No. 156 of 1981.

4.2 Regional instruments

4.2.1 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa²⁵

Article 2 provides that all State parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures.

Article 13 provides for economic and social welfare rights. It states that state parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities.

In this respect, State parties shall:

- Promote equality of access to employment;
- Promote the right to equal remuneration for jobs of equal value for women and men;
- Ensure transparency in recruitment, promotion and dismissal of women, and combat and punish sexual harassment in the workplace;
- Guarantee women the freedom to choose their occupation and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;
- Create conditions to promote and support the occupations and economic activities of women within the informal sector; and
- Establish a protection and social insurance system for women working in the informal sector and sensitise them to adhere to it.

Article 19 provides for the right to sustainable development. It states that women are entitled to enjoy their right to sustainable development fully. In this regard, the state parties shall take all appropriate measures to:

- Introduce the gender perspective in national development planning procedures;
- Ensure the participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
- Promote women's access to and control over productive resources, such as land, and guarantee their right to property;
- Promote women's access to credit, training, skills development and extension services at rural and urban levels to provide women with a higher quality of life and reduce the level of poverty among women;
- Take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- Ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

²⁵ Maputo, 11 July 2003.

4.3 Domestic instruments

4.3.1 Constitution of the Republic of South Africa, 1996 (the Constitution)

Section 9(1) of the Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) further states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Section 23 (1) states that everyone has the right to fair labour practices.

Section 24 provides that everyone has the right:

Section 24(a): To an environment that is not harmful to their health or wellbeing; and

Section 24(b): To have the environment protected for the benefit of present and future.

4.3.2 CGE Act,²⁶ as amended

The CGE Act was promulgated into law in 1996 and the Act regulates the Commission. The Commission has been established to promote respect for and the protection of development, along with attaining gender equality. In terms of Section 11(1)(e) read with Section 12, the Commission is mandated to investigate any gender-related issue on its own accord or on receipt of a complaint and shall endeavour to resolve the same. The Commission shall determine the procedure to be followed in any investigation in terms of Section 12 of the CGE Act.

4.3.3 Promotion of Equality and the Prevention of Unfair Discrimination Act²⁷ (“PEPUDA”)

PEPUDA came into effect in 2000. This law prohibits gender-based discrimination and provides for remedies designed to protect any person who experiences discrimination across the full spectrum of society, including gender-based discrimination. PEPUDA was enacted because of Section 9(4) of the Constitution, which requires the State to pass legislation that promotes equality and prevents unfair discrimination. PEPUDA gives effect to Section 9 of the Constitution, binding the State and all persons. However, PEPUDA does not apply to any person to whom, and to the extent to which, EEA²⁸ applies.²⁹

Neither the State nor any person may unfairly discriminate against any person.³⁰ No person may unfairly discriminate against anyone on the grounds of race, gender, or disability, including the engagement in any activity which is intended to promote or has the effect of promoting exclusivity based on race, gender-based violence, female genital mutilation and the system of preventing women from inheriting family property³¹ and failing to eliminate obstacles that unfairly limit or restrict PWD from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.³²

²⁶ Act 39 of 1996.

²⁷ Act 4 of 2000.

²⁸ Act 55 of 1998 as amended.

²⁹ Section 5(3) of PEPUDA.

³⁰ Section 6 of the PEPUDA.

³¹ See *Bhe v the Magistrate, Khayelitsha, Shibi v Sithole and South African Human Rights Commission v President of the Republic of South Africa* 2005 (2) SA 580 (CC).

³² Section 7, 8 and 9 of PEPUDA.

4.3.4 Basic Conditions of Employment Act³³

The BCEA regulates labour practices within the workplace and sets out the rights and duties of employees and employers. The BCEA aims to ensure social justice by establishing the basic standards for employment with regard to working hours, leave (annual, study, and maternity leave), remuneration, dismissal and dispute resolution.

4.3.5 Broad-Based Black Economic Empowerment Act (Act 53 of 2003), as amended (“B-BBEEA”)³⁴

Section 2 provides that its objectives are to facilitate B-BBEE by increasing the extent to which Black women own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training.

Paragraph 9 of the Codes of Good Practice (B-BBEE 2007) provides for the enhanced recognition of Black women, Black PWD, Black youth, Black people living in rural areas and Black unemployed people.

4.3.6 Preferential Procurement Policy Framework Act (Act 5 of 2000) (“PPPFA”)³⁵

The PPPFA gives effect to Section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in Section 217(2) of the Constitution.³⁶

When an organ of the State in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.³⁷

The PPPFA entrenches the obligation of the government to award preferential procurement points to enterprises owned by historically disadvantaged persons and for certain government priorities. The Act also provides exemptions to preferential procurement in certain sectors and industries. Preferential procurement is used as a wealth redistribution strategy to channel funds to discrete categories of economic sectors.

4.3.7 Labour Relations Act (Act 66 of 1995) (“LRA”)³⁸

The LRA protects all parties in the workplace and aims to promote economic growth, fair labour practices, peace, democracy and social development.

³³ Act 11 of 2002.

³⁴ Act 53 of 2003.

³⁵ Act 5 of 2002.

³⁶ The Constitution of the Republic of South Africa, 1996.

³⁷ Ibid at Section 271(1).

³⁸ Act 66 of 1995.

5 Investigative hearing: Employment Equity and Transformation Hearings

The Commission conducted its Employment Equity and Transformation Hearings with three entities, namely, the Department of Small Business Development and the Department of Water and Sanitation and Clover (Pty) Ltd.

5.1 Department of Small Business Development

5.1.1 Introduction

The Ministry of Small Business Development (DSBD) was established in 2014, demonstrating the Government's commitment to placing small, micro and medium enterprises (SMMEs) and co-operatives at the centre of economic growth and job creation.

The DSBD was thereafter established as a stand-alone national department in accordance with the reorganisation announced by the President in 2014 of some national departments.

The DSBD is mandated to lead and coordinate an integrated approach to promoting and developing entrepreneurship, SMMEs and co-operatives and to ensure an enabling legislative and policy environment to support their growth and sustainability.

The mission of the DSBD is the coordination, integration and mobilisation of efforts and resources towards the creation of an enabling environment for the growth and sustainability of small businesses and co-operatives. In contrast, the vision of the Department is a transformed and inclusive economy driven by sustainable, innovative SMMEs and co-operatives.

The annual performance plan of the DSBD takes its guidance from the National Development Plan Vision 2030, the 2019–2024 Medium-Term Strategic Framework. The DSBD revised the 2020–2025 Strategic Plan, Economic and Recovery Plan, 2021 State of the Nation Address, 2021 Budget Speech, Human Rights Implication of Covid-19 as suggested by the United Nations Address and adapted to the South African context, and the Gender Responsive Planning, Budgeting, Monitoring and Evaluation Framework.

5.1.2 Background

The Commission dispatched correspondence dated 11 July 2022 to the DSBD, inviting it to participate in the Transformation Hearing. To that effect, a questionnaire regarding transformation was attached as part of the correspondence to the DSBD.

The invitation was received on 21 July 2022, and the DSBD acknowledged receipt of the invitation on 23 August 2022. The DSBD responded to the invitation with the completed questionnaire and attached its Annual Performance Plan for the 2022/2023 financial year.

Subsequent to the initial submission to the Commission, the DSBD appeared before the Commission on 29 November 2022. Upon the appearance and based on the information submitted by the DSBD, the Commission made the following preliminary findings:

- The DSBD failed and/or neglected to submit a comprehensively completed questionnaire with supporting documents;
- The DSBD failed and/or neglected to demonstrate its commitment to transformation in its practices;
- The DSBD submitted insufficient information to put the Commission in a position to analyse whether the DSBD has created a working environment that is enabling for PWD;
- The top and senior management positions of the DSBD are predominantly occupied by Black women and Black men, almost to the exclusion of all other racial groups;
- The DSBD does not utilise gender-responsive budgeting practices; and
- The DSBD does not have policies to deal with relevant issues, specifically those of gender, disability and issues facing the LGBTQIA+.

In line with the outcomes of the hearing, the Commission formally, and premised on its powers, requested responses in writing to be delivered to the Commission related to the following:

1. A full and comprehensive response to the questionnaire, including the provision of further evidence/documents as requested in the questionnaire.
2. In responding to the Commission's recommendations, the DSBD must address the lack of information provided in relation to the following:
 - a. Sexual harassment policy;
 - b. Gender-sensitive policies in relation to gender inclusion in line with Section 9 of the Constitution;
 - c. Provision of sexual harassment workshops, with a clear aggregation of the number of employees and the targeted employee cohort within the DSBD (senior management, middle management).
3. The Commission will be formally invited to future sexual harassment workshops and training.
4. The DSBD must provide disaggregated data in terms of their internal and external working policy in relation to PWD and stipulate any policies and steps taken to create an enabling work culture in line with universal access guidelines in terms of disability accommodations.
5. The DSBD must provide a timeline in terms of the gender markers and KPAs of managers.
6. The DSBD should additionally submit its policies regarding the following gender policies:
 - a. Employment Equity Plan;
 - b. Recruitment and Selection Policy;
 - c. Uniform and Protective Clothing Policy;
 - d. Training and Development Policy;
 - e. Sexual Harassment Policy;
 - f. Succession and Retention Policy ;
 - g. Flexi-time Policy;
 - h. Maternity leave policy; and
 - i. Any other relevant gender-responsive policies and gender-sensitive policies.

The Commission dispatched the correspondence to the DSBD, in which the Commission highlighted the preliminary recommendations made and requested a formal response from the DSBD. The DSBD responded and submitted correspondence to the Commission on 12 December 2022.

In its response to the preliminary findings and recommendations made by the Commission, the DSBD submitted the following additional information:

1. Employment Equity Plan for 2020–2023;
2. Attendance of Courses Policy;
3. Dress Code Policy;
4. Leave Policy;
5. Recruitment Policy;
6. Retention Policy;
7. Sexual Harassment Policy; and
8. Working Hours Policy.

After a thorough analysis of the additional information submitted, the following was established.

5.1.3 Workforce profile

The following table indicates the total number of employees per grade. The table is disaggregated by gender, race and disability status for the 2022/2023 financial year:

Level	Total	Disability (add race)		Women				Men			
		F	M	B	C	I	W	B	C	I	W
16	2							2			
15	0										
14	8			5				3			
13	25	1		8	1	1	1	10	2	1	
12	19			11				7	1		
11	24	1		12			1	9	1		
10	9	1		4				4			
9	11			3	1			7			
8	37		1	23	1		1	11			
7	18	1		11			1	5			
6	14		1	8				5			
5	11		1	6				3		1	
4	0										
3	8			6				2			
2	0										
Total	186	4	3	97	3	1	4	68	4	2	0

In relation to the initial information submitted for top management, it was confirmed that:

- At level 16 there are two employees. The representation is 100% Black men. There is no representation of women of any race. Furthermore, Coloured men, Indian men, and White men are not represented.
- At level 15 there is no representation.
- At level 14 there are eight employees. The representation is five (62.5%) Black women and three (37.5%) Black men. There are no Coloured men or women, Indian men or women and no White men or women.
- At level 13 there are 25 employees. The representation is eight (32%) Black women, one (4%) Coloured woman, one (4%) Indian woman, and one (4%) White woman. There are ten (40%) Black men, two (8%) Coloured men, one Indian (4%) man. There is one woman with a disability, but there is no race classification for her. There are no White men represented.
- At level 12 there are 19 employees. The representation is 11 (57.89%) Black women, seven (36.84%) Black men and one (5.26%) Coloured man. There are no Coloured women, Indian women, White women, Indian men or White men represented.
- At level 11 there are 24 employees. The representation is 12 (50%) Black women, one (4.16%) White woman, nine (37.5%) Black men and one (4.16%) Coloured man. There are no Coloured women, Indian women, Indian men or White men represented.
- At level 10 there are nine employees. The representation is four (44.44%) Black women and four (44.44%) Black men. There is one woman with a disability, but her race is not provided. There are no Coloured women, Indian women, White women, Coloured men, Indian men or White men represented.
- At level 9 there are 11 employees. The representation is three (27.27%) Black women, one (9.09%) Coloured woman and seven (63.63%) Black men. There are no Indian women, White women, Coloured men, Indian men or White men represented.
- At level 8 there are 37 employees. The representation is 23 (62.16%) Black women, one (2.7%) Coloured woman, one (2.7%) White woman and 11 (29.72%) Black men. There are no Indian women, Coloured men, Indian men or White men represented.
- At level 7 there are 18 employees. The representation is 11 (61.11%) Black women, one (5.5%) White woman and five (5.5%) Black men. There are no Coloured women, Indian women, Coloured men, Indian men or White men represented.
- At level 6 there are 14 employees. The representation is eight (57.14%) Black women and five (35.71%) Black men. There are no Coloured women, Indian women, White women, Coloured men, Indian men or White men represented.
- At level 5 there are 11 employees. The representation is six (54.54%) Black women, three (27.27%) Black men and one (9.09%) Indian man. There are no Coloured women, Indian women, White women, Coloured men or White men represented.
- At level 4 there is no representation.
- At level 3 there are eight employees. The representation is six (75%) Black women and two (25%) Black men. There are no Coloured women, Indian women, White women, Coloured men, Indian men or White men represented.
- At level 2 there is no representation.

