

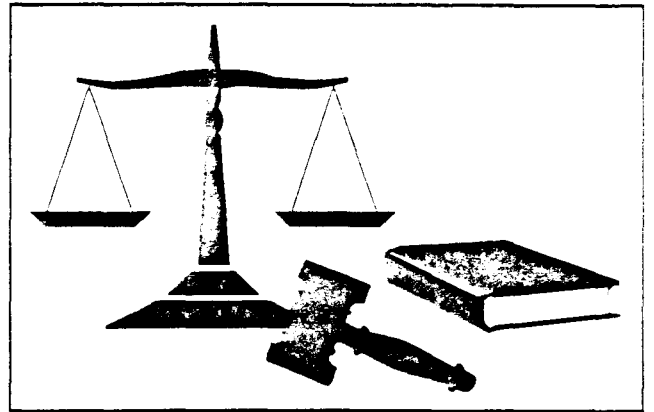
Draft memorandum of law: Affirmative Action in South Africa

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Boston University

BOSTON UNIVERSITY SCHOOL OF LAW FACULTY WORKSHOP

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Speaker: Bob and Ann Seidman

Title: Affirmative Action for South Africa

January 18, 1994

We drafted this in Cape Town for the Community Law Center of the University of the Western Cape, but ultimately for the Constitutional and Legal Committee of the ANC. (As you ~~know~~ doubt know, South Africa's first democratic election will take place on 27 April.) Present polls give ANC 67% of the vote, and the next party 18%. ANC must now prepare its legislative program against the day they become a majority in the National Assembly. This is their first effort. There still exists a time to make changes, even major changes in this draft. Any inputs you may have will be greatly appreciated -- we need all the help we can get!

Without making him a co-conspirator, we must express our appreciation to Mike Harper, who generously shared with us a small portion of his knowledge about American affirmative action law before we left for South Africa. Since we drafted all of this in about two weeks, without the small head start we had as the result of talking to Mike., we never would have gotten even this far.

Affirmative Action for South Africa drafted by Bob and Ann Seidman, to be discussed at Law School Workshop, Thursday, January 27, 1:00 to 2:00 PM

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January 11, 1994

[TO BE ANNEXED AS AN ADDENDUM TO THE MEMORANDUM OF LAW]

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**PRELIMINARY DRAFT: AFFIRMATIVE ACTION LAW AND
SECTION-BY-SECTION COMMENTS**

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PREAMBLE

The National Assembly finds:

1. As a result of the long apartheid night, at every level in the South African economy, and its political and educational systems, blacks (including in that term Africans, Asians and coloureds) and women remain substantially discriminated against in employment, in educational opportunities, in the receipt of government services. Policy-making almost totally excludes them.
2. A new democratic South Africa must of course eliminate discrimination in all these areas. Because of disadvantages imposed over the past generations, however, the removal of formal discrimination will not create a level playing field. Blacks and women will remain disadvantaged.
3. In order to make the new democratic South Africa a substantial reality for blacks and women -- that is, for the overwhelming majority of our citizens -- the law must ensure that they receive equal pay for equal work, and for work of equal worth, and their rapid entry into the better jobs to which their skills and experience already qualify them; that their businesses have equal opportunity to compete for contracts with industry and with

Draft affirmative action bill with section-by-section comments 2

government; that they acquire the education necessary to compete for better jobs; that they receive governmental services that others in the community received years ago; and that they enter the ranks of the policy-makers.

4. South Africa needs affirmative action for the benefit of all our citizens. Productive efficiency cannot improve until we can utilize all the talents of all our people, not a mere 20% of the population. The more businesses that can compete for private and government business, the better for all of us. A better educated population constitutes the basis of a vigorous democracy. Eliminating discrimination in pay, education and governmental services will remove a potent source of social unrest. Admitting all groups into the power structure without discrimination constitutes a partial guarantee against a reversion to the old regime.

