AN ANALYSIS OF THE POLICY-MAKING PROCESS IN THE DEPARTMENT OF LABOUR WITH SPECIFIC REFERENCE TO THE EMPLOYMENT EQUITY ACT, ACT 55 OF 1998

BY

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AN ANALYSIS OF THE POLICY-MAKING PROCESS IN THE DEPARTMENT OF LABOUR WITH SPECIFIC REFERENCE TO THE EMPLOYMENT EQUITY ACT, (ACT 55 OF 1998)

BY

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SUPERVISOR: PROF. H.F. WISSINK

MARCH 2004
I, Lungile Easter Matshikwe, hereby declare that:

- the work in this thesis is my own original work;
- all sources used or referred to have been documented and recognised; and
- this thesis has not been previously submitted in full or partial fulfillment of the requirements for an equivalent or higher qualification at any other recognised educational institution.

..........................................................  ................................
Lungile Easter Matshikwe                          DATE
DEDICATION

To three wonderful women in my life, Nokulunga, Kena, Beauty Matshikwe (Grandmother), and the late Nomaci Mtyekwana (my mother) and Yvonne Vovo Matshikwe (my sister) for their sincere love, encouragement and support.

Your encouragement wherever you are, had given me the strength to complete this study.
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SUMMARY

The research problem in this study was to analyse how the new constitutional, legal and political arrangements have influenced public policy-making in the department of labour with specific reference to the Employment Equity Act. To achieve this objective a theory for analysing policy-making process was presented. Corporatist theory is based on the following assumptions:

- Public policy is shaped by interaction between the state and interest groups.
- The state licences behaviour of interested organizations by attributing public status to them.
- Policy-making is based on interest groups bargaining across a broad range of issues.
- The groups are functionally interdependent to enhance social stability.
- The groups use consensus in making decisions.
- Decision-making is centralised, it is done by leaders.
- The groups are bureaucratic in organization.
- The groups must be recognised by the state so that they can be allowed representation.

The research questions that arise are:

1. Who sets the agenda for policy formulation?
2. How is the policy formulated?
3. How are the decisions taken?
4. How is the policy implemented?
5. How is the policy monitored?

The objective of this study analyse how constitutional, legal and political changes have influenced public policy formulation in the Department of Labour with specific reference to the Employment Equity Act. Policy-making processes in the South African arena and factors that led to the promulgation of Employment Equity Act were discussed.

This study was a qualitative design. Purposive sampling was used in the selection of five participants who were interviewed. All interviews were transcribed verbatim. Data was analysed as described by Rubin and Rubin (1995:260).

The result negated some of the assumptions of corporatist theory and others concurred with the theory. The findings of the study revealed that policy formulation in the Department of Labour is as a result of constitutional, and international conventions obligations. The findings further revealed that policy-information is institutionalised and there are competing interests due to divergent ideological orientations, different social backgrounds; racial differences; different political beliefs; different class background; different historical backgrounds, and gender differences.
The formulation of the act was also characterised by advocacy, adversarism, stereotyping, alliances and consensus. These organisations were bureaucratic and decisions were centralised.

This study recommended a theory and the theory postulates that “public policy is the product of the social, economic, political, cultural, technological, and natural conditions of a given society in a particular epoch or period in the historical development of the particular nation or society and is influenced by dominant national and international forces and these influences may be cultural, economically, social, politically, technological, and type and system of government.”
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CHAPTER 1
STATEMENT OF THE PROBLEM AND RESEARCH METHODOLOGY

1.1 INTRODUCTION

From its colonial past, South Africa has evolved through the following constitutional and political arrangements: the Union of South Africa, consisting of four colonies (Cape of Good Hope, the Orange River Colony, the Transvaal and Natal). This was enabled for by the South Africa Act, (Act 9 of 1909).


These constitutional and political arrangements were based on colonialism and on the policy of separate development (apartheid), which served as the guiding philosophies in the development and formulation of public policy.

The Constitution of the Republic of South Africa (Act 108 of 1996) has brought about fundamental constitutional and political changes and has fundamentally influenced the policy-making process in South Africa. These changes have, inter alia, necessitated the formulation and implementation of economic and social policies that will give effect to the principles embodied in the new Constitution. The principle of equality entrenched in the Constitution is embodied in the Employment Equity Act,(Act 55 of 1998) which is aimed at redressing the imbalances created by the past.

The Constitution of the Republic of South Africa requires that certain values to be upheld in the formulation of public policy. It stipulates that South Africa is
one sovereign democratic state in which the following values should be upheld:

1) Human dignity, the achievement of equality, and the advancement of human rights and freedoms;
2) Non-racialism and non-sexism;
3) Supremacy of the Constitution and the rule of law; and
4) Universal adult suffrage, a national common voter’s roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The abovementioned values have transformed the policy-making environment in South Africa as all policy-making institutions; processes and structures have to adhere to the abovementioned values in order to ensure legitimacy and constitutionality.

1.2 STATEMENT OF THE PROBLEM

Hanekom and Sharkansky (1993:98) state that the previous South African constitutional and political arrangements were based on colonialism and on the policy of separate development (apartheid) as guiding philosophies in the development and formulation of public policy.

The question can be asked why is it necessary to change public policy formulation in South Africa? The purpose of this study is to investigate how public policy is formulated in the Department of Labour with specific reference to the Employment Equity Act, (Act 55 of 1998). For the purposes of this study, the term public policy should be understood to mean those policies developed by government actors, although non-government acts may also influence public policy formulation and development (Wissink 1990:10). What can be deduced from the above definition is that public policies are based on decisions made by governments.
Mkwanazi and Rall (1994:37) write that the apartheid system or policy resulted in the passing of a number of racially discriminatory laws, which ensured white domination economically, socially and politically over other racial groups as described in the Population Registration Act, Act 30 of 1950 which classified people according to race, that is, “black”, “white”, “coloured” and “Asian”.

The racially discriminatory laws included the following pieces of legislation:

1. The Native Land Act, Act 3 of 1913 which provided for the setting aside of small pieces of land and for the exclusive use and occupation thereof by black people. The provisions in this Act later culminated in the homeland system. The greater part of the land was set aside for whites and the small remaining portions for blacks.

2. The Native Urban Areas Act, Act 79 of 1941, which limited the number of blacks present in an urban area to what was required for normal labour requirements.

3. The Group Areas Act, Act 36 of 1966. Its main purpose was to set aside areas in which only members of specified racial groups were entitled to own and occupy land.

4. The Mines and Workers Amendment Act, Act 25 of 1926, which legalised the colour bar in the mining industry.

5. Apprenticeship Act, Act 22 of 1922. This Act prohibited people of colour, and more specifically blacks from being apprenticed and thus from qualifying to assume skilled and semiskilled occupations,

6. The Factories, Machinery and Building Works Act, Act 22 of 1941 and the Industrial Conciliation Act, (Act 41 of 1956). This Act was amended in 1959 and entrusted the Minister of Labour with powers, which enabled him or her to determine the part race could play in various spheres of economic activity. The Act specifically reserved certain industrial occupations for members of specified racial groups.

7. To further restrict the advancement of blacks, an inferior educational system for blacks was designed to ensure white supremacy and self-
determination. This was designed under the Bantu Education Act, (Act 47 of 1953) and separated educational system according to race.

The Constitution of the Republic of South Africa, Act 110 of 1983, which established the tri-cameral parliament, was based on racial discrimination, Indians, Coloureds and whites had their own legislative assemblies, but blacks were excluded and all these racially discriminatory laws were passed to acquire power, resources, skills and reserve jobs for whites. It is evident that public policy in South Africa was formulated along racial lines and that whites acted as guardians of country’s other races, determining what to do, how and when they should act, through the political and economic power they possessed (the whites).

With the introduction of a democratic, non-racial government in 1994, the abovementioned values transformed the policy-making environment in South Africa. Henceforth any policy-making institution processes and structures had to adhere to the abovementioned values and constitutionality. It is against the above background that it was decided to embark upon a study to investigate public policy formulation in the Department of Labour with specific reference to the Employment Equity Act,(Act 55 of 1998).

The assumption is made that policy-makers need a particular level of understanding, expertise and knowledge to enable them to perform their functions and duties in the best interests of the communities in particular and society in general and, furthermore, to uphold the Constitution, as it is the supreme law of the land.

This research is an attempt to investigate how public policy is formulated in the Department of labour with specific reference to the Employment Equity Act, (Act 55 of 1998).
1.3 **KEY QUESTIONS PERTAINING TO THIS RESEARCH**

The purpose of this study is to investigate how the new constitutional, legal and political arrangements have changed or influenced public policy formulation (policy process or processes) in the South African Department of Labour with specific reference to the Employment Equity Act, (Act 55 Of 1998).

De Coning and Fick (1996:20) write that in studies of the policy process, the concern is with how policies are actually made in terms of actions taken by various actors at each stage of the policy process. In this study the contents of the policy namely the Employment Equity Act and the dynamics of public policy formulation in the Department of Labour, will be studied. Therefore, the following questions will be relevant to this study:

1(a) Who sets the agenda for policy formulation?
   (b) How policy issues come to the attention of the government?
   (c) Which process is used?
   (d) Which institutions are involved?
2(a) How is policy formulated?
   (b) Who is involved?
3(a) How are decisions taken?
   (b) How is the policy adopted and adapted?
4(a) How is the policy implemented?
   (b) Which institutions implement the policy?
   (c) Which process are used to implement the policy?
5(a) How is the policy monitored?
   (b) How is the policy evaluated?

1.4 **STATEMENT OF THE HYPOTHESES**

Mouton (1996:1210) claims that a hypothesis is a statement that makes a provisional or conjectured knowledge claim about the world and that it must
be empirically testable, which means that one must be able to specify clearly what data would provide support or rejection.

In this study, it can be hypothesized. The public policy-making environment has changed in South Africa with the ushering in of the new constitutional and political order.

The key question is, to what extent public policy formulation changed in the Department of Labour. That will be investigated, with specific reference to the Employment Equity Act. The Constitution of the Republic of South Africa stipulates that the Constitution is the supreme law of the Republic, which means that parliamentary sovereignty has been changed to constitutional supremacy. The policy-making environment has also changed because of the values policy-makers have to adhere to, as required by the Constitution and the relevant legislations.

A cause for concern is the apparent lack of understanding among the South African public that the policy-making environment in South Africa has changed and that there are new policy-making institutions, processes and structures, and furthermore that there are new policies which should be implemented by the government to influence and shape society in general.

In order to perform their duties effectively, policy-makers in particular and civil society in general should have a broad understanding of the new policy-making processes and policies that have such a profound influence and effect on the daily lives of South Africans.

Mouton (1996:119) contends that it is essential to relate one’s work to an existing body of theoretical and empirical knowledge. One way of doing this, is to frame research hypotheses, either by deriving them deductively from well-established theories, or by basing them on the observation of phenomena and events in everyday life. Mouton (1996:119) further states that to conceptualize also means integrating one’s study into a larger conceptual framework. To conceptualise this study, which relates to public
policy formulation in the Department of Labour with specific reference to the Employment Equity Act, corporatist theory will be useful. Corporatist theory is based on the following assumptions:

- Public policy is shaped by interaction between the state and interest groups.
- The state licenses the behaviour of interested organizations by attributing public status to them.
- Policy-making is based on interest groups bargaining across a broad range of issues.
- The groups are functionally interdependent to enhance social stability.
- The groups use consensus in making decisions.
- Decision-making is centralized, leaders do it.
- The groups are bureaucratic in organizations.
- The groups must be recognized by the state so that they can be allowed representation (Howlett and Ramesh (1995:56),

1.5. **DELIMITATION OF RESEARCH**

This research will be limited to the Department of Labour with specific reference to the Employment Employment Act, (Act 55 of 1998).

1.6 **RESEARCH METHODOLOGY**

This study will be conducted through a qualitative approach. Denzin and Lincoln (1994) write that a paradigm is a set of beliefs that constitutes the researcher’s ontology (the researcher’s perceptions regarding the nature of reality or the world and what there is to know about it); epistemology (the researcher’s perceptions of where he/she stands in relation to reality or the world); and methodology (the researcher’s perceptions of how he or she can find out about reality or the world). Qualitative research will be used in this study, because of the abovementioned aspects, and also because of the nature of the research question.
Denzin and Lincoln (1994:2) define qualitative research as a multiperspective approach (utilizing different qualitative techniques and data collection methods) to social interaction aimed at describing, making sense of interpreting, or reconstructing this interaction in terms of the subjects attached to it. Marshall and Rossmon (1989:148) claim that qualitative research is often accused of falling short of the scientific requirements, namely internal validity; external validity; reliability; and objectivity. These constructs are inappropriate for qualitative inquiry; qualitative studies want to make broader statements about more complex responses than “yes” or “no” answers, as is the case with quantitative studies.

In order to try to fulfill these scientific requirements of internal validity, external validity reliability and objectivity, this study will use multiple respondents representing different formations at the National Economic, Development and Labour Council (Nedlac). Multiple respondents will be used to corroborate data.

1.7 SAMPLE

Marshall and Rossmon (1989) state that qualitative samples are not as large as in quantitative studies. In this study, respondents from organized labour, business or employer organizations, government (Department of Labour) and community (civic) organizations are used because they are represented at the National Economic, Development and Labour Council (Nedlac).

1.8 DATA COLLECTION TECHNIQUES

1.8.1 Literature study

A literature search and a study of current literature on public policy formulation, policy processes, and institutions involved in policy-making, and also a literature search of available texts comprising of relevant books, journals, papers, legislation and other publications have been undertaken to determine how public policy is formulated in the Department of
Labour, with specific reference to the Employment Equity Act.

1.8.2 Interviews

In this study structured and unstructured interviews will be used.

1.9 DATA ANALYSIS AND INTERPRETATION

The data will be analysed as described by Rubin and Rubin (1995:260). These authors state that data analysis begins while interviewing or any data collection method is still ongoing, and that the focus should be on the identification of emergent themes whilst data is collected. The process of data analysis will be aided by available computer software.

1.10 ORGANIZATION OF CHAPTERS

Chapter 1: Research methodology, statement of the problem and organization of chapters

Chapter One refers to the statement of the problem, research methodology, demarcation of the field of study, and the organizing of chapters in this study.

Chapter 2: Public policy formulation within the new constitutional and political dispensation.

Chapter Two deals with the dynamics of public policy formulation within the new constitutional and political dispensation.

Chapter 3: Necessity for Employment Equity in South Africa

Chapter Three investigates why is employment equity necessary, and the contents of the Employment Equity Act.
Chapter 4: Data Collection

Chapter Four deals with empirical research, i.e. a literature study and the interviewing of respondents.

Chapter 5: Findings of the study

Chapter Five deals with the findings of the study.

Chapter 6: Contents of Employment Equity Act

Chapter Six examines the contents of Employment Equity Act

Chapter 7: Integration of the study with theory

Chapter Seven deals with the integration of the study with theory to see whether it supports or rejects the theory and to evaluate the validity of corporatism in policy-making

Chapter 8: Conclusions and recommendations

Chapter Eight presents summaries of the preceding chapters. A number of recommendations regarding public policy formulation in the Department of Labour, with specific reference to the Employment Equity Act, are made.
CHAPTER 2
PUBLIC POLICY WITHIN THE NEW CONSTITUTIONAL DISPENSATION

2. INTRODUCTION

The 1994 elections brought about huge constitutional and political changes. This culminated into the adoption of a new Constitution with specific values, that should be respected, among all South Africans, as well as institutions such as the legislative, the executive and the judicial organs of state.

The new Constitution has created new processes, structures, institutions and procedures that serve as mechanisms for policy formulation in the new constitutional dispensation. This chapter will endeavor to explain these changes.

2.1 ENVIRONMENT OF PUBLIC POLICY FORMULATION

Firstly, it is very important to explain the environment in which public policy is formulated. Parsons (1995:207) argues that public policy-making takes place in the context of the constraints of economic, social, geographical, historical, cultural and globalisation limits, and that public policy-makers engage in judgements as to what these realities are. Some of these realities will now be examined below:

2.2 Economics constraints

Parsons (1995: 208) argues that public policy decisions involve, at their most basic level, choices along the boundaries of what is possible, given the limitations of the resources, available. This means that public policy is usually determined by resources available. The State gets its resources through taxation, which is the taxing of taxpayers. Economic growth is necessary so that many people are employed in order that the tax base may be broadened, which will ultimately empower the government to expand its capacity.
Numerous factors enhance economic growth. A popular view is that government should not intervene in the economy; it should be left to the vagaries of market forces. However, the government should create a conducive climate in which market forces will thrive.

Gildenhuy (1993: 3-21) argues that the above is an ideological question, facing legislators or policy-makers when formulating public policy. Some questions pertaining to the above statement may be refuted or negated as untrue. These differences that arise in policy formulation are usually based on an ideology or approach of that particular government’s macro economic framework. A typical example is COSATU’s vigorous challenging of GEAR as a macro economic framework, although it is part of the tripartite alliance (COSATU, ANC, SACP). Economic constraints is one of the major constraints facing modern states, and a situation exists that certain types of policies are relevant for the third world (poor states) and others for the first world (rich states).

2.3 Social constraints

The social environment includes the entire life of human beings, as individuals and as groups. All differences between people in society result in different social relationships and interaction, and the manifestation of this is the formation of political parties, interest groups, and other institutions found in civil society. Swanepoel (1992: 48) argues that politics has a profound influence, also on public policy, but its influence will depend on political institutions found in that particular country.

2.4 Technological constraints

Public policy is formulated within the rapidly developing technological environment. Fox, Schwella and Wissink (1991: 20) state that public organisations should be encouraged to interact with their technological environments, or they will soon lag behind without any redemption from the
situation. They should be innovative and pro-active or the change will be determined for them without their input. This means that the influence and effect of technological developments on public policy formulation cannot be ignored and should not be underestimated.

2.5 Geographical constraints

The geographical make-up of a country has a profound influence on policy formulation. It might determine the “how” and “why” of policy formulation. It might determine why a certain type of house should be built in a particular area.

2.6 Cultural constraints

Fox et al. (1991: 20) state that institutions as cultural systems include family, religious institutions, and educational institutions. They impose a major constraint on policy formulation, especially in countries where the society is not homogenous. This means that policies should accommodate and cater for cultural and religious diversity.

2.7 Historical constraints

Parsons (1995: 230) argues that policy-makers have to work within the framework of given constitutional arrangements, the territorial distribution of authority, and executive and legislative relationships. This would include the relationships between labour and capital and the international economy. It is further stated that policy-making also takes place within the parameters of past policies and choices, as well as inherited institutional arrangements. When issues arise or when problems are formed and policy options set out, this happens in a setting that comprises the policies, programmes and decisions of the past. The past policies will have a significant influence on how current issues will be defined and what strategies, and means and ends will be deployed. The importance of historical constrains is well illustrated by the South African situation.
Bekker (1996) states that there are four constraints facing South African government as far as policy is concerned. The first is the “new and the old” which arises from the nature of this country’s political transition. The South African political transition has been the etiquette of being a “miracle”, rather than the weightier identification of a revolution. The public policy processes involves both former adversaries; the values and attitudes of both the new and the old policy- making communities.

The second constraint is that public policy is governed by a number of rules. The first set of rules is derived from recently established institutions of democratic governance, for instance, the formal responsibilities of a constitutional judge, Attorney General and Public Protector. The second set of rules has evolved from the “forum movement” and reflects the expectations that public policy needs to bear the stamp of the people’s approval.

The third constraint is that of the Reconstruction and Development White Paper (hereafter referred to as the RDP), which has to effectively address the problems of poverty and gross inequality. This commitment has to be translated into a policy document like the Employment Equity Act, which would centre on goods and services that need to be delivered in order to address inequality and poverty.

In terms of the commitment the focus will be on capacity-building and sustainable development, with the policy accent falling particularly on the training of and access people and communities to information appropriate to their needs.

The fourth constraint is that the South African society is highly diverse. Its groups have experienced divisions along the lines of languages, territory, racial difference and relationships to the South African economy. This has resulted in two related and parallel currents in the country; one promoting a new nationhood based on territory rather than cultural coherence, and the
other claiming the right to celebrate cultural uniqueness, a right that sometimes tends towards claims for self-determination.

The above four constraints present policy-makers with a difficult territory full of potential pitfalls in which to navigate. Firstly the rules of the cultural game are anything but clear. Secondly the game evokes high emotions among players and spectators alike. In particular, the technological and scientific predominance of Eurocentric forms of thought invades and corrodes other systems of knowledge, which nourishes resistance to western ways. Thirdly, policy making on capacity building and affirmative action in a non-racial context appears to be extremely difficult to justify.

2.8 Globalisation

Bekker (1996) argues that since the end of the Cold War, a new world order has emerged. Global interdependence has proliferated and the global economy has grown. There is also growing international ability of financial instruments, investment and some kinds of labour. Parsons (1995: 232 – 235) states that a policy agenda is no longer defined and set with purely national boundaries. The political system operates within what has been described as a “world system”. The implications of the notion of globalisation are that the solidity of the “Estonian black boss,” which defines the “political system” in a rather limited and domestic way, is less robust than it was in the past. The boundaries of the political system may well be atrophying and no longer penetrable to outside pressures and influences.

The world economy has been transformed by new modes of production, by trade and as transnational corporations, and by institutions that exercise more influence and power, so that the capacity of national policy-makers to frame their own agendas has been diminished. Public policy now takes place in world system, as well as in national political systems. Globalisation has the following characteristics and features:
1. *Complexity and diversity.* There is growing complexity and diversity in the institutions and organisations as well as in issues on the global agenda. No longer are defence (UN Security Council) and international relations considered to be the only international issues; others, such as economic welfare, drugs, and the environment, are items on the domestic agenda, are interlocked with global issues. This has been accompanied by growing regionalisation and transnational cooperation; a good example of this is the European Union.

2. *Intense pattern of interaction.* Nation states have a higher level and a greater scope of interaction, through regional bodies and world bodies such as the United Nations.

3. *The permeability of the nation state.* The structural linkages between domestic and external arenas mean that the national policy agenda is more open to developments in other countries, which in turn means that the nation state is now less able to control the agenda than it was in the past. A typical example is the Asian crisis, which affected the world economy.

4. *Rapid and cascading change.* Not only is change rapid, but also change also has the capacity to spill over in an unpredictable fashion into different issues and problems.

5. *The fragility of order and governance.* Global policy is less robust and more fragile than that of nation states. Global compliance and the capacity of international institutions to gain compliance for their decisions varies considerably across issues. From national perspective this means that the policy agenda may be more “global” but the modes of implementation may be more local. The policy agenda may be more global, but decision-making and delivery remain national.
Globalisation proposes that there should be a new kind of interplay between transnational companies and national and world economics; transgovernmental relations and transnational organisations. Gummett (1996: 34) argues that the structure of international economic diplomacy continues to evolve into what is called “new diplomacy”. Triangular in form, it entails traditional state-to-state relationships and firm-to-firm exchanges, but also state-to-firm negotiating and bargaining. Firms have become more important in the interrelationship between states and markets than in the past. In fact Firms or industries are now central to alliances made by governments in their attempts to maximize national welfare.

States still have considerable theoretical and real assets, especially the sovereign right to decide who does what within their territorial jurisdiction, but are also constrained by the heightened search for economic well-being in a globalised division of labour. Gummett (1996: 64) states that multi-national enterprises cannot simply be treated as “National corporate” entities involved in the formulation of public policy within a nation state, but rather as transnational actors with its political behaviour at home and in host states.

The multi-national enterprise makes a difference in the institutional make up in two ways. Firstly, the relations the multinational enterprise entertains with external actors impact directly and indirectly on its own competitive advantage, as well as on overall national competitiveness. Secondly, the multi-national managerial capacities influence variables of public policy processes and outcomes in the bargaining relations with governments and other external actors. The global strategies of individual multi-national enterprise play an increasingly important role in influencing the direction, contents and outcome of public policy choices.

2.9 ENVIRONMENT OF THE FORMULATION OF SOUTH AFRICAN PUBLIC POLICY

Cloete (1994:91–92) writes that the Constitution is the first policy statement of the state and usually the most difficult one on which to reach agreement. The
constitution is a policy statement, because it declares the action to be taken by specified institutions and office-bearers who follow stated procedures and respect prescribed conduct guidelines and values (particularly where the constitution contains a Bill of Rights) for the creation and maintenance of the state.

The Constitution of the Republic of South Africa, Act 108 of 1996 states that the Republic of South Africa is one, sovereign, democratic state founded on the following values:

1) Human dignity, the achievement of equality, and the advancement of human rights and freedoms;
2) Non racialism and non-sexism;
3) Supremacy of the Constitution and the rule of law; and
4) Universal adult suffrage, a national common voter’s roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The Act further states that the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled. This means that the Constitution of the Republic of South Africa binds all legislative, executive and judicial institutions and functionaries on all spheres of government. Chapter 2 of the Constitution states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The state must respect, promote and fulfil the rights in the Bill of Rights.

De Coning and Fick (1996: 10) aver that the mega constitutional and political changes in South Africa heralded an entirely new culture of policy management, based on traits such as transparency, participation and accountability. The ANC (1994: 5) in De Coning and Fick, 1996: 13) claim that democracy for ordinary citizens must not end with formal rights and periodic ‘one person, one vote’ elections. The democratic order should foster a wide
range of institutions of participatory democracy in partnership with civil society on the basis of informed and empowered citizens.

De Coning and Fick (1996: 13) state that the clearest expression, so far, of the government’s serious intentions with regard to the continued involvement of civil society through forum activity in the policy process has been establishment of the National Economic Development and Labour Council (hereafter referred to as (Nedlac) as provided for in the Reconstruction and Development (South Africa 1994) which consists of four chambers respectably dealing with monetary and fiscal policy, trade and industry, labour and development. With regard to the Development Chamber, provision is specifically made for the inclusion of different levels of government, organisations of civil society, as well as organised labour and business.

The Reconstruction and Development (South Africa 1994) encourages government departments to “continue ongoing policy interaction with sectoral forums which comprise key sectoral stakeholders and technical experts, while Provincial government should ensure the broad consultation, co-ordination and engagement and negotiation with all stakeholders through sub-regional and/or local forums.

The Reconstruction and Development White Paper (1994: 39) stipulates that although government has a crucial role in facilitating the RDP, the programme should be implemented through the widest consultation and participation of the South African citizenry. Structured consultation processes at all levels (spheres) of government should be introduced to ensure participation in policy-making and planning, as well as project implementation. Civil society institutions will be empowered to enhance building national consensus.

These stipulations have resulted in the establishment of (Nedlac) as a mechanism of consultation, co-ordination, engagement, and negotiation by key stakeholders. The Nedlac participants include the labour, business and government, sectors, as well as a broader group of interests and organisations. Nedlac has a Development chamber, which brings together
participants from different levels of government institutions and organisations of civil society, organised labour and organised business. The three other chambers are Public Finance and Monetary Policy; Trade and Industry; and Labour. Nedlac plays a key in building consensus on economic and development policy and mobilise the entire South Africa behind the objectives of the RDP or GEAR.

The Reconstruction and development White Paper (1994: 39) stipulates that a variety of sectoral negotiating forums have developed a participatory approach to policy formulation. National line function departments will be encouraged, where appropriate, to continue ongoing policy interaction with sectoral forums, which comprise key sectoral stakeholders and technical experts. Forums will advise Ministers either on request or pro-actively.

The Constitution of the Republic of South Africa, stipulates that South Africa shall be a sovereign and a democratic state. This means that it should adhere to democratic ways of policy making. Ranney (1971: 76 in Bekker 1996: 63) defines democracy as a form of government organised in accordance with the principles of popular sovereignty, political equality, popular consultation and majority rule.

Bekker (1996: 54) writes that the principle of popular sovereignty is at the heart of democracy, and its intent is to place the power to make popular and basic governmental decisions in the hands of the public; and no particular person or elite group should have the power to dictate or dominate. The public may delegate its decision-making power to whomever it wishes, for example to legislators, the executive bodies, and judges. Popular sovereignty exists wherever and whenever the people have vested power to make final decisions on what decision-making powers are to be delegated, and to whom, and for how long and how accountability is to be enforced.

Bekker (1996: 54) further states that the principle of political equality requires that all members of the community should possess equal opportunities to participate in the political process, whatever the process may entail. Hence
the Constitution of the Republic of South Africa Act (Section 19(1)) stipulates that every citizen is free to make political choices, which includes the right a) to form a political party; b) to participate in the activities of, or recruit members for, a political party; and c) to campaign for a political party or cause. Section 19(2) further emphasises that every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution of the Republic of South Africa.

Bekker (1996: 55) claims that the principle of popular consultation demands that the people and not any party leaders or other influential person, persons or body, should ultimately decide which public policies would best serve to advance the common welfare. Certain requirements should be fulfilled with regard to the principle of popular consultation. The first requirement is that the democratic system should provide some kind of institutional machinery that can inform the public officials and other bodies involved of the decisions and policies that the public want to adopt and enforce.