In total, there are 186 employees. The representation is 97 (52,15%) Black women, three (1,61%) Coloured women, one (0,54%) Indian woman and four (2,15%) White women, 69 (37,1%) Black men, four (2,15%) Coloured men, two (1,1%) Indian men. White men are not represented.

The DSBD has employed seven PWD (four female PWD and three male PWD) throughout the occupational levels of the organisation. The DSBD confirmed the information submitted.

The information submitted by the DSDB indicates that gender transformation has generally seen an upward trajectory throughout the organisation. However, this has not translated in the same way for PWD, as they currently make up 3,76% of the total number of employees within the DSBD.

Additionally, the information submitted acutely indicates an over-representation of Black men and women throughout the organisation, specifically at the top and senior management levels. Section 195 of the Constitution states that public administration should be “broadly representative” of the Republic of South Africa. In the *Solidarity and others vs Minister of Correctional Services*³⁹ case, the court confirmed that a broadly representative workforce could not be achieved where an exclusively segmented workforce exists.⁴⁰ The court stated further that the implementation of an EEP addressing this would assist in resolving the concern.⁴¹

In the *Solidarity* case, the constitutional court confirmed the principle established in the *South African Police Service v Solidarity obo Barnard*⁴² case. In the *Barnard* case, the court determined that an employer may refuse to appoint a candidate who falls within a category of persons already adequately represented at a certain occupational level.

Subsequent to their attendance before the Commission, the DSBD submitted its Employment Equity Plan (EEP), as registered with the Department of Labour and Employment (DOLE), from 2020 to 2023. The introduction of the EEP expressly stated that the implementation of the plan is dependent on additional financial resources being made available to the DSDB.

The adjustment of the numerical targets in the EEP clearly displays the intention of the DSBD to address the representation of various under-represented groups within the organisation. The EEP objectives are based on annual achievement. The objectives of the EEP in the first year were to ensure that a new EE Manager is appointed by 31 October 2020 and establish an Employment Equity Committee by 30 November 2020. The DSBD additionally envisaged that it would consult with the DOLE on service providers to assist with attracting PWD by 15 December 2020.

From the initial information submitted by the DSBD, it was established that its EEP was not implemented. The lack of implementation has resulted in no considerable adjustments being made in terms of the employment equity targets as established, and further the DSBD has not indicated what it has been able to achieve in terms of its employment equity targets within its available resources.

39 2016 (10) BCLR 1349 (CC).

40 Para 40.

41 Para 41.

42 2014 (10) BCLR 1195 (CC).

As noted above, Section 195 of the Constitution states the positive obligation of the employer to enhance or achieve a workforce broadly representative of the Republic of South Africa. Further noted above, the DSBD is reliant on the allocation and availability of additional resources to implement its EEP. The argument that the EEP could not have been implemented as a direct result of not receiving additional resources, does not hold water.⁴³

As it stands, the DSBD has an Attendance of Courses Policy available that acts as a skills development policy. This Policy could be activated to develop and enhance existing employees that form part of the under-represented groups to be promoted within the organisation.

Section 195 of the Constitution indicates that the “public administration must be development orientated”. The Public Service Commission (PSC) stipulated in its Guide on the Constitutional Principles and Values Governing Public Administrations that development orientation means that departments focus on the achievement of development objectives, and more broadly on overcoming the root causes of poverty and inequality, and focus on building State capacity to fulfil this role.

In its EEP, the DSBD stated it would consult with the DOLE to gain access to service providers to assist in the recruitment of PWD. Nothing prohibits the DSBD from initiating these consultations. Engaging service providers will place the DSBD in a favourable position to continue recruiting PWD when funded positions within the Department become vacant.

- As previously indicated, PWD comprise close to 4% of the total employees represented within the DSBD. These employees are present at various levels throughout the DSBD.
- Creating an enabling environment for PWD means that employers should eliminate all barriers that restrict PWD employment and promotion. The DSDB did not submit any information to the CGE regarding its successes in creating an enabling environment for PWD or mainstreaming gender within the workplace, although it presented data on the number of PWD within the workplace.
- The intention of the EEP is to create an enabling environment for PWD and address the issues of under-representation, as noted above. By actively engaging its available resources, the DSBD will be able to foster a culture of diversity as envisaged by the Constitution.

Diversity improves decision-making by bringing the various perspectives of a diverse group of people to bear on an issue. It will also enhance identification with the groups served by the DSBD. If managed creatively, a diverse and value-orientated workforce will better serve its stakeholders and society in general, as public service is embedded in the fabric of everyday lives.

5.1.4 Procurement of goods and services

The Commission requested that the DSBD provide information relating to the implementation of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE), which relates to increasing the extent to which Black women own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training. In response, the

⁴³ *Maginiwana and others v The President of RSA and others (Black Lawyers Association as Amicus Curiae)* 2013 (11) BCLR 1251 (CC). The positive obligation of the State to achieve administrative justice through legislative and other resource, can be ascribed to DSDB as, it is able to enhance the inclusion of PWD within its workforce, by utilising the internal resources it has at its disposal.

DSBD indicated that it has not practically applied the provisions of B-BBEE, demonstrating a lack of commitment by the DBSD to ensure the economic inclusion of women and other vulnerable groups.

Furthermore, the Commission requested information relating to Section 2 of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the Regulations of the PPPFA as published in 2017. The intention of these questions is to ascertain how the DSDB procures in terms of its obligations within the PPPFA and its Regulations as they relate to vulnerable groups. Also, the DSBD indicated that it has not practically applied the provisions of PPPFA, demonstrating a lack of commitment by the DBSD to ensure the economic inclusion of women and other vulnerable groups and uphold the law. The DSDB is not acting on its obligation to include vulnerable groups within its procurement cycle. Therefore, those groups intended to benefit from the PPPFA are being excluded.

5.1.5 Gender-responsive budget

The DSBD submitted that it does not have a budget geared towards empowering women and men in the workplace, which concerns the Commission.

The application of a gendered lens to the budgetary process of a department or institution helps to create a better understanding of the impact of such policies. Applying a gendered lens helps make them more likely to contribute positively to gender equality.

Gender budgeting integrates a gender perspective into fiscal policies and public financial management (PFM) processes. Budgets and policies are never neutral, and gender budgeting removes systemic biases, helping governments be smarter in designing and implementing policies that could have an unintended negative impact on a segment of the population.⁴⁴

5.1.6 Sexual harassment in the workplace

Pursuant to the transformation hearings and the recommendations made by the Commission, the DSBD submitted its departmental Sexual Harassment Policy and indicated that it had not received any sexual harassment cases since 2019.

The DSBD indicated that it provided virtual training on sexual harassment in May 2021 and November 2022. There is no specification of what sexual harassment content the said training offers. There is no attendance register provided for the two training sessions. However, in respect of the training of November 2022, the online login activity report indicates that about 18 employees participated. Of the 18, some joined late, and others left before the session ended.

The Commission condemns the failure of the DSBD to fulfil its duty to take reasonable proactive steps to eliminate sexual harassment in the workplace by ensuring that employees receive proper and adequate training on sexual harassment. Providing training to 18 out of 186 employees is inadequate and a dereliction of duty. The fact that the DSBD has not registered any sexual

44 <https://blogs.iadb.org/igualdad/en/gender-budgeting-w-important-for-gender-equality-and-economic-growth/> (Accessed on 13 February 2023).

harassment cases for over five years is questionable, which may be misleading given the inadequate training and/or poor attendance recorded. The duty to promote equal opportunity in the workplace by eliminating unfair discrimination and protecting employees against sexual harassment, as provided for in Section 60 and Section 5 of the EEA, requires commitment and much more effort than the DBSD has done.

The most pertinent observation is that the sexual harassment policy submitted by the DSBD speaks to the Code of Good Practice published in 1998. This code was subsequently repealed by the gazetting of the *Code of Good Practice on the Elimination of Harassment within the Workplace, 2022*.

The revised Code of Good Practice references victimisation, workplace bullying, and sexual harassment. Additionally, the revised Code of Good Practice is gender neutral, ensuring inclusion and protection for LGBTQIA+ persons within the workplace.

The objective of the Code of Good Practice is aimed at preventing, eliminating and managing harassment in the workplace in all forms. The ILO Convention 190 and its Recommendations concerning the *Elimination of Violence and Harassment in the World of Work, 2019, Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111), and ILO Convention 151 on Occupational Health and Safety* guide its efforts.

In order to fulfil its obligations as a State under Convention 190 to prevent harassment and violence at work, South Africa introduced the EEA as one of several Acts in respect of addressing discrimination, gender-based violence and harassment in the workplace. Harassment constitutes an unfair form of discrimination, preventing equity and equality in the workplace. The elimination of harassment, including sexual harassment, gender-based violence, bullying, and racial, ethnic and social origin harassment, is therefore imperative. Physical, psychological, emotional and sexual abuse are all forms of harassment.

Harassment is when a person or group is threatened with force or power, or it is used against another, resulting in or having a high likelihood of causing social injustice, economic harm, injury, death, physical and psychological harm, maldevelopment or deprivation. A form of harassment against women, men, LGBTQIA+ and vulnerable individuals in the workplace is an abuse of power.

Bringing the current DSDB Sexual Harassment Policy in line with the intention of the revised Code of Good Practice will ensure effective management of reported complaints while simultaneously including vulnerable groups. Furthermore, the use of an outdated code is not only misleading but counter transformation. Training provided on an outdated policy is inadequate and substandard and likely adds to the zero reporting of sexual harassment cases at the DSDB.

5.1.7 Women's empowerment principles (WEP)

In the initial request for information, the DSDB was required to submit information on its compliance with the WEP.

- WEP 2 provides for equal opportunities, inclusion and non-discrimination, with the assurance of sufficient participation of women (30%) or greater in decision-making and governance at all levels and across all business areas.
- WEP 5 provides for enterprise development, supply chain and marketing practices.
- WEP 7 provides for transparency and measured reporting.

Regarding WEP 2, the DSBD submitted that a strategic decision was taken by the DSBD Portfolio Committee, comprising of the Department and its entities, to ensure that targeted groups are mainstreamed across all departmental programmes, policies, positions and interventions.

Moreover, it advised that it had established a target of >50% women at the senior management service (SMS) level. As per its annual performance plan ("APP"), the DSBD has maintained this target for the past three consecutive financial reporting years.

Regarding WEP 5, the DSBD failed to submit information confirming compliance. The DSBD has not provided any explanation for its non-compliance or implementation of the WEP 5.

Regarding WEP 7, the DSBD indicated that it had incorporated gender markers in the performance agreement of the Director-General. The DSBD did not submit any further information in this regard.