5. Eradicating the discriminatory language that dishonored the apartheid laws alone will no more than marginally change the institutions that developed in the apartheid era, and which to this day impose a bitter discrimination on blacks and women. A democratic South Africa requires an affirmative action law that will change the institutions rapidly to eradicate not only apartheid in the books, but apartheid in action. This bill aims at the widest possible range of organizations covered by it.

6. To change the thousands of organizations whose work force today reflects apartheid's sting, whose student bodies remain monochromatic, which still service citizens with a discriminatory

hand, which make policy through exclusively white, male officials, cannot be done only by top-down, bureaucratic means. The necessary changes will more likely come about by enlisting the cooperation and good will of those organizations themselves, using the strong hand of the state only where those involved refuse to comply with the law that requires them to change themselves.

7. This law proposes a temporary means for developing and enforcing an affirmative action programme in these five areas: employment and procurement contracts in public, parastatal, quango and private sectors; education and training; delivery of governmental services; and admission to policy-making positions. For an individual organization, its affirmative action provisions will disappear as soon as the organization has achieved a demographic structure that substantially matches that of the relevant population.

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In as many ways as possible, a complicated and novel bill should give guidance to its interpretation. This bill does it in two ways: by this Preamble and by the statement of its purposes (section 2).

This preamble, in the form of legislative findings of fact, adopts a U. S. form. It purports to set out the reasons for the bill. In construing legislation, the mischief rule directs a court to consider the reasons for the legislation. These findings of fact aim to tell the courts what those reasons are.

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CHAPTER ONE. PRELIMINARY MATTERS

1. Short title.

This Act shall be known as the Affirmative Action Act, 1994.

2. Scope of the Act; interpretation.

1. This Act has as its purposes the following:

a. To achieve equality in the work place, so that no

person shall fail to receive employment opportunities for reasons unrelated to ability, or equal pay for equal work or for work of equal worth;

- b. in the fulfillment of that goal, to correct the conditions of disadvantage in employment experienced by blacks and by women, by giving effect to the principle that employment equity means more than treating persons in the same way, but also requires special measures and the accommodation of differences;
- c. to help achieve equality in the market place, so that businesses shall not suffer discrimination because their principals have dark skins or a female gender, and in the fulfillment of that goal, to give effect to the principle that a level playing field demands more than formal equality to compete for contracts from racially or gender-biassed procurement systems;
- d. because without an equal education, a worker cannot compete fairly in the labour market, to correct the conditions of disadvantage experienced by blacks and by women in education;
- e. in the fulfillment of that goal, to give effect to the principle that educational equity means more than treating persons in the same way, but also

requires special measures and the accommodation of differences;

f. to correct the disparities in the government services received by blacks and by women and those received by others, and in the fulfillment of that goal, to give effect to the principle that until blacks and women receive the same services as others, government must pay special attention to their needs;

g. to achieve positions for blacks and women on policy-making bodies and as policy-making officers in government, parastatals, educational institutions and the private sector, until their representation there equals their proportionate numbers in the population as a whole.

2. This Act shall be construed liberally to carry out these purposes.

3. In interpreting this Act, a court shall give a presumption of correctness to an interpretation by the Authority, and if a reasonable lawyer could agree that the Authority had made an arguably correct interpretation of the Act, a court shall adopt that interpretation.

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1. This section carries forward the instructions to courts about interpretation begun in the Preamble. It derives mainly from the Canadian act. Like the Canadian act, it holds that until equality has been achieved in fact, formal equality and absence of intentional discrimination will not suffice.

2. Unlike any other affirmative action law, this law aims at

far more than employment or minority business. It includes in a single Act a variety of categories of social problems with a common theme of discrimination: Employment issues, both in the public and private sectors; procurement contracts by organizations of all sorts (in South Africa, in buying supplies and services, formal-sector organizations typically disregard informal sector and black-owned and female-owned businesses); discrimination in choosing students and awarding funding in educational organizations, and in their grading and promotion practices; the disparate distribution of government services; and the all but complete absence of blacks and females from policy-making positions any place in the society.