The second requirement is that after having ascertained what the public’s wishes and demands are, government officials should bring these to fruition, irrespective of whether or not they agree with the wisdom of the demands.

Bekker (1996: 55) contends that in a democratic government most decisions that have to be made constitute choices from alternative views, variously supported by different groups, parties or individuals. In order to reach these decisions the principle of majority rule is applied.

2.10 Citizen participation mechanisms

The Reconstruction and Development White Paper (1994: 39) stipulates that the Cabinet took a decision to establish Nedlac as mechanism for the consultation, co-ordination, engagement of and negotiation with key stakeholders. Nedlac includes a Development Chamber, which brings together participants from different levels of government, institutions and organizations of civil society, organised labour and organised business. The
three other chambers are the Public Finance and Monetary Policy, Trade and Industry; and Labour. The Reconstruction and Development White Paper (1994:39) states that the following four stakeholders are represented in Nedlac:

1) Organised labour, represented by the Congress of South African Trade Unions (COSATU), Federated Unions of South Africa (FEDUSA) and the National Council of Trade Unions (NACTU), that directly represent two million workers.

2) Business South Africa (BSA) and the National African Federated Chamber of Commerce (NAFCOC), which represent business.


4) The community, represented by the South African National Civics Association (Civics), the National Women- Coalition (Women), the National Youth Development Forum (Youth), the National Rural Development Forum, (Rural) and the Federal Council for the Disabled (Disabled people). Senior decision-makers from each constituency participate in Nedlac.

i) Objectives of Nedlac

The objectives of Nedlac, as declared by the representatives of the constituencies represented are as follows:

- Sustainable economic growth;
- Greater social equity in the community and workplace; and
- increased participation of all major stakeholders in shaping policy on economic, labour and development issues.
ii) Structure of Nedlac

Nedlac is comprised of four chambers. They are:

- Labour Market Chamber;
- Trade and Industry Chamber;
- Public Finance and Monetary Policy Chamber; and
- Development Chamber.

Six delegates per constituency sit in each chamber. The chambers meet twice a month to draft reports and reach consensus. Experts and advisors are co-opted to assist the representatives with their work. The chambers make recommendations to Nedlac’s Executive Council. Up to eighteen delegates per constituency sit on this Council, which meets quarterly. The Council receives reports backs from the four chambers; reviews progress, and conclude agreements. Only if there is full consensus in the Executive Council, will a recommendation from a chamber be changed. Approximately 300 participants attended the Annual Nedlac Summit, chaired by the President of the country or the Deputy President. Participants receive feedback and inputs from a broad range of organisations and individuals.

The Nedlac Management Committee and Secretariat support the work done in the chambers, Executive Council and National Summit. The Management Committee oversees and co-ordinates Nedlac activities at its monthly meetings. Chamber convenors and a delegate from each constituency attend these meetings. The secretariat, which employs 19 staff members, supports all structures, processes and negotiations.

Nedlac’s long-term vision is to bring about, sustain and extend co-operation between the different social forces in South Africa. A great deal of emphasis is placed on facilitating the process of reaching consensus.
2.11 **Supremacy of the Constitution**

Section 2 of the Constitution of the Republic of South Africa stipulates that the Constitution is the supreme law of the Republic. Law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

Section 2 has transformed the former constitutional model of parliamentary sovereignty/legislative supremacy into one of constitutional supremacy. In a system of constitutional supremacy, the courts have the power to test the constitutional validity of our government action, including parliamentary and provincial statutes. Burns (1998: 41) claims that although parliament is the highest legislative body in a system of constitutional supremacy, it is no longer the highest organ of state, which determines the existence of individual rights and the extent to which these may be curtailed.

Venter (1997: 222) contends that Section 2 of the Constitution of the Republic of South Africa simply means that there is no legal norm in the state higher than the Constitution. The primacy of the Constitution is protected by institutional mechanisms of the Constitution itself. It can, therefore, only continue to work efficiently as long as the citizenry continues to afford it legitimacy by respecting and employing the mechanisms and procedures provided by the Constitution. All components of the state are regulated by the Constitution and by related legal norms. This is true also of the establishment, structuring and operation of the organs entrusted with state authority, as well as the limitations imposed by such authority.

Venter (1997: 222) states that Section 2 of the 1996 Constitution naturally provides the most fundamental standard for the determination, judicially or otherwise, of the validity of legislation. Venter (1997: 222) states that the Constitutional Court indicated that its jurisdiction to test the constitutionality of Bills was founded inter alia upon Section 2 of the 1996 Constitution. It should be noted that it is not only statutory law that must comply with all the provisions of the constitution in order to be valid and effective, Section 2 of the
1996 Constitution provides without any qualification that any law or conduct inconsistent with it is invalid.

2.12 The rule of law

Burns (1998: 9) claims that according to Dicey the “rule of law” rests on the following:

- the absence of arbitrary power – no man is above the law and no man is punishable except for a distinct breach of the law established in the ordinary manner before the courts.
- equality before the law – every man is subject to the ordinary law and the jurisdiction of the ordinary courts.

The Constitution of the Republic of South Africa specifically includes the supremacy of the Constitution and the rule of law as founding principles. Venter (1997: 225) avers that the rule of law should be understood in the South African context as a formal element of the constitutional state (Rechtsstaat) and that it impacts primarily upon constitutional structures and procedures.

2.13 Bill of Rights

Burns (1998: 10) states that the idea of a Bill of Rights was anathema to the traditional South African constitutional system (which was based on parliamentary sovereignty or legislative supremacy, as practiced in Britain, i.e. the Westminster system). The inclusion of a Bill of Rights in the South African Constitution has brought fundamental rights to all spheres of life in the South African society, including the policy-making environment. The Bill of Rights enshrines certain fundamental rights, which the State has a duty to respect, promote, and fulfill. The objective of the Bill of Rights is to protect the individual (who is generally in a subordinate position vis-à-vis the state) from the abuse of power by the state. The Bill of Rights thus effectively curbs the arbitrary limitation, suspension or curtailment of fundamental rights, in that
any such action must take place strictly in accordance with the general limitation clause. In terms of Section 36(1) of the Constitution the rights contained in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

i) the nature of the right;
ii) the importance and purpose of the limitation;
iii) the nature and extent of the limitation;
iv) the relation between the limitation and its purpose; and
v) less restrictive means to achieve the purpose

Section 36(2) of the Constitution further stipulates that, except as provided in Subsection 36(1) of the Constitution or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The Constitution of the Republic of South Africa states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all citizens in South Africa and affirms the democratic values of human dignity, equality and freedom in terms of Section 7(2) of the Constitution. The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

Section 8 makes the Bill of Rights applicable to all law, binds the legislature, the executive, the judiciary and all organs of state. Burns (1998: 15) writes that the phrase “all law” includes legislation, common law and also customary law. It also applies to the rules of private law.

i) **The Bill of Rights binds the legislature**

On the one hand, Burns (1998: 15) claims that the legislature is bound not to limit the rights in the Bill of Rights unconstitutionally, in other words, the legislature must always comply with the requirements of the limitation clause. On the other hand, the State (including the
legislature) also has a positive duty in terms of Section 7(2) to respect, protect and fulfill the rights in the Bill of Rights.

ii) The Bill of Rights binds the judiciary

In terms of Section 165(2) of the Constitution, the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Burns (1998: 16) claims that the courts play a key role in protecting fundamental rights and freedoms. In fulfilling this function and enforcing observance of the Bill of Rights by others, the courts are bound to promote values that underlie an open democratic society based on human dignity, equality and freedom.

iii) The Bill of Rights binds all the executive and other organs of the state

The executive includes all executive bodies at all levels (spheres) of government. In other words, the Cabinet, the President, the Public Administration and any other body, involved in performing state functions, are bound by the Bill of Rights. Section 239 of the Constitution defines an organ of state as follows:

a) any department of state or administration in the national, provincial or local sphere of government; or
b) any other functionary or institution-
   i) exercising a power or performing a function in terms of the constitution or a provincial constitution, or
   ii) exercising a public power or performing a public function in terms of any legislation.
2.14 **Democratic state**

Section 1 of the Constitution of the Republic of South Africa characterises the Republic of South Africa as a democratic state. Burns (1998: 4) claims that the term democracy is not easy to define: “It has many faces, and people are inclined to define democracy to accord with their own views and ideologies rather than to measure their ideologies against some fixed criterion”.

Burns (1998: 4) further states that although the constitution of a country may create the impression of democracy, and may even actually protect human rights, the political process may nevertheless be geared towards restricting representation to an elite group, or even to one specific political party.

In liberal democratic societies, the people are regarded as the constituent power, which means that the constitution can only take effect once the people have approved it. In such a liberal democratic state, the approval of the constitution by the people is a prerequisite for the legitimization of the system created by it.

Burns (1998: 5) avers that the traditional view of democracy – government of the people, by the people and for the people implies that the government takes place with the consent of the people and is geared towards the interests of the people.

It also signifies that the legislatures are made up of representatives elected by the people and that the implementation of policies should be subject to certain clearly defined controls. This implies that policy formulation should follow democratic processes and means. Venter (1997: 225) states that democracy is the cornerstone of the South African Constitution and therefore the key value against which the law and conduct of the government is to be measured. Venter (1997: 225) further indicates that the multi-party system of democratic government is identified as a value upon which the state is founded.
2.15 **Non-racialism and non-sexism**

Section 9(3) of the Constitution 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. Venter (1997: 225) believes that non-racialism and non-sexism are subspecies of equality, and as constitutional values they are derived from equality, which is in turn subsumed in human dignity.

2.16 **STATE INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY**

Burns (1998: 39) states that the Constitution has created a number of state institutions such as the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission, to strengthen constitutional democracy. These institutions may investigate, monitor, and research a wide variety of issues concerning state affairs, gender, equality, human rights violations, and so on.

2.17 **CO-OPERATIVE GOVERNMENT**

The Constitution of the Republic of South Africa stipulates that in the Republic of South Africa, government is constituted as national, provincial and local spheres of government that are distinctive, interdependent and interrelated. Burns (1998: 70) claims that co-operative governance implies willingness on the part of one government authority to co-operate or act in conjunction with other government authorities at the national, provincial and local government spheres. Burns (1998: 70) further maintains that co-operative governance lies therein that:
Although each sphere of government has its unique characteristics and place in the constitutional system, each sphere is, nevertheless dependent on the other spheres of government, and is constitutionally linked to these spheres in terms of the requirements of co-operative governance and intergovernmental relations.

One sphere of government participates in the decision-making of other levels (spheres) of government; for example, the National Council of Provinces represents the provinces in the national legislative process. The permanent numbers of this council (National Council of Provinces) may attend the proceedings of their provincial legislatures and representatives of organised local government may sit in the National Council of Provinces. This means that co-operation and interaction between the different spheres of government is an ongoing process.

Co-operative governance requires that the different levels of government support and assist one another. For example, in allocating revenue, the equitable division of national revenue between the national, provincial and local governments must be regulated by an act of Parliament.

Co-operative governance brings about a sharing of expertise and ensures the delivery of better services to the general public.

Section 41(1) of the Constitution states that all spheres of government and all organs of state within each sphere must:

a) preserve the peace, the national unity and the indivisibility of the Republic;

b) secure the well-being of the people of the Republic;

c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

d) be loyal to the Constitution, the Republic and its people;

e) respect the constitutional status, institutions, powers and functions of government in other spheres;

f) not assume any power or function, except those conferred on them in terms of the Constitution;
g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

h) co-operate with one another in mutual trust and good faith by –
   i) fostering friendly relations;
   ii) assisting and supporting one another;
   iii) informing one another of and consulting one another on matters of common interest;
   iv) co-ordinating their actions and legislation with one another;
   v) adhering to agreed upon procedures; and
   vi) avoiding legal proceedings against one another

Burns (1998: 72) claims that the principles of co-operative governance apply to:

- the national, provincial and local spheres of government;
- the legislative and executive branches within each sphere of government;
- the public administration (including the Public Service);
- organs of the state; and
- public entities.

The above-discussed institutions, structures and processes serve as the environment in which South African public policy is formulated.

2.18 LEVELS OF POLICY

2.18.1 Political policy level

Political policy, which will be the policy of the ruling political party/parties, will always be the highest policy level in the public sector. The governing party or parties set(s) objectives (policy) which point the way in which the authorities will direct community life (Cloete 1994: 94).
The official policy of the government of the day (ANC government) is the Reconstruction and Development policy, though in some quarters within the Tripartite Alliance (the African National Congress (ANC), the Congress of South African Trade Unions (COSATU), and the South African Communist Party (SACP), there is some suspicion that the ANC government has replaced its much-vaunted RDP programme with the Growth, Employment and Redistribution strategy (GEAR). The Reconstruction and Development White Paper (1994: 6-7) states that the Reconstruction and Development programme is the policy instrument that will direct the progress of the transformation strategy. The Reconstruction and Development Policy is a policy framework for integrated and coherent socio-economic progress. It seeks to mobilise all South Africans and the country’s resources towards the final eradication of the effects of apartheid. Its goal is to build a democratic, non-racial and non-sexist future, and it represents a vision for the fundamental transformation of South Africa by:

- developing strong and democratic institutions;
- ensuring representivity and participation;
- ensuring that our South Africa becomes a fully democratic non-racial and non-sexist society; and
- creating a sustainable and environmentally friendly growth and development path.

The Reconstruction and Development White Paper (1994: 7) further states that the RDP, which has developed through a process of consultation and joint policy formulation, will continue to encourage organisations within civil society to take responsibility for the effective implementation of the programme. Bekker (1996: 18) writes that the making of public policy is governed by a number of rules. There are new sets of rules that restrict the process in specific and potentially divergent ways. The first set derives directly from institutions of democratic governance, for instance, the formal responsibilities of the Constitutional Court judge who has to look at the constitutionality of legislation passed by the legislatures, the Attorney General and the Public Protector.
The second set of rules has evolved from the ‘forum movement’ and reflects the expectation that public policy needs to bear the stamp of the people’s approval. Rules about consultation with civil society are well entrenched in the new South African constitutional and political dispensation. Inclusivity, participation and transparency are firmly rooted in the game of public policy formulation (Bekker 1996: 18).

2.18.2 The role of political office-bearers in implementation of policy

The political executive institutions (cabinet, provincial executive councils, and municipal councils) and office-bearers (Ministers and Deputy Ministers, members of the Provincial Executive Council, members of the Executive Mayoral Committee) have to take the initiative in the implementation of policies by legislation. The legislation could state what should be done, and perhaps also how, where and by whom it should be done. Nevertheless, there will be many decisions that will have first to be taken to start the implementation stage. The implementation stage of a policy consists of activities to begin with financing, staffing (personnel provision and utilization), organizing, determining of work procedures and determining of control measures (Cloete 1995:95).

Cloete (1995:96) states that the formulation of a political implementation policy will largely be undertaken by those political executive office-bearers or institutions constituting the superstructure of the executive institutions (e.g. ministers, the cabinet and the provincial executive councils) assisted by top officials.

2.18.3 The role of the executive in implementing policy

When the policy of the government of the day and the political implementation policy have been made known, attention can be given to the formulation of the third policy, viz. administrative executive policy. Administrative executive policy is concerned with the practical steps to give effect to the political
implementation policy and it usually left to the officials to formulate the administrative executive policy (Cloete 1995:96)

2.18.4 **Operational policy**

Apart from policy made at the different levels described above, decisions on various other matters of policy may still have to be taken at the level where the work has to be done, i.e. the operational level and decisions at this level are usually taken by the supervisors and do not really affect the nature of the policy. This level of policy-making usually relates to routine work that can be performed by supervisors at the lower level of the hierarchy (Cloete 1995: 97).

2.18.5 **Provincial and local consultation**

The Reconstruction and Development White Paper (1994: 39) states that to facilitate local and sub-regional consultation and participation, provincial governments should encourage the establishment of sub-regional and/or local forums consisting of representatives of the various stakeholders in the areas. Provincial governments should dictate the boundaries of these sub-regional forums. In consultation with these forums, local authorities will then promote the development of their areas. At provincial level, consultation councils should be established, consisting of representatives of both stakeholders and their sub-regional forums. Their function will be to ensure broad consultation, co-ordination, engagement and negotiation.

2.19 **POLITICAL AND LEGISLATIVE ASPECTS OF POLICY-MAKING**

Cloete (1994: 101) states that the making of policy on every matter will always be a time-consuming and complicated process. To obtain a major policy change or a new policy on even a seemingly insignificant matter, can sometimes become a laborious task because there will seldom be agreement about proposals for a new or amended policy. The usual policy-making procedure is that the political executive office-bearers (the President, ministers, Provincial Premiers, Members of the Provincial Executive Councils,
and Committees of Local Authorities) will normally obtain the approval of the conferences or caucus of the ruling political party or parties for the proposals to be submitted to the legislatures concerned to translate the policy of the ruling political party or the proposals of the officials into the policy of the government of the day.

When a change in policy is proposed, the government often first puts forward its proposals in a Green Paper, which is a discussion document on policy options. It usually originates in the department of the Ministry concerned and is then published for public comment and ideas. A submission date is usually given for input from civil society. This document forms the basis for a White Paper, which is a broad statement of government policy. Comment may again be invited from interested parties.

Once these inputs have been considered, the Minister and officials within the state department concerned may draft legislative proposals. At this stage, the proposals are also considered by the Cabinet. Occasionally, this document may be gazetted as a Draft Bill, for comment by a set date, or given to certain organisations for comment. Once all the comments have been considered, the document is taken to the State Law Advisors who check the proposals and their consistency with existing legislation in detail. The proposals are then printed by Parliament, given a number and tabled or introduced at either the National Assembly or the National Council of Provinces. The document is now no longer a Draft Bill: it is a Bill, and its introduction or tabling is called the first reading. After this reading, it is put on the Order Paper and is submitted to a committee for consideration.

This committee, which consists of members of the different parties represented in Parliament, discuss the Bill. The committee members sometimes call expert witnesses or invite submissions to help refine it, after which they may amend it. When the Committee has approved the Bill, it goes for debate in the House in which it was tabled. Once that House (National Parliament) has agreed to the Bill, it is transmitted to the other House (NCOP), and the same procedure is followed.
When both Houses have passed the Bill, it is allocated an Act number and then goes to the State President to be signed. It is then published in the Government Gazette as an Act and after which it becomes the law of the land.

2.20 Theories of policy-making

Cloete and Wissink (2000:26) state that theories of policy and policy-making are closely associated with political paradigms (ideologies), in which political values play an important role. Major ideologies, which influence specific policy approaches and theories of public policy-making, include the following:

- **liberal laissez-faire approach**, which determines that the state should concern itself with the maintenance of law and order, the protection of society from attacks from the outside, the protection of private property, the establishment of conditions conducive to the promotion of free enterprise and should interfere with the lives and activities of individuals on a limited basis only.

- **socialism**, which is an ideology according to which the state has control over the economy, through economic institutions which function as government institutions, and by abolishing capitalism.

Hanekom (1987: 45) claims that public policy-making theories are utilized just before explain the policy-making process and various authors have designed theories to explain policy-making, inter alia -

- Classical theory (also referred to as institutional theory), which accepts that the different interests represented in government should be taken into account, i.e. the contributions of the legislature, the executive and the judiciary ought to be heeded (*trias politica*)
- Liberal democratic theory, in which the political party assumes the position of primary force in policy-making because it represents the individual voter and is thus superior to interest groups.

- Elite theory, which sees small elite groups acting as leaders of a large group of followers.

- Systems theory, which focuses on the contributions of interrelated forces to policy-making.

Hanekom (1987: 46) states that there is no such thing as an universally agreed upon policy-making theory, and the above theories are not the only theories. In practice, it may seem that the various theories of policy-making suit different situations, or may overlap. Cloete and Wissink (2000:27) state that in South Africa, following negotiations and the setting up of a new government, a new culture has emerged that demands participation in policy-making. This culture of participation in policy-making has been characterised by the institutionalization of policy capacity in organizational settings.

2.21 Models of analyzing policy

Hanekom (1987: 45–46) further states that simplification of policy-making is usually enhanced by using models. Hanekom (1987: 46) contends that models are simplified representations of the real world and are used to order and interpret situations, and to assist in explaining and predicting the outcome(s) of specific choice.

Cloete and Wissink (2000:30) state that in policy management and analysis, models for such analysis fall into two broad categories:

- Those that are appropriate for analysing the process of policy-making, and
- Those that are appropriate for analyzing the content, results impacts and the likely consequences of a policy.
Cloete and Wissink (2000:30) classifies analytical models as follows:

1. Models for analyzing the contents of policy options (what to do). This category of models focuses on the analysis of approaches for determining the most appropriate policy options. The most popular include the rational comprehensive, mixed scanning, instinctive, and the so-called garbage can models.

- The rational-comprehensive model has its roots in the rational-comprehensive decision-making model and implies that the policy-maker has a full range of policy options to choose from.
- The incremental model postulates that only a limited number of policy alternatives are available in an incremental fashion. It regards public policy as the continuation of the existing government activities, with the potential for small, incremental adoption.
- The mixed scanning model integrates the good characteristics of the rational-comprehensive model with those of the incremental model, firstly, by reviewing the overall policy and, secondly, by concentrating on a specific need.
- The garbage can model is where decision-makers and for various reasons delay taking decisions, until circumstances force them into reactive acceptance of a situation that has developed over time into one which they can only accept passively without any real alternative open to them.

2. Models for analyzing policy-making processes (who is involved, why and how). This second main category of model analysis focuses on the policy-making process and which includes the following:

- The elite /mass model is based on the assumption that a small, elite group is solely responsible for policy decisions and this group governs an ill-informed public (masses). Policy decisions
made by elite flow down to the population at large and executed by the bureaucracy.

- The group model, which regards policy as outcome of consensus amongst the group interests. This model assume that the outcome of public policy is representative of an equilibrium reached in the struggle between groups, and further assumes that the policy-makers are sensitive to the demands of the interest groups.

- The institutional model is premised on the understanding that public policy is the product of public institutions. Its proponents argue that public policy is legitimize by government, and only government policies apply to all members of society, the structure of governmental institutions can have an important bearing on policy results.

- Social interaction model is based on general participation, negotiation, mediation and conflict resolution and have proved to relevant in policy process. The theory and practice of negotiations provide a framework or decision-making on policy. This has been particularly true of the constitutional negotiations in South Africa.

- System model is helpful in portraying policy processes on an general and simplistic level and often identifies major sub systems and processes. This model is closely related to the well-known input-output model of David Easton, which focuses on the response by the political system to the demands and needs of interests groups. Such demands enter the political system as inputs and through the political process via such channels as political debates, cabinet memoranda, proposals, counter proposals, consensus and decision (or “conversion”), and agreement on the policy is finally reached or output to be made.

- Policy networks and communities model is of the view that policy decisions are not always taken only by a single decision-maker, but frequently the outcomes of negotiations between
networks of policy stakeholders in different policy communities which may operate either inside or outside the public sector. These networks may be formalized institutions, but they may also be informal and ad hoc. A good illustration of such networks is the existence and operation of the National Employment, Development and labour Council (Nedlac) in South Africa.

- Chaos, complexity and quantum models of policy analysis are as a result of theoretical advances in natural sciences, especially in the field of physics, and have resulted in new theories of complex systems. These approaches are all based on the assumption that in real life, systems are mostly in disequilibrium, and not in equilibrium as traditional systems theory has it. Applied to policy systems, the assumption is that policy stability is in most cases an important objective that is not always achieved, and not the status quo that the policy makers try to maintain.

3. Functional policy stages /phases models

Hogwood and Gunn (1984:4) in Cloete and Wissink (2000:45) state that it is useful to analyse policy process in terms of a number of stages through which an (policy) issue may pass: deciding to decide (issue search or agenda setting, deciding how to decide or issue filtration); forecasting, setting objectives and priorities; option analysis; policy implementation, monitoring and control; evaluation and review and policy maintenance, succession and termination. The stage model views the policy-making process as consisting of activities which are often present, but ignored, in contemporary models. These activities include initiation or becoming aware of the public problem through civic, political or stakeholder action, and agenda setting or placing the issues on the policy agenda and determining of priorities. Subsequent processing involves identifying the problem and the major stakeholders
and considering the options – identifying the major alternative forms of action to solve the problem.

2.22 POLICY MAKING PROCESSES

Cloete (1994: 102) claims that broadly speaking, the policy processes can be placed in three groups, namely:

i) policy making processes (including formulation and legitimization);
ii) policy implementation processes (also known as the executive process; and
iii) policy analysis and evaluation processes.

On the other hand, De Coning and Fick (1996: 22) argue that although the policy process is cyclical in nature, care should be taken to view such a cycle in a dynamic way, in which certain phases or stages need not necessarily take place. Howlett and Ramesh (1995: 11) contends that policy cycle may start with:

1) agenda setting (which refers to the process by which problems come to the attention of governments);
2) policy formulation;
3) policy adoption or decision-making;
4) policy implementation; and
5) policy evaluation.

On the other hand, De coning and Fick (1996: 21) argue that policy can be analysed by using the following stages through which the policy issues may pass:

- deciding to decide (issue search or agenda setting);
- deciding how too decide (or issue filtration);
- issue definition;
- forecasting;
- setting objectives and priorities;
- options analysis;
- policy implementation;
- monitoring and control;
- evaluation and review and finally;
- Policy maintenance, succession or termination.

The above policy stages imply that some stages may or may not appear in the policy cycle. Hanekom (1987:8) argues that by breaking down public policy making into different phases makes it possible to get a clear picture of its very nature. Dror (1990: 91) in De Coning and Fick (1996) states that without value guidance, policy development requires values, grand designs and umbrella conceptions of desirable and feasible visions to increase the coherence of such policies. Vision is an important component of policy development, and is useful for giving policy making and policy implementation a sense of purpose.

Cloete (1994: 103) states that policy-making will always involve interaction between the population (public) and the institutions and functionaries (e.g. the political executive office-bearers), legislatures and officials who have to perform the policy-making functions. They interact through institutions like (Nedlac) and through the constituency offices. Cloete (1994: 103) also avers that the interaction takes place at elections, at meetings between the public, and political office-bearers and officials, and also between the representatives of interest groups and political office bearers. Interaction also occurs through the contact and through public opinion surveys, public meetings and processions, and media campaigns. Institutionalized interaction, such as with Nedlac and sectoral forums also plays an important role in policy-making.

2.23 ROLE-PLAYERS IN PUBLIC POLICY MAKING

Lindblom and Woodhouse (1993: 3) state that because presidents and prime ministers, cabinet secretaries and ministers, mayors and governors,
Legislators and bureaucrats are the most visible parts of the policy-making process, they tend to receive disproportionate attention in media coverage, in courses about politics and public policy, and in the public mind.

Goods and services are obviously produced through a complex economic system, with products emerging through the contributions of numerous people interacting with each other. Public policies, likewise, are produced via a complex political system and cannot be understood by only considering the actions of the President or other top governmental officials.

2.24 Role of the population in policy making

In Chapter 2, the Constitution of the Republic of South Africa, provides fundamental rights, to be respected by all legislative and executive organs of state. This means that individuals should exercise their rights so that they can influence public policy-making. Cloete (1994: 110) writes that an individual is always free to make representation, to political office-bearers and public officials about any matter, that affects him or her, but because individuals are rather insignificant entities in a large community, they must associate with others to enlarge their political significance and powers. For example, an individual can draw up a petition which can be submitted to others for signature before submitting it to a relevant public institution, political office-bearer or officials. A petition submitted to a legislature will have an impact proportionate to the number of signatures it bears.

Section 17 of the Constitution states that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present a petition. This will have an effect on public policy if certain individuals associate themselves with other people to advance their interests when policy is formulated. Section 18 of the Constitution further stipulates that everyone has the right to freedom of association, and that right is qualified by Section 19 (1) of the Constitution, which stipulates that every citizen is free to make political choices, which includes the right-
a) to form a political party;
b) to participate in the activities of, or recruit members for a political party; and
c) to campaign for a political party or cause.

Section 19(2) of the Constitution states that every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution. Section 19 (3) of the Constitution further states that every adult has the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret and to stand for public office and if elected, to hold office. The right to freedom of association is further extended to the labour relations Section 23 of the Constitution, which stipulates that:

1. Everyone has the right to fair labour practice
2. Every worker has the right –
   (a) to form and join a trade union;
   (b) to participate in the activities and programmes of a trade union; and
   (c) to strike
3. Every employer has the right –
   (a) to form and join an employers’ organisation; and
   (b) to participate in the activities and programmes of an employers’ organisation.
4. Every trade union and every employers’ organisation has the right –
   (a) to determine its own administration, programmes and activities;
   (b) to organise; and
   (c) to form and join a federation.
5. Every trade union, employers’ organisation and employer has the right to engage in collective bargaining, which processes are regulated by the Labour Relations Act, (Act 66 of 1995). This means that an individual can exercise the rights stipulated in the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) to influence public policy.
2.25 **Interest and pressure groups or associations affecting public policy**

The Bill of Rights, contained in Chapter 2 of the Constitution provides for fundamental rights, to be respected by all legislative and executive institutions. Cloete (1994: 111) avers that because individuals are polarised, they are powerless and insignificant when they act singularly. Therefore, they have to create voluntary associations (labour, civil, business) to enable them to act collectively. These associations became known as interest or pressure groups. Cloete (1994: 111) writes that it is not always possible to distinguish between interest and pressure groups. The theory is usually advanced that an interest group becomes a pressure group when it starts to play a political role. It can be accepted that most interest groups (e.g. the S.A. Agricultural Union) also serve as pressure groups.