Based on the lack of information submitted, the Commission is unable to provide an accurate analysis of the DSBD's compliance with WEP.

For State departments to deliver on the 2030 agenda and Sustainable Development Goals for gender equality, WEP serve as the primary vehicle. By joining the WEP community, through accounting officers, State departments signal their commitment to this agenda at the highest levels in departments. In addition, they agree to work collaboratively in multi-stakeholder networks to foster practices that empower women. Among these practices is equal pay for equal work, gender-responsive supply chain practices and zero tolerance for sexual harassment at work.

South Africa is a member of the United Nations and a signatory to the WEP. Therefore, it has *positive and negative obligations*⁴⁵ to ensure the implementation of and compliance with the WEP. Without information on the DSBD's implementation of the WEP, the DSBD is circumventing the State's efforts to comply in terms of its international and regional obligations.

5.1.8 Pay gap

In line with the International Labour Organisation's (ILO) conventions, the EEA and its Regulations align South Africa's employment equity laws with the ILO objectives. In South Africa, several previous cases have acknowledged the principle of equal pay for equal work. However, very few successful claims have been filed. In order to determine whether work is of equal value, the Regulations provide guidelines.

⁴⁵ <https://www.weps.org/companies> (Accessed on 13 February 2023).

A principle of equal pay applies to work of equal value if it is the same, substantially the same or of equal value compared to an appropriate actual comparator of the same employer. It is important to note that when comparable work is of equal value, employees should not be paid unequally if the difference between them is based on a prohibited ground of discrimination or an arbitrary basis.

Thus, it is difficult to make a determination of arbitrary remuneration practices in the public sector because the public sector operates on approved salary scale levels. A true determination of whether a pay gap exists will require an analysis of the determination of notch progressions.

The DSBD failed to submit any information regarding the potential pay gap in the Department.

Based on the lack of evidence submitted, CGE is unable to confidently make a determination on whether the DSBD has identified a pay gap or addressed this concern.

5.1.9 Skills development

Initially, the DSBD did not submit any information regarding its skills development practices. Subsequent to the transformation hearings and the findings and recommendations by the Commission, the DSBD submitted its Attending Courses Policy for review.

As noted above, Section 195 of the Constitution confirms that public administration is skills development-orientated. The importance of skills development cannot be overemphasised. When correctly utilised, skills development can upskill employees within the organisation and ensure that skilled public servants will be able to assist their constituents better.

5.1.10 Additional information submitted and challenges

The DSBD advised that the most pertinent challenge it is experiencing in implementing gender mainstreaming is the lack of departmental policies on gender-responsive procurement and insufficient capacity within the Mainstreaming Unit. The insufficient capacity in the unit affects the ability of the unit to conduct audits on the procurement activities of the DSBD.

The DSBD further advised that limited human resources within the supply chain management unit make it difficult to initiate and/or implement any procurement transformation measures and that the National Treasury is the custodian of legislation and policies. Legislation and policies that ensure public procurement and budgeting are regulated, and at this stage, no sanctioned gender-responsive budgeting tools or policies are available.

The DSBD indicated that to integrate gender equality in procurement practices fully, it must develop and implement a gender-responsive policy. It will also be required to capacitate the supply chain management unit with sufficiently skilled officials to develop and implement the transformation measures.

5.1.11 Observations and findings

Upon review of the initial information and the additional information submitted by the DSBD, as analysed, the Commission can draw the following findings.

1. The information submitted acutely indicates an over-representation of Black men and women throughout the organisation, specifically at the top and senior management levels. Section 195 of the Constitution states that public service should be “broadly representative” of the Republic of South Africa, and the Constitutional Court has previously confirmed that a broadly representative workforce cannot be achieved where an exclusively segmented workforce exists
2. The Commission notes the budgetary constraints that the DSBD has highlighted.
3. In its observation of its EEP, the Commission notes the intention of the adjustments of the numerical targets to address the representation of under-represented groups.
4. The Commission notes that the DSBD envisaged that it would consult with the DOLE on service providers to assist with attracting PWD to its organisation.
5. The DSBD has not implemented its EEP.
6. The Commission observes that there is a discrepancy in the way the DSBD is procuring. The DSBD indicated that it was experiencing several challenges in the inclusion of gender equality practices in its procurement cycle.

The Commission finds that the organisational policies submitted by the DSBD were actioned in 2016, save for the DSDB's Sexual Harassment Policy, which was actioned in 2020. These policies are outdated and should be reviewed to be brought in line with the EEP of the organisation.

The DSDB did not comply with the recommendations fully and had neglected and/or failed to re-submit the completed questionnaire. As a result of this failure, the Commission is unable to fully analyse the extent of the implementation of gender transformation within the DSBD.

The neglect and/or failure of the DSBD to submit the information requested by the Commission places the Commission in a precarious position, where it is unable to analyse the extent of gender transformation within the DSBD fully. Following the remarks made by the Constitutional Court in the judgment of the *Economic Freedom Fighters v Speaker of the National Assembly and others*,⁴⁶ the accounting officers of government departments should be seen to be actively supporting and protecting the constitutional imperatives bestowed on Chapter 9 institutions.

The neglect and/or failure of the DSBD to engage the Commission on the implementation of the recommendations directly undermines the mandate and powers of the Commission.

Based on these revised observations and findings, the Commission makes the following recommendations.

⁴⁶ 2018 (2) SA 571 (CC).

5.1.12 Recommendations

1. The DSDB must address the failure of the implementation of its EEP.
2. The DSBD must consider utilising the Barnard principle, which indicates that an employer may refuse to appoint a candidate who falls within a category of persons already adequately represented at a certain occupational level. The use of the Barnard principle could address its representativity challenges and is in line with Section 195 of the Constitution, which states that public administration should be broadly representative of the Republic of South Africa.
3. The DSBD must develop and implement a gender-responsive policy in its procurement practices.

In addition, the DSBD is required to address the following:

- a) The DSBD must provide a full and comprehensive response to the questionnaire and to provide further evidence as requested in the questionnaire.

In responding to the Commission's recommendations, the DSBD must address the lack of information provided in relation to the following:

- b) Gender-sensitive policies in relation to gender inclusion in line with Section 9 of the Constitution;
 - c) The provision of sexual harassment workshops, with a clear aggregation of the number of employees and the targeted employee cohort within the Department (senior management and middle management).
4. The Department must review its Sexual Harassment Policy to align it with the Code of Good Practice on the Elimination of Harassment within the Workplace, 2022.
 5. The Commission should be formally invited to future sexual harassment workshops and training planned by the DSBD.
 6. The DSBD should ensure that a comprehensive risk assessment on sexual harassment and bullying in the workplace is conducted, and it should submit the finalised risk assessment report to the Commission.
 7. The DSBD must provide disaggregated data regarding their internal and external working policy in relation to PWD, and stipulate any policies and steps taken to create an enabling work culture in line with universal access guidelines regarding disability accommodations.
 8. The DSBD must provide a timeline in terms of gender markers and KPAs of other members of management.
 9. DSBD should comply with the abovementioned recommendations and submit the written progress report to the Commission by 30 June 2023.

5.2 Department of Water and Sanitation

The Department of Water and Sanitation (DWS) is the custodian of South Africa's water resources. It is primarily responsible for formulating and implementing policy governing this sector. While striving to ensure all South Africans access to clean water and dignified sanitation, the Department also promotes effective and efficient water resources management to ensure sustainable economic and social development.

As the sector leader, the Department of Water and Sanitation's mission is to serve the people of South Africa by positively impacting the country and its people as custodians of South Africa's water and sanitation resources and as innovative and committed partners in the drive for sustainable development. Also, the DWS enables partners with knowledge and capacity to ensure that all water services are delivered. Secondly, as service and delivery oriented, it strives to get it right the first time, every time, on time, ensuring that citizens are provided with the water and sanitation services they deserve.

The Commission dispatched correspondence dated 7 July 2022 to the DWS, inviting the DWS to participate in the Transformation Hearing. To that effect, a questionnaire regarding transformation was attached as part of the correspondence to the DWS.

The DWS appeared before the Commission on 29 November 2022.

Upon appearance and based on the information submitted by the DWS, the Commission made the following preliminary findings:

- The DWS failed to provide a comprehensively completed questionnaire with supporting documents
- The DWS failed and/or neglected to demonstrate commitment to transformation practices.
- Due to the lack of information, the Commission deduced that the working environment is not conducive for persons with different forms of disability,
- The top and senior management positions are predominantly occupied by Black women and Black men, almost to the exclusion of all other racial groupings;
- The DWS does not have a designated Employment Equity Manager, as Section 20 of the EEA requires, and there is no information submitted to conclude that there is a gender-focal person to spearhead transformation.
- The DWS does not utilise gender-responsive practices
- The DWS does not have policies to deal with relevant issues, specifically those of gender, disability and issues facing the LGBTQIA+ community;
- The DWS did not conduct sexual harassment workshops in 2018 and 2019 nor submit a sexual harassment policy for analysis.

In line with the outcomes of the hearings, the Commission formally premised on its powers requested responses in writing to be delivered to the Commission related to the above. However, the DWS is yet to submit the request.

5.2.1 Workforce information

5.2.1.1 Demographic profile

In terms of workforce information, the DWS submitted the following matrices. The matrices set out posts filled per race and gender and the number of employees per grade. The matrices are disaggregated by gender, race and disability status for the 2021/2022 financial year.

Matrix 1: Filled posts per race and gender for the entire Department of Water and Sanitation

EXECUTIVE SUMMARY - AUGUST 2021							
FILLED POSTS PER RACE AND GENDER FOR THE ENTIRE DEPARTMENT							
RACE	GENDER	TOTAL	%	MALE %	FEMALE %		
AFRICA	MALE	3098	47.84	57.37	42.63		
	FEMALE	2340	36.13				
INDIAN	MALE	63	0.97				
	FEMALE	58	0.90				
COLOURED	MALE	224	3.46				
	FEMALE	139	2.15				
WHITE	MALE	330	5.10				
	FEMALE	224	3.46				
TOTAL		6476	100.00				
MALE AND FEMALE TOTALS						3715	2761

In response to the question on “the total number of employees per grade and disaggregate by gender, race and disability status for the current financial year”, in respect of the questionnaire dispatched. DWS submitted the following information as per Matrix 1.

First, in terms of its executive summary in relation to its filled posts per race and gender for the DWS in August 2021, the number of employees is 6 476. There are 3 715 (57.37%) male employees and 2 761 (42.63%) female employees.

However, the following can be concluded when one breaks the matrix down demographically in terms of race. Matrix 2 provides a detailed breakdown of the above in respect of salary levels, gender and race disaggregation.