3. Subsection 3 provides that a court shall give a presumption of regularity to the Authority's interpretation of the Act. That follows U.S. administrative law, on the theory that the Authority, which must work with the law day to day, has greater knowledge than a court about which of two or more permissible interpretations the Authority should use. Note, however, that the Authority's interpretation must be permissible in terms of the current way that lawyers construe statutes in South Africa -- that is, the Authority's interpretation must be one that a reasonable lawyer would not to dismiss as entirely untenable.

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CHAPTER TWO. DISCRIMINATION IN EMPLOYMENT, EDUCATIONAL AND TRAINING PLACES AND PROVIDING GOVERNMENTAL SERVICES

3. Discrimination defined

1. In this Act: --

a. "Discrimination" means making a decision whose outcomes disadvantage blacks and women as compared to whites and males. It includes but is not limited to keeping in force existing rules and systems that perpetuate historical disadvantages of blacks and women in employment, business, education, the delivery of governmental services, and admission to policy making bodies and positions.

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1. In general, this bill follows the drafting strategy of placing definitions where first the key word appears in the legislation, using the formal definitions section at the end of the statute, mainly as an index to help the reader find those definitions as they appear in the text. In this bill, the general

definitions section appears as section 58.

2. This definition defines as discrimination in terms of its objective manifestation. That definition assumes the substantive equality between races and genders. Any disparity between the qualifications of blacks and women compared with white males reflects not differences in innate capacities, but discriminatory social practices -- for example, in the educational system, in the information system about available jobs, in the way existing job patterns drive the career choices of women and blacks, etc.

3. This definition of "discrimination" limits the Act to protecting blacks and women. The Interim Constitution, section 8 protects everyone against "unfair discrimination", specifically mentioning not only racial and ethnic origin, colour, gender and sex, but also "sexual orientation, age, disability, religion, conscience, belief, culture or language". This bill protects only blacks and women. The problems of discrimination with respect to the other categories mentioned seem so different that specific bills ought to address them.

3. Elsewhere, anti-discrimination laws historically have served to protect minorities. South Africa presents a special case: The minority here discriminates against the majority. To define "discrimination" in the usual way -- that is, to define discrimination to include any decision that either intentionally or by disparate impact disadvantages anyone, blacks, whites, women, men -- will likely end by its being used, as elsewhere, to protect the minority against the majority. Whites and males can too easily use a universal anti-discrimination act to protect their present positions of power and privilege, claiming that any attempt to change these constitutes discrimination. South Africa's unique situation, where a minority discriminates against the majority, calls for a more narrow definition, pinpointing blacks and women as the protected group.

3. In this transitional period, however, this definition might cause serious political problems. It must be assessed carefully.
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b. "Government agency" means an agency of government at every level, excluding judges and magistrates but including parastatals, and departments of the federal, regional and local government [the police and the defence forces (????)];

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It is a central purpose of this Act to reach every state

agency. Whether this law should become the instrument to bring about deep-seated change in the police and the armed forces, however, seems questionable. On the one hand, the basic strategy of the bill (self-audit, affirmative action plan designed by the organization, negotiations with the Authority, coercion only as a last resort -- see note to section 5) seems a useful way to deal especially with the police and the armed forces, presumably the most obdurate of organizations. On the other hand, it may be better to deal with them through separate laws, aimed specifically at their problems. This bill adopts a middle road. It does not include the police and armed forces in the word "organization", thus relieving them of the obligation to prepare and file a self-audit or an affirmative action plan. Section 4(2)(c), however, does make them liable for damages for discrimination in employment, and section 44(2)(b) trebles those damages (because the police and the army presumably would not have in place affirmative action plans).

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- c. "organization" means a government agency, an educational or training institution, a quango or private business.