The Reconstruction and Development White Paper (1994: 39) states that Nedlac has been established as a mechanism of consultation, co-ordination, engagement and negotiation by key stakeholders. The structure of Nedlac will include labour, business, and government, while also making room for the participation of a broader group of interests and organisations. This has enhanced the participation of a broad spectrum of stakeholders in policy-making processes in order to build national consensus on national policy issues.

2.26 **Legislative institutions**

Cloete (1994: 113) writes that the legislatures are the top policy-makers on each level (spheres) of government. The legislatures must legitimise policies. Section 2 of the Constitution states that the constitution is the supreme law of the land and any law or conduct inconsistent with it, is invalid. This means that any law enacted by the legislatures must be consistent with the Constitution.

Sections 43 and 44 of the Constitution stipulate that the legislative authority with regard to any matter is vested in the national legislature (i.e. parliament). Cloete (1994: 113) contends that legislative institutions consist of
representatives elected by the voters and that it is the duty of the members of the legislatures (e.g. members of the Houses of Parliament) to bring to the notice of the legislatures the dysfunctional situations identified by them in the government and administration of the country, as well as in community life. Legislatures will mostly consider only the bills (or the draft laws, in the case of the Provinces, or the draft by-laws, in the case of municipal councils) and estimates of expenditure submitted by the political executive office-bearers (ministers, in the case of the National Assembly, or the members of the executive councils of the provinces and the members of executive committees of the municipal councils).

The 1996 Constitution stipulates that Parliament’s key function is to make laws the of the country, and in doing so, Parliament must makes sure that these laws serve the best interests of the citizens. Over and above making laws, Parliament guides and ensures that the Executive and its departments are accountable. Parliament undertakes this function in the following ways:

- The most direct way in which Parliament holds the Executive accountable is by passing the annual budget allocating funds to government departments.
- Members of Parliament can put questions to Ministers – these questions have to be replied to in public.
- The portfolio and select committees of Parliament can investigate any aspect of how government department’s function, and can call any departmental official or even a minister to appear before the committee to supply information.

The 1996 Constitution stipulates that the National Assembly (Parliament) is presided over by the Speaker of the National Assembly, who is assisted by the Deputy Speaker and the Chairperson and Deputies of Committees. The National Assembly consists of no fewer than 350 and no more than 400 members. The National Council of Provinces (NCOP) replaced the former Senate. It came into operation on 4 February 1997. The NCOP is presided over by a Chairperson who is assisted by two Deputy Chairpersons. There
are 90 delegates in the NCOP. Each of the nine provinces has a single
delelegation consisting of ten delegates. The composition and duties of the ten
delegates are as follows:

a) Four special delegates consist of the Premier of the province or, if the
Premier is not available, any member of the provincial legislature
designated by the Premier either generally or for any specific business
before the National Council of Provinces; and six permanent delegates,
appointed in terms of Section 61(2) which states that within 30 days
after the result of a provincial legislature is declared, the legislature
must -

b) determine, in accordance with national legislation, how many of each
party’s delegates are to be permanent delegates and how many are to
be special delegates;

c) appoint the permanent delegates in accordance with the nominations
of the parties.

Discussions and debates cannot be held in detail in the sittings of the Houses.
Therefore committees must be formed to go into detail and debate legislation
before a decision is taken in either of the two Houses. Committees in the
National Assembly are called portfolio committees, while in the NCOP they
are called select committees. To increase participation, committees hold
public hearings and receive submissions from the public. This gives people
the opportunity to raise their views and concerns. In this way, the often
divergent views of different people are taken into account before a law is
passed by Parliament. The meetings of the committees are open to the public,
who are encouraged to attend.

2.27 Legislative authority

Schedules 4 and 5 of the Constitution provide the referential basis for
stipulating the legislative authority assigned to governments at various levels
or spheres. Part A of Schedule 4 A provides a list in two parts of the so-called
functional areas of concurrent national and provincial legislative competence.
Part A consists of some 33 entries, ranging from the administration of indigenous forests to welfare services, indicating matters on which both the national parliament and provincial legislatures can make laws. Part A of Schedule 4 adds additional matters falling under the concurrent legislative competence of the two levels (national and provincial spheres) of government, but also Part B of Schedule A deals specifically with local government legislative competencies; here the entries number 15 and range from air pollution to water and sanitation. Schedule 5 provides, again in two parts, a list of functional areas of exclusive provincial legislative competence. The 12 entries range (Part A) from abattoirs to veterinary services, while Part B of Schedule 5 lists local government matters; in this instance 23 matters, ranging from beaches and amusement facilities to traffic and parking.

Section 155(6) and (7) of the Constitution empowers duly elected municipal council to make by-laws on any matter listed in Part B of Schedule 4 and Part B of Schedule 5, as well as on any other matter assigned to it by national or provincial legislation. Section 156(2) of the Constitution stipulates that a municipality may make and administer by-laws for the effective administration of the matters, which it has the right to administer.

Robson (1998: 28) avers that the legislative competence of a municipal council is limited in three main ways. The Constitution stipulates that any by-law that conflicts with national or provincial legislation is invalid (Section 156(3)). A provincial government must by legislative or other measures provide for the monitoring and support of local government (Section 155(6)(a)). Section 155(7) of the Constitution further grants to both the national and provincial governments the legislative and executive authority to see to the effective performance by municipalities of their functions.

Robson (1998: 28) writes that at the provincial level (sphere), authority is vested in the provincial legislatures to pass legislation in regard to a matter in the functional areas in which they are competent to pass legislation. Section 104(1)(c) of the Constitution empowers a provincial legislature to assign any of its legislative powers to a municipal council in that province. Section 146(2)
further stipulates that national legislation that applies uniformly to the country as a whole shall prevail over provincial legislation –

- in matters that cannot be regulated effectively by separately enacted provincial legislation;
- in matters that should be handled uniformly across the nation and provides such uniformity by establishing norms and standards; frameworks; or national policies.
- if necessary for the maintenance of national security, the maintenance of economic unity, the protection of the common market,
- in promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services, or the protection of the environment.
- If it is aimed at preventing unreasonable actions by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole; or impedes the implementation of a national economic policy.

In terms of section 44 (1) of the Constitution national legislative, authority is vested in Parliament. Robson (1998: 30) states that the Constitution places residual legislative authority with Parliament; in other words, the authority to pass legislation on a matter not specifically mentioned in the Constitution is vested in Parliament. A feature of the legislative process at national level is the right of participation granted to the provinces via the National Council of Provinces (NCOP), including participation in legislation concerning so-called residual matters (Section 44 (2)). The National Assembly may also assign any of its legislative powers, except the power to amend the Constitution, to any legislative body at another level of government (Section 44 (1) (a) (iii)).

2.28 Political executive institutions

Cloete (1994: 114) states that political executive institutions serves as links between the legislatures and the administrative executive institutions, e.g. the cabinet, the provincial premiers-in-executive council; and the municipal
executive committees. Cloete (1994: 115) avers that the significance of the cabinet and its members as policy-makers resides in the fact that bills generally have to be submitted to them before they are introduced in Parliament. It is essential for the Cabinet to approve the budgetary proposals before they are introduced in the Houses of Parliament. It is largely the Cabinet, that determines whether or not changes in policy will be brought about and, if so, at what speed. On the provincial level (sphere) of government, the premiers, the executive councils, and local council committees dominate in policy- making. Meetings of the Cabinet and other political executive institutions are usually held behind closed doors. The Cabinet and provincial executive councils usually deal with a broad policy framework, and once they have made decisions in principle, the development of policy will largely be delegated to individual ministers or even to top officials. The Cabinet and provincial executive councils are collectively responsible for everything that their colleagues and subordinates do, or neglect to do; therefore the latter will guard against doing anything that will embarrass the Cabinet of a provincial executive council.

In terms of Section 85 (1) of the Constitution, the executive authority of the Republic is vested in the President. Section 85(2) further states that the President exercises the executive authority, together with the other members of the Cabinet, by:

- implementing national legislation, except where the Constitution or an Act of Parliament provides otherwise;
- developing and implementing national policy;
- co-ordinating the functions of state departments and administrations;
- preparing and initiating legislation; and
- any other executive function provided for in the Constitution or in national legislation.

A Cabinet member may, by mutual agreement, assign a power or function, to be exercised or performed in terms of an Act of Parliament, to a member of a provincial executive council, or to a municipal council (Section 99).
Section 156(1) provides that a municipal council has executive authority in respect of, and the right to administer any listed local government matter, (Part B of Schedule 4 and part B of Schedule 5), as well as any other matter assigned to it by national or provincial legislation (Section 156(1)). A municipal council can also administer any matter falling in a functional area listed in Part A of Schedule 4 (functional areas of concurrent national and provincial legislative competence) or Part A of Schedule 5 (functional areas of exclusive provincial legislative competence) where such a matter has been assigned to it by the national or provincial government (Section 156(4)).

The executive authority of a municipal council is qualified by a power given to its provincial government to monitor and support local government in that province, as well as by the legislative and executive authority granted to the national and provincial governments to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5 (Sections 155(6)(a) and 155(7)).

Section 139(1) provides for the intervention by the provincial executive when a municipality cannot or does not fulfill its executive obligation in terms of legislation. The provincial executive can (a) issue a directive to the council describing the extent of the failure to fulfill its obligation, or (b) itself assume responsibility for a particular obligation to the extent necessary to-

- maintain essential national standards, or meet minimum standards for the rendering of a service;
- prevent the council from taking unreasonable action that is prejudicial to another municipality or to the province as a whole; or
- maintain economic unity.

Such intervention by a provincial executive is subject to the approval of the Cabinet Minister responsible for local government, as well as to approval and review by the National Council of Provinces (NCOP) (Section 139(2)).
Section 125(1) of the Constitution states that at the provincial level (sphere) of government, executive authority vests in the Premier, and such authority is exercised together with other Members of the Executive Council. The executive authority is exercised *inter alia* by implementing provincial legislation and by implementing national legislation regarding matters falling in the functional areas listed in Schedules 4 and 5 of the 1996 Constitution, except where the Constitution or any Act of Parliament provides otherwise, and by the administration of other national legislation where the administration is assigned to the province in terms of an Act of Parliament. To be permitted to implement or administer national legislation, a provincial executive must have the necessary administrative capacity to do so (Section 125 (3)).

Section 125(5) states that the implementation of provincial legislation is an ‘exclusive provincial power’. It provides for intervention by the national executive in provincial affairs in circumstances where a province cannot or does not fulfill an executive obligation in terms of legislation or the Constitution.

### 2.29 Political executive office bearers

Cloete (1994: 117) states that the political executive office-bearers (e.g. the President, Executive Deputy President, ministers, provincial premiers, members of provincial executive councils, and members of municipal executive committees), and the institutions staffed by them, will always have the final say in the legislative and budgetary proposals submitted to the legislatures. The political executive office-bearers should be the principal initiators/innovators in policy-making.

In terms of Section 73(2) of the Constitution only a cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a bill in the Assembly; however only the Cabinet member responsible for national financial matters may introduce a money bill in the Assembly.
2.30 **Public officials as policy-makers**

Section 197 of the Constitution stipulates that within public administration there is a Public Service for the Republic of South Africa, that must function and be structured in terms of national legislation, and that must loyally execute the lawful policies of the government-of-the-day. This means that public officials should execute public policy that is authorised by Parliament and enacted in legislation. Section 197(4), stipulates that provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the Public Service in their administrations applying to the Public Service. This means that the provincial Public Service must observe the stipulations of the national legislation or constitution as provided by the principles of co-operative governance (Section 41(1)).

Dye (1995: 311) argues that policy-making does not end with the passage of law and the signing by the President, “Implementation of public policy is the continuation of politics by other means.” The bureaucracy is not constitutionally empowered to decide policy questions, but is does so, nonetheless, as it performs its task of implementation. Implementation involves all of the activities designed to carry out the policies enacted by the legislative branch. These activities include the creation of new organizations. These organizations must translate laws into operational rules and regulations. They must hire personnel, draw up contracts, spend money and perform tasks. All of these activities involve decisions by officials, decisions that determine policy.

2.31 **Departmental and interdepartmental committees**

Cloete (1994: 120) states that departmental and interdepartmental committees can be appointed by ministers, officeholders or political office-bearers or even heads of state departments, either to investigate a particular vexatious matter or to collect factual information or possibly to make recommendations on how to solve problems or otherwise deal with them.
In terms section 40(1) of the Constitution, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated. All spheres of government must observe and adhere to the principles of co-operative government and intergovernmental relations.

Burns (1998: 72) contends that the principles of co-operative governance apply to:

- the national, provincial and local spheres of government;
- the legislative and executive branches within each sphere of government;
- the public administration (including the Public Service);
- organs of state; and public entities.

Burns (1998: 72) avers that Section 151 of the Constitution implies a number of instances when the principles of co-operative governance and intergovernmental relations come into play, and that municipalities must co-operate with each other. Subsection 2 provides that the executive and legislative authority of a municipality is vested in its municipal council, which means that these two branches of a municipality must work together. Subsection 3 recognizes a municipality’s right to govern its own affairs, subject to national and provincial legislation. This indicates co-operation with the national and provincial legislatures and underlines the fact that local governmental by-laws are subject to national and provincial enactments. National and provincial governments may not compromise or impede a municipality’s right to exercise its power or perform its functions.

Burns (1998: 72) states that Section 156(1) of the Constitution indicates vertical co-operation between a municipality and the provincial legislature, while Sub-Section 3 states that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to
national and provincial legislation, as provided in the Constitution. This is an example of vertical co-operation between all three spheres of government.

2.32 **Central directive, research and co-ordinating institutions**

Cloete (1994: 118) contends that the central directive and co-ordinating institutions such as the Department of the Finance, Financial and Fiscal Commission, the Public Service Commission, and the Central Statistical Service, undertake research in the fields entrusted to them and prepare legislation as well as regulations and codes of procedures to stipulate measures for the implementation of policy. A principal function of these institutions is to conceive, find or discover new ways, methods or procedures of performing tasks and functions and to make new laws or amend existing laws and other directives to bring such innovations into effect. The central directive institutions usually serve as co-ordinating institutions to ensure that all concerned institutions apply the same policy and implementation measures.

In terms of Section 196(1) of the Constitution, there is a single Public Service Commission for the Republic, and its powers and functions are:

- to promote the values and principles set out in Section 195(1) of the Constitution (which are the basic values and principles governing public administration), throughout the Public Service;
- to investigate, monitor and evaluate the organization and administration, and personnel practices, of the public service;
- to propose measures to ensure affective and efficient performance within the public service;
- to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in Section 195;
- to report in respect of its activities and the performance of its functions, including any funding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and
principles set out in Section 195 are complied with; and, either on its own accord or on receipt of any complaint –

i) to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature;

ii) to investigate grievances of employees in the Public Services concerning official acts or omissions, and recommend appropriate remedies;

iii) to monitor and investigate adherence to applicable procedures in the Public Service; and

iv) to advise national and provincial organs of state regarding personnel practices in the Public Service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the Public Service.

Section 220(1) creates a Financial and Fiscal Commission, which must function in terms of an Act of Parliament and, in performing its functions, must consider all relevant factors, including those listed in Section 214(2). There must be consultation between organized local government, provincial governments and the Financial and Fiscal Commission and any recommendations of the Commission have to be considered, taking into account the following:

- the national interest;
- any provision that must be made in respect of the national debt and other national obligations;
- the needs and interests of the national government, as determined by objective criteria;
- the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- the fiscal capacity and efficiency of the provinces and municipalities;
- developmental and other needs of provinces, local government and municipalities;
- economic disparities within and among the provinces;
- obligations of the provinces and municipalities in terms of national legislation;
- the desirability of the stable and predictable allocation of revenue; and
- the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

The above functions, duties and powers imply that these central directive and co-ordinating institutions have a profound influence on public policy-making in respect of their areas of operation.

2.33 Commissions of inquiry

Cloete (1994: 119) states that commissions of inquiry are often used to obtain information on and assess various matters. These commissions are usually appointed by the Head of State (President) on the advice of the Cabinet and possibly ministers, or the Premier of province acting on the advice of the provincial Executive Council. One major advantage of a commission of inquiry is that usually persons who are not officials or political office-bearers can be appointed as members.

The success of a commission will largely depend on its composition. The members should preferably be persons who possess expert knowledge on the matter in question, i.e. a commission of inquiry should be constituted in such a manner that the members are impartial experts who have a keen awareness of the needs of all the interested parties.

Cloete (1994: 119) further states that one major point of criticism against commissions of inquiry that is the government (or whichever other authority appoints them) sometimes uses commissions to delay taking a decision about a vexing or contentious matter. This could possibly occur when government does not have a policy on the matter in question and therefore opts to refer it to an expensive and time-consuming commission of inquiry. It is also alleged that the authorities, for some unknown reason, sometimes have no intention of acting constructively to rectify a matter of complaint and then simply
appoint a commission of inquiry as a means of placating the interested (or disgruntled) parties.

Cloete (1994: 119) argues that a matter can hardly be subjected to a thorough investigation other than by means of a commission of inquiry. Such commissions can, however only make recommendations and cannot be held responsible for action taken as a result of its finding or failure to take action. The Ministers, Cabinet or Premier in the Executive Council will, in due course, have to take a decision about the recommendations, once it has been established whether they are amendable to implementation. It is the Minister or other office-bearer concerned who will have to accept responsibility for action taken as a result of the findings of any commission of inquiry, and this could cause a commission to be less circumspect than it might otherwise have been in making recommendations on policy matters and the means to give effect thereto.

2.34 Research institutions

Cloete (1994: 118) claims that the public research institutions such as the Council for Scientific and Industrial Research (CSIR) and the Human Sciences Research Council (HSRC), can also be commissioned by public institutions to undertake research on their behalf for policy-making purposes. South African universities can also undertake research of value to public institutions.

Mmakola (1996: 13) argues that a very significant, but perhaps less frequently discussed, phenomenon characterising current policy-making in South Africa is the volume and nature of the research that informs the process. Mmakola (1996: 13) claims that there has been a significant shift from the former apartheid regime, which tended to be indifferent or even actively hostile to independent research, particularly if the loyalty of the researchers or the research findings to the apartheid philosophy was in doubt.
Mmakola (1996: 13) states that this situation changed dramatically in the period preceding the 1994 elections. This period saw the mushrooming of many centres/institutes, mainly in the non-governmental sector, conducting research on policy issues. Research tended to originate from some multi-lateral organizations such as The World Bank, and a number of universities.

2.35 **International institutions**

Cloete (1994: 120) states that nowadays certain international institutions can provide policies or standards that must be observed by all countries, e.g. the International Civic Aviation Organisation (ICAO) can prescribe standards that must be respected by all countries over the world. Cloete (1994: 120) contends that while the United Nations and its specialised agencies cannot prescribe rules to be observed by sovereign states, but the states will in their policy-making give some weight to the resolutions and recommendations of such international institutions.

Section 39(1)(b) of the Constitution stipulates that when interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom must consider international law and may consider foreign law.

Burns (1998: 21) claims that Section 39(2) should be read with Sections 231 to 233 of the Constitution, which provides for the incorporation of treaties. In terms of Section 231(1) of the Constitution the negotiating and signing of all international agreements is the responsibility of the national executive,

- An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.
- An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive binds the Republic without approval by the National Assembly and the National Council of
Provinces, but must be tabled in the National Assembly and National Council of Provinces within a reasonable time.

- An international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament; and

- The Republic is bound by international agreements that were binding on the Republic when the 1996 Constitution took effect.

This means that the South African government respects the following charters when formulating public policy, provided they are consistent with the Constitution.

- The Charter of the United Nations
- The Universal Declaration of Human Rights
- The International Covenant on Economic, Social and Cultural rights
- The African Charter on Human and Peoples rights (Benjul Charter)

Section 232 of the Constitution stipulates that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Other international institutions that have a profound influence on South African public policy formulation are the Organization of African Unity (OAU) and the South African Development Council. They influence South Africa because it is the member state of these institutions and consequently has to implement the resolutions of the various bodies attached to these institutions. Furthermore South Africa shares common problems with the other African governments, because of their geographical location and common history as far as colonisation is concerned.
2.36 **Other states: international influences**

Cloete (1994: 122) claims that the affairs of countries are often so intertwined that every state must, in its policy-making, take into account developments in other countries and policy statements by their heads of state and other influential leaders of other states. Usually, every country will enter into agreements with other countries. These agreements must be taken into account when policy is made. Some of these agreements provide for multilateral institutions (committees and commissions) (an example is the bilateral committees between South Africa and the United States of America) to deal with specific matters, such as health and trade. The decisions of these multi-lateral institutions must also be taken into account by the policy-makers. Section 231(2) of the Constitution stipulates that an international agreement binds the Republic of South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces.

2.37 **Newspapers and other news media**

Cloete (1994: 122) claims that newspapers and journals (i.e. the print media) as well as other news media (for example, the electronic media), play significant roles in politics and public policy-making. Newspapers and other news media are usually controlled or influenced by interest or pressure groups. This will obviously influence public policy-making because it ensures that conflicting views are brought to light.

In terms of Section 16(1) of the Constitution everyone has the right to freedom of expression, which includes (a) freedom of the press and other media, (b) and freedom to receive or impart information or ideas. This means that every individual can use the above rights to influence public policy. However, in practice it is difficult to do so because the press is controlled by specific groups with divergent ideologies, especially in a stratified society like South Africa.
Cloete (1994: 122) states that public officials and political office-bearers should be careful not to base their policy decisions merely on the views expressed or propagated by the news media. The officials and politicians should first undertake independent investigations to verify the truthfulness of views expressed and propagated by the news media.

2.38 **Policy implementation processes**

Dye (1995:311–312) avers that the implementation of policy is the continuation of politics by other means, and it does not end with the passing of a law. Policy implementation involves all the activities designed to carry out the policies enacted by the legislative branch. These activities include the creation of new organisations – departments, agencies, bureaus and so on – or the assignment of new responsibilities to existing organisations. These organisations must translate laws into operational rules and regulations. They must hire personnel, draw up contracts, spend money and perform tasks.

Cloete (1994: 108) explains that policy implementation will require the performance of the full spectrum of activities, constituting public administration, namely the generic administrative, the auxiliary and instrumental activities, as well as the functional activities. Hanekom (1987: 55) argues that although policy-making and policy implementation are two distinct and distinguishable functions, they are so closely interrelated that separating them is difficult, if not impossible or impractical. Hanekom (1987: 55) avers that policy implementation is the Achilles’ heel of the entire policy process and therefore also of the entire administrative process. Policies are not self-implementing and if public officials did not implement policies, not much of the day-to-day work of government would be done. This means legislation should be enforced to prevent policies from becoming nullities. De Coning and Fick (1996: 26) aver that it is widely recognised that policy implementation today is the responsibility of government, the private sector and the non-governmental organisations (NGOs).
i) Who implements public policies

Hanekom (1987: 56) claims that public policies are made, implemented and evaluated by public officials and by governmental institutions duly authorised or specifically established to do so. The institutions and individuals specifically involved in implementing public policies will be examined later.

ii) Public officials

Hanekom (1987: 56) states that public policy, i.e. legislation, becomes significant only when implemented, usually by the appointed public official who originally formulated the policy. His or her actions or inactions can seriously impede the success of a particular policy. The successful implementation of policy depends on the insight of the official and whether he or she identifies him or herself with the policy aims of the legislator. The official's decisions pertaining to policy implementation are limited to those that correspond to the political policy of the government in power. The decisions of officials should, if possible, be those decisions, which the political office-bearer would have taken him-herself, if he/she were personally implementing the policy.

The Constitution of the Republic of South Africa stipulates that (within public administration) there is a Public Service for the Republic, which must function and be structured in terms of national legislation, and which must loyally execute the lawful policies of the government-of-the-day, which means that public officials should loyally execute the programmes of the RDP and the GEAR, which are the official policies of the ANC, and, more-over they should loyally execute policies that are in service of the Constitution, as South Africa is a constitutional state. The Constitution further stipulates that provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the Public Service in their administrations.
within a framework of uniform norms and standards applying to the Public Service.

The policies of the government-of-the day should be executed in a co-operative manner, because in the Republic of South Africa, government is constituted as national, provincial and local spheres that are distinctive, interdependent and interrelated. The Constitution further stipulates that all spheres of government and all organs of state within each sphere must-

- exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere, and
- co-operate with one another in mutual trust and good faith by

  i) fostering friendly relations;
  ii) assisting and supporting one another;
  iii) informing one another of and consulting one another on matters of common interest;
  iv) co-ordinating their actions and legislation with one another;
  v) adhering to agreed procedures; and
  vi) avoiding legal proceedings against one another.

Section 195(1) of Constitution stipulates that public institutions and Public Service (Public Administration) that are responsible for the execution of policies, must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a) A high standard of professional ethics must be promoted and maintained.
b) Efficient, economic and effective use of resources must be promoted.
c) Public administration must be development oriented.

d) Services must be provided impartially, fairly, equitably and without bias.

e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

f) Public administration must be accountable.

g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

h) Good human resource management and career development practices must be cultivated to maximise human potential.

i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.

2.39 Policy analysis and evaluation

Hanekom (1987: 65) states that policy is an attempt to measure the costs and benefits of various policy alternatives, or to evaluate the efficacy of existing policies. In the public sector, policy analysis is concerned with conditions affecting implementation, such as executive structures, efficiency, goods and services, recipients, equity, availability, distribution, monitoring and enforcement. Policy analysis is concerned with an explanation of the causes and consequences of why governments do what they do, as opposed to policy advocacy, which is concerned with what governments should do or ought to do about public issues.

Hanekom (1987: 65) further states that policy analysis provides the political office-bearer with policy-relevant information that could be utilised in policy-making, either in the adaptation of existing policies, or in devising proposed policies, or both. Cloete (1994: 109) avers that the processes of policy analysis can be:
a) studying the existing policy or lack of policy;

b) identifying the dysfunctional situation that developed because of the lack of policy, or despite the existing policy,

c) studying the outputs of the existing policy to establish what factors caused the failures – finding out whether the policy was wrong or whether the inputs provided for its implementation were inappropriate,

d) forecasting the future with the use of extrapolative techniques such as the Delphi technique, brainstorming and scenario sketching to determine the issues which will have to be met by the new or adapted polices; and

e) preparing possible new or amended policies.

Hanekom (1987: 89) claims that public policy evaluation has often been referred to as the last stage of the policy process, during which those who determined and implemented the policy, and those who were affected by the policy attempt to establish if it has really worked. Policy evaluation does not necessarily take place only after the implementation of policy, but could occur as a continuous process throughout the policy process. Hanekom (1987: 89) further states that public policy evaluation is an appraisal or assessment of policy intent, implementation and impact in order to determine the extent to which the specified policy objectives have been or are being achieved.

Hanekom (1987: 89) contends that the evaluation of public policies is the concern of various participants, either within or outside the public institution. Hogwood and Gunn (1984: 234) in De Coning and Fick (1996: 26) state that evaluation carried out by those delivering the programme can have important implications both for the technical effectiveness of the evaluation and for its utilization. An advantage of evaluation by the operating staff (insiders) is that they possess detailed knowledge of what has happened. The disadvantages are that they may lack specialised evaluation skills or may be subjective in their evaluation.
2.40 CONCLUSION

It is apparent that public policy formulation is guided by certain values, which should be observed by all organs of state. It is also apparent that there are numerous participants in public policy formulation and these should be given an opportunity to participate, as such participation is cornerstone of the South African democracy.
CHAPTER 3
NECESSITY FOR EMPLOYMENT EQUITY

3.1 INTRODUCTION

This chapter provides an overview of the historic and other circumstances in South Africa, which necessitated the adoption, and implementation of employment equity. Among the numerous factors that have contributed to the introduction of employment equity the major ones are the, legacy of apartheid, socio-economic factors, and political and international obligations.

The Employment Equity Act was introduced against a background of extreme disparities in the distribution of labour market opportunities, among South Africans, specifically in terms of race, gender and disability. Most of the disparities in the workplace were a direct legacy of past discriminatory laws, particularly those laws that deliberately excluded black people, women and the disabled from key jobs, skills development opportunities and ownership of property.

3.2 PAST DISCRIMINATORY LAWS

The Green Paper on Employment and Occupational Equity (1996) states that historically, discrimination occurred within the South African labour market. In addition, panoply of laws, regulations and policies disadvantaged the majority of South Africans. Outside the labour market, critical factors that reinforced inequality included the history of unequal education and training, disparities in the ownership of assets, the unequal division of household labour, especially in communities with poor infrastructure, and regional backlogs.