DEPARTMENT: WATER & SANITATION																			
REGION OR CLUSTER: ALL																			
EMPLOYMENT EQUITY PROFILE AND TARGETS: AUGUST 2021																			
SALARY LEVEL	AFRICAN		INDIAN		COLOURED		WHITE		MALE TOTAL	MALE %	FEMALE TOTAL	FEMALE %	TOTAL	FEMALE %	TOTAL POSTS				
	MALE	%	MALE	%	MALE	%	MALE	%								MALE	%	MALE	%
1									0		0		0		0				
2	487	64.5	220	29.1					34	4.5	14	1.9	521	69.0	234	31.0	755	187	
3	256	75.5	52	15.3					29	8.6	1	0.3	286	84.4	53	15.6	339	175	
4	181	73.9	48	19.6	1	0.4	1	0.4	11	4.5			196	80.0	49	20.0	245	77	
5	419	36.7	565	49.5	5	0.4	12	1.1	33	2.9	44	3.9	467	40.9	674	59.1	1141	219	
6	291	70.8	68	16.5	4	1.0			25	6.1	5	1.2	333	81.0	78	19.0	411	144	
7	280	33.7	411	49.4	2	0.2	11	1.3	14	1.7	30	3.6	324	38.9	508	61.1	832	214	
8	281	41.5	304	44.9	5	0.7	4	0.6	19	2.8	12	1.8	334	49.3	343	50.7	677	118	
9	257	50.0	153	29.8	3	0.6	5	1.0	14	2.7	9	1.8	317	61.7	197	38.3	514	112	
10	196	40.2	174	35.7	10	2.0	10	2.0	19	3.9	7	1.4	280	57.4	208	42.6	488	87	
11	223	41.2	191	35.3	14	2.6	9	1.7	19	3.5	10	1.8	321	59.3	220	40.7	541	48	
12	145	41.7	88	25.3	9	2.6	3	0.9	4	1.1	5	1.4	233	67.0	115	33.0	348	74	
13	67	47.5	51	36.2	5	3.5	3	2.1	1	0.7			78	55.3	63	44.7	141	43	
14	14	38.9	11	30.6	3	8.3			2	5.6	2	5.6	21	58.3	15	41.7	36	17	
15	1	12.5	4	50.0	2	25.0							4	50.0	4	50.0	8	5	
16													0		0		0	2	
Unclassified													0		0		0	0	
TOTALS	3098	5438	2340	83.97%	63	121	58	1.87%	224	363	139	330	3715	57.37	2761	42.63	6476	1522	
										554	224	8.55%							
GENDER %	47.84	36.13	0.97	0.90	3.46	2.15	5.10	3.46	7998	19.03									
TARGET %	75	11	9	11	11	11	11	11	11	11	11	11	11	11	11	11	11	11	
TOTAL %	83.97	8.55	5.61	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	2.45	
DEVIATION %	-8.97	-581	202.8	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	219.84	
HEADCOUNT																			

In respect of the employment equity profile, by August 2021, Matrix 2 above illustrates that DWS has a salary level ranging from 1 to 16. At level 2, there are 755 positions filled by 521 men (69%) and 334 women (44.23%). The racial composition is 487 Black men (64%), 34 Coloured men (4.5%) and no White or Indian men. There are 220 Black women (29.14%), 14 Coloured women (1.85%). There are no Indian or White women.

At salary level 3, there are 339 positions filled by 286 men (84.36%) and 53 women (18.53%). There are 256 Black men (75.51%), 29 Coloured men (8.55%), one White man (0.29%) and no Indian men. There are 53 Black women (15.63%), one Coloured woman (0.29%) and no Indian women.

At level 4, there are 245 positions filled by 196 men (80%) and 49 women (20%). The racial composition is 181 Black men (73.88%), three Coloured men (1.22%), three White men (1.22%), and one Indian man (0.4%). There are 48 Black women (19.59%), one Indian woman (0.4%) and no Coloured women or White women.

At level 5, there are 1 141 positions filled by 467 men (40.92%) and 674 women (59.07%). The racial composition is 419 Black men (36.72%), 33 Coloured men (2.89%), ten White men (0.88%) and five Indian men (0.44%). There are 565 Black women (49.52%), 44 Coloured women (3.86%), 12 Indian women (1.05%) and 53 White women (4.65%).

At level 6, there are 411 positions filled by 333 men (81.02%) and 78 women (18.98%). There are 291 Black men (70.80%), 25 Coloured men (6.08%), 13 White men (3.16%) and four Indian men (0.98%). There are 68 Black women (16.54%), five Coloured women (1.21%) and five White women (1.12%). There are no Indian women.

At level 7, there are 832 positions filled by 324 men (38.94%) and 508 women (61.06%). There are 280 Black men (33.65%), 14 Coloured men (1.68%), 28 White men (3.37%) and two Indian men (0.24%). There are 411 Black women (49.40%), 30 Coloured women (3.60%), 121 Indian women (14.54%) and 56 White women (6.73%).

At level 8, there are 677 positions filled by 334 men (49.33%) and 343 women (50.66%). There are 281 Black men (41.50%), 19 Coloured men (2.80%), 29 White men (4.30%) and five Indian men (0.74%). There are 304 Black women (44.90%), 12 Coloured women (1.77%), four Indian women (0.60%) and 23 White women (3.40%).

At level 9, there are 514 positions filled by 317 men (61.67%) and 197 women (38.33%). There are 257 Black men (50%), 14 Coloured men (2.72%), 43 White men (8.40%) and three Indian men (0.60%). There are 153 Black women (29.80%), nine Coloured women (1.75%), five Indian women (1%) and 30 White women (5.83%).

At level 10, there are 488 positions filled by 280 men (57.40%) and 208 women (42.62%). There are 196 Black men (40.2%), 19 Coloured men (3.90%), 55 White men (11.30%) and ten Indian men (2.1%). There are 174 Black women (35.66%), seven Coloured women (1.43%), ten Indian women (2.5%) and 17 White women (3.5%).

At level 11, there are 554 positions filled by 321 men (57,94%) and 220 women (39,71%). There are 223 Black men (40,25%), 19 Coloured men (3,43%), 65 White men (11,73%) and 14 Indian men (2,53%). There are 191 Black women (34,48%), ten Coloured women (1,81%), ten Indian women (1,81%) and nine White women (1,62%).

At level 12, there are 348 positions filled by 233 men (66,95%) and 115 women (33,05%). There are 145 Black men (41,66%), four Coloured men (1,15%), 75 White men (21,55%) and nine Indian men (2,59%). There are 88 Black women (25,29%), five Coloured women (1,44%), three Indian women (0,90%) and 19 White women (5,46%).

At level 13, there are 141 positions filled by 78 men (55,32%) and 63 women (44,69%). There are 67 Black men (47,52%), one Coloured man (0,71%), five White men (3,55%) and five Indian men (3,55%). There are 51 Black women (36,17%), three Indian women (2,13%) and nine White women (6,38%). There are no Coloured women.

At level 14, there are 36 positions filled by 21 men (58,33%) and 15 women (41,67%). There are 14 Black men (38,89%), two Coloured men (5,56%), two White men (5,56%) and two Indian men (5,56%). There are 11 Black women (30,56%), two Coloured women (5,56%) and two White women (5,56%). There are no Indian women.

At level 15, there is one position filled by a Coloured man (100%).

Level 16 has no occupants.

Considering the above data provided by the DWS, it can be concluded that Black employees constitute most of the employees. Furthermore, Black men comprise the largest workforce percentage at 47.84% and women in the same category represent 36.13%. When considering that Black persons are the largest group in the population, it is not alarming. However, what is concerning is the number of Indian persons employed, considering that Indian men constitute 0.97% and women 0.90%. The demographics indicate a very low number of employees compared to the employee size of other racial groups outside of Black, which is concerning. Section 195 of the Constitution states that public service should be "broadly representative" of the Republic of South Africa and persons of Indian and/or Asian decent make up approximately 1,56 million of the population of South Africa of 60,6 million people. This equates to approximately 2,57% of the total population of South Africa.⁴⁷ Thus, the Constitution indicates a positive obligation created for the employer to achieve a workforce broadly representative of the Republic of South Africa.

Additionally, In the *Solidarity and others vs Minister of Correctional Services*⁴⁸ case, the court confirmed that a "broadly representative workforce" cannot be achieved where an exclusively segmented workforce exists.⁴⁹ The court further stated that the implementation of an EEP addressing this would assist in resolving the concern.⁵⁰

47 <https://www.statista.com/statistics/1116076/total-population-of-south-africa-by-population-group/#:~:text=As%20of%202022%2C%20South%20Africa's,approximately%201.56%20million%20people%20overall> (assessed on 21-03-2023).

48 2016 (10) BCLR 1349 (CC).

49 Para 40.

50 Para 41.

In addition, the *South African Police Service v Solidarity obo Barnard*⁵¹ case established the Barnard principle. The court determined that an employer may refuse to appoint a candidate who falls within a category of persons already adequately represented at a certain occupational level. Considering the data provided by the DWS, it is clear that the over-representation of one race to the almost exclusion of another needs to be addressed by implementing an EEP that speaks to this.

5.2.1.2 Disability

A breakdown of PWD employees are illustrated in Matrix 3. The DWS has reported that it measured 5 410 public servants within its employ and of the 5 410 public servants, it only has 80 PWD employed and therefore does not meet the minimum requirements by 36 persons as its target is 2%. However, it only stands at 1.33%. Unfortunately, the DWS did not provide disaggregated data on the race and gender of the employees for analysis. Thus, the Commission is not afforded an opportunity to properly analyse the extent to which the DWS is under target in respect of PWD within its employ. Furthermore, the Commission cannot conclude whether DWS is indeed an employer doing its best to create an enabling environment for PWD, and thus whether it ensures that all barriers that restrict the employment and promotion of PWD are eliminated. The DWS did not submit any information to the Commission on its difficulties in creating an enabling environment for PWD or mainstreaming gender within the workplace.

51 (2014) 11 BLLR 1025 (CC).

EMPLOYMENT EQUITY STATISTICS FOR DWS, SENIOR MANAGEMENT - JUNE 2022																				
SALARY LEVEL	AFRICAN				INDIAN				COLOURED				WHITE		TOTAL PER SL	% PER SL				
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%						
13	68	47.22	53	36.81	5	3.47	3	2.08	2	1.39	2	1.39	5	3.47	8	5.56	144	74.61		
7	16	43.24	13	35.14	2	5.41	2	5.41	2	5.41	1	2.70	2	5.41	1	2.70	37	19.17		
8	2	28.57	5	71.43	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00	7	3.63		
16	3	0.00	1	0.00	0	0.00	0	0.00	0	0.00	0	0.00	1	0.00	0	0.00	5	2.59		
10 Sub-Tot	89	46.11	72	37.31	7	3.63	3	1.55	4	2.07	1	0.52	8	4.15	9	4.66	193	100.00		
11 TOTAL	161				10				5				17							
12 %	83.42				5.18				2.59				8.81							
13 GRAND TOTAL	193																193			
16 TOTAL AFRICAN PEOPLE AT SENIOR MANAGEMENT LEVEL:																	176		91.19 %	
17 TOTAL WHITE PEOPLE AT SENIOR MANAGEMENT LEVEL:																	17		8.81 %	
18 GRAND TOTAL:																	193		100.00 %	
20 AFRICAN WOMEN IN SENIOR MANAGEMENT:																	76		39.38 %	
21 WHITE WOMEN IN SENIOR MANAGEMENT:																	9		4.66 %	
22 GRAND TOTAL:																	85		44.04 %	
24 PERSONS WITH DISABILITIES:																	80		1.33 %	
25 Total number of public servants measured against:																	5410			
28 LEVELS 13 - 16:																	193			
29 SMS VACANT POSTS:																	58			
30 TOTAL SMS POSTS (FILLED & VACANT):																	251			
31 SMS VACANCY RATE:																	23.11%			
19																			50 %	
20																			Target:	
21																			Does not meet the minimum requirement (This equates to a shortage of 20 african women)	
22																			Target:	
23																			Does not meet the minimum requirement (by (This equates to a shortage of 36 person living with disabilities)	
24																			Target:	
25																			0.67 %	
26																			2 %	
27																				

5.2.2 Gender-responsive budgeting – external environment

Gender-responsive budgeting is geared towards the empowerment of both women and men in terms of procurement. Programmes and projects must provide a budget allocation with disaggregated race and gender data of the beneficiaries. The DWS reported not having any programmes or projects. Furthermore, the DWS reported not having any community outreach/social responsibility programmes to empower or develop women in procurement.

The DWS also reported that the mainstreaming of gender is still a challenge in respect of implementation. Moreover, DWS required increased awareness raising to ensure that all plans are gender and disability responsive. Also, the DWS's vast budgets are focused on infrastructure, and thus it can be a barrier to women who were previously disadvantaged and to people living with disabilities that do not allow them the flexibility to be involved in the infrastructure and built environment.

The DWS furthermore reported that to integrate gender equality in procurement fully: First, it must be an indicator in the APP of the Department on transformation. Secondly, the SMS must include transformation (gender mainstreaming, PWD and youth development in their performance agreement). Lastly, the demand plan of the department must be explicit on targeted procurement for women, youth and PWD.