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Except insofar as they constitute employers, this definition - and the bill -- excludes trade unions. Both political considerations and the complexity of the issue seemed to make it more advisable to deal with the problems of the white trade unions specifically in a new industrial relations act, rather than in the context of a general affirmative action law. On the other hand, a good case can be made to include them, and require affirmative action statements by union detailing how they propose to make their membership match the working population at large. In South Africa, making unions open their membership in effect could lead to industrial unions. That might prove the strongest guarantee of affirmative action, for unions with a predominantly black membership would surely fight for affirmative action.

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- 2. An actor may discriminate by reason of: --
 - a. the intent of the actor;
 - b. the disparate impact of criteria used in making an employment decision, an educational decision, a procurement contract by a contractor, a decision concerning the provision of governmental services,

- or a decision appointing policy-making personnel;
- c. the disparate impact of the rules, procedures, structures, practices and customs of the organization concerned; or
- d. the disparate impact of the organization's pursuit of its mission.

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1. Elsewhere, the early anti-discrimination laws defined discrimination as intentional discrimination. Implicit in that lay the notion that so long as employers and others did not intentionally discriminate, the market would deal with candidates' relative capacities and qualifications. Built into that was a value-premise and an assumption. The value premise held that efficiency trumps equity, a premise denied by both the democratic movement's position and by the Interim Constitution, section 8(3)(a). The assumption held that affirmative action must decrease efficiency, because the affirmative action rules would necessarily interfere with the employer's economic choices and thus violate the conditions of enterprise efficiency. That assumption erred; research in the United States and Canada finds that, if anything, efficiency tends to increase with affirmative action, because the labour pool increases.

2. The Canadian Equity in Employment Act, the U.S. Contract Compliance Program and some court cases hold that discrimination is evidenced when differences exist between the demographic composition of the relevant pool and the organization's demographic composition. That discrepancy may exist either because the employer intentionally discriminates, or maintains in face job criteria or rules and procedures that effectively make some candidates swim upstream as compared to others. (It may also exist (as earlier mentioned) because other institutions in the society have in their socialization and training of these candidates treated them differently). An organization may therefore to discriminate not merely intentionally, but also by maintaining in force either job or educational place criteria or employment rules and proecures that have a disparate impact on the disadvantaged.

3. To this, this bill adds a fourth category: discrimination by reason of the declared mission of the organization. In the apartheid era, many organizations had for their mission servicing exclusively the white community. In the new South Africa, that mission necessarily causes the organization to discriminate. Under this bill, a mission that is inherently discriminatory can under this bill, therefore, itself evidence discrimination.

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4. Discrimination prohibited.

1. In this Act, the following definitions apply: --

- a. "Employer" means a government agency, but not including a parastatal with fewer than fifty employees, and, if they have fifty or more employees, a private business, an educational or training organization, a quango, a trade union and a non-governmental organization.
- b. "Employment decision" means a decision affecting the employment relationship. It includes a decision concerning advertising of jobs and solicitation of applications, hiring, promotion, firing, wages and salary, perquisites, employer-supplied facilities and amenities and fringe benefits for an employee, tolerating work place sexual or racial harassment, and discipline of employees.
- c. "Educational decision" means a decision affecting the relationship between an educational or training institution, or the sponsors or managers of a training course, and a student. It includes decisions concerning the advertising of educational places, the solicitation of candidates for places, the award of places and financial awards of all sorts, the provision of services and amenities, placement in classes, courses and schools, discipline, grading and the award of honors.

Draft affirmative action bill with section-by-section comments 11

d. "contractor" means a private business with gross revenues during its last annual accounting period in excess of R XXXXX, a government agency, an educational or training organization, or a quango; and

e. "educational or training organization" means an organization whose primary mission consists of educating and training with more than XXX full or part-time students;

2. Except as required by this Act --

a. No governmental or private job broker or agent may discriminate in advertising, soliciting applicants for a job, or in telling applicants about possible job openings;

b. no newspaper may publish an advertisement soliciting applicants for a job using racial or gender criteria or job description;

c. no employer, the police nor the armed forces may discriminate in an employment decision;

d. no contractor may discriminate in making a procurement contract;

e. no person or organization may discriminate in an educational decision;

f. no government agency may discriminate in allocating governmental services;

g. no person or organization may discriminate in

appointing persons to policy-making positions.