Mkwanazi and Rall (1994: 37) state that, although the National Party (hereinafter referred to as the NP) is perceived as the initiator of South African discriminatory laws, the truth is that discriminatory laws were on the statute book long before 1948 when the NP assumed power. When the NP took over
in 1948, it did not repeal these laws, but added more to what became known as the apartheid system.

According to literature discriminatory laws in South Africa can be traced as far back as 1841. For example, the Masters and Servant Act, Act26 of 1926, which was legislated to ensure that black workers obeyed and respected their white masters. Mkwanazi and Rall (1994: 37) are of the opinion that racially discriminatory laws were passed to acquire power, resources, and skills and to reserve jobs for whites. Hugo (1992: 2) claims that in colonial Africa, Africans were seldom treated on an equal footing to whites and racial discrimination was widely institutionalized. Gerhart (1978: 4) states that apartheid, or the doctrine of racial segregation, was an official a philosophy of the National Party, which ruled South Africa from 1948 until 1994.

According to Gerhart (1978: 4) the earliest roots of racial discrimination can be traced back to the seventeenth century, when Europeans first colonised the Cape of Good Hope; but apartheid as a fully fledged political ideology developed much later, following the transition to an industrial economy in the late nineteenth and early twentieth centuries. Pressed both by white employers and white workers, who shared an interest in the tight control of black labour, successive governments enacted a web of laws and regulations designed to guarantee and enshrine the superior economic status of whites and to perpetuate a master-servant relationship between the races at all levels of society.

A plethora of racially discriminatory laws were passed. These laws included:

- The Native Land Act, Act 3 of 1913. This Act provided for the setting aside of land exclusively for use and occupation by blacks. The act further prohibited blacks from buying or leasing land from white people except in reserves. In Mkwanazi and Rall (1994: 37) Robertson (1986: 104) claims that the areas scheduled for blacks in 1913 amounted to no more than about seven percent of the South African land. Even after
the addition of more land in 1936, the total was never to rise above 13 percent.

- The Native (Urban Areas) Act, Act 79 of 1941. The aim of this Act was to limit the number of blacks in urban areas to what was required for normal labour requirements.

- The Population Registration Act, Act 30 of 1950. According to this Act, the Director General of the Department of Internal Affairs was to keep a register of the population of South Africa. Every person in the register was to be classified according to race (black, white, coloured and Asian).

- The Group Areas Act, Act 36 of 1966. The purpose of this Act was to set aside areas in which only members of specified racial groups were entitled to own and occupy land.

- The Bantu Education Act, Act 47 of 1953, which separated education departments according to race. Its main aim was to perpetuate white supremacy and domination in all spheres of life. The Bantu Education Act (No. 47 of 1953) decreed that blacks should be provided with separate educational facilities under the control of the Ministry of Native Affairs, rather than the ministry of Education. The pupils in these schools would be taught their Bantu cultural heritage and, in the words of Hendrik F. Verwoerd, Minister of Native Affairs, Blacks would be trained “in accordance with their opportunities in life,” which he considered did not reach “above the level of certain forms of labour”.

- The Act also removed state subsidies from denominational schools with the result that most of the mission–run African institutions (with the exception of some schools run by the Roman Catholic Church and the Seventh Day Adventists) were sold to the government or closed.

- The Extension of University Education Act, Act 45 of 1959 prohibited blacks from attending white institutions, with few exceptions, and established separate universities and colleges for Africans, colourdes and Indians.

- The Mines and Works Act, Act 25 of 1926, which legalised the colour bar in the mining industry.
The Apprenticeship Act, Act 26 of 1922 (as amended) in 1944). This Act prohibited people of colour and more specifically blacks from being apprenticed and thus from qualifying to assume skilled and semi-skilled occupations.

The Industrial Conciliation Act, Act 28 of 1956 (as amended) entrusted the Minister of Labour with powers, that enabled him to determine the part race could play in various spheres of economic activity. For example, the Act reserved certain industrial occupations (typically semi-skilled) solely for members of specified racial groups. The Act enabled the Minister of Labour to reserve categories of work for members of specified racial groups. In effect, if the Minister felt that white workers were being pressured by “unfair competition” from blacks, he could recategorise jobs for whites only and increase their rates of pay.

The Native Laws Amendment Act, Act 54 of 1952, made African women as well as men subject to influx control and the pass laws. Under Section 10 of the Act, neither African men nor women could remain in an urban area for longer than seventy two hours without a special permit confirming that they were legally employed.

The Abolition of Passes and Coordination of Documents Act, Act 67 of 1952, which was designed to make the policy of pass restrictions easier, abolished the pass, replacing it with a document known as the “reference book”. The Act stated that all Africans had to carry a reference book containing their photograph, address, marital status, employment record, list of taxes paid, influx control endorsements, and rural district where officially resident; not carrying a reference book was a criminal offence punishable by a prison sentence.

The Suppression of Communism Act, Act 44 of 1950 outlawed Communism and the Communist Party in South Africa. Communism was defined so broadly that it covered any call for radical change. Among other features, the Act defined Communism as any scheme that aimed at “bringing about political, industrial, social, or economic change within the Union by promotion of disturbance or disorder “or encouraged “feelings of hostility between the European and non-
European races of the union the consequences which are calculated to further disorder”.
- The Act allowed the Minister of Justice to list members of such organizations and ban them, usually for five–year periods, from public office, from attending public meetings, or from being in any specified area of South Africa

Mkwanazi and Rall (1994: 37) argue that these discriminatory laws produced political, social, economic and organisational obstacles to black advancement. (Cheroux (1986:3 )in Mkwanazi and Rall (1994: 40) states that legislation had a major impact on the occupational hierarchy, education, training, freedom of movement, choice of occupation, and upward mobility of the South African blacks. The marginal position of blacks further reinforced racial prejudices.

Human and Human (1987: 65) in Mkwanazi and Rall (1994: 40) state that the discriminatory legislation had a major impact on the South African occupational hierarchy. South African organizations were and to an extent still or generally dominated by white male managers, who in turn dominate the South African economy. This situation led to extreme disparities in the labour market opportunities, particularly in terms of race, gender and disability

3.3 **SOCIO-ECONOMIC FACTORS**

According to Mkwanazi and Rall (1994) apartheid legislation authorized reservation of many skilled jobs and managerial positions for whites; qualified blacks were legally excluded from most senior jobs, but black education standards were so inferior to those of whites, that very few blacks were qualified for well –paid jobs. Even in equivalent job categories, blacks received lower wages than whites. This was due to government policies rather than labour market principle.

The Green Paper on Employment and Occupational Equity (1996) states that in South Africa, the differences in income and status in the economy go hand in hand with race and gender. Generally, inequalities still exist between blacks
and whites and men and women, even when they have similar occupational status education (see 3.5).

The Green Paper on Employment and Occupational Equity (1996) states that massive inequalities in income and status affect social cohesion, undermine efficiency and economic growth, and have a devastating impact on families and individuals. South Africa cannot sustain these inequalities based on race and gender at the level it currently suffers. These inequalities contribute to a high level of social unrest and crime, which undermine growth and development. Extreme inequality also affects the economy directly, as it is associated with inefficiencies in the labour market and consequently throughout the economy. In addition, inequality has prevented the growth of middle class, which has stunted domestic demand and human resource development.

The Green Paper on Employment and Occupational Equity (1996) further states that apartheid policies also artificially reduced the cost of the majority labour force and increased the cost of employing a favoured minority. As a result, employers faced higher costs for skilled and supervisory workers, with little incentive to improve the productivity of skilled labour. Since employers could not easily substitute high-cost, sometimes poor quality protected labour, they ensured substantial inefficiency at the micro-economic level. Consistent inequalities in incomes based on race and gender were associated with an unusually skewed distribution of income. The apartheid legacy distorted resource allocation in the labour market, the way in which capital and labour were combined, the relative costs of inputs, the structure of production and consumption and levels of savings and investments in the economy. The cost to society and to individuals remains unaccounted (see 6.8).

3.4 NON LABOUR MARKET FACTORS

Both labour and non-labour factors, contributed to inequality in employment in the South African context. The Green Paper on Employment and Occupational Equity (1996) states that there is a distinction between factors that arise inside and outside the labour market. Non-labour market factors
contributing to inequality include disparities in education, housing and household infrastructure, responsibility for housework and childcare, and how close living areas are from work. These disparities largely from apartheid and its legacy, which has affected all facets of South African society.

The Green Paper on Employment and Occupational Equity (1996) states that the years of separate and unequal education mean that most Africans bring relatively weak formal qualifications to the labour market. According to the October Households Survey for 1994, Africans had half the years of education of whites, with lightly lower figures for African women. The average white person had completed secondary school; while the average African had five years of formal education only. The education gap narrows substantially for younger cohorts of the population. For Africans aged 25 to 29, only a tenth had less than five years of education, compared to half of those aged 60 to 64.

The Green Paper on Employment and Occupational Equity (1996) states that equalisation in spending per pupil expected to be achieved only well after the turn of the century, a considerable racial gap in education will persist for the foreseeable future. While more Africans have acquired some secondary education, the pool of highly qualified people remains disproportionately white. According to the 1994 October Households Survey, in the population as whole, white men make up over 30 percent of all people with post–matric qualifications, while white women comprised almost 25% of that group. African men and women together made up 40 percent.

The Green Paper on Employment and Occupational Equity (1996) further states that a peculiarly South African problem emerged from the history of separate school systems. Employers cannot easily assess the value of education in the historically Black system, which combined rigorous selection methods with under-resourced teaching conditions. The lack of reliable information on different, schools systems constitutes a market failure. Separate school systems also fostered the use of different languages according to ethnic group. In lower level jobs, employers may effectively
exclude Africans, by insisting on European languages. The highly unequal
distribution of assets contributes to differences in incomes along race and
gender lines.

The Green Paper on Employment and Occupational Equity (1996) states that
apartheid prevented Africans from owning land. It limited the access of black
people, and especially black women, to loans, markets and infrastructure,
making capital accumulation difficult. This was fostered through various
pieces of legislations, the prominent one being, the Natives Land Act, (act 3 of
1913) which made it illegal for blacks to purchase or lease land from whites,
except in the reserves which restricted black occupancy to less than 13
percent of South Africa 's land. This laid the foundations for residential
segregation in urban areas

Unfortunately, no definitive evidence exists regarding the ownership of assets
by race, gender or class. Estimates suggest that whites own over nine tenths
of all assets in South Africa. The figures on income from self –employment
underline the consequences of unequal access to assets. Both African
women and white men are disproportionately self-employed. However, for
African women, self-employment constitutes a poorly paid survival strategy,
while in contrast, self employed white men are mostly managers and
professionals, able to use their assets and formal qualifications to generate
high incomes (see 3.5.).

The Green Paper on Employment and Occupational Equity (1996) states that
women typically face the burden of unpaid household labour in addition to
income generating work. A rigidly organised work may prevent them from
performing well, since they must take time off for childcare and other family
responsibilities. For many women household responsibilities leave no time for
paid employment at all. These factors have made South African women the
group against which the most discrimination has been applied.
3.5. DISCRIMINATION IN THE LABOUR MARKET

The Employment Equity act, (Act 55 of 1998) espouses the elimination of discrimination in employment and stipulates some grounds on which discrimination is prohibited in employment (see Chapter Six). The Report of the Commission for Employment Equity (2000) states that the country’s apartheid legacy still shows its ugly face even within the new constitutional dispensation. Though there is Legislative framework, that outlaws past discriminatory laws, a lot of work, still needs to be done to eradicate all forms of discrimination in employment. The Green Paper on Employment and Occupational Equity (1996) defines labour market discrimination as including decisions by employers about employees for reasons that are not genuine work requirements. Discrimination is most conspicuous when an employer focuses on irrelevant personal characteristics instead of work performance or merit. Labour market discrimination can manifest in hiring, training, promotion and retrenchment, and unnecessary hindrances perpetuated by the way in which work and training are organized.

The Green Paper on Employment and Occupational Equity (1996) states that discrimination in employment can be identified from the decisions employers make about employees’ careers. Key decisions about employees, either as individuals or groups, pertaining to are hiring; setting pay and benefits; promotion; grading selection for training; and retrenchment.

The Report of Commission for Employment Equity (2000: 39) reported that the most frequently reported barriers fell into the following categories:

- Recruitment and selection processes
- Training and development
- Succession and experience planning
- Performance and evaluation systems
- Job classification and grading; and
- Corporate culture
In this study, the South African employment profile will be examined using the three variables, race, gender and disability and which variables are referred to as designated groups by the Employment equity Act. The Report of the Commission for Employment Equity (2000:17-18) reported that women currently held 13% of all top management positions in South Africa, with males occupying 87% and women 20% of all senior management positions, with males occupying 80%. When combining all levels of management and professional employment, women held 38% of all jobs in these levels while 62% went to males. African women held 1.2% of all top management positions. This means that employment or hiring in South Africa is still skewed towards males.

In terms of the Commission’s Report black employees represent 13% of all top management positions in South Africa in 2000. This figure consisted of 6% African employees, 3% Coloured employees and 4% Indian employees. This means that of the top management positions in South Africa were still held by whites as recently as 2000. Black employees hold 19% of all senior management positions, Africans 9%, Coloureds 5 %, and Indians 5%.

At the professionally qualified and mid-management level, Black employees represented 44% of all employees, with Africans 33%, Coloureds 5% and Indians 6% and Whites 62%. When Combining all levels of management and professional employment, Black employees represented 38% of managers, Africans 27%, Colours 5%, and Indians 6% in 2000.
Designated groups representation

<table>
<thead>
<tr>
<th>Occupational level</th>
<th>Black %</th>
<th>Female %</th>
<th>Disability %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top management</td>
<td>13%</td>
<td>13%</td>
<td>1%</td>
</tr>
<tr>
<td>Senior management</td>
<td>18%</td>
<td>21%</td>
<td>1%</td>
</tr>
<tr>
<td>Professionally qualified, experienced specialists and middle-management</td>
<td>44%</td>
<td>43%</td>
<td>1%</td>
</tr>
</tbody>
</table>

The Report of the Commission for Employment Equity (2000:21) reported that of all employees recruited in 2000, 40% were women. Black employees recruited constituted 73%. Africans 53%, of Colourdes 15%, and Indians 5%. Black people account for 33% of all top, senior and professionally qualified recruits, while 37% of all management recruits were women. Africans made up 21% of all management recruits. This means that recruitment and employment opportunities are still skewed towards males and the struggle for equal representativity in the workplace is far from over (see 6.2.1 and 6.2.2).

3.6 POLITICAL FACTORS

Various political factors necessitated the promulgation of the Employment Equity Act, (Act 55 of 1998). In particular the Bill of Rights in the Constitution sets a new political stage by guaranteeing certain rights to all South African citizens. This means that the South African citizens are entitled to these rights and can use them to advance their interests.
The 1996 Constitution has brought some obligations on the part of the government. One of these obligations is demanded by Section 9 (2) of the Constitution, which stipulates, “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken”. The Employment Equity Act was promulgated in order to fulfill this constitutional obligation. Although this right is a constitutional imperative it is also fundamentally a political imperative because eradicating all forms of discrimination in the labour market is one of the fundamental objectives of the government. This is demanded by the 1996 Constitution and is an integral part of the process to achieve social justice in South Africa.

Social justice in the context of South Africa means that no discrimination may be unfairly practiced against any citizen, directly or indirectly, on the basis of gender; race; sex; marital status; family responsibility; ethnic or social origin; colour; sexual orientation; age; disability; religion; HIV status; conscience; belief; political opinion; culture; language and birth. This means that all institutions in South Africa should observe the value of equality so that social justice will prevail (see 5.2.1).

3.7 THE INTERNATIONAL FACTOR

The 1994 democratic elections integrated South Africa with the international community and the new democratic government was obligated to ratify and honour international conventions. One of these conventions was Convention III of the International Labour Organisation (see 5.2.1).

The Green Paper on Employment and Occupational Equity (1996) states that the provisions of the ILO Convention III were integrated into the policy formulation processes in order to ensure that South Africa meets its obligations in that branch of International Labour Standards and were also considered in drafting the Green Paper. The Discrimination (employment and occupation) Convention, 1958, Convention III stipulated that discrimination
constituted a violation of rights enunciated by the Universal Declaration of Human Rights Article I of Convention III, 1958, defines the term discrimination as any distinction, exclusion or preference on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The convention further states that each member state should undertake, declare and pursue a national policy designed to promote, by methods appropriate to national conditions, and practice equality of opportunity in respect of employment and occupation, with a view to eliminate any discrimination. The Employment Equity Act or policy is a result of this international obligation.

### 3.8 CONCLUSION

The above factors necessitated the introduction of employment equity in South African society. These may no be the only factors, because the apartheid system was the manifestation of a broader global system that thrived on the exploitation of the weaker nations by the stronger ones.
CHAPTER 4
RESEARCH METHODOLOGY AND DATA COLLECTION

4.1 INTRODUCTION

This chapter will deal with the research methodology applied in this study. The data collection process and how the data was analysed and interpreted, will be explained.

4.2 RESEARCH METHODOLOGIES AND DATA COLLECTION

As previously stated, this study was conducted within a qualitative paradigm or approach, Denzin and Lincoln (1994) state that a paradigm is a set of beliefs that constitutes the researcher’s ontology (the researcher’s perceptions regarding the nature on reality of the world and what is known about it); epistemology (the researcher’s perceptions of where he/she stands in relation to reality or the world); and methodology (the researcher’s perception of how he/she can find out about reality or the world).

Qualitative research was used in this study, both because of the abovementioned aspects, and also because of the nature of the research question. Denzin and Lincoln (1994:2) define qualitative research as a multi-perspective approach (utilising different qualitative techniques or data collection methods) to social interaction, aimed at describing, making sense of interpreting, or reconstructing this interaction in terms of the subjects attached to it. Marshall and Rossmon (1989: 148) claim that qualitative research is often accused of falling short of the scientific requirement as namely internal validity, external validity, reliability and objectivity. These constructs are inappropriate for qualitative inquiry; qualitative studies want to make broader statements about more complex responses than simple yes or no answers, as is the case with quantitative studies.
4.3 SAMPLE

Marshall *et al.* (1989) claim that qualitative samples are not as large as quantitative samples. In this study respondents who represent organized labour (COSATU, NACTU and FEDUSA), organized business or employer organizations (Business South Africa), government (Department of Labour), community organizations (South African Youth Council, Women National Coalition, National Rural Development Forum, Disabled People South Africa, and the South African National Civic Organisation) and Black Management Forum (BMF) have been used because they represented their respective constituencies during the drafting of the Employment Equity Act at the National Economic, Development and Labour Council (Nedlac).

4.4 DATA COLLECTION

4.1 Use of documents

In this study certain documents, especially legislation, have been used as sources of data, including-

4.1.1 Legislation

i) Employment Equity Act, Act 55 of 1998

ii) Skills Development Act, Act 97 of 1998


iv) Labour Relations Act, (Act 66 of 1995);

v) Basic Conditions of Employment Act, (Act 75 of 1997);

vi) Equity Code of Good Practice (2000 issued in terms of section 54 of the Employment Equity Act, Act 55 of 1998);

vii) Green Paper on Employment and Occupational Equity;

viii) The Bill on Employment Equity; 1997

x) The Master’s and Servants Act, (Act 26 of 1926;
xi) Population Registration Act, (Act 30 of 1950)
xii) Native Land Act, (Act 3 of 1913)
xiii) Urban Areas Act, (Act 79 of 1941)
xv) Apprenticeship Act, (Act 22 of 1922)
xvii) Industrial Conciliation Act, (Act 41 of 1959)
xviii) Bantu Education Act, (Act 47 of 1953)

4.1.2 Reports

ii) Report of the National Economic, Development and Labour Council on the Employment Equity Bill (Nedlac 2000a) and;
iii) Hansard reports, and
iv) Report of the Commission for Employment Equity

4.1.3 Conventions and declarations


4.1.4 Submissions to Nedlac

Various submissions by NEDLAC constituencies during the Employment Equity Bill negotiations have been used.

i) Business by Business South Africa (BSA);
ii) Labour representing (COSATU, FEDUSA and NACTU);
iii) Government represented by the Department of Labour; and
iv) Black Management Forum
v) Community – representing the (South African Youth Council (SAYC); the Women National Coalition (NWC); the National
Rural Development Forum; Disabled People South Africa (DPSA) and the South African National Civic Organisation (SANCO).

4.1.5 **Submissions to the Parliamentary Portfolio Committee on Labour**

Written submissions and representations by various stakeholders, interest groups and pressure groups to the Portfolio Committee on Labour in Parliament during the discussions on the Employment Equity Bill in Parliament have been used. These documents are not the only documents that may have shaped or influenced the basic principles and arguments around the final drafting of the Employment Equity Act. Numerous other processes were undertaken, all playing a role in shaping the policy (Act). They include:

3) COSATU’s submission on the Employment Bill, 22 July 1998;
4) Business South Africa’s Submission to Parliamentary Portfolio Committee on Labour, 20 July 1998;
5) The South African insurance: Presentation to the Labour Portfolio Committee, 21 June 1998;
6) Gay and Lesbian Coalition: Submission to Portfolio Committee on Labour, 18 July 1998;
7) MANCO/FIBASA’s submission to the Portfolio Committee on Labour, 14 July 1998;
8) The Free Market Foundation of Southern Africa: Submission to the Portfolio Committee on Labour, 17 July 1998;
9) NAFCOL’s submission to the Portfolio Committee on Labour;
10) The Federation of Unions of South Africa (FEDUSA)’s submission on the Employment Equity Bill to the Portfolio Committee on Labour, 22 July 1998;
12) Society for Industrial Psychology: Submission to the Portfolio Committee on Labour;
13) Centre for Applied Legal Studies, University of the Witwatersrand: submission to the Portfolio Committee on Labour;
14) AIDS Legal Network: Submission to the Portfolio Committee on the Employment Equity Bill, 20 July 1998;
15) Commission on Gender Equality: submission on Employment Equity Act to the Portfolio Committee on Labour; and

4.1.6 Books and articles

Books and articles, as well as Internet publications were consulted.

4.5 INTERVIEWS

In this study topical interviews were used. During the interviews, the researcher guided the discussions to retain the focus and to obtain answers to the questions. The purpose was to avoid omitting a crucial step in a process or a critical event in a decision.

The topical questions asked during the interviews were based on the submissions of the Nedlac constituencies, the Nedlac reports, the Employment Equity Bill, the Employment Equity Act, the Green Paper on the Employment Equity Bill and other relevant documents relating to the consultation/ negotiation process.

In this study, elite interviews were conducted. Samples in qualitative studies are not as large as those of quantitative studies. Jarol et al. (1981:133) states that elite interviewing is required when people possess knowledge, which, for the purpose of the given research project, requires that they be given
individualized treatment in an interview. Their elite status depends not on their role in society, but on their access to information that can help answer a given research question. The criteria for choosing the five respondents in this study were as follows:

Four of the five elite interviewees were chief negotiators of their respective constituencies at Nedlac during the drafting of the Employment Equity Act, (Act 55 of 1998). They were therefore knowledgeable about the process and contributed in the formulation of the Employment Equity Act. They were:

1) representing Labour, Muzi Buthelezi.
2) representing Community Crecentia Mofekeng.
3) representing Business, Frans Barker.
4) representing Black Management Forum, Jimmy Manyi.
5) The other interviewee, Frans Moatshe, a Director of Equal Opportunities in the Department of Labour, was conversant with and knowledgeable about the process and the product of the process. He represented government in the sample.

4.6. DATA ANALYSIS

In this study, the interviewees were given full information about the study, and the consented to be interviewed and tape-recorded. The documents that are used in this study were intended for public consumption, and the respective authorities gave the information required freely. Data was analysed while the interviews were conducted. The interviewees' responses were coded into categories that brought together similar ideas, concepts and themes. Similar themes were put together, so that it was clear explanation what they meant. The interview data was corroborated with other sources of data (secondary data) to give one interpretation of the study. The data was interpreted in relation to the theory (corporatism) on which this study was based.

An overview of the themes and sub–themes identified in this study is outlined in the Table. The six major themes and sub-themes that emerged will be discussed in Chapter 5.
### TABLE 6: An overview of the themes and sub-themes of policy-making in the Department of Labour with specific reference to the Employment Equity Act 1998 (Act 55 of 1998)

<table>
<thead>
<tr>
<th>THEMES</th>
<th>SUBTHEMES</th>
</tr>
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<tbody>
<tr>
<td>5.1 The Development of the Employment Equity Act</td>
<td>6.1.1 Constitutional obligations</td>
</tr>
<tr>
<td>5.2 Participants in the formulation of the Employment Equity Act</td>
<td>6.1.1.1 International obligations</td>
</tr>
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<td>5.4 Legislative process of the Employment Equity Act</td>
<td>6.2.1 Institutional participation</td>
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<tr>
<td>5.5 The negotiation process (Employment Equity Act)</td>
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</tr>
<tr>
<td>6.1 Contents of the Employment Equity Act</td>
<td>6.1.1 Purpose of Employment Equity Act</td>
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<td></td>
<td>6.1.1.1 Elimination of unfair discrimination</td>
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<td></td>
<td>6.1.2 Implementing of affirmative measures</td>
</tr>
<tr>
<td>THEMES</td>
<td>SUBTHEMES</td>
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<tr>
<td>6.1.3</td>
<td>Duties of designated employer</td>
</tr>
<tr>
<td>6.1.4</td>
<td>Consultation with the employees</td>
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<td>Disclosure of information</td>
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<td>Conducting an analysis</td>
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<td>6.1.7</td>
<td>Report to the Director-General</td>
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<td>6.1.8</td>
<td>Employment Equity Plan Development</td>
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<td>6.1.9</td>
<td>Income differentials</td>
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<td>6.1.10</td>
<td>Commission for Employment Equity</td>
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<td>6.1.11</td>
<td>Monitoring, enforcement and legal proceedings</td>
</tr>
<tr>
<td>6.1.12</td>
<td>Protection of employee rights</td>
</tr>
</tbody>
</table>
4.7  CONCLUSION

Research methodology helps to guide a study, it indicates how the study should be conducted, and indicates which data collection methods are compatible with which methodology and how such data, when collected, can be analysed and interpreted. So, it is important that when conducting a study, the research methodology should be carefully chosen in order for the investigation to reach reliable and valid conclusions. It can be concluded that there are many role-players in the formulation of policy in the Department of Labour and that all of them have their own ways of articulating their positions in various stages and forums. The following chapters will discuss the results of this investigation.
CHAPTER 5
RESEARCH FINDINGS

5.1 INTRODUCTION

This chapter deals mainly with the findings of the study. It explains how policy is formulated in the Department of Labour, the institutions that are consulted or used in policy formulation; the processes that are followed when policy is formulated; and the participants in policy formulation and the role they play. It also discusses how the Employment Equity Act was formulated, the legislative process, and the contents of the Act.

5.2 DEVELOPMENT OF THE EMPLOYMENT EQUITY ACT, ACT 55 OF 1998 AS PUBLIC POLICY

The term “public policy” has different meanings, but for the purpose of this study, it will refer to those policies developed by government actors, although non-government actors may also influence their formulation and development (Wissink, 1990: 10).

The Employment Equity Act is one of those policies that have been developed by both government and non-government actors. Its development can be attributed to both constitutional and international obligations.

5.2.1 Constitutional obligations

The Constitution has brought some obligations on the part of the government. One of these obligations, in terms of Section 9(2), is to enhance and advance equality, “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”
Moatshe, in an interview conducted on the 17 June 2000 stated that “the idea of the Employment Equity Act emanate from the constitutional point of view section 9 of the Bill of Rights, as contained in the Constitution, said that equality before the law means that all people should be afforded the same equal opportunities. Section 23 ensures fair labour practice in the workplace. People should not be unfairly discriminated against in the workplace, so from a constitutional point of view, there has to be a policy or legislation developed to satisfy the constitutional requirements”.

This is amplified by the COSATU submission on the Employment Equity Bill, which states that the equality clause is rooted in Section 9(2), which lays the basis for legislative and other measures to achieve equality for those disadvantaged by unfair discrimination. Clearly the Employment Equity Act is in service of the Constitution.

5.2.2 **International obligations**

The democratic elections of 1994 integrated South Africa with the international community, and the global world. South Africa thereby became obligated to ratify and honour international conventions. One of these conventions is Convention III of the International Labour Organisation.

The Discrimination (Employment and Occupation) Convention, 1958, Convention III stipulates that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights. Article I of Convention III, 1958 defines the term discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Convention further states that each member state should undertake, declare and pursue a
national policy designed to promote, by methods appropriate to national conditions, and practice equality of opportunity in respect of employment and occupation, with a view to eliminate any discrimination.