Firstly, it can therefore be concluded that the DWS does not have an effective gender-responsive procurement programme. Secondly, outside of a discussion that is still underway in respect of having gender-responsive procurement programme plans, there are no other plans established, developed or in existence to implement and track gender-responsive procurement programmes.

However, the CGE has observed that the DWS raised its successes and challenges, indicating that mainstreaming gender is still a challenge to implement. More awareness should be raised to ensure that all plans are gender-and-disability responsive. The DWS's vast budgets are spent on infrastructure. Thus, the department does not allow women who were previously disadvantaged and people living with disabilities the flexibility to be involved in infrastructure and built environment development.

The DWS's plan to fully integrate gender equality in procurement by adding an indicator in the annual performance plan ("APP") of the DWS on transformation, the senior management service ("SMS") to include transformation (gender mainstreaming, people with disabilities and youth development in their performance agreement) and the demand plan of the DWS to be explicit on targeted procurement for women, youth and people living with disabilities

5.2.3 Analysis of promotion of gender equality under procurement spent

5.2.3.1 Section 2 (1) PPPFA (Preferential Procurement Policy Framework Act 5 of 2000)

This section addresses the DWS's compliance in terms of Section 2 of the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and the regulations to the PPPFA as published in 2017. The data provided under this section provides the Commission with data to ascertain how the DWS procures in terms of its obligations within the PPPFA and its regulations. The PPPFA obligations relate to vulnerable groups and how the DWS brings those historically disadvantaged by unfair discrimination into the fold.

The Commission noted that the DWS had previously practically applied the provisions of PPPFA in the procurement of goods and or services to enhance persons or categories of persons historically disadvantaged by discrimination based on race, gender or disability. The information in the matrices below briefly indicates how the target procurement amount was spent.

Matrix 4

% PROCUREMENT FROM WOMEN – YOUTH AND PWD – May 2022		
	Actual Target Procurement Amount	% Procurement
TOTAL PROCUREMENT FOR April 2022	81 460 621,49	
PROCUREMENT FROM WOMEN	82 521 460,88	
51-100% Owned Companies	23 370 759,16	28%
<50-99% Owned companies	59 150 701,72	72%
TOTAL PROCUREMENT FROM WOMEN		
PROCUREMENT FROM YOUTH	6 465 686,45	
51-100% Owned Companies	6 278 696,11	97%
<50-99% Owned companies	186 990,34	3%
TOTAL PROCUREMENT FROM YOUTH		
PROCUREMENT FROM PERSONS WITH DISABILITIES	-	
51-100% Owned Companies	-	0%
<50-99% Owned companies	-	0%
TOTAL PROCUREMENT FROM PWD		
PROCUREMENT FROM BLACK PEOPLE	59 534 968,33	
51-100% Owned Companies	57 119 396,79	96%
<50-99% Owned companies	2 415 571,54	4%
TOTAL PROCUREMENT FROM BLACK PEOPLE		

In terms of the above matrix, it can be observed that the DWS spent a large percentage of its budget and even overspent in terms of its procurement spending in the category of women. The matrix illustrates that the DWS had a total target procurement amount of R81 460 621,49, and the DWS reported having R82 521 460,88 procurement spent on women.

However, notwithstanding the procurement amount spent and the target group from which it was spent, the Commission is not in a position to determine whether the spent amounts were substantive in determining how women-owned businesses are brought substantially into the fold. Thus, whether previously disadvantaged women are benefiting meaningfully from the process. This unscrutinised benefit is of particular importance when considering the scourge of fronting practices where people are presented as stakeholders, sometimes without their knowledge.

The DWS has made strides in its procurement practices in relation to Black-women-owned, youth-owned, and Black-owned companies. However, what is alarming is the zero procurement expenditures for PWD. PWD are more likely to be unemployed or underemployed, as data shows. Consequently, reducing unemployment gaps between persons with and without disabilities not only benefits individuals with disabilities and their families but may also benefit the State by reducing welfare and support costs. Given the ratification of the Convention on the Rights of Persons with Disabilities (CRPD), PWD must receive preferential contracting. Despite not being explicitly required by the CRPD, preferential contracting was intended by the drafters as a tool to ensure that employment-related provisions of the law are implemented.⁵²

Lastly, preferential contracting is a way for governments to implement national development plans and mainstream disability into their development agendas in order to realise Sustainable Development Goals. The SDG 10 target emphasises reducing inequalities, while the SDGs 12.7 and 16.6 address government procurement and expenditures. Even though preferential contracting is not explicitly mentioned in the Sustainable Development Goals, its framing implies that governments should promote income growth for those in poverty (SDG 10.1), facilitate social, economic and political inclusion (SDG 10.2), as well as provide opportunities and eliminate discriminatory practices (SDG 10.3). It is also evident from recent SDG reports that the SDGs support procurement as a method for advancing sustainable development and achieving social and economic inclusion.⁵³

Below is the disaggregated data on the monetary value procured in respect of the categories of listed persons (persons or categories of persons historically disadvantaged by discrimination based on race, gender or disability). As provided in the 2022/2023 first quarter report of qualifying small enterprise ("QSE") and exempted micro enterprise ("EME") from April, May, and June and water trading entity ("WTE") BBEE Report from April, May, and June).

52 United Nations Department of Economic and Social Affairs, Disability and Employment, Fact Sheet I. For more recent data specific to European countries only, see also, Geiger, Ben Baumberg, Kjetil A. van der Wel and Anne Grete Tøge (2017).

53 United Nations Statistics Division (2021), p. 50. the Sustainable Development Goals Report 2021 notes, "As of December 2020, 40 countries had reported on sustainable public procurement policies or action plans (or equivalent legal dispositions), which encourage the procurement of environmentally sound, energy-efficient products, and promote more socially responsible purchasing practices and sustainable supply chains".

5.2.3.2 QSEs and EMEs reporting template

1. 2018/19 financial year

Description	Account	1st Quarter		
		April	May	June
Month				
EME	Main account	6.76%	70.11%	73.66%
QSE		29.09%	14.55%	14.55%
EME	Trade account	25.59%	10.26%	0.38%
QSE		3.23%	38.09%	0.006%

2. 2019/20 financial year

Description	Account	1st Quarter		
		April	May	June
Month				
EME	Main account	76.05%	27.06%	59,79%
QSE		5.21%	21.95%	27,86%
EME	Trade account	77.3%	32,19%	30,64%
QSE		0.2%	11,55%	28,21%

The main account sent through the revised data for March on 4 June 2020. The previous percentage change was EME 57,78% and QSE was 19,02%

3. 2020/21 financial year

Description	Account	1st Quarter		
		April	May	June
Month				
EME	Main account	3%	2,44%	32,22%
QSE		3,20%	29,59%	10,17%
EME	Trade account	9%	42%	33%
QSE		0%	2%	0%

4. 2021/22 financial year

Description	Account	1st Quarter		
		April	May	June
Month				
EME	Main account	39,79%	13,05%	17,52%
QSE		17,52%	25,69%	78,38%
EME	Trade account	-	-	-
QSE		-	-	-

5. 2022/2023 financial year

Description	Account	1st Quarter		
		April	May	June
Month				
EME	Main account	31,08%	56,30%	73,77%
QSE		62,42%	29,23%	16,91%
Women EME	Main Account	20,49%	16,61%	25,23%
Women QSE		13,15%	23,54%	8,11%
Youth EME	Main Account	9,46%	19,29%	21,74%
Youth QSE		49,26%	4,73%	0%
PWD EME	Main Account	0%	0%	1,74%
PWD QSE		0%	0,43%	0%

The period of such procurement/s are on the 2022/23 first quarter report on the main account QSE and EME April, May, June Reports and WTE BBEE Report April, May, and June.

QSE-EME QUARTER 1 REPORT		
APR – JUN 2022		
	Amount	% Procurement on SMME
Grand Total (EME+QSE+LARGE)	R185 914,30	
Grand total for EME	R57 797,50	31,09%
Grand total for QSE	R116 064,00	62,43%
Grand total for Large	R12 052,80	6,48%

CONSOLIDATED% PROCUREMENT FROM QSE AND EMES		
Apr-22		
	Amount	% Procurement
Grand Total for procurement below R30k	R 94 315,30	
EME	R 57 797,50	61,28%
QSE	R 24 465,00	25,94%
LARGE	R 12 052,80	12,78%
Grand Total for procurement above R30k	R 91 599,00	
EME	R 0,00	0,00%
QSE	R 91 599,00	100,00%
LARGE	R 0,00	0,00%
Grand Total for procurement above R1mil	R 0,00	
EME	R 0,00	0,00%
QSE	R 0,00	0,00%
LARGE	R 0,00	0,00%
GRAND TOTAL OF% PROCUREMENT – APRIL		
Grand Total (EME+QSE+LARGE)	R 185 914,30	
Grand total for EME	R 57 797,50	31,09%
Grand total for QSE	R 116 064,00	62,43%
Grand Total for Large	R 12 052,80	6,48%

In respect of the matrices above, similar to Matrix 4, the data does not allow for an acute analysis of the DWS spend and the substantiveness of the spend. The Matrix 4 table depicts a skewed procurement spend, especially concerning PWD.

The DWS reported to the Commission that it had commenced with the incorporation of a subcontracting clause in its terms of reference. The clause was included in consultation with the Chief Procurement Officer (CPO) at the National Treasury. The subcontracting clause inclusion was also confirmed by the correspondence with the CPO. The Treasury guidelines were also attached.

The data in respect of the subcontracting clause could not be provided since the procurement referred to has not been done. The DWS has indicated that supply chain management workshops have been planned and will target entrepreneurs with disabilities in order for the DWS better to understand the root cause of its poor performance. The Gender and Disability Mainstreaming Unit will coordinate entrepreneurs with disabilities to attend these intended workshops, while the Supply Chain Management Officers will be required to make presentations in these workshops.

The DWS is still in the process of finalising its gender-responsive procurement programme plans. In accordance with the PPPFA, the DWS has put measures in place in its Annual Performance Plan to ensure compliance with the Departmental indicator for the "Number of job opportunities created through implementing infrastructure projects". The infrastructure projects will ensure stakeholder management, where Technical Steering Committees report to a multi-stakeholder task team.

Following the above measures, the DWS created new employment opportunities from 2017 to 2021, and mostly women benefited from these new opportunities. Below is the classification of jobs created during each financial year. As per the approved annual reports of the DWS, the following are the number of job opportunities that were created:

- 2017/2018 – 1 604 job opportunities created
- 2018/2019 – 907 job opportunities created
- 2019/2020 – 1 166 job opportunities created
- 2020/2021 – 73 job opportunities created

5.2.4 Women Empowerment Principle 2 (WEP)⁵⁴

The WEP provides for equal opportunity, inclusion and non-discrimination of women. The DWS reported that sufficient participation of women (30% or greater) in decision-making and governance at all levels and across all business areas was required. The DWS has set a target greater than 30%, ensuring sufficient participation of women in decision-making positions and governance at all levels and across all business areas.

5.2.4.1 WEP 5 provides for enterprise development, supply chain and marketing practices

⁵⁴ UN Women and UN Global Compact Office "Women's Empowerment Principles", Equality Means Business, second edition 2011, 2. List of WEP are as follows; 1. Leadership promotes gender equality, 2. Equally opportunity inclusion and non-discrimination, 3. Health, safety and freedom from violence, 4. Education and training, 5. Enterprise development, supply chain and marketing practices, 6. Community leadership and engagement, and 7. Transparency, measuring and reporting.

However, the DWS has expanded relationships with women-owned enterprises, including small businesses and women entrepreneurs. It has done so with the planning of supply chain management workshops aimed at targeting entrepreneurs with disabilities in order for the Department better to understand the root cause of this poor performance. Gender and Disability Mainstreaming will result in the coordination of entrepreneurs with disabilities to attend these workshops. Supply Chain Management Officers will make presentations in these workshops.