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1. This definition of employer excludes employers of under fifty employees. That number was chosen out of thin air, and should be reconsidered. The definition of educational or training organization includes every such organization -- including pre-schools and primary schools. Many of these, of course, will be excluded by the number of pupils involved. Nevertheless, is it wise to include even large primary and pre-schools in this bill? Should South Africa try to solve the problems of educational discrimination through this bill? Because the considerations differ at different levels of the educational system, perhaps this bill ought to address primarily affirmative action in tertiary institutions -- universities, colleges, technicons, teacher training institutions, and apprenticeship programmes. At any rate, note that under section 6 the Authority can exempt various sets of organizations.

2. This section details the circumstances in which an individual can recover damages for unlawful discrimination. Note what possible causes of action it omits, especially --

a. Actions by an individual against a governmental agency for discrimination; and

b. actions by an individual against a trade union, either for discrimination in admission to membership or discrimination in the union's representation in industrial relations matters.

Certainly some statute should give individuals in these circumstances the right to sue for damages or other relief. Should it be this bill? A strong case could be made that it should be included. Why should an individual or a community not have the right to sue a local government if it discriminates, say, in garbage collection services? or the supply of water? or to sue Eskom for discrimination in supplying electrical services? On the other hand, these discriminations are so prevalent in South Africa, to try to solve them through a series of unrelated proceedings before the Authority may not make much sense.

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CHAPTER THREE. EQUITY SELF-AUDITS AND AFFIRMATIVE ACTION PLANS

5. Equity self-audit and affirmative action plan required

1. Except as set forth in subsection 4, an organization shall prepare and file with the Authority an equity self-audit and an affirmative action plan.

Draft affirmative action bill with section-by-section comments 13

2. The equity self-audit shall deal with employment decisions as prescribed by section 8, procurement decisions as prescribed by section 9, educational decisions as prescribed by section 10, decisions concerning the delivery of government services as prescribed by section 11, and appointments to policy decision-making positions as prescribed by section 12.

3. The affirmative action plan shall deal with discrepancies and discriminatory practices revealed in the equity self-audit, as prescribed by section 14.

4. Notwithstanding subsection 1, from time to time the Authority may by subordinate legislation exempt particular sets of organizations from the obligation to prepare and file an equity self-audit, an affirmative action plan or an annual report.

5. In making the exemptions mentioned in subsection 4, the Authority shall take into account only the wise use of the administrative resources available to process the self-audits placed on file with the Authority.

6. A person exempted from preparing and filing an equity self-audit may voluntarily prepare and file an equity self-audit and affirmative action plan.

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1. The basic strategy of this bill consists of the following sequence: Requiring the organization initially to conduct a self-audit of its practices with respect to discrimination, and, based on that self-audit, to put forward an affirmative action plan to meet the deficiencies revealed by the self-audit. If that plan appears insufficient, there follows a period of negotiation between the Affirmative Action Authority and the organization. Only if those negotiations come to naught does the bill invoke the strong hand of state power to impose an affirmative action plan on the organization. The same procedure applies to the organization's actions in implementing the plan: Self-action and reporting by the organization, negotiations, and only at the end of the day,

coercive state action.

2. This section sets forth an organization's obligation to prepare and file an equity self-audit and an affirmative action plan. The equity self-audit requires the organization to investigate its own demographic composition and its employment, educational and other practices, and to explain them. On the basis of the causes for the discrepancies revealed by its explanations, the organization must then prepare a programme for remedying them - that is, the affirmative action plan.

3. Note that the Affirmative Action Authority may exempt sets of organizations, but only because of reasons of its own limited resources to process self-audits and plans.

4. Exempted organizations may still want to file a self-audit and a plan, in order to escape the penalty implicit in section 39 (concerning the burden of proof in employment and educational discrimination cases where no plan has been filed), and section 44 (additiobnal damages imposed in any discrimination case where no affirmative action plan on file)

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6. Definition of "demographic composition".