In an interview conducted on 17 June 2000 Moatshe said that “since 1994 we have became members of the international community, and part of International Labour Organisation, in order to retain this status we have to satisfy conventional requirements and one convention that deals with discrimination in a workplace from International Labour organization is Convention III and we have to develop a policy or legislation to satisfy that”.

South Africa as signatory of this Convention has been obligated to legislate a policy that will endeavour to meet the conventional requirements, hence the Employment Equity Act, (Act of 1998) was promulgated.

5.3 PARTICIPANTS IN THE FORMULATION OF THE EMPLOYMENT EQUITY ACT

The formulation of the Employment Equity Act was characterized by the consultation of various stakeholders in its formulation. These stakeholders included civil society organizations, statutory institutions (government), interest groups and expert individuals. The participation of these stakeholders was institutionalised into ad hoc forums also referred to as the colloquium and statutory institutions. Manganya and Houghton (1996: 240) state that democratic states give all extra-parliamentary groups the framework for incorporation into civil society, enabling them to make claims on the state. This means that the state does not rely only on the parliamentary system for its dealings with private interests. These arrangements, labeled ‘democratic corporatism’, not only co-exist with democracy, but are essential to it, since they commit organized interests whose consent is essential to democracy's
functioning and bind their members to policies enacted by democratic government in exchange for the right to negotiate those policies.

5.3.1 **Affirmative Action Policy Development Forum (AAPDF)**

The Green Paper on Employment and Occupation Equity published on the 10 July 1996 was the result of deliberations with stakeholders who participated in the Affirmative Action Policy Development Forum (AAPDF). This forum represented major stakeholders in the area of affirmative action and employment equity, namely trade unions, business, community organizations, disabled people’s organisations, women’s organizations and non-governmental organisations. When it completed its work, a team of experts was appointed to draft the Green paper. The above forum was an *ad hoc* institution. The institutions, organisations and individuals who participated in the forum included the following:

A(1) Business South Africa (BSA);
(2) Black Management Forum (BMF);
(3) Congress of South African Trade Unions (COSATU);
(4) Centre for Applied Legal Studies – Gender Research Unit;
(5) Centre for Political Studies;
(6) Career Guidance Unit;
(7) Centre for Human Rights – University of Pretoria;
(8) National Women’s Coalition;
(9) National Youth Development Forum (NYDF);
(10) Office of the Public Service Commission;
(11) Reconstruction and Development Programme (RDP)-Disability Empowerment Desk;
(12) Lawyers for Human Rights Disability Rights Desk;
(13) National Council of Trade Unions (NACTU);
(14) Federation of Unions of South Africa (FEDUSA); and
(15) The Department of Public Service and Administration (DPSA).
B. Expert individuals who contributed to the Drafting of the Green Paper on Employment and Occupational Equity:

(1) Ms Valerie Ames, former CEO – Equal Opportunities Commission (UK), currently Director of Ames Fraser Bernard, London, UK;
(2) Professor Paul Benjamin, Cheadle Thompson & Haysom;
(3) Ms Urmiba Bhoola, Cheadle Thompson & Haysom;
(4) Professor Halton Cheadle, Cheadle Thompson & Haysom;
(5) Mr Sipho Madlopha, CEO, Madlopha Attorneys;
(6) Ms. Thuli Madonsela, Consultant, Planning Unit, Ministry of Justice;
(7) Dr. Neva Makgetha, Director: Research, Policy and Planning, Department of Labour;
(8) Mpho Makwana, Director: Equal Opportunities, Department of Labour;
(9) Dr. Guy Mahone, Chief Director: Labour Market Policy, Department of Labour;
(10) Ms Lucia Rayner, Deputy Director: Employment Equity, Department of Labour;
(11) Ms Jackie Scholtz, State Law Advisors; and
(12) Dr. Caroline White, Centre for Policy Studies.

5.3.2 National Economic, Development and Labour Council (Nedlac)

The National Economic, Development and Labour Council is a statutory institution established in terms of the Nedlac, Act.

Nedlac is composed of:

(1) an executive council, which is the governing body of the Council;
(2) four chambers, namely

(a) the Public Finance and Monetary Policy Chamber;
(b) the Trade and Industry Chamber;
(c) the Labour Market Chamber;
(d) Development Chamber;
In terms of Section 4(1) Nedlac has the following functions:

(a) strive to promote the goals of economic growth, increased participation in economic decision-making, and social equity;
(b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
(c) consider all proposed labour legislation before it is introduced in Parliament;
(d) consider all significant changes to social and economic policy before these are implemented or, in the case of legislation before it is introduced in Parliament; and
(e) encourage and promote the formulation of co-ordinated policy on social and economics matters.

In terms of function (c) of the Nedlac Act, the Employment Equity Act had to go through the NEDLAC process before it was tabled in Parliament.

5.3.2.1 Participation and representation at Nedlac during the Employment Equity Act negotiations

In terms of Section 6 of the Nedlac Act, the state, organized business, and organized labour shall nominate not more that 18 representatives as members of the executive council and not more than six representatives as members of each chamber. Nominations are as follows:

(1) for organized business, by Business South Africa;
(2) for the state, by the President of the Republic of South Africa;
(3) for organized labour, by proportional representation according to paid up membership of the founding trade union federations COSATU, FEDUSA and NACTU;
(4) for the organisations representing community and development interests, by the Minister without Portfolio in consultation with organised business, organised labour and the Minister of Labour.

Community-based organisations may be admitted into the Nedlac provided that they:

(a) represent a significant community interest on a national basis;
(b) have a direct interest in development and construction;
(c) are constituted democratically and have a constitution that provides for democratic decision-making procedures; and
(d) seek mandates from their own members and to obtain compliance from its members in regard to resolutions of the Nedlac.

Representation during the negotiations were as follows:

(a) Business

Business South Africa (BSA) were represented by Frans Barker (Chief negotiator), Vic van Vuuren (Chief negotiator), Vukile Mehana, Max Makhabola and Aubrey Tshalata.

NAFCOC was not part of Business South Africa (BSA) during the negotiations. Mr Barker, in an interview conducted on 29 June 2000 said that “NAFCOC was the founding member of Business South Africa, but it has resigned from Business South Africa. However we do work with them.”

It stands to reason that Business South Africa (BSA) during the drafting of the Employment Equity Act, represented white business. In an interview conducted on 29 June 2000, Baker said that “Business South Africa represents 90% of the employers in South Africa and they employ 95% of the workers in South Africa consisting of 19 employer organisations like the South African Chamber of Business (SACOB), Afrikaanse Handelsinstituut, Chamber of Mines, FABCOS, SISA and many others”.
(b) Labour

Labour consisted of all three major federations in South Africa, (COSATU, NACTU and FEDUSA) and their representation is in proportion with their paid-up members. Corell, Elbeit, Hatfield, Grobler, Max and Grobler (1998: 454) claim that the dominant federations of unions in South Africa is the Congress of South African Trade Unions (COSATU) which has about 43% of union members among its affiliates. It is followed by the National Council of Trade Unions (NACTU), with 11% and then the Federation of South African Labour Unions (FEDUSA) with 8%. This means that their representation at Nedlac during the negotiations was in proportion to their membership. COSATU dominated representation from the labour constituency. Representatives were as follows:

Mbazima Shilowa (then COSATU Secretary General), Connie September (Deputy-President of COSATU), Muzi Buthelezi (Chief negotiator and the Secretary General of COSATU affiliated union – Chemical, Energy, Paper, Printing, Wood and Allied Workers Union), Gwede Mantashe (Secretary General – National Union of Mine Workers (NUM) – COSATU affiliate), Mbuyiselo Ngwenda (the late NUMSA Secretary General-COSATU affiliate) and Leon Grobler (Secretary General – FEDUSA).

In an interview conducted on 21 June 2000, Buthelezi said that “As a labour market convenor in the labour market chamber at NEDLAC, I was representing labour in general, the three federations participating at NEDLAC, COSATU, NACTU and FEDUSA, I was the convenor representing all the three, not first COSATU unions, all workers.”

(c) Government

During the negotiations, officials representing government from the Department of Labour were as follows:
Les Kettledas (Chief negotiator); Loyiso Mbabane; Mbuli Sithole; Guy Mahone and Terrence Clarke.

In an interview conducted on 26 June 2000, Moatshe stated as follows: “Government will always represent government interest at NEDLAC, and the community will always represent the community interest” and “while the government will have to ensure that there is no deviation from the Constitution’s requirements and, as a result their interest will say any policy or legislation must be the reflection as to what is contained in the constitution.”

(d) The Community

The community constituency during the negotiations comprised the following organizations: the South African Youth Council (SAYC), the Women’s National Coalition (WNC), the National Rural Development Forum (NRDF); Disabled People South Africa (DPSA); and the South African National Civic Organisation (SANCO). These organizations represented the widest spectrum of non-governmental community organizations and social movements, and furthermore, were directly from the poor, historically disadvantaged and unemployed areas, in both the rural and urban areas.

The following persons represented the community constituency:

Godfrey Jack, Crecentia Mofekeng, (Chief negotiator), Thusi Kubheka, Chemist Khumalo and Patrick Nkosi.

In an interview conducted on 31 May 2000, Mofekeng said that: “Well, community constituency is one of the recognised constituencies at Nedlac, representing disabled, women, youth, the community at large, larger than both business and labour, and I was representing the women’s sector.”
(e) **Black Management Forum**

The Nedlac report on the Employment Equity Bill states that the Black Management Forum (BMF) requested representation on the Negotiating Committee of the Labour Market Chamber of Nedlac during the drafting of the Employment Equity Act. It was agreed at the meeting 25 February 1998 that the Black Management Forum should be granted one more representative in the negotiations, but that it would have no official status as a Nedlac party. Jimmy Manyi represented the forum during the negotiations.

In an interview conducted on 22 May 2000, Manyi said that: “the Black Management forum started the process of consulting and conceptualization affirmative action long back in the eighties and they were of great help to the Department of Labour in the drafting of Green Paper on affirmative action”.

5.4. **Employment Equity summit**

Consensus on many issues concerning the Employment Equity Act was reached at a summit held on 5 February 1998 at the Holiday Inn Garden Court, Crown Plaza, Pretoria. The summit was chaired by Sipho Pityana (Director – General) and facilitated by Loyiso Mbabane (Director of Equal Opportunities). Presentations were made by Mbuli Sithole (Deputy Director: Equal Opportunities); Advocate Jan Tladi (Assistant Director: Equal Opportunities) and Brenda Hlapane (Senior Administration Officer: Equal Opportunities directorate).

Themes discussed at the summit included:

(i) Name of the Bill, purpose and desired end results;( see chapter 6)
(ii) Scope of the Bill, exclusions and designated groups(see chapter 6);
(iii) Targets and quotas ;(see chapter 6);
(iv) Positive measures;(see chapter 6);
(v) Employment equity plans (see chapter 6) :
(vi) Enforcement and monitoring mechanisms, and
(vii) Role and function of statutory bodies (see chapter 6).

The agreements reached at this summit resulted in the present form of the Employment Equity Act. It covered the major themes of the Act and it may be seen as a breakthrough in the formulation of the Act.

5.5 LEGISLATIVE PROCESS OF EMPLOYMENT EQUITY ACT (ACT 55 OF 1998)

The Employment Equity Act followed a certain legislative process before it was enacted as an Act of Parliament.

5.5.1 Labour Market Commission

The legislative process of the Employment Equity Act emerged from the recommendations made by the Labour Market Commission, which was established at the beginning of 1995 to investigate the development of a comprehensive labour market policy. Part of the Commission's terms of reference was to examine and investigate mechanisms aimed at redressing discrimination in the labour market. In particular, the Commission was to consider a policy framework for affirmative action in employment, with due regard to the objectives of employment creation, fair remuneration, productivity enhancement and macro-economic stability. The Commission recommended that employment equity legislation be promulgated as soon as possible and such legislation contain, *inter alia*, the requirement that employment equity legislation be promulgated as soon and possible and also contain the requirement that employers formulate comprehensive affirmative action plans. (Green Paper: Policy Proposals for a new Employment and Occupational Equity Statute (1996)).

5.5.2 Affirmative Action Policy Development Forum

The Minister of Labour established the Affirmative Action Policy Development Forum (AAPDF) on 3 March 1995 as a non-statutory advisory forum. The
AAPDF brought together organised business, organised labour, women, youth, and representatives of disabled people, government officials and researchers to debate key aspects of employment equity in an informal environment. It concluded its work on February 22, 1996, after establishing the drafting team to prepare the Green Paper: Policy Proposals for new Employment and Occupational Equity Statute (1996).

5.5.2.3 The Green Paper on Employment and Occupational Equity

The Green Paper: Policy Proposals for new Employment and Occupational Equity Statute (1996) was drafted by the Minister of Labour: Directorate of Equal Opportunities.

The Green Paper as a consultative document was published on 1 July 1996 for public comment and discussion. There was also interaction by the Department of Labour with the social partners and organisations with an interest in the issue prior to the drafting stage of the Employment Equity Bill. The bill skipped the white paper stage and the Employment equity Bill was published on 1 December 1997. Report on Employment Equity Bill (1996)

5.5.2.4 Nedlac process

The National Economic Development and Labour Council is an institution established in terms of the Nedlac Act, (Act 34 of 1994). Its main task is to enhance interaction on policy issues between government and civil society. Its main functions include the following-

(a) Strive to promote the goals of economic growth, increased participation in economic decision-making and social equity;
(b) Seek to reach consensus and conclude agreements on matters pertaining on social and economic policy;
(c) Consider all proposed labour legislation before it is introduced to Parliament;
(d) Consider all significant changes to social and economic policy before it is implemented or, in the case of legislation, before it is introduced into Parliament;
(e) Encourage and promote the formulation of co-ordinated policy on social and economic matters.

Nedlac as consensus-seeking institution on national policies was utilized during the formulation of the Employment Equity Act; Constituencies that were represented were labour, business, government, the community and the Black Management Forum (BMF). The Employment Equity Bill was published on 1 December 1997 and tabled in the Labour Market Chamber of NEDLAC on 22 January 1998 for negotiation. Negotiations were held on the following dates:


5.5.2.5 Parliamentary process

The Constitution of the Republic of South Africa, stipulates that the South African parliament shall consists of 1.a. the National Assembly; and the National Council of Provinces.

The National Assembly and National Council of Provinces participate in the legislative process. In this legislative process, the National Assembly and the National Council of Provinces work through Portfolio (National Assembly) and Select committees (National Council of Provinces). The Employment Equity Bill was introduced to Parliament and the Portfolio Committee on Labour considered it. Department of Public Service and Administration (2003:41)
5.5.2.6 **Portfolio Committee on Labour**

The Department of Public Service and Administration (2003:39) states that there is a portfolio committee for every government department. Each committee consists of about thirty members of Parliament and is responsible for shadowing its respective department. The various political parties are represented in these committees roughly in proportion to the number of seats they hold in the National Assembly. The committees monitor their departments and may investigate and make recommendations relating to legislation. During the formulation of the Employment Equity Act, various interested parties or stakeholders made presentations and representations to try and influence the policy-makers in decision-making. Some positions of the stakeholders were included in the Bill but some were not, and the Bill was taken to National Assembly for decision-making.

5.5.2.7 **National Assembly**

Section 46(1) of the Constitution of the Republic of South Africa, stipulates that the National Assembly shall consist of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system. The Assembly may pass legislation with regard to any matter, which is within its national competency, excluding matters, which are of exclusively a provincial competency. It debates all draft bills that Ministers bring to Parliament and approves, rejects or changes them. During the promulgation of the Employment Equity Act, the National Assembly comprised the following parties.

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<thead>
<tr>
<th>Party</th>
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<tr>
<td>(1) African National Congress (ANC)</td>
<td>252</td>
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<td>(2) New National Party (NNP)</td>
<td>82</td>
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<td>(3) Democratic Party (DP)</td>
<td>7</td>
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<tr>
<td>(4) Freedom Front (FF)</td>
<td>9</td>
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<tr>
<td>(5) African Christian Democratic Party (ACDP)</td>
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The Daily News of 10 August 1998 stated that the Employment Equity Act, served to divided political parties in the National Assembly. The traditionally white parties opposed the Act, whilst, the traditionally African parties were for its promulgation. Hansard report (1998:5214) states that the National party (NP) rejected the Bill on the grounds that, firstly it would be a major intrusion in the private sphere, secondly it would introduce racial auditors which will go around as they did under the apartheid system when they checked passbooks, and thirdly, the Bill would further destroy job growth and it would lead to more unemployment.

South Africa Hansard states (1998:5230) reports that the Freedom Front (FF) also rejected the Bill, on the ground that it would reracialised the South Africa society. Groenewald in the Hansard report (1998:5229) said that:" In 1950 an Act was piloted through Parliament, Act 30 of 1950, namely the Population Registration Act. A definition of a black person is included in that Population Registration Act. According to the Act, it is a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa and this Population Registration Act and its definition formed the basis of racism and racial discrimination with which the African National Congress(ANC) sympathy of the world as oppressed group and it was equated with gross human rights violations. The ANC has now presented a new racial classification Act”.

Tony Leon (Leader of the Democratic Party) is recorded in the South Africa Hansard Report (1998:5248) to have stated that in rejecting the Bill:" I came prepared for it .I knew that the proponents of this Bill, starting with the Minister and going downwards, would actually begin invoking the politics of race and the politics of emotion and would try to criminalise the opponents of this Bill as somehow being perpetrators of apartheid privilege, as being sultans of the status quo, as being the proppers up of minority privilege”.
The proponents of the Bill vigorously defended the Bill and these were mainly parties with traditional African support. Muendane (PAC) was recorded in the South Africa Hansard Report (1998: 5251) as having said that in accepting the Bill: "We sympathise with the ANC for excluding black women as a designated group because we know their ideologies are limited. Although this a serious exclusion, we welcome the Bill as a progressive start, and shall vote yes with pride". Zulu was recorded (IFP) in the South Africa Hansard Report (1998:5224) as having said that in accepting the Bill: "The IFP appreciates the measure of compromise by the members of the Portfolio Committee in taking on board most of our amendments to the Bill. The IFP therefore supports the Bill". Martins (ANC) was recorded in the South Africa Hansard Report (1998:5250) to have said that the Employment Equity Bill recognizes that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market, and those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing some discriminatory laws.

“It is, therefore, necessary that Parliament enact the Employment Equity Bill in order to, firstly promote constitutional right of equality and exercise of true democracy; secondly, eliminate unfair discrimination in employment; thirdly, ensure the implementation of employment equity to redress the effects of discrimination; fourthly, achieve a diverse workforce; broadly representative of all our people; fifthly, promote economic development and efficiency in the workforce; sixthly, give effect to the obligations of our country as a member of the International Labour Organisation”. The Saturday Star (Randall:1998) reported that the Employment Equity Bill had been approved by the National Assembly by a majority of 214 votes to 72, in spite of a last minute attempt by the white opposition to delay the legislation. The Bill was approved by the State President on 12 October 1998.
5.5.2.8 The National Council of Provinces (NCOP)

Department of Public Service and Administration (2003:42) states that the National Council of Provinces (NCOP) replaced the former Senate and came into operation on 4 February 1997, in terms of the Constitution of the Republic of South Africa. The NCOP is presided over by a Chairperson assisted by two Deputy Chairpersons. There are 90 delegates in the NCOP. Each of the nine provinces has a single delegation, consisting of ten delegates. The ten delegates are:

(a) four special delegates, consisting of:
   (i) the Premier of the province or, if the Premier is not available, any member of the provincial legislature designated by the Premier either generally or for any specific business before the National Council of Provinces; and
   (ii) three other special delegates, and
(b) six permanent delegates appointed in terms of Section 61(2) of the Constitution of the Republic of South Africa, which stipulates that within 30 days after the result of an election of a provincial legislature is declared, the legislature must-
   (i) determine, in accordance with national legislation, how many of each party’s delegates are to be permanent delegates, and how many are to be special delegates and appoint the permanent delegates in accordance with the nominations of the parties. The Employment Equity Act had proponents and opponents when it was tabled in the National Council of Provinces (NCOP). The delegates from the traditionally black political parties were in favour of the Bill and voted accordingly.

The Minister of Labour (Mdladlana) was recorded in the Hansard report (1998:1982-1983) to have said that: “The Employment Equity Bill before this house was passed by a majority vote by the National Assembly on the 21 August, after an extensive consultative process, which involved all major stakeholders, including community and development organisations, business,
labour and government. The Portfolio Committee on Labour also had extensive debates on the Bill and the Nedlac report. It therefore gives me great pleasure to table this Bill for the NCOP’s consideration and passage.

The Minister of Labour (Mdladlana) was recorded in the South Africa Hansard Report (1998:1992) to have further said that: "The debate around this legislation has shown how deep-seated the divisions that engulf our society are. The project of building a single nation remains evasive, mainly as a consequence of the unshaken commitment to the past by those who long to retain their sectional privileges and interests. It is terrible indictment on the DP, NP, and FF who constitute an alliance in defence of white minority privileges to the detriment of others”.

Zondi (IFP) was recorded in the South Africa Hansard report (1998:2006) to have stated that in favour of the Bill: "Anybody who believes in the principles of justice and equity cannot condone the situation where the minority continues to exercise an exclusive stranglehold on the economy, to the detriment of the majority. We long for the day when it will no longer be necessary to introduce corrective Bills of this nature. However, while we wait for such a day, we have to take appropriate action to hasten the dawn of such a day. The IFP therefore supports the Bill”.

Ms Tyobeka-Lieta (ANC) was recorded in the South Africa Hansard Report (1998:2007) to have said the following concerning the Bill: “The legislation introduced by the Minister of Labour forms the nucleus of transformation. It is the principle which guides affirmative action. It aims to address the legacy of the past regime which manifested itself in racism and discrimination in gender and in the employment of disabled people in this country”.

Of the opponents of the Bill Moorcroft (DP) was recorded in the South Africa Hansard Report (1998:2006) to have said "The Democratic Party’s attitude towards the Employment Equity Bill was expressed in forthright terms in the other place. We are opposed to it. Nothing has happened between our voting
against it there and the present time to make us change our minds. We are still against it and we will still be voting against it again”.

Van Der Walt (FF) was recorded in the South Africa Hansard Report (1998:1998) to have stated that the Freedom Front accepted the primary challenge for affirmative action was to rectify imbalances and discrimination of the past without creating new forms of imbalances and discrimination. One of the biggest objections which the FF had to this Bill is that, regarding employment, training and promotion, all workers would be judged according to their skin colour in terms of racial classification, while we have to move away from that racial classification.

“The consequences of this are to be catastrophic for white man, and particularly for those entering the labour market for the first time, because it will lead to a freezing of employment processes, and pressure is going to be exerted on employers to get rid of whites as a result of the requirements of the legislation”.

Marais (NP) was recorded in the South Africa Hansard Report (1998:1994) to have said that while the Bill pretended to rely on the Constitution for its legitimacy. It contained virtually the same prohibition of unfair discrimination as provided for in Section 9 of the Constitution. It then goes further and stipulates which affirmative action measures, which may be possible discriminatory, will be regarded as unfair. The Constitution, on the other hand, determines that discrimination is unfair, unless it is established that it is fair. That means that each and every case must be treated on its own merits. An Act cannot override the Constitution by laying down a general criterion for what is not fair.

South African Hansard report (1998:2014) states that the Bill in the NCOP was passed through the division of the House. The voting was as follows:

YES – 35 Permanent delegates: Bhabha, M; Bhengu, GB; Cwele, SC; Direko, IW; Foster, JA; Grove, SP; Khobe, ON; Lamani, NE; Lebona, HJP; Lubidla, EN; Mahlangu, QD; Makgothi, HG; Makwela, MI; Malapane, B; Mashile, NL;
The Employment Equity Act was approved by the NCOP on 12 September 1998. The (Citizen, 13/09/1998).

5.6 The negotiation process of the Employment Equity

The negotiators were characterized by different interests, different social and class backgrounds, different ideological orientations and different historical background. Stereotyping, alliances centralized decision-making and adversarialism also characterised the process.

5.6.1 Different interests

Moeridis et al (1991: 12) in Heywood (1991) states that within a political regime various actors, both groups and individuals, seek to articulate and advance their interests. They have certain expectations, they make certain demands, and they seek the realization of their needs and desires. The Employment Equity Act was not immune against the expectations, demands and desires of the various groups and individuals during the negotiation process. Various economic, political, and social interests seek to advance themselves and interests speak through organisations, usually associations and groups. Groups are generally identified and defined in terms of some shared objectives, such as race, class, tribal membership, occupation, age,
religion or ethnic identity. Associations are formally constituted and organised by individuals in order to protect their interests.

In an interview conducted on 21 June 2000, Buthelezi said that there were different interests within labour: “Various constituencies at Nedlac were defending the interests of their constituencies and it was also very difficult to co-ordinate consensus within the labour constituency because affirmative action or employment equity was like direct threat to other federation’s constituency, particularly Fedusa, which has white dominated membership, they see it as if their members are going to lose their jobs and be given to blacks”.

Van der Walt (Freedom Front) was recorded in the South Africa Hansard Report (1998:1998) to have said that: “The consequences of Employment Equity Act are going to be catastrophic for a white men, and particularly for those entering the labour market for the first time, because it will lead to a freezing of employment process and pressure is going to be exerted on employers to get rid of white employees as a result of the requirement of the legislation”.

The conflicting interests encountered during the drafting of the Employment Equity Act were reconciled and synthesized through an institutionalised framework (i.e. the Nedlac process and the parliamentary process) in order to reach consensus.

5.6.2 Different historical backgrounds

The organisations and individuals who negotiated about the Employment Equity Act had different and diverse historical backgrounds. Heywood (1991: 3) claims that political ideas are moulded by the social and historical circumstances in which they develop and the political ambitions they serve. This means that the associations established in a given society are a result of social and historical circumstances of that society.
Since the apartheid policy was based on white supremacy and was the official policy of the National Party government, the former government of South Africa, divided the country and stratified on the basis of race. The organisations that negotiated about the Employment Equity Act were also divided and stratified on a racial basis and had different historical backgrounds, which is still evident within the new constitutional dispensation.

The Minister of Labour was recorded in the South Africa Hansard Report (1998:1993) to have said that: "The debate around the legislation has shown how deep-seated the divisions that engulf our society are. The project of building a single nation remains evasive, mainly as a consequence of the unshaken commitment by those who long to retain sectional privileges and interests. It is a terrible indictment on the NP, DP, FF, who constitute an unholy alliance in defence of white minority privilege to the detriment of others".

In an interview conducted on 21 June 2000, Buthelezi said that: "the Labour Relations Act of 1995 does not allow unions that are based on race, but still the three union federations, COSATU and NACTU, are still black dominated and FEDUSA is still white dominated, and that is due to the legacy of “apartheid”.

The different historical backgrounds fostered different conceptualizations, different understandings and different expectations of affirmative action/employment equity among the different sectors of the South African society. In an interview conducted on 22 May 2000, Manyi said that: "In the BMF we think affirmative action needs to transform the whole environment, because as a black person, you get disadvantages in many ways, from the time you leave home and by the time you get to work, you travel all sorts of distances using all sorts of modalities of transport and all those things are very far from the workplace. When you get from the workplace, you are not accepted, in the workplace your whole cultural exposition is not accepted, I mean a simple example is that if in a workplace there is rugby which is mostly enjoyed by whites in this country and if there are big rugby matches it is an acceptable
thing for everybody not to work and to go and watch rugby and so on. But if you have got a big soccer fever that same understanding is not applied to you, you are expected to work and just ignore that.”

Business South Africa (BSA) articulated a different understanding of employment equity. BSA’s comment on Draft Employment Equity Bill, was that the Bill required employers to classify the employees according to race. Employers would be prevented from employing the best person for the job, irrespective of race or gender, but would be required to give preferential treatment to “suitably qualified” persons from designated groups to ensure a workforce that is broadly representative of the national demographics in all occupational categories and at all levels. Hence, as long as a candidate from a designated group is reasonably suitable, that person must be given preference above better qualified candidates who are not from a designated group. Business South Africa’s comment on the Draft Employment Equity Bill, was that “the Employment Equity Act will impact adversely on South Africa’s already poor competitiveness record, and will discourage labour-intensive investment and job creation”.

5.6.3 Stereotyping

The different historical backgrounds of the participants also tended to create stereotyping during the negotiations about the Employment Equity Act. Individuals representing organisations had different perceptions about each other and also had different perceptions about the organisations with which they negotiated. The Active English Dictionary defines stereotype as rigid patterns for certain types of person or people. In an interview conducted on 29 June 2000, Frans Baker said that: “Equality creates the impression that we should all be equal. We are not created equal. You have got the intelligence to go to university and the other person might only be intelligent enough to do manual labour, for instance, so there is inequality; some girls are beautiful and others not.”
Stereotyping was fuelled by the negotiators' different historical backgrounds, different social backgrounds, different class backgrounds, different ideological orientations, gender differences, and racial differences.