5.2.5 Sexual harassment in the workplace

During the initial submission of information, the DWS did not submit any information regarding how it manages sexual harassment complaints in the workplace. However, at its appearance before the Commission, the DWS reported that it did not conduct sexual harassment workshops in 2018 and 2019. The Commission found this to be concerning for the following reasons.

First, it is not clear as to what Code is being employed by DWS in its Sexual Harassment Policy, that is, if a policy does indeed exist.

Secondly, in order to fulfil its obligations as a State under Convention 190 to prevent harassment and violence at work, South Africa introduced the EEA as one of several Acts in respect of addressing discrimination, gender-based violence and harassment in the workplace. Harassment constitutes an unfair form of discrimination, preventing equity and equality in the workplace. The elimination of harassment is therefore imperative, including sexual harassment, gender-based violence, bullying, and racial, ethnic and social origin harassment. Physical, psychological, emotional and sexual abuse are all forms of harassment.

Noting that no policy has been submitted to the Commission and the disclosure made by the DWS in respect of the lack of workshops conducted in the previous financial years, it is difficult to conclude whether DWS is doing its part under the obligations set out in Convention 190 and the objective of the Code of Good Practice is aimed at preventing, eliminating, and managing harassment in the workplace in all forms. The ILO Convention 190 and its recommendations are concerned with the *Elimination of Violence and Harassment in the World of Work, 2019*, *Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111)*, and *ILO Convention 151 on Occupational Health and Safety*.

Lastly, the lack of policy concerns the Commission as it cannot ascertain how the DWS investigates and manages sexual harassment complaints and thus reflects that in respect of sexual harassment, there is an indication of counter-transformation.

5.2.6 Enabling working environment for PWD and mainstreaming disability in the workplace

In spite of presenting data about the number of PWD within the workplace, the DWS did not provide any information about its success in mainstreaming gender within the workplace. In light of the lack of information, the Commission cannot determine whether the DWS has adequately met its EEA duties as a designated employer. As a result, no conclusion can be drawn about whether, in

accordance with the EEA, the employer has analysed its policies, practices, procedures, profiles, environment and culture to identify barriers and potential barriers that hinder the achievement of the EEAs objectives. In addition, policies that prevent previously disadvantaged groups from entering, developing and advancing in the workplace remain unexamined by the DWS.

Lastly, whether it can use these results to develop realistic, workplace-specific Employment Equity Plans that can be measured. Based on the data presented, there is no evidence that an EE plan exists that includes previously disadvantaged designated groups (including PWD) as beneficiaries of the actions and measures outlined in the strategy.

5.2.7 Pay gap

The DWS failed to submit any information regarding the potential pay gap in the Department.

Based on the lack of evidence submitted, the Commission is unable to confidently make a meaningful submission on whether the DWS has identified a pay gap or addressed this concern. However, similar to the State department's position under the DSDB discussed above, the DWS also has the same responsibilities to align in terms of the ILO CONVENTIONS and the EEA's objectives and its REGULATIONS in terms of South Africa's employment equity laws. Due to the lack of data or a report by the DWS, it is difficult to make a determination of arbitrary remuneration practices by the DWS that goes against the public sector practice of operating on an approved salary scale level. A true determination of whether a pay gap exists will require an analysis of the determination of notch progressions and one that is based on prohibited grounds of discrimination or an arbitrary basis.

5.2.8 Skills development

The DWS did not submit any data regarding its skills development policy and whether this policy is being implemented correctly.

Based on the lack of evidence submitted, the Commission cannot determine whether the DWS has identified, developed and implemented a concise skills development policy.

Since the DWS did not submit accurate or required data to the Commission in terms of the questionnaire submitted to the Commission, the Commission could not analyse the activities of the DWS, and therefore the following findings were made.

5.2.9 Findings

The Commission found that the DWS has not provided a full and comprehensive response regarding the questionnaire dispatched, nor did it provide adequate evidence as the questionnaire required.

- The DWS failed/neglected to demonstrate commitment to transformation in its practices;
- Due to the lack of information, the Commission deduced that the working environment is not conducive for persons with various forms of disability, as determined from its report;

- The top and senior management positions are predominantly occupied by Black women and Black men, to the almost exclusion of all other racial groupings;
- The DWS does not have a designated Employment Equity Manager, as required by Section 20 of the EEA, and there is no information submitted to conclude that there is a gender-focal person to spearhead transformation;
- The DWS does not have policies to deal with relevant issues, specifically those of gender, disability, and issues facing the LGBTQIA+ community;
- The DWS did not conduct sexual harassment workshops in 2018 and 2019.

In line with the outcomes of the hearing, the Commission formally, and premised on its powers, requested responses in writing to be delivered to the Commission related to the following:

5.2.10 Recommendations and requests for further information

1. The Department of Water and Sanitation (DWS) must provide the following concerning the questionnaire:
 - 1.1 Full and comprehensive responses to the questionnaire and provide further evidence requested in the questionnaire; and
 - 1.2 Following the completion of the questionnaire, the DWS may be called for a follow-up hearing based on the additional information submitted and for the subsequent analysis.
2. In responding to the Commission's recommendations, the Department of Water and Sanitation must address the lack of information provided in respect of the following:
 - 2.1 Sexual harassment policy;
 - 2.2 Gender-sensitive policies in respect of gender inclusion in line with Section 9 of the Constitution;
 - 2.3 The provision of sexual harassment workshops, with aggregation of the number of employees and the targeted employee cohort within the Department of Water and Sanitation (managerial);
 - 2.4 Comprehensive plan on the sexual harassment training and disciplinary processes in instances of a power imbalance between the perpetrator and the victim within the Department of Water and Sanitation;
 - 2.5 A comprehensive outline of the process of legislative review in line with the Water Services Act to enable the Department of Water and Sanitation to issue directives on the enforcement of compliance with drinking water quality;
 - 2.6 Provide reasons for the lack of a gender-responsive procurement programme within the Department of Water and Sanitation and why this is not a priority for the Department of Water and Sanitation;
 - 2.7 Provide a comprehensive document outlining the disciplinary processes concerning the handling of sexual harassment within the Department of Water and Sanitation;
 - 2.8 The Department of Water and Sanitation must provide disaggregated data in terms of their internal and external working policy concerning PWD and stipulate any

- policies and steps taken to create an enabling work culture in line with universal access guidelines in terms of disability accommodations; and
- 2.9 The Department of Water and Sanitation must provide a timeline in terms of gender markers and KPAs of other members of management.
3. The Department of Water and Sanitation should additionally submit to the following policies:
 - 3.1 Employment Equity Plan;
 - 3.2 Recruitment and Selection Policy;
 - 3.3 Uniform and Protective Clothing Policy;
 - 3.4 Training and Development Policy;
 - 3.5 Sexual Harassment Policy;
 - 3.6 Succession and Retention Policy;
 - 3.7 Flexi-time Policy;
 - 3.8 Maternity leave policy; and
 - 3.9 Any other relevant gender-responsive policies and gender-sensitive policies.
 4. The Department of Water and Sanitation must conduct gender sensitization workshops before the end of March 2023.
 5. The Department of Water and Sanitation must provide the Commission with a comprehensive outline of the steps taken to address the legislative gaps. Addressing the gaps will empower the Department of Water and Sanitation to issue directives to municipalities and water providers on the enforcement of compliance with drinking water quality.

6. Provide the Commission with a comprehensive outline of the Department's intervention in the *Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others matter*;
7. Provide the Commission with a comprehensive outline of the Department's intervention strategy in the Magalies Water matter and the ongoing litigation.
8. DWS should ensure that a comprehensive risk assessment on sexual harassment and bullying in the workplace is conducted, and it should submit the finalised risk assessment report to the Commission.
9. The Department of Water and sanitation should comply with the abovementioned recommendations and submit the written progress report to the Commission by 30 June 2023.

5.3 Clover (Pty) Ltd

The vision of Clover is to be a leading branded foods and beverages group in South Africa and other African countries, providing accessible nutrition to all consumers. Its head office is situated in Roodepoort, Gauteng Province.

Clover appeared before the Commission on 30 November 2022 and presented information regarding its employment equity and transformation.

5.3.1 Workforce profile

Level	Total	Disability (add race)		Women				Men				Foreign- W	Nationals M
		W	M	A	C	I	W	A	C	I	W		
Top management	5	0	0	0	0	0	0	0	0	0	4	0	1
Senior management	14	0	0	1	1	0	1	0	1	0	10	0	0
Middle management	392	2	2	23	9	15	84	40	18	44	155	0	4
Junior management	939	2	5	156	24	27	91	326	83	109	119	1	3
Semi- skilled	3036	4	13	525	118	33	65	1859	270	104	59	2	1
Unskilled	899	0	6	68	4	0	0	766	35	19	5	0	2

In response to the question on "the total number of employees per grade and disaggregate by gender, race and disability status for the current financial year", Clover submitted the following information as per the above matrix.

At the top management level, Clover reported having five positions. There are 100% men and 0% women. The racial composition is 80% White employees, 0% Indian, 0% Coloured and 0% African. There is no representation of PWD at the top management level.

At the senior management level, Clover reported having an increase of 9.6% in the representation

of women between 2017 and 2022. As of 12 August 2022, despite the increase, of the 14 positions, 21,43% are women and 78.57% are men. Pursuant to the probe by the Commission, four women were appointed in November 2022, increasing the representation of women to 32%.

The Commission is concerned that women are not represented in the top management level of Clover, which is contrary to Section 20 of the EEA, which requires the implementation of an Employment Equity Plan ("EEP") to achieve equitable representation at each occupational category. Furthermore, Clover appointed four women at the senior management level to increase the representation of women. Despite this effort, the representation of women at Clover remains insignificant. Insignificant representation of women or lack thereof at the top and senior management levels may lead to a hostile work environment and result in negative effects regarding gender imbalance within the workplace. Commitment is required for Clover to show progress and impact in its transformation journey.

In respect of racial composition at the senior management level, 11 out of 14 positions are occupied by 78.57% White, 7,14% African, and 14,29% Coloured persons. There are no Indian persons and no PWD.

At the middle management level, Clover reported having 392 positions. There are 33,42% women and 66.58% men. The racial composition is 60,97% White, 15,05% Indian, 6,89% Coloured and 16,07% African. There are 1,02% PWD.

Top, senior and middle management levels are dominated by the representation of White persons at over 60% average, which drops to approximately 22% at the junior management level. Similarly, the representation of African, Coloured and Indian persons is dominant at the lowest levels: junior management, semi-skilled and unskilled.

Clover cited that the organisation-wide restructuring in 2021 has impacted the retention of women, leading to a decrease in women's representation at all levels. Clover underwent restructuring and had to let go of some employees whilst others found new employment elsewhere. The restructuring affected both men and women, and their representation decreased. Since women were already under-represented at some levels before the restructuring, Clover made a concerted effort to improve external recruitment of women across all occupational levels to improve the representation of women.

The Commission is concerned that Clover played a reactive role in addressing the under-representation of women instead of a proactive role after the restructuring. Clover had an opportunity to significantly address the under-representation of women, other designated groups and PWD that had existed prior to the restructuring and could have engaged in proactive measures aimed at transforming its representation. As indicated above, the efforts of Clover after the restructuring are insignificant and did not contribute significantly to its transformation journey.