5.6.4 Social Differences

The organisations, groups and individuals who took part in the formulation of the Employment Equity Act, displayed diverse social backgrounds. This stems mainly from the different social roles and cultures these organisations and individuals played in the development of South African society. Apartheid divided the South African nation. As a result, people were socialized differently. The dividing factor was mainly race. Giddens (1989: 60) states that socialization is the process whereby a helpless infant gradually becomes a self-aware, knowledgeable person, skilled in the ways of the culture into which she or he is born.

Different forms of socialization have caused social institutions to be formed on the basis of race. This has prevailed with the South African society even after the new constitutional dispensation. In an interview conducted on 21 June 2000, Buthelezi said that: “Socialisation under apartheid has led to the formation of social institutions on the basis of race”.

5.6.5 Class Differences

Mkwanazi (1994: 37-38) state that the major inequalities that are evident South Africa society were created by racial discrimination. Patriarchal white male dominated society and that inequalities in any society lead to social stratification.

Giddens (1989: 206) defines stratification as structured inequalities between different groupings of people. The organisations and individuals who took part in the formulation of Employment Equity Act represented diverse class interests.
Giddens (1989: 209) defines a class as larger scale grouping of people who share common resources, which strongly influences the types of lifestyle they are able to lead. The ownership of wealth, together with occupation, are the chief basis of class. Giddens (1989: 209) claims that the main classes that exist in western societies are an upper class (the wealthy, employers, industrialists plus top executives, those who own or directly control productive resources); a middles class (which includes most white-collar workers and professionals); and a working class (those in blue-collar or manual jobs). Sometimes, a fourth class the peasants (people engaged in traditional types of agricultural production, is also evident.

The concept of class is less clear in the South African context and this is because race and class have been used interchangeable. Under apartheid, black people saw themselves as the working class selling their labour and white people as the ruling class owning the factors of production. This has resulted in the racialisation of class interests. This means that the interests of the, upper class, the middle class and the working class were different, whilst they may be belonging to the same class, which is due to racial discrimination espoused by apartheid and its legacy. Marx and Engels (1970: 64) in Heywood (1991: 7) state that the ideas of the ruling class are in every epoch the ruling ideas. The class ruling the material force of society is at the same time ruling intellectual force. The class that has the means of material production at its disposal, also has control over the means of mental production, so that generally speaking, the ideas of those who lack the means of mental production are subject to it. That is the case within South African society, because though the whites are not in political power, they control the production forces, and therefore controlling the mental production. They can therefore be categorized as a ruling class.

The people who negotiated the Employment Equity act displayed class differences although these class differences in the context of South African context are confused with the issue of racial differences.
5.6.6 Ideological differences

The organisations and individuals who took part in the formulation of the Employment Equity Act, displayed different ideological orientations. Heywood (1998: 6) claims that the concept of “ideology” has been widely employed, referring to disagreements that persisted over the social role and political significance of ideologies. Numerous meanings have been attached to the concept “ideology”.

The role-players in the formulation of the Employment Equity Act were characterised by the different ideological orientations, which can be attributed to apartheid and its legacy. It must also be stated that there has never been a truly homogenous society in the history of mankind. Old ideas have been negated by new ones, which does not mean the old ones will vanish entirely.

Business South Africa (BSA) was of the view that there was no need for the Act and that it would impact adversely on South Africa’s already poor record in competitiveness and discourage labour-intensive investment and job creation. Its view was shared by many sharing the same ideological orientation or those who embraced the same economic principles. The Free Market Foundation of South Africa’s submission to the Portfolio Committee on Labor on the Employment Equity Bill, stated that the primary objectives of government were to create an enabling environment in which South African citizens would have the opportunity to improve the quality of their lives by increasing their standards of living. An important aspect of an improved quality of life is individual liberty, something for which many generations of South Africans have been striving. An essential component of individual liberty is the right to engage in voluntary exchange without interference from third parties, including political parties. Business South Africa espoused the view that imbalances should be left to the vagaries of market forces; the market forces would sort them out. In an interview conducted on 22 June 2000, Frans Baker said that: “The small employer does not have all functionary that are needed in a business establishment. There are many labour laws that regulate the operations of a business and all these laws
have to be administered. The Employment Equity Act will just add another administrative burden. The other fundamental problem of affirmative action is that there is a period of training, of mentorship and of unproductive time before the appointees can do the work properly”.

The community and other groups hold the opposing view that the state should intervene to address the imbalances created by apartheid inequalities. In an interview conducted on 31 May 2000, Mofekeng said that: “There were people who were lamenting on the past, due to their ideological orientation. They wanted to protect their interests at all cost. It was difficult to blame them, because it is difficult to change the mind-set. COSATU’s submission on the Employment Equity Bill, stated that there are forces in our society that are opposed to the Bill, mainly business representatives, opposition parties, especially the Democratic Party and the Nationalist Party, as well as the South African Institute of Race Relations. In the main, these groupings use a façade of defending standards, the need to keep the state out of the market, concerns that the bill, reracialises South African society and the need for labour market, ‘flexibility’ are used as their justification for opposing the Bill. COSATU’s submission stated National Party and the Democratic Party suggests that what was required in South Africa was the elimination of formal discrimination in the form of repeal of discriminatory legislation, and that the market would redress past imbalances with no state intervention and that approach is flawed for a number of reasons. Firstly without concrete programmes to redress past imbalances, the market will simply perpetuate inequality on the basis of race, gender, disability and income. This becomes even more serious if we take into account extra labour market inequalities. Secondly, the playing field will not be level as discriminatory laws and practices have historically advantaged some groups in society and market cannot be relied upon to correct these anomalies without the creation of the current regulatory environment by the state.

The above arguments clearly demonstrate the intensity of ideological differences during the formulation of the Employment Equity Act.
5.6.7 Adversarialism

The Employment Equity Act, was a tough piece of legislation or policy to formulate because it touched the emotions of many people and there have been expectations from various groupings in South African society. The nature of the policy, that is Employment Equity Act, rendered it to be characterised by adversarism. The Concise Oxford Dictionary defines adversarialism as involving conflicting, opposing or hostile views or ideas towards each other. This was caused by many of things, *inter alia*, the history of South Africa and its legacy, ideological differences, race, class, gender, social differences, stereotypes and different interests.

There were conflicting interests within and between the negotiating constituencies. Labour movement had conflicting interests because the labour movement was racialised by “apartheid” laws into white union federations and black union federations and each federation wanting to advance the interests of its constituency.

There were also conflicting positions within business sector. In an interview conducted on 21 June 2000, Buthelezi said that: “There were differences within the respective constituencies and you could see that there were individuals who want to cling to the past, seeing the Bill as interference by the state, and those who want to see progress.” Furthermore the business sector had a divided approach to the Employment Equity Act, because their representatives were divided on the basis of race.

In an interview conducted on the 21 of June 2000, Buthelezi said that: “Well, most times you will find because of hard bargaining or negotiations that you will find government much more understanding than business and I must say that specifically on the Employment Equity, I think, I can’t remember well, when business was comfortable with the positions, with business our agreements were not more than 10% of the whole Bill”.

5.6.8 Alliances

The formulation of the Employment Equity Act was characterised by alliances from various organisations that sharing the common positions or objectives in so far as the Act was concerned.

The alliances were formed by institutions or organisations on the basis common history, ideology, class, interest, racial dominance, social background and a common vision in of the transformation of the South African society.

The first alliance that should be noted in policy formulation in South Africa is the ANC-COSATU-SACP alliance, which consults alliance partners on policy formulation. The COSATU Submission on the Employment Equity Bill, to the portfolio committee on labour, 22 July 1998 stated that the ANC-COSATU-SACP alliance never wavered from the its vision of a non-racial society. The DP was, therefore, being disingenuous when it claimed that “the ANC used the rhetoric of ‘non-racialism’ and reconciliation as big lies, primarily to diffuse any resistance by minorities until it has consolidated power. The COSATU submission stated that it was, in fact, parties from the old order who were trying to re-racialise South African policies in order to consolidate a white support base. There were consequently alliances among political parties, organisations, and groups that shared the common history, ideology, social background, experiences and common vision as to how South African society should be transformed.

Alliances were established among organisations who shared disadvantaged backgrounds or common social backgrounds. These alliances had major disagreements with those organisations, which were previously advantaged by apartheid. In an interview conducted on 21 June 2000, Buthelezi said that: “Well, in most times you will find because of hard bargaining or negotiations, that you will find government much more understanding than business, and must say that specifically on the Employment Equity, I think, I can’t remember
well when business was comfortable with its position, with the listing of business of was more than 10% of the Bill'.

Alliances were established among organisations who upheld the values of Constitution of the Republic of South Africa, lobbied their positions as a group or an alliance. These organisations consolidated themselves into what was known as the Employment Equity Alliance. It comprised of an AIDS Consortium, an AIDS Law Project, an AIDS Legal Network, the Black Sash, the Gender Research Project, the CALS Labour Project, the Commission for Gender Equality, the Disabled People of South Africa, the Freedom of Expression Institute, the Gender Equity Unit of the University of the Western Cape, the Health and Human Rights Project, the Human Rights Committee, the KwaZulu-Natal Coalition for Gay and Lesbian Equality, the National Association of Democratic Lawyers, the Human Rights and Advocacy Project, the National Association of People Living with AIDS/HIV, the National Convention on AIDS in South Africa, the National Coalition for Gay and Lesbian Equality, the New Women Movement, People Opposing Women Abuse, the Triangle Project, and the Tshwarenang Legal Advocacy Centre to End Violence Against Women.

5.6.9 Decision-Making

Many decisions were made during the formulation of the Employment Equity Act by the stakeholders who took part in the formulation of the Employment Equity Act. Robbins (1984: 57) in Fox et al (1991) defines decision-making as making a choice between two or more alternatives. Individuals and committees who were clothed with that authority from the various stakeholder organizations made the decisions.

The Employment Equity Act was characterized by centralized, bureaucratic, and belief system models of decision-making. Heywood (1991:384-385) defines a bureaucratic model as a model that highlights the degree to which the process influences the product (decision). It suggests that decisions arise from an arena of contest in which the balance of advantage is constantly
shifting, whilst the belief system model highlight the degree to which behaviour is structured by perception and puts emphasis on the role of beliefs and ideology in decision-making. The Act was characterised by centralised and elitist decision-making because the representatives of the stakeholder organisations consulted the National Executive Committee members (secretary generals and national committees) before taking major decisions. This means that the belief systems, structures and values of the organisations had a major influence on decision-making during the formulation of the Employment Equity Act.

In an interview conducted on 21 June 2000, Buthelezi said that: “It will be full government delegation, a full business delegation, seven, eight people are allowed. I was leading negotiations for labour. Labour, instead of seven or eight people we will be two, three people, maybe we will start very late. I will be alone with a full two teams, powerful institutions but I must say, we open a direct line between myself and Shilowa and anything I thought we didn’t have a mandate, reporting back, we will get mandate all the time and equity was something to liaise with NACTU, and that it was for Sam to speak to Cunningham to look into it, ask what do we do, maybe it will be a legal strategy then will bring in a lawyer, whether it's six o’ clock or seven o’ clock in the morning, I will meet with Sam, brief him, draft everything quickly, move quickly to meet them”.

This means that although there were issues on which the representatives had reached mandates, there were also issues that demanded quick decisions (impulsive decisions) which were made by powerful individuals clothed with authority in some organizations.

In an interview conducted on 29 June 2000, Baker said that: “We had meetings, we had a committee looking at Employment Equity, we discussed issues there and then. We went to Business South Africa’s governing body for mandates, the governing body consisting of the various employer organisations; the various members gave us mandates” This means that the
Committee made recommendations to the governing body, clothed with authority to make decisions.

5.6.10 **Consensus-building**

The Employment Equity Act was formulated through the principle known as consensus in reaching agreement. Nedlac, which is a national consensus seeking institution on certain national policy issues mostly uses this principle. In an interview conducted on 31 May 2000, Mofekeng said the following about consensus: “We are not talking about numbers, we are not focusing on the majority in terms of numbers but in terms of the constituencies.” Government representatives had this view about consensus.

In an interview conducted on 17 June 2000, Moatshe said that: “Consensus means obviously we will have areas where we have different points of view, and we will have areas where we have common points of view and where we have common points of view on the issue that will amount to 99% common point of view on the issue that will be consensus. We will respect the differences of opinion and the points of view that are different to other constituencies’ points of view”.

In an interview conducted on 21 of 2000, a Nedlac representative, Buthelezi said that: “Well, the first thing with Nedlac, Nedlac as an institution, is a consensus-seeking constitution on issues. So, the way of trying to achieve that, is through negotiations, so, basically it is direct negotiations between labour, government and business and the way those negotiations will develop and unfold is that you find in particular issues where government is agreeing with labour, and disagreeing with business, or business and government agreeing against labour, and *vice versa* or even at times not regularly as you may find that business and labour do agree on particular issues but government disagrees”.

In an interview conducted on 29 June 2000, a business representative, Baker said that: “We had formal and informal discussions, we put proposals or made
oral proposals, we went to see other parties, adhere to various procedures in order to reach consensus, and to build consensus”.

Consensus can be understood as reaching agreements on particular issues by various stakeholders or constituencies during negotiations. The Employment Equity Act was the product of consensus among various stakeholders or constituencies who took part in its formulation.

5.6.11 Advocacy

The Employment Equity Act was characterised by the advocation of women rights and the rights of the disabled people and that is why they were included as designated groups in the Act. Pearsal (1998) defines advocacy as public support for or recommendation of a particular cause or policy. The inclusion of women and disabled people was supported by many groups who took part in the formulation of the Employment Equity Act, the rationale behind that being the Constitutional imperative of fulfilling the right to equality. The rights of the disabled and women were advocated by organisations such as the Women National Coalition (WNC) and the Disabled People of South Africa (DPSA) who were also they were given support by various organisations sympathetic to their cause.

Tyobeka-lieta was recorded (ANC) in the Hansard report (1998:2007) to have said that: “The legislation introduced by the Minister of Labour forms the nucleus of transformation. It is the principle which guides affirmative action. It aims to address the legacy of the regime which manifested itself in racism and discrimination in gender and in the employment of disabled people in this country”.

5.6.12 Conclusions

It can be concluded that the formulation of the Employment Equity Act was characterized by tendencies that resembled the legacy of apartheid South Africa. A South Africa divided on the basis of race, gender, disability, poor and
rich (class), prejudice and mistrust. It is hoped that the enactment of a policy legislation such as the Employment Equity Act things will change herald a society that knows no race, gender or class and in which the skin colour does not count.
CHAPTER 6

6.1 INTRODUCTION

The Employment Equity Act was enacted to address the legacy of apartheid and other discriminatory laws and practices. These disparities in employment, occupation and income created by these laws and practices within the national labour market; have created such pronounced disadvantages for certain categories of South Africans that they cannot be redressed simply by repealing discriminatory laws.

It soon became clear that it was necessary to enact a piece of legislation that will enhance the full enjoyment of some of the rights enshrined in the 1994 Constitution, particularly the right to equality. It has been necessary to enact a policy/legislation that would eliminate all forms of discrimination in employment, implement affirmative action measures that will give opportunities in employment to disadvantaged categories of people, create a framework for conducting workforce analysis that will enhance representation in certain levels of employment and look at income disparities, and lastly and most importantly create a monitoring mechanism that will see to it that the goals of the policy/legislation are adhered to by the affected parties.

6.2 PURPOSE OF THE EMPLOYMENT EQUITY ACT

6.2.1 Elimination of unfair discrimination

Section 2(a) of the Employment Equity Act, stipulates that the purpose of the Act, is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The Department of Labour (2000a: 2) states that South Africa has a legacy of discrimination in relation to race, gender and disability that has denied access to opportunities for education, employment, promotion and wealth creation to
the majority of South Africans, and, therefore, the Employment Equity Act was passed to address this legacy. The Act has two main objectives:

(a) to ensure that workplaces are free of discrimination; and
(b) to ensure that employers take active steps to promote employment equity.

The Employment Equity Act states that equity centers around the eradication of unfair discrimination of any kind in “employment policy or practice” which includes but are not limited to:

(1) recruitment procedures, advertising and selection criteria;
(2) appointments and the appointment process;
(3) job classification and grading;
(4) remuneration; employment benefits and terms and conditions of employment;
(5) job assignments;
(6) the working environment and facilities;
(7) training and development;
(8) performance evaluation systems;
(9) promotion;
(10) transfer;
(12) demotion; and
(13) disciplinary measures other than dismissal; and dismissal.

The Green Paper on Employment and Occupational Equity (2000b:10) claims that the need for policies on employment equity arises in the first place from the recognition of continuing inequalities associated with past discrimination primarily on race, gender and disability. Hence the Employment Equity Act, 1998 (Act 55 of 1998), defines designated groups as black people (Africans, Colourdes and Indians); women; and people with disabilities.

The Employment Equity Alliance submission on the Employment Equity Bill, (1998) states that persons with disabilities were historically excluded from the
benefits of full citizenship based on the paternalistic and sometimes noble perception of care, charity, trusteeship, pity and rehabilitation. The constitutional prohibition on unfair discrimination based on disability is a simple, but revolutionary reversal of that perception. Its fundamental premises are dignity and equality, and it recognizes that persons with disabilities are part of society, and therefore have a civil right to participate in the full range of services, benefits and employment opportunities that constitute the South African society.

Furthermore, the government has endorsed the United Nations Standard Rules for the equalization of opportunities for people with disabilities, and the World Programme of Action concerning disabled persons. Studies have shown that fewer than 30% of persons with disabilities in South Africa are economically active and that fewer than 1 in every 100 persons with disabilities participate in the open labour market (White Paper on Integrated National Strategy (1997)).

The Employment Equity Alliance submission on the Employment Equity Bill, (1998) states that women represent the majority of the South African population, but constitute fewer than 15% of top and middle managers. Hence, they have been categorized as a designated group. The employment of both black or white women will depend on the workforce analysis, and the audit of that particular employment equity plan. Black people have been also categorized as designated groups. The Employment Equity Act defines black people as Africans, Coloureds and Indians. Again this classification will depend on workforce analysis and employment equity plans and how a particular company will try to reach the set objectives.

6.1.2 Implementing affirmative action measures

Section (2)(b) of the Employment Equity Act stipulates that the purpose of the Act is to achieve equity in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all
occupational categories and levels in the workforce. Section 15(1) and (2) of the Employment Equity Act defines affirmative action measures as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. The affirmative action measures implemented by a designated employer must include the following:

a. Measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

b. Measures designated to further diversity in the workplace based on equal dignity and respect of all people;

c. Reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. The Employment Equity Act defines reasonable accommodation as any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to, or participate in or advance in employment;

d. i. Measures to ensure equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

d. ii. retain and develop people from designated groups and to implement appropriate training measures, including measures provided by the Skills Development Act, and these measures include preferential treatment and numerical goals, excluding quotas. The Employment Equity Act defines a suitably qualified person for a job with reference to, or any combination of that person's –
   a. formal qualifications;
   b. prior learning;
   c. relevant experience; or
d. capacity to acquire, within a reasonable time, the ability to do the job.

A designated employer who should implement the above affirmative measures is defined in Section 12 of the Employment Equity Act, as-

a. an employer who employs 50 or more employees;
b. an employer who employs fewer that 50 staff members, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business. Schedule 4 of the Employment Equity Act lists a designated employer, as defined by the turnover threshold as follows:

**Turnover threshold applicable to designated employers**

<table>
<thead>
<tr>
<th>Sector or Sub-sectors with the Standard Industrial Classification</th>
<th>Total annual turnover</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>R 2.0 m</td>
</tr>
<tr>
<td>Mining and Quarrying</td>
<td>R 750.0 m</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>R 10.0 m</td>
</tr>
<tr>
<td>Electricity, Gas and Water</td>
<td>R 10.0 m</td>
</tr>
<tr>
<td>Construction</td>
<td>R 5.00 m</td>
</tr>
<tr>
<td>Retail and Motor Trade and Repair Services</td>
<td>R 15.00 m</td>
</tr>
<tr>
<td>Wholesale Trade, Commercial Agents and Allied Services</td>
<td>R 25.00 m</td>
</tr>
<tr>
<td>Catering, Accommodation and other Trade</td>
<td>R 5.00 m</td>
</tr>
<tr>
<td>Transport, Storage and Communication</td>
<td>R 10.00 m</td>
</tr>
<tr>
<td>Finance and Business Services</td>
<td>R 10.00 m</td>
</tr>
<tr>
<td>Community, Social and Personal Services</td>
<td>R 5.00 m</td>
</tr>
</tbody>
</table>

**6.2.2 Prohibition on unfair discrimination**

Section 5 of the Employment Equity Act stipulates that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.
Section (6)(1) of the Employment Equity Act stipulates that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, age, colour, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

This clause, which forms the basis on which unfair discrimination is prohibited, emanates from Section 9(3) of the 1996 Constitution. The Employment Equity Act has added two more grounds on which unfair discrimination is prohibited in employment policy and practice, namely family responsibility and HIV status.

The Employment Equity Act, defines “family responsibility” as the responsibility of employees in relation to their spouse or partner, their dependent children, or other members of their immediate family who need their care and support. This definition has included non-conventional families and partners because discrimination on the basis of sexual orientation and marital status is prohibited by the Constitution of the Republic South Africa, Act 108 of 1996.

Section 6(1) of the Employment Equity Act furthermore prohibits discrimination on the basis of HIV status. The Act defines HIV status as a disability and people with a disability as people who have a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into or advancement in employment. The Aids Law Project Employment Equity submission to the Employment Equity Bill (1998) states that the HIV virus continually replicates in the body of an infected person and continually impacts on his or her psychological and physical well-being. It also impacts on the infected person major life activities, such as reproduction and sexual relations. However, illness directly associated with HIV often takes many years to develop, and a person with HIV is generally fit and productive and poses no risk to his or her colleagues at work. The Act also prohibits discrimination on the basis of pregnancy. The Act defines “pregnancy” as
pregnancy and that includes intended pregnancy, termination and any medical circumstances related to pregnancy.

The University of the Western Cape’s Community Law Centre and Human Rights submission to the Employment Equity Bill (1998) states that the equality, espoused by Section (9) of the Constitution of the Republic of South Africa (Act 108 of 1996), has two aspects, anti-discrimination measures (prohibition and discrimination) and positive measures. Anti-discrimination measures can advance substantive equality, as do positive measures. The prohibition on indirect discrimination in the Employment Equity Act, 1998 (Act 55 of 1998), Section 6(1), is a means of advancing substantive equality. The inclusion of this prohibition acknowledges, for example that there are certain employment policies and practices, which while neutral at face value between men and women, have a disproportionate, adverse impact on women, which cannot be justified.

University of Western Cape’s Community Law Centre Women and Human Rights submission to the Employment Equity Bill (1998) states that the 1996 Constitution embraces a substantive understanding of equality, as opposed to formal equality. It focuses not only on equality and opportunity, but also on equality of outcomes. Formal equality is about equality of treatment. It requires similar treatment of similarly situated people. It focuses on individuals and ignores the disadvantages that women, black people and disabled people suffer as a group. The deficiency of formal equality is that it does not recognize systemic inequality. It assumes that the people, to whom it applies, all have the same opportunities and advantages. It ignores the actual social and economic conditions of disadvantaged groups and in fact, then perpetuate disadvantage.

Section (6)(3) of the Employment Equity Act stipulates that the harassment of an employee is a form of unfair discrimination and is prohibited on any one or any combination of the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political
opinion, culture, language and birth. The most common type of harassment that is widely reported in South Africa is sexual harassment and it is envisaged that following the promulgation of the Employment Equity Act, other forms of discrimination, that are prohibited by the 1996 Constitution and the Employment Equity Act will be reported.

Code of Good Practice on the Handling of Sexual Harassment (2000b) states that the victims and perpetrators of sexual harassment may include owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with a business. Sexual harassment is defined as an unwanted conduct of a sexual nature, and differs from behaviour that is welcome and mutual. Sexual attention becomes harassment if:

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

Code of Good Practice in Handling Sexual Harassment (2000b) states that sexual harassment may include unwelcome physical, verbal or non-verbal conduct, for examples, the examples listed below:

a. Physical conduct of a sexual nature, which includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex;
b. Verbal forms of sexual harassment, which include unwelcome innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person’s body made in their presence or directed towards them, and unwelcome whistling directed at a person or group of persons;
c. Non-verbal forms of sexual harassment which include unwelcome gestures, indecent exposure and the unwelcome display of sexually explicit pictures and objects;

d. Quid pro quo harassment when an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence the process of employment promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours. Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit-rating or salary increases.

Section (7)(1) Employment Equity Act stipulates that the medical testing of an employee is prohibited, unless (a) legislation permits or requires; or (b) it is justifiable in the light of medical facts, employment conditions, social policy and the fair distribution of employee benefits or the inherent requirements of a job. The Employment Equity Act defines medical testing as any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition. Section (50)(4) of the Employment Equity Act stipulates that the Labour Court can allow medical testing on the above grounds, if it is justifiable.

Section (7)(2) of the Employment Equity Act stipulates that the testing of an employee to determine that employee’s HIV status is prohibited, unless such testing is determined to be justifiable by the Labour Court. The Labour Court may make any order that it considers appropriate in the circumstances; including imposing conditions relating to-

a. the provision of counseling;

b. the maintenance of confidentiality;

c. the period during which the authorization for any testing applies; and
d. category or categories of jobs or employees in respect of which the authorization for testing applies.

Section 8 of the Employment Equity Act stipulates that psychological testing and other similar assessments of an employee are prohibited, unless the test or assessment being used:

a. has been scientifically shown to be valid and reliable;
b. can be applied fairly to all employees; and
c. is not biased against any employee or group.

6.2.1 Disputes concerning Chapter II of the Employment Equity Act

Section 10(1) of the Employment Equity Act stipulates that a dispute excludes a dispute about an unfair dismissal and that must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.

Section 10(2) of the Employment Equity Act stipulates that any party to a dispute concerning Chapter II of the above Act may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration (CCMA) within six months after the act or omission that allegedly constitutes unfair discrimination on one or more of the 21 grounds in Section 6(1) of the Employment Equity Act.

Section 10(3) of the Employment Equity Act states that the CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit, which is six months. Section 4 of the Employment Equity Act stipulates that the party that refers a dispute must satisfy the CCMA that (a) a copy of the referral has been served on every other party to the dispute; and b) the referring party has made a reasonable attempt to resolve the dispute.
Section 10(5) Employment Equity Act states that the CCMA must attempt to resolve the dispute through conciliation. Section 10(6) of the Employment Equity Act states that if the dispute remains unresolved after conciliation –

a. any party to the dispute may refer it to the Labour Court for adjudication; or
b. all the parties to the dispute may consent to arbitration of the dispute.

Section 10(7) of the relevant provisions of Part C and D of Chapter VII of the Labour Relations Act with the changes required by context shall apply in respect of a dispute in terms of Chapter II of the Employment Equity Act.

6.2.2 Burden of proof

Section 11 of the Employment Equity Act stipulates that whenever unfair discrimination is alleged in terms of Chapter II of the above Act, the employer against whom the allegation is made, must establish that the discrimination is fair. This means that the onus to prove that the discrimination is fair rests with the employer.

6.2.3 Application of Employment Equity Act

Section 4(1) and (2) of the Employment Equity Act states that Chapter II of the Act applies to all employees and employers, except where Chapter III provides otherwise, Chapter III of the Act applies only to designated employers and people from designated groups). The Employment Equity Act does not apply to the members of the National Defence Force, the National Intelligence Agency, or the South African Secret Services.
6.3 AFFIRMATIVE ACTION MEASURES

Section 6(2) Employment Equity Act, stipulates that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act. Section 15(1) of the Employment Equity Act defines affirmative action measures as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels of the employer’s workforce. The clause emanates from the Section 9(2) of 1996 Constitution and stipulates that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, the Employment Equity Act was promulgated. The above is indicative of the substantive nature of equality guaranteed in the 1996 Constitution that affirmative action measures are part and parcel of equality.

Section 6(2)(b) of the Employment Equity Act further stipulates that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of inherent requirements of a job. This clause emanates from the International Labour Organisation Article 1 Convention 111(2), which stipulates that “any distinction, exclusion or preference in respect of a particular job based on the inherent requirements, shall not be deemed to be discrimination”.

The University of the Western Cape’s Community Law Centre Women and Human Rights project submission to the Employment Equity Bill (1998) states that in most comparative anti-discrimination statutes there is some type of defence for discrimination in the employment sphere, based on the inherent requirements of the job. This means that employers admit that discrimination has taken places but argue that it is justified on the basis of genuine occupational requirements. In the event that the employee feels that unfair discrimination has been committed against him or her on the basis of genuine occupational requirements, he or she may seek redress through appropriate bodies, such as the Commission for Conciliation Mediation and Arbitration.
The dispute should be referred in writing within six months after the act or omission that allegedly constitutes unfair discrimination. The Employment Equity Act defines a “dispute” as including an alleged dispute, but for the purpose of section 10(1) of the Employment Equity Act, the word dispute excludes a dispute about unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.

6.4 DUTIES OF DESIGNATED EMPLOYERS

Section 13(1) of the Employment Equity Act stipulates that every designated employer, must in order to achieve employment equity, implement affirmative action measures for people from designated groups. Section 15(1) of the Employment Equity Act stipulates that affirmative action measures are measures designated to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. Section 15(2) of the Employment Equity Act, stipulates that affirmative action measures implemented by designated employers must include the following:

a. appointment of members from designated groups, which would include transparent recruitment strategies such as appropriate and unbiased selection criteria and panels, and targeted advertising;

i. increasing the pool of available candidates. Community investment and bridging programmes can increase the number of potential candidates;

ii. training and development of people from designated groups. These measures include access to training by members of designated groups, structural training and development programmes such as learnerships and internships, on-the-job mentoring and coaching; and accelerated training for new recruits.
b. Measures designated to further diversity in the workplace based on equal dignity and respect of all people. Where required, diversity training should be provided to responsible managers, as well as training in coaching and mentoring skills. The retention of people from designated groups is vital. Retention strategies would include the promotion of a more diverse organizational culture; an interactive communication and feedback strategy; and ongoing labour turnover analysis.

c. Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. The Employment Equity Act defines reasonable accommodation as any modification or adjustment to a job or to the working environment that will enable a person from designated groups to have access to or participate or advance in employment. The Equity Code of Good Practice (Equity 2000) states that reasonable accommodation for people from designated groups include providing an enabling environment for disabled workers and with those family responsibilities so that they may participate fully and, in so doing, improve productivity. Examples of reasonable accommodation are accessible working areas, modifications to buildings and facilities, and flexible working hours where these can be accommodated.

d. Measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce, which include preferential treatment and numerical goals, but exclude quotas. Section 20(3) Employment Equity Act defines suitably qualified people with reference to any of, or any combination of that person’s
a. Formal qualifications;
b. Prior learning;
c. Relevant experience; or
d. Capacity to acquire, within a reasonable time, the ability to do the job.

The Equity Code of Good Practice (Equity 2000) states that numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer’s workforce, where underrepresentation has been identified, and to make the workforce reflective of the relevant demographics. In developing numerical goals, the following factors should be taken into consideration:

i. The degree of under-representation of employees from designated groups in each occupational category and level in the employer’s workforce;
ii. Present and planned vacancies;
iii. The provincial and national economically active population and the demographics should reflect race and gender and who occupies which occupation in so far as the above variables are concerned.
iv. The pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;
v. Present and anticipated economic and financial factors relevant to the industry in which the employer operates;
vi. Economic and financial factors relevant to the industry in which the employer operates;
vii. Economic and financial circumstances of the employer;
viii. Anticipated growth or reduction in the employer’s workforce during the time period of the goals;
ix. Expected turnover of employees in the employer’s workforce during the time period for the goals; and
x. Underlying reasons; specifically for employees from designated groups.
d. Measures to retain and develop people from designated groups and to implement appropriate training measures including measures in terms of the Skills Development Act. The Equity Code of Good Practice (Equity 2000) states that retention strategies would include the promotion of a more diverse organisational culture, an interactive communication and feedback strategy, and ongoing labour turnover analysis and training and development of people from designated groups, including access to training by members of designated groups, structured training and development programmes such as learnerships and internships, on-the-job mentoring and coaching; and accelerated training for new recruits.

Section 15(3) Employment Equity Act stipulates that subject to Section 42 of the above Act, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

The Equity Code of Good Practice (Equity 2000) states that the employer is under no obligation to introduce an absolute barrier relationship to people who are not from designated groups, for example introducing a policy of not considering white males at all for promotion, or excluding them from applying for vacant positions. Section 42 of the Employment Equity Act stipulates that in determining whether a designated employer is implementing the Act or in compliance with the Act, the Director General or any person or body applying the Act must, in addition to the factors stated in Section 15 of the Act, take into account all of the following:

a. The extent to which suitably qualified people from amongst the different designated groups are equitably represented within each
occupational category and level in that employer’s workforce in relation to the –

i. demographic profile of the national and regional economically active population;

ii. pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

iii. economic and financial factors relevant to the sector in which the employer operates;

iv. present and anticipated economic and financial circumstances of the employer; and

v. number of present and planned vacancies that exist in the various categories and levels, and the employer’s labour turnover.

b. Progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

c. Reasonable efforts made by designated employers to implement its employment equity plan;

d. The extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

e. Any other prescribed factor.

6.4.1 Consultation with employees

Section 16(1) of the Employment Equity Act puts an obligation on designated employers to take reasonable steps to consult and attempt to reach agreement on the following matters:

a. the conduct of an analysis regarding the employment policies, practices, procedures and the working environment, in order to identify employment barriers that adversely affect people from designated groups;
b. the preparation and implementation of an employment equity plan that will achieve reasonable progress towards employment equity in that employer’s workforce; and

c. submission of a report to the Director-General

Section 16(1) of the Employment Equity Act stipulates that a designated employer must take reasonable steps to consult and attempt to reach agreement on the above matters. The designated employers must consult the following parties:

a. A representative trade union representing members at the workplace and its employees or representatives nominated by them;

b. If no representative trade union represents members at the workplace, its employees or representatives nominated by them. Section 16(2) of the Employment Equity Act further stipulates that the employees or their nominated representatives with whom an employer consults, must reflect the interests of -

   i. employees from across all occupational categories and levels of the employer’s workforce;

   ii. employees from designated groups; and

   iii. employees who are not from designated groups.

The Equity Code of Good Practice (Equity 2000) states that employers are required to consult with regard to conducting an analysis, the preparation and implementation of the analysis, and the submission of the employment equity reports to the Department of Labour to ensure the successful implementation of a plan. Employers should make every effort to include employee representatives in all aspects of the plan, especially the planning and development phases.

Managers should be informed of their obligations in terms of the Employment Equity Act and training should be provided to them where particular skills do not exist. Examples of the required training could include diversity management, and coaching and mentoring programmes. The
communication of an employment equity strategy should focus on positive outcomes, such as the better utilisation of all of the employer’s human resources and the creation of a diverse and more productive workforce. Such communication should also include employees from non-designated groups and focus on the contribution that can be made by them.

Consultation with employees should commence as early as possible in the process. A consultative forum should be established or an existing forum should be utilised. The forum should include employee representatives reflecting the interests of employees from both designated and non-designated groups and across all occupational categories and levels of the workforce. Representative trade unions, where these exist, or representatives nominated by such trade unions must be included in the consultation process. One or more members of senior management should represent the employer. Consultation would include:

a. the opportunity to meet and report back to employees and management;
b. reasonable opportunity for employee representatives to meet with the employer;
c. the request, receipt and consideration of relevant information and;
d. Adequate time should be allowed for each of these steps.

Section 16(3) of the Employment Equity Act stipulates that Section 16 (3), does not affect the obligations of any designated employer in terms of Section 86 of the Labour Relations Act, to consult and reach consensus with a workplace forum on matters referred to in Section 17 of the Employment Equity Act. The Labour Relations Act stipulates that unless the matters for joint decision-making are regulated by a collective agreement with a representative trade union, an employee must consult and reach consensus with a workplace forum implementing any proposal concerning:
a. disciplinary codes and procedures;
b. rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
c. measures designed to protect and advance persons disadvantaged by unfair discrimination; and
d. changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to rules regulating social benefit schemes.

6.4.2 Disclosure of information

Section 18(1) of the Employment Equity Act stipulates that when a designated employer engages in consultation, that employer must disclose to the consulting parties all relevant information that will allow those parties to consult effectively. The Equity Code of Good Practice (Equity 2000) states that to ensure an informed and constructive consultation process, structural and regular meetings of the consultative or forums should be held. The disclosure of relevant information by designated employers is vital for the successful implementation of the plan. Such information could include:

i. the particular business environment and circumstances of the employer;
ii. information relating to the economic sector or industry;
iii. relevant local, regional, and national demographic information relating to the economically active population;
iv. the anticipated growth or reduction of the employer’s workforce;
v. the turnover of employees in the employer’s workforce;
vi. the internal and external availability for appointment or promotion of suitably qualified people from designated groups;
vii. the degree of representation of designated employees in each occupational category and level in the employer’s workforce;
viii. employment policies and practices of the employer; and
ix. all parties should, in all good faith, keep an open mind throughout the process, and seriously consider the proposals put forward.
Section 18(2) of the Employment Equity Act stipulates that unless the Act provides otherwise, the provisions of section 16 of the Labour Relations Act shall apply to the disclosure of information with the changes required by the context. The Labour Relations Act, states that:

a) “An employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4) of the Labour Relations Act.

b) Subject to Subsection 16(5) of the Labour Relations Act whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.

c) The employer must notify the trade union representative or the representative trade union in writing if any information disclosed is confidential.

d) An employer is not required to disclose information
   i) that is legally privileged;
   ii) that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
   iii) that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
   iv) that is private personnel information relating to an employee, unless that employee consents to the disclosure of that information.

e) If there is a dispute about what information is required to be disclosed, any party to the dispute may refer the dispute in writing to the commission. The dispute will follow the normal CCMA procedures until resolved through arbitration".
6.5 **CONDUCTING AN ANALYSIS**

Section 19(1) of the Employment Equity Act stipulates that a designated employer must collect information on and conduct an analysis of its employment policies, practices, procedures and the working environment that may adversely affect people from designated groups. Subsection (19)(2) of the Employment Equity Act further states that an analysis conducted must include profiles of the designated employer’s workforce within each occupational category and level in order to determine the degree of under-representation of people from designated groups in various occupational categories and levels in that employer’s workforce.

The Equity Code of Good Practice (Equity 2000) (states that the purpose of conducting such an analysis is:

a. to assess all employment policies, practices, procedures, and the working environment, so as to:
   i. identify any barriers that may contribute to the under-representation or under-utilisation of employees from the designated groups;
   ii. identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
   iii. identify other employment conditions that may adversely affect designated groups;
   iv. identify practices or factors that positively promote employment and diversity in the workplace.
   v. to determine the extent of under-representation of employees from the designated groups in the different occupational categories and levels of the employer’s workforce.
   vi. a review of all employment policies, practices, procedures and of the working environment in order to identify any barriers that may be responsible for the under-representation or under-utilization of employees from designated groups.
vii. The review should include a critical examination of all established policies, practices, procedures and working environments.

These would include:

i. employment policy or practices, such as recruitment, selection, pre-employment testing; and induction that could be biased, inappropriate or unaffirming;

ii. practices related to succession and experience planning, and related promotions and transfers to establish whether designated groups are excluded or adversely impacted;

iii. utilisation and job assignments to establish whether designated groups are able to meaningfully participate and contribute;

iv. current training and development methodologies and strategies; including access to training for designated groups;

v. remuneration structures and practices such as equal remuneration for work of equal value;

vi. employee benefits related to retirement, risk, and medical aid to establish whether designated groups have equal access;

vii. disciplinary practices that may have a disproportionately adverse effect on designated groups and that may not be justified;

viii. working conditions that may not accommodate cultural or religious differences, such as the use of traditional healers and observance of religious holidays;

ix. the number and nature of dismissals, voluntary terminations and retrenchments of employees from designated groups that may indicate internal or external equity related factors contributing to such terminations;

x. corporate culture, which may be characterized by exclusionary social and other practices;

xi. practices relating to the management of HIV/AIDS in the workplace; to ensure that people living with HIV/AIDS are not
discriminated against; and all practices should be assessed in terms of cross-cultural and gender fairness.

xii. the review should take into account more subtle or indirect forms of discrimination and stereotyping that could result in certain groups of people not being employed in particular jobs; or which could preclude people from being promoted; examples would include pregnancy, family responsibility, exclusionary social practices, sexual harassment; and religious or cultural beliefs and practices.

The Equity Code of Good Practice (Equity 2000) states that the first step in conducting an analysis of the workforce profile is to establish which employees are members of the designated groups. This information should be obtained from employees themselves, or from existing and dependable sources. An example of an existing and dependable source would be an employer’s database that contains the information required on employment application forms. If such existing records are utilised for this purpose, each employee should have the opportunity to verify, or request changes to that information. An analysis of the workforce profile should provide a comparison of designated groups by occupational categories and levels to relevant demographic data. In addition to the demographics, both the availability of suitably qualified people from designated groups in the relevant recruitment area, as well as the internal skills profile of designated employees, should be taken into account. The relevant recruitment area is that geographic area from which the employer would reasonably be expected to draw or recruit employees.

Recruitment areas may vary, depending upon the level of responsibility and the degree of specialisation of the occupation. Usually, the higher the degree of responsibility or specialisation required for the job, the broader the recruitment area. The standard occupational classification, as defined in the EEA 10 form should form the basis for determining occupational categories. The EEA10 form as required by the Employment Equity Act classifies occupations in the following manner:
i. Legislators, Senior Officials and Managers. This group includes occupations in which the main task consists of determining and formulating policy and strategic planning or planning, directing and co-ordinating the policies and activities of the organisation in the private and public sector, determining and formulating laws and for directing and controlling the functions of an organization;

ii. Professionals. This group includes occupations in which the main tasks require a high level of professional knowledge and experience in the fields of physical and life sciences or social sciences or humanities. The main task consists of increasing the existing stock of knowledge; applying scientific and artistic concepts and theories to the solution of problems and teaching about the foregoing in a systematic manner. This group includes engineers, lawyers and accountants;

iii. Technicians and associated professionals. This group includes occupations whose main tasks require technical knowledge and experience in one of more fields of the physical and life sciences; or the social sciences and humanities. The main tasks consist of carrying out technical work connected with the application of concepts and operational methods in the above-mentioned fields, and in teaching at certain educational levels. It includes computer programmers, nurses, writers and editors;

iv. Clerks. This group includes occupations in which the main task requires the knowledge and experience necessary to organise, store, compute and retrieve information. The main tasks consist of performing secretarial duties, operating word processors and other office machines, recording and computing numerical data and performing a number of customer orientated clerical duties mostly connected with mail services, money-handling operations and appointments;

v. Service and sales workers. This group includes occupations in which the main tasks require the knowledge and experience necessary to provide personal and protective services and to sell goods in shops and markets. The main tasks consist of providing services related to travel, housekeeping, catering, personal care, protection of individuals and property, and maintaining law and order;
vi. Skilled agricultural and fishery workers. This group includes occupations in which the main tasks require the knowledge and experience necessary to produce farm, forestry and fishery products. The main tasks consist of growing crops, breeding or hunting animals, catching or cultivating, fishing and working forests, and selling agricultural and fishery products to purchasers;

vii. Craft and related trades. This group includes occupations in which the main tasks require the knowledge and experience necessary of skilled trades and handicrafts which, among other things, involve an understanding of materials and tools to be used, as well as all stages of the production process, including the characteristics and the intended use of the final product;

viii. Plant and machine operators and assemblers. This group includes occupations whose main tasks require the knowledge and experience necessary to operate and monitor large-scale and often highly automated industrial machinery and equipment;

ix. Elementary occupations. This group covers occupations which require relatively low elementary levels of knowledge and experience necessary to perform mostly simple and routine tasks, involving the use of hand-held tools and, in some cases considerable physical effort; and with few exceptions, limited personal initiative and judgment. Occupational levels can be determined by any of the professional grading systems (Paterson, Peromnes, Hay) or their equivalents. In the absence of a formal job grading system, designated employers may use equivalent occupational levels as the basis for workforce analysis.

6.6 REPORT TO THE DIRECTOR -GENERAL

Section 21 of the Employment Equity Act, stipulates that a designated employer that employs fewer than 150 employees, must

a. submit its first report to the Director -General within 12 months after the commencement of the Act, or later, within 12 months after the date on which that employer becomes a designated employer; and
b. thereafter, submit a report to the Director-General once every two years, on the first working day of October.

A designated employer that employs 150 or more employees, must:

a. submit its first report to the Director-General within six months after the commencement of the Act or, if later, within six months after the date on which that employer becomes a designated employer; and

b. thereafter, submit a report to the Director-General once every year on the first working day of October.

The reports should contain a work profile analysis; this means that the report needs to contain information concerning the designated employer’s workforce profile regarding race, gender and disability representation in all levels and categories of the workforce. The report should also contain information from designated employers regarding recruitment, promotions, terminations, disciplinary action and skills development plans as required by the Skills Development Act. The reports should be a public documents, which can be perused by the various stakeholders.

6.7 EMPLOYMENT EQUITY PLAN DEVELOPMENT

Section 20 of the Employment Equity Act stipulates that a designated employer must prepare and implement an employment equity plan that will achieve reasonable progress towards employment equity in that employer’s workforce. The Equity Code of Good Practice (Equity 2000) states that the duration of the plan should be for a period that will allow the employer to make reasonable progress towards achieving employment equity. The period should not be shorter than one year, and not longer than five years.
The Employment Equity Plan must state:

a. the objectives to be achieved in each year of the plan. The Equity Code of Good Practice (Equity 2000) states that the plan should have broad objectives and be specified and that a timetable should be developed for the fulfillment of each objective. The objectives should-
   i. take into account the output of the planning phase;
   ii. the particular circumstances of the employer; and
   iii. be aligned with and included in the broader business strategy of the employer.

b. An employment equity plan must state the affirmative action measures to be implemented. The Equity Code of Good Practice (Equity 2000) specifies that affirmative action measures, to address the barriers identified during the analysis should be developed to improve the under-representation of the designated group members. Such measures should relate to, but should not limited to the following -
   i. appointment of members from designated groups and which would include transparent recruitment strategies such as appropriate and unbiased selection criteria and selection panels, and targeted advertising.
   ii. Increasing the pool of available candidates. Community investment and bridging programmes can increase the number of potential candidates.
   iii. training and development of people from designated groups. These measures would include access to training by members of designated groups, structured training and development programmes like leaderships and internships, on-the-job mentoring and coaching; and accelerated training for new recruits. Where required, diversity training should be provided to responsible managers, as well as training in coaching and mentoring skills.
   iv. promotion of people from designated groups. This could form part of structured succession and experience planning and would include appropriate and accelerated training.
v. retention of people from designated groups. Retention strategies would include the promotion of a more diverse organisational culture, interactive communication and feedback strategy; and ongoing labour turnover analysis.

vi. reasonable accommodation for people from designated groups. These measures include providing an enabling environment for disabled workers and workers with family responsibility so that they may participate fully and, in so doing improve productivity. Examples of reasonable accommodation are accessible working areas, modifications to buildings and facilities; and flexible working hours, where these can be accommodated.

vii. steps to ensure that members of designated groups are appointed in such positions that they are able to meaningfully participate in the corporate decision-making process. A conscious effort should be made to avoid all forms of tokenism, candidates must be appointed with commensurate degrees of authority.

viii. steps to ensure that the corporate culture of the past is transformed in a way that affirms diversity in the workplace and harness the potential of all employees. Such steps could include programmes for all staff, including management, contextualising employment equity, and sensitising employees with regard to the grounds of discrimination such as race, diversity, gender, disability and religious accommodation.

c. Where under-representation of people from designated groups has been identified by the analysis, an employment equity plan must state the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals. The Equity Code of Good Practice (Equity 2000) states that numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each
occupational category and level in the employer’s workforce, where under-representation has been identified, and to make the workforce reflective of the relevant demographics, be it national or provincial. In developing the numerical goals, the following factors should be taken into consideration:

i. the degree of under-representation of employees from designated groups in each occupational category and level in the employer's workforce;

ii. present and planned vacancies;

iii. the provincial and national economically active population;

iv. the proof of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;

v. present and anticipated economic and financial factors relevant to the industry in which the employer operates;

vi. economic and financial circumstances of the employer;

vii. the anticipated growth or reduction in the employer's workforce during the time period for the goals;

viii. the expected turnover of employees in the employer’s workforce during the time period for the goals; and

ix. labour turnover trends and underlying reasons, specifically for employees from designated groups.

d. An employment equity plan must state the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals. The Equity Code of Good Practice (Equity2000) states that the duration of the plan allow the employer to make reasonable progress towards achieving employment equity. This period should be no shorter than one year and no longer than five. There should be a timetable for each year of the plan for the achievement of goals and objectives, other than numerical goals and qualitative goals.

e. An employment equity plan must state the procedures that will be used to monitor and evaluate the implementation of the plan and whether
reasonable progress is being made towards implementing employment equity. The Equity Code of Good Practice (Equity 2000) requires that:

i. records be kept to effectively monitor and evaluate the plan.

ii. Mechanisms to monitor and evaluate the implementation of the plan should be established, to include benchmarks, to permit the assessment of reasonable progress.

iii. the plan be evaluated at regular intervals to ensure that reasonable progress is made. This evaluation should be integrated into mechanisms that the employer normally utilizes to monitor its operations.

iv. the consultative forum(s) should continue to meet on a regular basis; and should receive progress reports.

v. progress should be recorded and communicated to employees and such meetings should take place at reasonable intervals to ensure feedback on the ongoing implementation process.

vi. the plan should be reviewed and revised, as necessary, through consultation.

Section 21 of the Employment Equity Act stipulates that designated employers are required to submit reports to the Department of Labour. Designated employers whose operations extend across different geographical areas, functional units, workplaces or industry sectors may elect to submit either a consolidated or a separate report for each of these. This decision should be made by employers after consultation with the relevant stakeholders.

Section 20(2) of the Employment Equity Act stipulates that an employment equity plan must state the internal procedures to solve any dispute about the interpretation or implementation of the plan. The Equity Code of Good Practice (Equity 2000) states that the internal procedures for resolving any dispute about the interpretation and implementation of the plan should be agreed upon and specified. The use of existing dispute resolution procedures should be encouraged,
provided they are appropriate; and, if necessary, adapted to the needs of employment equity. Alternatively, a mechanism with appropriate representation from both employers and employees may be established in order to address and resolve such disputes. The plan should be appropriately and comprehensively communicated to employees. The communication mechanism should indicate the parties responsible for the implementation of the plan and the agreed upon dispute resolution procedures, and information about the plan should be easily accessible to all levels of employees.

An employment equity plan must state which persons in the workforce, including senior managers, responsible for monitoring or implementing the plan. Section 24 of the Employment Equity Act stipulates that every designated employer must:

i. assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan,
ii. provide the managers with the authority and means to perform their functions; and
iii. take reasonable steps to ensure that the managers perform their functions. The Equity Code of Good Practice (Equity 2000) states that the employer should take reasonable steps to ensure that these managers perform their allocated functions. This could be done through the incorporation of key employment equity outcomes in performance contracts with the responsible managers as well as line managers through the organisation. Section 23 of the Employment Equity Act stipulates that before the end of the term of the current employment equity plan, a designated employer must prepare a subsequent employment equity plan.
6.8 INCOME DIFFERENTIALS

Section 27 of the Employment Equity Act stipulates that every designated employer, when reporting in terms of Section 21(1) and (2) must submit a statement of the remuneration and benefits received in each occupational category and level of that employer’s workforce. Where disproportionate income differentials are reflected, a designated employer must take measures to progressively reduce such differentials. These measures may include the following:

i. collective bargaining;

ii. compliance with sectoral determinations. The Basic Conditions Employment Act, Act 75 of 1997 states that the Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and an area;

iii. applying the norms and benchmarks set by the Employment Conditions Commission established in terms of Section 59 of the Basic Conditions of Employment Act;

iv. relevant measures contained in the Skills Development Act;

v. any other measures that are appropriate in the circumstances. The issue of benchmarks in income differentials will be guided by the advice given to the Minister (i.e. Minister of Labour) by the Employment Conditions Commission, which is tasked to research and investigate norms and benchmarks for reducing disproportionate income differentials.

6.9 COMMISSION FOR EMPLOYMENT EQUITY

Section 28 of the Employment Equity Act established the Commission for Employment Equity. The Commission consists of a chairperson and eight members appointed by the Minister to hold office on a part-time basis. The members of the Commission include-
i. two people nominated by those voting members of Nedlac who represent organized labour;

ii. two people nominated by those voting members of Nedlac who represent organised business;

iii. two people nominated by those voting members of Nedlac who represent the state; and

iv. two people nominated by those voting members of Nedlac who represent community organisations and the development interests in the Development Chamber in Nedlac.

The party that nominates persons must have due regard to promoting the representativity of people from designated groups. The chairperson and each member of the Commission -

i. must have experience and expertise relevant to the functions of Section 30 of the Employment Equity Act;

ii. must act impartially when performing any function of the Commission;

iii. may not engage in any activity that may undermine the integrity of the Commission; and

iv. must not participate in forming or communicating any advise on any matter in respect of which they have a direct financial interest, or any other conflict of interest.

The Minister may determine:

i. the term of office of the chairperson and for each member of the Commission, but no member’s term of office may exceed five years;

ii. the remuneration and allowances to be paid to members of the Commission, with the concurrence of the Minister of Finance.

The chairperson and members of the Commission may resign by giving at least one month’s written notice to the Minister. The Minister may remove the chairperson or a member of the Commission from office for:
i. serious misconduct
ii. permanent incapacity
iii. that person’s absence from three consecutive meetings of the Commission without prior permission of the chairperson, except for good cause shown; or
iv. engaging in any activity that may undermine the integrity of the Commission.

6.10 **Functions of the Commission for Employment Equity**

Section 30 of the Employment Equity Act, stipulates that the Commission should advise the Minister on:

a. Codes of good practice envisaged by Section 54 of the Employment Equity Act.

b. Regulations made by the Minister in terms Section 55 of the Employment Equity Act, which stipulates that the Minister may by notice in the *Government Gazette*, and on the advice of the Commission, make any regulation regarding –
   i. any matter that the Employment Equity Act requires or permits to be prescribed; and
   ii. any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of the Act;
   iii. separate and simplified forms and procedures in respect of the obligations created by Sections 19, 20, 25 and 26 of the Employment Equity Act, for employers that employ 150 or fewer employees.

c. policy and any other matters concerning the Act;

d. the Commission may also:
   i. make awards recognizing the achievements of employers in furthering the purpose of the Act.
ii. research and report to the Minister on any matter relating to the application of the Act, including appropriate and well researched norms and benchmarks for the setting of numerical goals in various sectors; and

iii. perform any other prescribed function.

e. in performing its functions, the Commission may-
   i. call for written representations from members of the public; and
   ii. hold public hearings at which it may permit members of the public to make oral representations;

The Commission must submit an annual report to the Minister (Minister of Labour).

6.11 MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS

Section 34 of the Employment Equity Act stipulates that any employee or trade union representative may bring alleged contraventions of the Act to the attention of -

a. another employee
b. an employer
c. a trade union
d. a workplace forum
e. a labour inspector
f. the Director-General
g. the Employment Equity Commission

In terms of Chapter V of the Employment Equity Act, employees, trade unions, labour inspectors and the Director –General all play an important role in monitoring compliance with the Act. In addition, the Minister must keep a register of the designated employers that have submitted their employment equity reports. This register is a public document, which means that the public know which designated employers have failed to comply with the Act.
Section 35 of the Employment Equity Act stipulates that a labour inspector has the authority to enter, question and inspect as provided in Sections 65 and 66 of the Basic Conditions of Employment Act. Section 65 states that-

a. in order to monitor and enforce compliance, oath or affirmation.
b. Inspect, and question a person about, any record or document to which an employment law relates;
c. copy any record or document referred to in paragraph (b), or remove these to make copies or extracts;
d. require a person to produce or deliver to a place specified by the labour inspector any record or document referred to in paragraph (b) for inspection;
e. inspect, question a person about, if necessary remove, any article, substance or machinery present at a place referred to in Section 65 of the Basic Conditions of Employment Act;
f. inspect or question a person about any work performed; and
g. perform any other prescribed function necessary for monitoring and enforcing compliance with an employment law; and
h. a labour inspector may be accompanied by an interpreter and any other person reasonably required to assist in conducting the inspection.

6.11.1 MANNER IN WHICH TO UNDERTAKE COMPLIANCE

Section 36 of the Employment Equity Act stipulates that a labour inspector must request and obtain a written undertaking from a designated employer regarding the rectification of the points below, within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to -

a) consult with employees (as required by Section 86 of the Labour Relations Act with an employment law. A labour inspector may, without warrant or notice, at any reasonable time enter:
   i. any workplace or any other place where an employer carries on business or keeps employment records, that is not a home;
ii. any premises used for training in terms of the Skills Development Act; or
iii. any private employment office registered under the Skills Development Act;

b) A labour inspector may enter a home or any place other than a place referred to above only –
   i. with the consent of the owner or occupier or
   ii. if authorized to do so in writing by the Labour Court.

c) The Labour Court may issue an authorisation for entry only on written application by a labour inspector who states under oath or affirmation the reasons for the need to enter a place in order to monitor or enforce compliance with any employment law, and if it is practical to do so, the employer and trade union representative must be notified that the labour inspector is present at a workplace and of the reason for the inspection.