5.3.2 Gender transformation measures and budgeting

Regarding gender-responsive budgeting, Clover has budgeted for the following programmes:

National Certificate: Wholesale and Retail Operations	<p>Purpose: Facilitate employees, preferably merchandisers, to obtain a NQF level 2 qualification</p> <p>Duration: 12 months</p> <p>Requirements: Employees without a matric. A readiness assessment to be completed.</p> <p>Budget allocation: R120 000 pa.</p> <p>Beneficiaries: AM-12 AF-2</p>
Apprenticeships (18.1)	<p>Purpose: Provide permanent employees with an opportunity to obtain a qualification as Artisan Millwrights</p> <p>Duration: 48 months</p> <p>Requirements: Permanent employees must have N2 subjects in Electrical and Mechanical Engineering</p> <p>Budget allocation: R220 632 pa</p> <p>Beneficiaries: AM-1 IM-1 WM-2</p>
Dairyman Programme	<p>Purpose: The Dairyman programme to aims to build competence and provide technical training on the making of Dairy products</p> <p>Duration: 24 months</p> <p>Requirements: Permanent employees</p> <p>Budget allocation: R325 000 pa</p> <p>Beneficiaries: AM-11 WM-2</p>
EML Programme	<p>Purpose: The purpose of the EML programme is to provide employees with the Essentials of Management and Leadership skills</p> <p>Duration: 4 months</p> <p>Requirements: Permanent employees in supervisory or management positions or who have the potential</p> <p>Budget allocation: R640 000 pa</p> <p>Beneficiaries: AM-10, IM-02, CM-02, WM-01, AF-15, IF-01, WF-01</p>
Management Development Programme (MDP)	<p>Purpose: The overall objective of the programme is to build on management and leadership capabilities.</p> <p>The program is split into the course and project work. The participants are given a practical project based on Clover's business need. Clover managers are assigned as sponsors to assist and guide participants on the project. Once completed they are required to present their findings and recommendations to panel members consisting of Clover senior managers and senior lecturers at USB-ED Clover senior managers and senior lecturers at USB-ED</p> <p>Requirements: Based on feedback from Talent review days</p> <p>Budget allocation: R918 000 pa</p> <p>Beneficiaries: AM-06, IM-03, CM-01, WM-03, AF-02, WF-02</p>
Senior Management Development Programme (SMDP)	<p>Purpose: The overall objective of the programme is to build on management and leadership capabilities.</p> <p>The program is split into course and project work. The participants are given a practical project based on Clover's business need. Clover managers are assigned as sponsors to assist and guide participants on the project. Clover senior managers and senior lecturers at USB-ED. Once completed they are required to present their findings and recommendations to panel members consisting of Duration: 8months.</p> <p>Requirements: Based on feedback from Talent review days</p> <p>Budget allocation: R1 298 000 pa</p> <p>Beneficiaries: AM-02, WM-03, AF-03, CF-01, WF-02</p>

5.3.2.1 Social responsibility programmes

Programme or project	Objective or focus	No. of female beneficiaries	No. of male beneficiaries	Budget allocation	Achievements	Challenges
YES Programme	Provide unemployed youth with workplace experience	6	2	R448 000		
Pro-Star Programme	Provide unemployed graduates with workplace experience	21	19	R 4.5m	Over a two-year period, Clover has offered employment to 36 graduates	Shortage of technical skills in fence-line communities
Clover Contact Centre learnership	Provide unemployed learners an opportunity to gain an NQF level 4 qualification and experience at the Call Centre	16	10	R5.5m	The absorption rate of 5%	Difficult to source PWD

Programme or project	Objective or focus	No. of female beneficiaries	No. of male beneficiaries	Budget allocation	Achievements	Challenges
<p>Clover Mama Afrika Project*</p> <p>Please refer to the supporting Appendix 1.3</p>	<p>Give women taking care of abandoned, abused and neglected children, even aids victims, skills, training and equipment to become self-sustainable. We empower women.</p>	<p>We have appointed 57 women all over South Africa so far (over the almost 19 years since the project was established) and 28 of them are very active.</p>	<p>This particular project is women focused. Some men, though, have been sent to Clover Mama Afrika for training.</p>	<p>R4.2m</p>	<p>Proudly SA Homegrown Awards in 2005, 2006 and 2011</p> <p>PMR Corporate Diamond Arrow Award in 2005, Gold Arrow Award in 2008, Overall, Diamond Arrow Award in 2009 and 2010 and Diamond Arrow Award in 2011 and 1st Overall Diamond Arrow Award from 2012 to 2021</p> <p>FoodBev SETA Baobab 2010 Award (14 consecutive wins)</p> <p>Mail & Guardian Investing in the Future Award in 2010 (up against all sub-Saharan countries that entered)</p>	<p>With a limited budget, it is very difficult to appoint additional Clover Mama Afrikas and grow the project</p> <p>Free media exposure without a budget is problematic</p>

Programme or project	Objective or focus	No. of female beneficiaries	No. of male beneficiaries	Budget allocation	Achievements	Challenges
					<p>2nd Annual SA Premier Business Awards – Rural Development in 2013</p> <p>PWC – Gender Mainstreaming Award 2016 – Empowerment of women in the community category</p> <p>Gender Mainstreaming Award 2017</p> <p>Triologue – CSI Strategic Award 2017</p> <p>5th Annual SA Premier Business Award 2018 – Play one's part category</p> <p>6th Gender Mainstreaming Award 2018 – Special Mention in Positive Role Model</p>	

Programme or project	Objective or focus	No. of female beneficiaries	No. of male beneficiaries	Budget allocation	Achievements	Challenges
					<p>CEO Africa Today (International) Award for Best Corporate Social Responsibility project</p> <p>Corporate America Today Annual Award 2021</p> <p>South African CSI Legacy Awards 2021</p> <p>Best in Corporate Investment Project of the Year 2022</p> <p>Standard Bank Top Women 2022</p>	

The Commission commends Clover for implementing several training programmes that led to over 58% of women being absorbed into its workforce. The programmes ensure that men and (mainly) women are upskilled and become graduates and suitably qualified artisans.

The Commission further commends Clover for successfully implementing the Clover Mama Afrika Corporate Social Responsibility Project for over 22 years. For years, the project provided women with skills to generate income and become self-sustainable. It is impactful because it identifies women caring for abandoned, abused or neglected children. The empowerment of women renders them less financially dependent and less susceptible to various forms of discrimination.

Clover cited difficulties sourcing PWD to partake in the Clover Contact Centre learnership programme, and it did not exhaust external sources to source targeted participants. The use of external sources will assist in identifying suitable candidates with a disability and will contribute meaningfully to the representation of PWD at the various occupational levels of Clover.

5.3.3 Sexual harassment in the workplace

5.3.3.1 Workshops on sexual harassment

Clover has not conducted workshops on sexual harassment for the following financial years: 2017/2018, 2018/2019, 2019/2020 and 2020/2021. The Sexual Harassment Policy of Clover is silent on the aspect of training.

The Commission condemns the failure of Clover to conduct workshops on sexual harassment in the workplace for over five years. In Section 5 of the EEA, employers must promote equal workplace opportunity by eliminating unfair discrimination. Furthermore, Section 60 of the EEA places a duty on the employer to protect employees against and to take reasonable proactive steps to eliminate sexual harassment in the workplace. The prolonged failure by Clover to take proactive measures such as conducting a sexual harassment workshop is counter-transformation, unlawful and renders employees susceptible to sexual harassment.

As part of the amendments to the Codes of Good Practice in relation to harassment, Clover planned to incorporate workshops as part of the roll-out of its revised sexual harassment policy. Key policies are discussed as part of the employee onboarding induction, which includes the Sexual Harassment Policy.

5.3.3.2 Reported sexual harassment cases

Clover registered seven cases relating to sexual harassment in the workplace between January 2017 and now. The following table outlines the handling of the said cases:

Charges	Date reported	Date finalised	Outcome	Sanction: if any
Alleged sexual harassment	2018	2018	Employee found guilty	Final written warning
Alleged sexual harassment	2020	2020	Employee found guilty	Final written warning
Alleged sexual harassment	2021	2021	Formal investigation was conducted. Clover employee referred for counselling	External case (harassment was against a Clover employee, handled by external party)
Alleged sexual harassment	2021	2021	Formal investigation was conducted. Clover employee referred for counselling	External case (harassment was against a Clover employee, handled by external party)
Alleged sexual harassment	2021	2021	Formal investigation was conducted. Clover employee referred for counselling	External case (harassment was against a Clover employee, handled by external party)
Alleged sexual harassment	2022	2022	Due to the nature of the incident, no disciplinary action was taken. The matter was handled informally by the HR manager. The charged offender admitted to the wrong-doing and apologised. The apology was accepted, and the matter was resolved	
Alleged sexual harassment	2022	2022	Case reported via anonymous tip off, and charges were drawn up. However, the offender resigned before the hearing took place	

The Commission observed that Clover did not indicate the timeline regarding the case handling, although its Sexual Harassment Policy requires cases to be handled quickly and appropriately. It is unclear when the cases were reported and when they were finalised to determine expedient handling of these cases. The Commission cautions that a lack of measures in place to ensure expeditious handling of sexual harassment cases may lead to a delay in the handling of the cases or neglect thereof. Moreover, Section 60 of the EEA provides for the vicarious liability of the employer where the employer fails to take necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA.

On two sexual harassment matters, Clover found the employees guilty of sexual harassment and issued final written warnings. There is no indication of whether the complainants referred these matters to the CCMA to declare a dispute regarding the sanctions.

The Commission cautions Clover on the likely general imposing of a warning as a sanction to perpetrators found guilty of sexual harassment. It is crucial to ensure that the sanction is appropriate and is informed by the merits of each sexual harassment complaint. Sanctions must aim to deter such conduct in the workplace. Furthermore, it is essential to determine if the misconduct of which the employee was found guilty rendered a continued employment relationship intolerable. Such a determination of an intolerable workplace will avoid subjecting victims and survivors to secondary victimisation caused by the failure to dismiss an employee convicted of sexual harassment. Such a determination of an intolerable workplace is also appropriate to avoid having the employer held vicariously liable. The Commission refers Clover to the matter of *McGregor v Department of Health, Western Cape and Others*⁵⁵ where the Labour Appeal Court indicated that:

“When deciding whether or not to impose the penalty of dismissal, the employer may in addition to the gravity of the misconduct consider factors such as the employee's position in the organisation, the nature of his job and the circumstances of the infringements. In other words, when determining the substantive fairness of the dismissal, the three proven instances of misconduct fail to be construed within the context of the appellant's behaviour overall. An arbitrator is generally required to examine the circumstances surrounding the dismissal and to make a judgment on whether the totality of those circumstances, including but not limited to the proven misconduct with which the employee was charged, has rendered a continued employment relationship intolerable. The question of intolerability generally addresses trust relationship issues between the employer and employee. There must be a rational connection between the factual circumstances and the conclusion of intolerability or a breakdown in the trust relationship.”

As such, generally imposing a warning on sexual harassment cases might not serve as a deterrent but can potentially subject employees to secondary victimisation. Therefore, a proper determination of the impact of the appropriate sanction should be done. Employees should also be informed, through sexual harassment workshops and other means, of their right to refer labour disputes to the CCMA, the Bargaining Council or Labour Court, whichever is applicable. Employee awareness of how to proceed in a case of a sexual harassment charge will empower them to challenge inappropriate findings and sanctions.

⁵⁵) 42 ILJ 514 (LAC) 2021 at paragraph 57.

5.3.4 Conducive workplace

5.3.4.1 Challenges experienced in achieving gender transformation

Clover identified and is working on the following challenges:

- Retention of women in the professionally qualified categories;
- Attracting women in the technically qualified skilled categories;
- Limited new opportunities for progression available at the senior management level; and
- Low attrition rate.

5.3.4.2 Gender transformative programmes offered regarding race and gender to advance employees to managerial positions

- Clover offers learning programmes as mentioned above;
- Clover Circles was introduced and aims to provide opportunities for mentoring by senior leaders in the organisation on topics, such as development, leadership and advancement opportunities; and
- Clover's brand promise enforces a reset of culture transformation, which focuses on continuous growth and development. Its motto is "way better". Clover culture is aligned with the company's purpose and goals.

5.3.4.3 Key performance areas (KPA) performance contract of top and senior managers

Clovers' top and senior managers do not have KPAs that require compliance with transformation or specifically gender transformation. However, Clover utilises an approval form for the non-diverse appointments made in the organisation.