Section 66 of the Basic Conditions of Employment Act states that in order to monitor or enforce compliance with an employment law, a labour inspector may –

a) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on any matter to which an employment law relates; and require that the disclosure be made under oath;

b) conduct an analysis (Section 1);

c) prepare an employment equity plan;

d) implement the employment equity plan;

e) submit an annual report (Section 21);

f) publish the annual report (Section 2);

g) prepare a successive employment equity plan (Section 2);

h) assign responsibility to one or more senior managers (Section 24);

i) inform its employees (Section 2); and

j) keep records (Section 26)
Section 37 of the Employment Equity Act, stipulates that a labour inspector may issue a compliance order to a designated employer if that employer has -

a. refused to give a written undertaking when requested to do so or
b. failed to comply with a written undertaking given in terms of Section 36

c. a compliance order issued by a labour inspector to a designated employer who has refused or failed to comply with a written undertaking to comply must set out the following -

i. the name of the employer, and the workplaces to which the order applies;

ii. those provisions of Chapter III of the Employment Equity Act relating to affirmative action measures, with which the employer has not complied, and details of the conduct constituting non-compliance;

iii. Any written undertaking given by the employer to comply, and failure by the employer to comply, with the written undertaking.

d. Any steps that the employer must take and the period within which those steps must be taken;

e. The maximum fine, if any that may be imposed on the employer in terms of (Schedule 1 of the Employment Equity Act, for failing to comply with the order;

f. A labour inspector who issues a compliance order must serve a copy of that order on the employer named in it.

g. A designated employer who receives a compliance order must display-

l. a copy of that order prominently at a place accessible to the affected employees at each workplace named in it.; A designated employer must comply with the compliance order within the time period stated in it, unless the employer objects to the order. If a designated employer does not comply with an order within the period stated in it, or does not object to that order in terms of Section 9.16.5 below, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.
Section 39 of the Employment Equity Act stipulates that a designated employer may object to a compliance order by making written representations to the Director-General within 21 days after receiving that order. If the employer shows good cause at any time, the Director-General may permit the employer to object after the period of 21 days has expired. After considering the designated employer’s representation and any other relevant information, the Director-General—

i. may confirm, vary or cancel all or any part of the order to which the employer objected; and

ii. must specify the time period within which that employer must comply with any part of the order that is confirmed or varied.

The Director-General must, after making a decision in terms of Subsection 39(3), and within 60 days after receiving the employer’s representations, serve a copy of that decision on the employer. A designated employer who receives an order of the Director-General must either—

i. comply with that order within the time period stated in it; or

ii. appeal against that order to the Labour Court in terms of section 40 of the Employment Equity Act, and if a designated employer does not comply with an order of the Director-General or does not appeal against that order, the Director-General may apply to the Labour Court for that order to be made an order of the Labour Court.

Section 40 of the Employment Equity Act, stipulates that a designated employer may appeal to the Labour Court against a compliance order of the Director-General within 21 days after receiving that order. The Labour Court may at any time permit the employer to appeal after a 21 day time limit has expired if that employer shows good cause for failing to appeal within that time limit. If the designated employer has appealed against an order of the Director-General, that order is suspended until the final determination of -
i. the appeal by the Labour Court; or
ii. any appeal against the decision of the Labour Court in that matter.

Section 38 of the Employment Equity Act, states that a labour inspector may not issue a compliance order in respect of a failure to comply with a provision of Chapter III of the Act if-

a. the employer is being reviewed by the Director-General in terms of Section 43 of the Act; or
b. the Director-General has referred an employer’s failure to comply with a recommendation to the Labour Court in terms of Section 45 of the Act.

6.11.2 Register of designated employer

Section 41 of the Employment Equity Act states that the Minister (Minister of Labour) must keep a register of designated employers that have submitted the reports required by Section 21 of the Act, and that register must be a public document.

6.12 ASSESSMENT OF COMPLIANCE BY THE DIRECTOR-GENERAL

Section 42 of the Employment Equity Act states that in determining whether a designated employer is implementing employment equity in compliance with the Act, the Director-General or any person or body applying the Act must, in addition to the factors stated in Section 15 of the Act (affirmative action measures), take into account all of the following:

a. the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level of that employer’s workforce in relation to the –
   i. demographic profile of the national and regional economically active population;
ii. pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
iii. economic and financial factors relevant to the sector in which the employer operates;
iii. present and anticipated economic and financial circumstances of the employer;
iv. the number of present and planned vacancies that exist in the various categories and levels, and the employer’s labour turnover.

b. progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector.

c. reasonable efforts made by a designated employer to implement employment equity plan;

d. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

e. any other prescribed factor.

Section 43 of the Employment Equity Act stipulates that the Director-General may conduct a review to determine whether an employer is complying with the Act. In order to conduct a review, the Director-General may:

a. request an employer to submit to the Director-General a copy of its current analysis or employment equity plan.

b. request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer’s compliance with the Act;

c. request a meeting with an employer to discuss its employment equity plan, the implementation of its plan, and any matters related to its compliance with the Act, or

d. request a meeting with any
   i. employee or trade union consulted in terms of section 9.10.
ii. workplace forum; or

iii. other person who may have information relevant to the review.

Section 44 Employment Equity Act, stipulates that subsequent to a review in terms of section 9.16.10, the Director-General may:

a. approve a designated employer’s employment equity plan; or

b. make a recommendation to an employer; in writing, stating –

   i. Steps which the employer must take in connection with its employment equity plan, or the implementation of that plan, or in relation to its compliance with any other provision of the Act, and

   ii. the period within which those steps must be taken; and

   iii. any other prescribed information.

Section 45 of the Employment Equity Act, stipulates that if an employer fails to comply with a request made by the Director-General in terms of Sections 43(2) 2 or 44(b), the Director-General may refer the employer to the Labour Court for non-compliance.

**Maximum permissible fines that may be imposed for contravening the Act**

<table>
<thead>
<tr>
<th>Previous contravention</th>
<th>Contravention of any provision of sections 16, 19, 20, 21, 22 or 23</th>
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<tbody>
<tr>
<td>No previous contraventions</td>
<td>R 500 000</td>
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<tr>
<td>A previous contravention in respect of the same provisions</td>
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<td>A previous contravention within the previous 12 months or two previous contraventions within three years</td>
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<tr>
<td>Three previous contraventions in respect of the same provision within three years</td>
<td>R 800 000</td>
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<td>Four previous contraventions in respect of the same provision within three years</td>
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6.13 LEGAL PROCEEDINGS

Section 46 of the Employment Equity Act stipulates that if a dispute has been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) by a party in terms of Chapter II Section 10 of the above Act (see 9.6) and the issue to which the dispute relates also forms the subject of a referral to the Labour Court by the Director-General in terms of Section 45, the CCMA proceedings must be stayed until the Labour Court makes a decision on the referral by the Director-General. If the dispute has been referred to the CCMA by a party in Chapter II of the Employment Equity Act against an employer being reviewed by the Director-General, there may not be conciliation or adjudication in respect of the dispute until the review has been completed and the employer has been informed of the outcome.

6.13.1 Consolidation of proceedings

Section 47 of the Employment Equity Act stipulates that disputes concerning contravention of the Act by the same employer may be consolidated.

6.13.2 Powers of the CCMA in arbitration

Section 48 of the Employment Equity Act stipulates that a Commissioner of the CCMA may, in any arbitration proceedings in terms of the Act, make any appropriate arbitration award that gives effect to a provision of the Act.

6.13.3 The Labour Court

Section 49 of the Employment Equity Act stipulates that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the Act, except where the Act provides otherwise.

Section 50 of the Employment Equity Act stipulates that except where the Act provides otherwise, the Labour Court may make any appropriate order including -
a. on application by the Director-General in terms of Section 37 (b) or 39 (6) of the Employment Equity Act, making a compliance order an order of the Court;
b. subject to the provisions of the Act, condoning the late filing of any documents with, or the late referral of any dispute to, the Labour Court;
c. directing the CCMA to conduct an investigation to assist the court and to submit a report to the Court;
d. awarding compensation in any circumstances contemplated in the Act;
e. awarding damages in circumstances contemplated in the Act;
f. ordering compliance with any provision of the Act, including a request made by the Director-General in terms of Section 43(2) or a recommendation made by the Director-General in terms of Section 44(b);
g. imposing a fine in accordance with Schedule 1 of the Employment Equity Act, for a contravention of certain provisions of the Act;
h. reviewing the performance or purported performance of any function provided for in the Act, or any omission of any person, body in terms of the Act on any grounds that are permissible in law; or
i. in an appeal under Section 40, confirming, varying or setting aside all or part of an order made by the Director-General in terms of Section 39; and
j. dealing with any matter necessary or incidental to performing its functions in terms of the Act;
k. if the Labour Court decides that an employee has been unfairly discriminated against, the Court may make an appropriate order that is just and equitable in the circumstances, including -
   i. payment of compensation by the employer to that employee;
   ii. payment of damages by the employer to that employee;
   iii. an order directing an employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
iv. an order directing an employer, other than a designated employer to comply with Chapter III of the Employment Equity Act, as if it were a designated employer;

v. an order directing the removal of the employee’s name from the register referred to in Section 41; and

vi. the publication of the court order.

l. the Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing a dispute in terms of the Act;

m. If the Labour Court declares that medical testing of an employee as contemplated in Section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to -

i. the provision of counseling;

ii. the maintenance of confidentiality;

the period during which the authorization for any testing applies; and

iii. the category or categories of jobs or employees in respect of which the authorisation for testing applies.

6.14 PROTECTION OF EMPLOYEE RIGHTS

Section 51 of the Employment Equity Act stipulates that no person may discriminate against an employee who exercises any right conferred by the Act. Without limiting the general protection conferred above, no person may threaten to do, or do any of the following -

a. prevent an employee from exercising any right conferred by the Act or from participating in any proceedings in terms of this Act; or

b. prejudice an employee because of past, present or anticipated disclosure of information that the employee is lawfully entitled or required to give another person;

ii. exercise of any right conferred by this Act.
No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by the Act or not participating in any proceedings in terms of the Act. If there is a dispute about interpretation or application of the protection of employee rights as discussed above, any party to the dispute may refer the dispute in writing to the CCMA. The Commission must attempt to resolve a dispute referred to it through conciliation. If the dispute remains unresolved after conciliation, any party to the dispute may refer it to the Labour Court for adjudication; or all the parties to the dispute may consent to arbitration of the dispute by the CCMA.

6.15 Conclusion

The Employment Equity Act is a piece of legislation which seeks to end all forms of discrimination in employment, enhance representation of categories of disadvantaged people in employment through affirmative action measures so that South Africa’s workforce is representative of its people and to promote economic development and efficiency in the workforce. Creating implementing and monitoring mechanisms in employment will do this. This means that the affected parties and the labour market should take a serious consideration of this piece of legislation.
CHAPTER 7
INTEGRATION OF THE STUDY WITH THEORY

7.1 INTRODUCTION

In this chapter the study will be integrated with the theoretical suppositions of corporatist theory in order to evaluate the validity of corporatist theory in policy-making within the South African context.

7.2 HYPOTHESES

In this study it was hypothesized that the public policy-making environment changed in South Africa with the ushering in of the new constitutional and political order. The key question to be answered is, how is public policy formulated in the Department of Labour with specific reference to the Employment Equity Act. A key concern was therefore to get an understanding of how the policy-making environment in South Africa has changed since 1994.

It was necessary to relate this study to an existing body of knowledge or theory to establish if the theory is valid within the South African policy-making environment. Mouton (1996: 119) states that it is essential to relate one’s work to an existing body of theoretical and empirical knowledge. One way of doing that is to frame research hypotheses, either by deriving them deductively from well-established theories, or by basing them on the observation of phenomena in everyday life. This study has been based on corporatism as a useful theory in explaining policy formulation in South Africa. Corporatism is based on the following assumptions:

- public policy is shaped by interaction between the state and interest groups;
- the state licences the behaviour of interest groups;
- policy-making is based on interest groups bargaining across a broad range of issues;
- the groups are functionally interdependent, to enhance social stability;
- the groups use consensus in making decisions;
- Decision-making is centralised; it is done by leaders;
- The groups are bureaucratic in organizations;
- The groups must be recognized by the state so that they are allowed representation.

7.3 CORPORATISM

Corporatist theory will be critically evaluated in relation to the empirical data presented in this study. Corporatist theory is premised on the following assumptions:

Assumption 1

a) Public policy is shaped by interaction between the state and interest groups (corporatist theory). This study advances the view that public policy in the Department of Labour is shaped by interaction between what can be termed social partners, (labour, business, government and community organizations), interest groups and expert individuals in the form of consultancy and the external forces. This means that there are internal forces (within a national state) and external forces (outside the national state) that shape the interaction in policy-formulation. The social partners (government, business, labour, community organisations) interest groups and expert individuals within that country can be regarded as internal forces, while international influences from various international institutions the (United Nations UN), International Monetary Fund (IMF), the World Health Organisation (WHO), the International Labour Organisation (ILO), other governments, multinational, corporations and international capital can be regarded as external forces. Of interest in this study, the International labour organisation (ILO) through convention III played a major role in shaping
or influencing the conceptualization the Employment Equity Act. The social partners are partners in the sense that the Nedlac Act obligates the state to table all proposed labour legislation before Nedlac and to seek to reach consensus and conclude agreements before it is introduced to Parliament. In this case, the social partners did not act as interest groups but as partners in policy formulation whilst interest groups in the form of association set up to influence policy-makers in ways that would favour their members. Expert individuals in the form of consultancies also played a major role in shaping Act, so it was not only interest groups that influenced or interact with the formulation of the Act in the Department of Labour. The interaction of the state and the social partners is of a permanent nature, it should be noted because of the institutionalised framework of policy formulation in the Department of Labour.

Assumption 2

b) The state “licences” behaviour of interest organisations by conferring public status on them. This study advances the view that the social partners (business, labour, government and community organisations), interest groups and expert individuals operate within a legislative framework as dictated by the 1996 Constitution and other relevant legislations (Labour Relations Act, Nedlac Act,) in fulfilling their policy-making roles, and furthermore, that the behaviour of the national states or national organisations is monitored by the international institutions. As national governments and institutions are signatories to various international conventions, they obliged to meet such convention’s requirements when formulating national policies. Consequently convention III was used as a barometer or measure in formulating the Employment Equity Act. This means that in order for these organizations (including the state) to be attributed public status, their behaviour or operations should adhere to Constitutional values, relevant legislation and also to international requirements as dictated by international conventions.
Assumption 3

c) Policy-making is based on interest groups bargaining across a broad range of issues (corporatist theory). This study advances the view that policy is formulated through bargaining between internal forces (the government, business, labour, community organisations, expert individuals, interest groups), and external forces (international influences) on issues on which a particular functional department has competency as required by the Constitution of the Republic of the Republic of South Africa, and by the international influences, conventions and agreements. This means that bargaining issues are compartmentalised into functional areas by the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), by the relevant legislations and the international influences.

Assumption 4

d) The groups are functionally interdependent to enhance social stability (corporatist theory). This study advances the position that the internal forces (government, labour, business, community organisations, interest groups, expert individuals and international institutions (external forces) influence each other (directly or indirectly) when policy is formulated. In the case of South Africa, the functional interdependency of the internal forces (local participants in policy-making) has been institutionalised through the National Economic, Development and Labour Council (Nedlac) and the parliamentary processes. This has enhanced the functional interdependence of social institutions, which means they all own the final product (policy). One problem with this arrangement may be the registration organisations that were applied at the Nedlac Forum, which excluded organisations, which could have made a valuable contribution, but did not meet the criteria that organisations must have a national character before they are allowed representation. A second, problem may be the
representation in parliament or Nedlac if a certain political party or constituency had an outright majority, which will enable it to easily outvote, other parties or constituencies on policy issues.

Assumption 5

e) The groups use consensus in making decisions (corporatist theory). This study advances the position that South Africa has a national consensus-seeking institution on policies proposed by the state, and that institution is Nedlac and then the proposed policy will go to parliament. This means that the bargaining parties use consensus when taking decisions pertaining to policies. The Chambers Dictionary defines consensus as general agreement, unanimity. Section 4(b) of the Nedlac Act, stipulates that the Nedlac Council should seek to reach consensus and conclude agreements on matters pertaining to social and economic policy, and organisations that are represented at Nedlac should seek national or general agreements on policy issues tabled before them, whilst parliament is final decision-making institution in as far as national policy is concerned.

Assumption 6

f) Decision-making is centralised; it is done by leaders (corporatist theory). This study has confirm that most decisions in the formulation of Employment Equity Act were taken by the national leaders the major contributing factor being the hierarchical and bureaucratic structure of organisations, with authority centralized to national committees and powerful individuals within those committees. The decisions were taken by the leaders on the basis that they were elected leaders with broad mandates from their respective constituencies.
Assumption 7

g) The groups are bureaucratic in organizations (corporatist theory). This study advances the view that the national character of the organisations at Nedlac has enhanced the bureaucratic character of these organisations. This bureaucratic character was further enhanced through the legislations establishing these associations, namely the Labour Relations Act, and the admission requirements to institutions like Nedlac. Weber in Mullins (1993: 4) defines bureaucracy as an administration based on expertise (rules of experts) and based on discipline (rules of officials). Bureaucracy has the following features:

i. Specialisation applies more to the job than to the person undertaking the job. This makes for continuity because the job usually continues if the present job-holder leaves.

ii. Hierarchy of authority makes for a sharp distinction between administrators and the administered, between management and workers. Within the management ranks, there are clearly defined levels of authority. This detailed and precise stratification is particularly marked in the security forces and in the Public Service.

iii. A system of rules aims to provide for an efficient and impersonal operation, and knowledge of the rules is a prerequisite for holding a job in a bureaucracy.

iv. Impersonality means that the allocation of privileges and the exercise of authority should not be arbitrary, but in accordance with the laid-down system of rules. The associations, which took part in the formulation of the Act, can be said to have been bureaucratic in the sense that the hierarchy of authority was vested in the national committees or individuals who were national office-bearers.
Assumption 8

h) The groups must be recognised by the state so that they can be allowed representation (corporatist theory). This study advances the view that the groups or organisations that participated in the formulation of the Employment Equity Act, were external forces (international influences), and internal forces that could be termed social partners of the state (business, labour and community organisations), expert individuals and interest groups. The social partners (internal forces) are recognised by the state through their registration in terms of relevant legislations like the Labour Relations Act, and the requirements set out in the Nedlac Act. The latter Act stipulates that:

1. The State, organised business and organised labour shall nominate not more than 18 representatives as members of the executive council, and not more than six representatives of each chamber, and the representation at the inaugural meeting shall be determined as follows-
   a. for organised business, by Business South Africa (BSA);
   b. for the State, by the President of the Republic of South Africa;
   c. for organised labour, by proportional representation according to paid-up membership of the founding trade union federations – COSATU, FEDUSA and NACTU;
   d. for the organisations representing community and development interests, by the Minister without Portfolio in consultation with organised business, organised labour, and the Labour Minister.

2. Applications for admission to membership by organised business, organised labour and the state after the inaugural meeting shall be made to the secretariat, in writing, in a form required by the Executive Council.
3. The secretariat, on receiving such an application, shall submit application to the convener of the affected constituency of the Executive Council.

4. The convener shall, within one (1) month of receipt of an application from the secretariat, convene a meeting with the affected constituency to consider the application. This shall be done in terms of the procedures and criteria determined by each constituency.

5. In the event that members of the affected constituency decide to approve a nomination, then that would be forwarded to the Minister who shall appoint the representatives to the Executive Council and/or chambers.

6. Applications for admission to membership by any organisation representing community and development interests, after the inaugural meeting shall be made to the secretariat, in writing, on the application required by the Executive Council. The secretariat shall submit such applications to the Minster without Portfolio.

7. The Council shall take into account whether the applicant –
   a. represents a significant community, interest on a national basis, and
   b. has a direct interest in development and reconstruction;
   c. is constituted democratically and has a Constitution which provides for democratic decision-making and
d. is able to seek mandates from its own members; and to obtain compliance from its members in regard to resolutions and policies of the Council.

8. After the Council has approved the initial members of organisations representing community and development interests, any further applications from this constituency shall be considered by the members representing community and development interests. This is the way in which the groups which have representation at Nedlac and Parliament are recognised and accorded representation. This means that they
should meet certain statutory requirements as defined by the values enshrined in the Constitution of the Republic of South Africa, and the relevant legislation in service of the 1996 Constitution. Expert individuals, interest groups and professional bodies are accorded representation (oral or written) on the basis of their expert knowledge, advice, and bargaining for their interests whilst the permanent constituencies at Nedlac and the political parties in parliament have permanent representations as dictated by the relevant legislations. The external forces (international influences) are not physically represented, and sometimes they do not need not to be recognized by the national state, but their influence is certainly felt when national policy is formulated. This means that the study concurs with the assumption that the groups (government, organised labour, organised business, political parties, interest groups) that participate in policy formulation must be recognised by the state so that they can be allowed representation, but the study adds other dimension that it is not only groups who are allowed representation when policy is formulated, also expert individuals and indirect representation through international influences and experiences.

7.4 CONCLUSION

It can be concluded that some of the basic assumptions of the corporatist theory are confirmed or plausible by the findings of this study, and also that there are those which the study rejects as implausible.
CHAPTER 8
SUMMARY AND RECOMMENDATIONS

8.1 INTRODUCTION

This chapter summarizes, and concludes the study and furthermore makes recommendations pertaining to the findings of the study.

8.2 SUMMARY OF CHAPTERS

Chapter 1 contains the problem statement, which flows from the recent constitutional changes in South Africa that have brought new values in policy formulation into the South African context, and that is why it is hypothesized in this study that public policy environment has changed in South Africa with the ushering in of the new constitutional and political order. It further presents, the research methodology that will be used to this study, a qualitative research methodology has been chosen as suitable research methodology for the study. It also explains how will the data collected will be analysed and interpreted.

Chapter 2 explains the policy-making environment in the South African context and the constraints that are usually prevalent when policy is formulated. It further examines constitutional principles to be adhered to in policy formulation, the policy framework in the South African context, levels in policy formulation, the policy process, theories and models in policy formulation and the various institutions involved in policy formulation.

Chapter 3 gives an account of the historical legal, social, political, economic and constitutional factors that necessitated and preceded the formulation of the Employment Equity Act.

Chapter 4 presents the research methodology and data collection methods employed in the study. The study was conducted within the qualitative
paradigm, and convenient sample has been used (people who are knowledgeable or who were involved in the formulation of the Employment Equity Act). Topical Interviews were used in this study and, it is correct to say that primary and secondary sources of data were used in this study.

Chapter 5 reports on the findings of the study. One major finding is that the Employment Equity Act has been developed for numerous reasons, inter alia that is it is a constitutional obligation, which is the right to equality, and, the secondly South Africa’s international obligations as a signatory of international conventions, in this instance, the International Labour Organisation (ILO) Convention Number III aimed at elimination of discrimination in respect of employment and occupation.

The Employment Equity Act was characterized by institutionalized participation through adhoc and permanent institutions and participants, representing divergent interests in South African society. They were allowed to participate at various stages in the formulation of the policy legislation. Participants characterized the negotiation process with different interests, stereotyping, social differences, class differences, ideological differences, adversarism, alliances, advocacy, centralized decision-making and ultimately consensus.

Chapter 6 presents, the essence of the Act of, Employment Equity act 55 of 1998. It gives an account how unfair discrimination should be eliminated in employment by designated employers, implementing affirmative action measures. It also details processes and procedures that should be employed by the institutions affected by the Act in order to attain its goals and objectives. It also sets a framework for the monitoring and enforcement mechanisms required by the Act.

Chapter 7 gives an account of the study in relation to the theoretical suppositions on which it was based. This study has been based on the corporatist theory as a useful theory in explaining policy formulation in South Africa. It may be concluded that some of the assumptions of the corporatist
theory are plausible, acceptable or are true, in as far as this study is concerned. However this study also brings forward some new information or new assumptions concerning policy formulation in the South African context.

Chapter 8 contains the summaries of other chapters, and the conclusions and recommendations of this study. The aim of this study is to investigate how policy is formulated in the South African Department of Labour with specific reference to the Employment Equity Act, within the new constitutional and political environment brought about by the Constitution. This study was conducted in the assumptions that the new Constitutional values have changed the policy-making environment, processes and structures in the South African policy-making arena.

8.3 FINDINGS

The study on policy formulation in the South African Department of Labour, with specific reference to the Employment Equity Act has led to certain findings. A brief presentation of such findings is given in the following paragraphs.

Policy formulation in the Department of Labour is a result of Constitutional obligations brought by the 1996 Constitution on the part of government. One of these obligations is demanded by Section 9 (2) of the Constitution of the Republic of South Africa. This has resulted in the formulation of the Employment Equity Act, which espouses to eliminate discrimination in employment.

South Africa furthermore is signatory to a number international conventions and is therefore obligated to honour and ratify these conventions. One of these conventions is Convention III of the International Labour Organisation.

Public policy is formulated within an institutionalised framework, and adhoc and statutory institutions were used, namely the Affirmative Action Policy Development Forum (AAPDF), Nedlac and Parliament.
Participants participate in policy formulation as constituencies, organizations, interests groups, and consultancy or expert individuals giving advice or representing their respective interests in order to influence the policy-making process.

International influences (external influences) also make major contributions in policy-making in the form of international conventions and expert individuals from other countries.

Participants in policy making are not homogenous, role–players or organisations generally have different ideological orientations, different social backgrounds, racial differences, different political beliefs, different class backgrounds, different historical backgrounds, and gender differences, which made these people or associations to have different interests.

It therefore not suprising that advocacy, adversarialism, stereotyping, alliances, and consensus characterized negotiations during the formulation of the Employment Equity Act.

The nature of the organisations that participated in policy formulation of i.e.Employment Equity Act, in this instance, were bureaucratic organisations with centralised decision- making patterns.

8.4 RECOMMENDATIONS

The nature of this study compels that a theory able to explain and predict policy formulation, must be formulated. This theory would be the result of the deductions from this study. Mouton (1996:198) defines a theory as a set of interrelated constructs (concepts, definitions and propositions) that present a systematic view of phenomena by specifying relations between variables, with the purpose of explaining and predicting phenomena. Neuman (2000:42) states that theories have the following features:
Theories are logical and consistent and if a contradiction occurs, researchers try to resolve them;

- Theories are open ended, always growing or developing to higher levels;
- Theories that fail to develop get replaced by competing theories;
- Rarely do theories claim to have all the answers, instead they contain areas of uncertainty or incomplete knowledge and only offer partial or tentative answers;
- Researchers constantly test theories and tend to adopt a skeptical approach about them; and
- The theory itself is disinterested or detached from the position of any specific social group or sector of society.

The phenomenon that this theory tries to explain is how public policy is formulated in the Department of Labour, with specific reference to the Employment Equity Act. This theory is premised on the findings of this study and it advances the following:

**Public policy is the product of the social, economic, political, cultural, technological, and natural conditions of a given society in a particular epoch or period in the historical development of that particular nation or society and is influenced by dominant national and international forces and these influences may be cultural, economically, socially, politically, technological, and type and system of government.**

A further investigation needs to be done to test the reliability of this theory so that it can be generalized.

### 8.5 CONCLUSIONS

This study has shown how public policy is formulated in the South African government with specific reference to the department of labour. Development in the world proceeds at an astonishing pace. This means that new theories of public policy will be developed to meet the needs of changing times. This also
means that new ones will negate the old theories. The old theories will not necessarily be phased out, as the dominant ones will stand the test of time.
BIBLIOGRAPHY

1. INTERVIEWS

Interviews were conducted with the following people:


2. REFERENCES


7. Business South Africa’s Submission to Parliamentary Portfolio Committee on Labour, 20 July 1998


11. Commission on Gender Equality: Submission on Employment Equity Act to the Portfolio Committee on labour, 22 June 1998


25. Federation of Unions of South Africa (FEDUSA)’s Submission on the Employment Equity Bill to the Portfolio Committee on Labour, 21 July 1998.


43. MANCO/FIBASA’s Submission to the Portfolio Committee on Labour, 14 July 1998


51. NAFCOL’s Submission to the Portfolio Committee on labour, 22 June 1998.


68. Society for Industrial Psychology: Submission to the Portfolio Committee on Labour, 22 June 1998.
69. South Africa Hansard Reports. 1998. Debates in the National Assembly, 17-
21 August. Cape Town. Government Printers

70. South Africa Hansard Reports. 1998. Debates in the National Council of

71. South African Insurance: Presentation to the Portfolio Committee on Labour,
21 June 1998

Africa Library Cataloguing in Publication (CIP) data.

73. Swanepoel, B.J. 1992. Affirmative Action and employee empowerment in
Namibia: South African Research perspective on same pieces of jigsaw


75. University of the Western Cape Community Law Centre for Human Rights'
Submission to the Portfolio Committee on Labour on the Employment Equity

of affirmative action, “promotions versus ‘meritorious’ promotions. South

:promotions” versus “meritorious” promotions. Legal positions and modalities.

SAIPA. Vol. 32, No. 4. p. 221-231.


3. Statutes