5.3.5 Policy framework

5.3.5.1 Identified barriers

In Clover's EEP, it identifies the following barriers, among others:

- Lack of structured succession planning; and
- Lack of understanding of why employees from designated groups at the junior and middle management levels are leaving the company. The Commission noted that Clover planned to analyse the issues in this regard, and the Commission should be provided with the analysis report upon its conclusion.

5.3.5.2 Policy reviews

Clover aligns its policies annually and whenever there is a change in legislation. However, the Commission observed that the Leave Policy and the Sexual Harassment Policy were last reviewed in 2020.

5.3.5.3 Employment Equity Manager

During the transformation hearing, Clover indicated that Chief Executive Officer Johann Vorster is the designated Employment Equity Manager. He is appointed at the top management salary level and has the highest decision-making power. To the contrary, as part of the information submitted to the Commission, the Commission observed that the appointment letter dated 6 August 2021, provided by Clover, indicates that Aran Oelsner who is/was the Chairman accepted the appointment as the designated manager.

5.3.5.4 Promotions in the last three years

Occupational levels	Disability		Men				Women				Foreign nationals		Total
	Men	Women	A	C	I	W	A	C	I	W	Men	Women	
Top management	0	0	0	0	0	1	0	0	0	0	0	0	1
Senior management	0	0	0	0	0	3	0	0	0	0	0	0	3
Professionally qualified and experienced specialists and mid-management	0	0	13	8	20	47	8	5	5	38	0	0	144
Skilled technical and academically qualified workers, junior management, supervisors, forepersons, and superintendents	0	0	49	18	22	27	17	9	4	24	1	0	171
Semi-skilled and discretionary decision making	1	0	153	20	5	6	20	7	3	5	1	0	220
Unskilled and defined decision making	0	0	13	0	0	0	0	0	0	0	0	0	13
TOTAL PERMANENT	1	0	228	46	47	83	45	21	12	67	2	1	552
Temporary employees	0	0	1	1	0	1	0	0	0	1	0	1	5
GRAND TOTAL	1	0	229	47	47	84	45	21	12	68	2	2	557

5.3.5.5 Breakdown per age group

Occupational levels	Age group									
	1-20	21-25	26-30	31-35	36-40	41-45	46-50	51-55	56-60	Total
Top management	0	0	0	1	0	0	0	0	0	1
Senior management	0	0	0	0	0	2	1	0	0	3
Professionally qualified and experienced specialists and mid-management	0	4	31	38	35	18	9	6	5	146
Skilled technical and academically qualified workers, junior management, supervisors, forepersons, and superintendents	2	20	40	43	34	22	6	2	1	170
Semi-skilled and discretionary decision making	0	19	46	63	43	27	12	7	2	219
Unskilled and defined decision making	0	2	2	3	1	2	1	2	0	13
TOTAL PERMANENT	2	45	119	148	113	71	29	17	8	552
Temporary employees	0	2	1	0	1	0	0	1	0	5
GRAND TOTAL	2	47	120	148	114	71	29	18	8	557

5.3.5.6 Childcare facilities and/or flexi-time for working employees

Due to the nature of Clover's environment, limited flexi-time is permitted, as per the discretion of the line managers. Clover is evaluating the possibility of a more structured flexi-time framework under Executive Committee (EXCO) review.

Clover is in the process of introducing a flexible workplace policy, pending approval from EXCO. The flexible workplace will assist employees with parenting responsibilities. Currently, flexi-time is provided when required and is evaluated on a case-by-case basis.

The first option available in terms of the Maternity Benefits Leave Policy requires that the employees remain in the employ of Clover for at least six months after returning from maternity leave. The policy is to avoid having to refund the pro rata benefits received. This provision seems to have restriction, exclusion and distinction elements, and as such, it requires contextualisation.

5.3.5.7 Company Remuneration Policy

Clover applies the principle of equal pay for work of equal value.

Clover does not have a formal remuneration policy, but the following remuneration principles are applied:

- Competitive remuneration within the industry in which it operates.
- Remuneration is benchmarked against market remuneration at the midpoint (50th percentile).
- The Company supports the principle of equal pay for equal work.
- Minimum salaries are determined and applied consistently throughout the company.
- Remuneration benchmarks are performed annually.
- Clover uses salary scales per grade when appointing or promoting employees.
- Remuneration and salary scales are determined using market benchmark information.
- No employee is appointed or promoted to below the minimum salary for the applicable grade band.

5.3.6 Findings

1. Clover has not conducted workshops on sexual harassment in the past five years. Clover has a duty in terms of Section 5 and Section 60 of the EEA to take reasonable proactive steps to eliminate sexual harassment in the workplace and promote equal opportunity by eliminating unfair discrimination.
2. Clover lacks an understanding of why employees from designated groups at the junior and middle management levels are leaving the company. The duty to create an enabling working environment requires Clover to consult, take into cognisance and address why employees leave Clover's employment. The Commission noted that Clover planned to conduct an analysis in this regard, and it is desirable for the Commission to be provided with the analysis report upon its conclusion. The report will allow the Commission to assess the measures Clover has put in place to create an enabling environment for the retention of designated groups.
3. Top, senior and middle management levels are dominated by the representation of White persons at over 60% average, which drops to about 22% from the junior management level. Similarly, the representation of African, Coloured and Indian persons is dominant at the lowest position, being the junior management, semi-skilled and unskilled levels.
4. Clover cited the difficulty of sourcing PWD to partake in the Clover Contact Centre learnership programme.
5. The key performance areas of Clovers' top and senior managers do not require compliance with transformation or gender transformation. Failure by Clover to set the key performance areas of transformation in the performance agreements of the top and senior managers renders Clover incapable of holding the managers accountable for non-performance and demonstrates a lack of commitment to transformation.
6. The Commission observed that Clover did not indicate the timeline regarding the handling of the sexual harassment cases nor the yardstick to measure the expeditious handling of

these cases.

7. It is not clear who the designated Employment Equity Manager is between the Chief Executive Officer and the Chairman of Clover.

5.3.7 Recommendations

1. Clover (Pty) Ltd must review its sexual harassment policy to ensure that it is aligned with the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*, published on 18 March 2022. In doing so, Clover (Pty) Ltd must ensure that the provisions of bullying, consequences of reporting false allegations and handling the matter involving senior managers and the CEO are included.
2. Clover (Pty) Ltd should ensure the implementation of sustainable measures to safeguard the expeditious handling of sexual harassment complaints.
3. Clover (Pty) Ltd should conduct training/workshops for top and senior managers on the reviewed sexual harassment policy and invite the Commission to observe the workshops when they are being conducted.
4. Clover should ensure that a comprehensive risk assessment on sexual harassment and bullying in the workplace is conducted, and it should submit the finalised risk assessment report to the Commission.
5. Clover (Pty) Ltd must review all its organisational policies that have not been reviewed and ensure that these reviewed policies are resubmitted to the Commission.
6. Clover (Pty) Ltd must ensure the expeditious finalisation and implementation of a written flexi-time policy to curb the potential abuse of managers' discretion when granting flexi-time.
7. Considering the Maternity Policy currently implemented throughout the organisation, Clover (Pty) Ltd should re-evaluate the nature and necessity of the Pregnancy Policy to avoid unintended exclusionary consequences.
8. Clover (Pty) Ltd should conduct an analysis to determine why designated groups are leaving or not being retained within the organisation to improve the representation of designated groups in all occupational categories, per Section 20 of the EEA 55 of 1998 as amended.
9. Clover (Pty) Ltd should develop additional means of consultation with its employees regarding their retention and not only utilise the exit interview process. This process may limit existing staff, as vague or misleading responses are often gathered during the exit interview.
10. Clover (Pty) Ltd should ensure that women are also represented at the top management level, as the lack of representation of women at this level exacerbates the culture of male domination. Similarly, the total dominant representation of White persons is concerning and is inconsistent with Section 20 of the EEA.
11. The Mama Afrika project should be reviewed to provide relevant IT training to the beneficiaries, with due consideration for the need for information technology skills development as a result of the fourth industrial revolution.

12. Clover (Pty) Ltd should ensure that it consults with institutions of learning, civil society organisations and non-profit organisations to assist in sourcing PWD.
13. Clover (Pty) Ltd should provide comprehensive proof of the implementation of the equal pay for work of equal value principle.
14. Clover (Pty) Ltd must review the appointment of the Employment Equity Manager and delegate the necessary authority to the appointed person in order to hold the CEO accountable for transformation.
15. Clover (Pty) Ltd should ensure the inclusion of transformation goals in the key performance areas of the top and senior managers for accountability purposes.
16. Clover (Pty) Ltd should ensure that its various empowerment programmes positively impact its workforce representation throughout the various occupational levels.
17. Clover (Pty) Ltd should provide the evaluation criteria that its compliance officers are utilising in the implementation of compliance legislation against transformation legislation.
18. Clover (Pty) Ltd should comply with the abovementioned recommendations and submit the written progress report to the Commission by 30 June 2023.

5.4 Bird & Co (Pty) Ltd

During the initial operational consultations, the CGE included Bird & Co (Pty) Ltd as one of the entities to be investigated during the transformation hearings.

As part of the initial investigation, Bird & Co was required to complete a questionnaire. After the completed questionnaire was submitted, it was confirmed that Bird & Co had 102 employees but did not have programmes, policies and principles to ensure gender transformation in the workplace.

The information, as received, suggested that there is a need to invite Bird & Co to the transformation hearings to interrogate their state of transformation at the workplace.

The following information was subsequently submitted to the CGE:

- Neither Bird & Co nor Paterimos Franchising (Pty) Ltd are designated employers as envisaged in terms of the Employment Equity Act.

In light of the evidence received from the legal representative of Mr Christo Paterimos, it was established that Bird & Co is not a designated employer, as determined in terms of the Employment Equity Act.

Based on this, the CGE has resolved that Bird & Co is no longer required to appear before it.

6 Conclusion

The Commission generally observed that women are under-represented at the top and senior management levels of the entities, contrary to Section 20 of the EEA, which requires the implementation of an Employment Equity Plan to achieve equitable representation at each occupational category.

Furthermore, there are polarised over-representations of designated groups of persons at all occupational levels within both the public and private sector entities. It appears that the entities fail to maintain a fair or equitable representation of designated groups despite the availability of Constitutional jurisprudence such as the Barnard case. The Barnard case gave rise to the court's determination that an employer may refuse to appoint a candidate who falls within a category of persons already adequately represented at a certain occupational level.

The entities lack disaggregated data regarding internal and external working policies in relation to PWD and failed to create an enabling work culture.

Based on the information received, the Commission observed that entities are resistant to applying the provisions of the B-BBEE and PPPFA fully. Due to such resistance, the consequence is the hampering of progress in relation to Black women and other designated groups owning and managing existing and new enterprises, including increasing their access to economic activities, infrastructure, skills and training. Furthermore, reported data reflects that entities are not acting on their legal obligation to include vulnerable groups within their procurement cycle and to comply with legislation.

The Commission cautions entities against its failure to fulfil legal duties by taking reasonable proactive steps in the elimination of sexual harassment in the workplace. Thus, entities must ensure that employees receive proper and adequate training on sexual harassment, as the failure to provide such training results in an inadequate means of protection from sexual harassment. Consequently, the dereliction of duty may subject employers to vicarious liability in accordance with Section 60 of the EEA.

The Commission observes that the management of sexual harassment complaints remains concerning in both sectors. There is an urgent need to ensure that both sectors are constantly updated in terms of the codes of good practice and that regular training is provided within the relevant organisation. The continued use of outdated codes or prescripts is counter-transformational and unlawful, as well as renders employees susceptible to sexual harassment.

The lack of relevant and consistently implemented gender-responsive budgeting policies, which are geared towards the empowerment of both women and men, demonstrates a lack of commitment to advance transformation by both the public and private sectors.

The failure by the entities to set the key performance areas of transformation into the performance agreements of the top and senior managers renders the entities incapable of holding these managers accountable for non-performance as related to transformation and gender equality.

OFFICES AND CONTACT DETAILS

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