1. In this Act: --

a. "demographic composition" of a group means the number the number of blacks and women in the group, and the proportion that each bears to the number of persons in the entire group.

b. "blacks" means Africans, Asians and coloureds.

2. In determining the demographic composition of a group, a person completing an equity self-audit and affirmative action plan shall make a good faith effort to classify persons according to external appearance or surnames pursuant to the common South African understanding of the terms "African", "Asian" and "coloured".

3. Where this Act requires data on demographic composition of a group or other data depending upon demographic composition of a group, the organization or person making a document required by this Act shall do so on the basis of the best available information or estimate. If based on data, the document shall state the source of the data and, if based on an estimate, the basis of the estimate.

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Justice Blackmun of the U.S. Supreme Court once said that in order to escape from racism, one must first take account of race. This section follows that dictum.
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7. Self-audit provisions concerning segregated facilities

An organization shall include in its self-audit a description of amenities or facilities for employees, students, the public or policy-making personnel that the organization or training course supplies segregated by ethnic group or, except for toilet facilities or locker or rest rooms, by gender.

8. Self-audit provisions concerning employment decisions.

1. In this Act,

- a. "relevant labour pool" means the group of South African workers qualified for the particular job;
- b. "employment category" means a group of jobs having similar content, wage rates and opportunities.
- c. "compensation" means salary or wages, including perquisites, fringe benefits and employer-supplied facilities and amenities.

2. An employer shall include in its self-audit the following:

Draft affirmative action bill with section-by-section comments 16

- a. Detailed information concerning the demographic composition of each of the employer's several employment categories, comparing these with the demographic content of the relevant labour pool;
- b. an identification of each black or women employee performing equal work as a white or male in the same employment category, whose compensation is less than that white or male, an identification of the white or male used as a comparison, and that white's or male's compensation; and
- c. an identification of the job categories as maintained in the employer's records which contain only or predominantly white or male employees; those that contain only or predominantly black or women employees; the job categories that perform work of relatively equal skills level; and the compensation paid in each job category.

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1. A central concept for employment issues concerns the relevant labour pool. An air line may have in force a criterion that for employment as a jet pilot, one must have a certification from a national agency. The national agency, it turns out, gives a certificate only to pilots who have passed a training course (not controlled or operated by the air line) in piloting large jet air planes -- and the training course is discriminatory. The criterion therefore makes blacks and women swim upstream, since it effectively excludes them from consideration. This bill takes the position that in such a case, assuming that no other training course exists, it does not count as discrimination if the employer does not employ any black pilots. (Section 16(e), however, requires the employer in its affirmative action plan to detail the steps the employer will take to expand the relevant labour pool).

2. The definition in subsection 1 defines the labour pool as all qualified South African workers. That seems problematic. Should the University of the Western Cape, with its traditional

ties to the Western Cape, measure discrimination by comparison to the demographic composition of the national labour pool, or only that of the Western Cape? The figures might vary considerably. Since most affirmative action and discrimination issues will arise in considering higher-level jobs (after all, blacks and women already occupy most lower level jobs!), it seemed appropriate to look at the labour pool from which those jobs in fact find their candidates, that is, the entire national labour pool of high-level manpower.

3. Discrimination in remuneration occurs in two ways: by failing to pay equal compensation to whites and blacks, or males and females doing the same work, or by segregating blacks and women into job ghettos with low pay, but doing work indistinguishable in its skill content or required effort than that performed in other segregated job categories by higher-paid whites and males -- that is, doing work of equal worth for which their employer pays less to blacks and women in those job ghettos. Subsection 1(b) and (c) attempt to reach these situations.

4. Note that the definition of "compensation" reaches every benefit the employer confers on an employee, including employer-supplied facilities and amenities.

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9. Self-audit provisions concerning procurement decisions

1. In this Act: --

- a. "entitled business" means a business in which blacks or women own more than 50% of the equity and actually manage and control; and
- b. "supplier" means a firm from whom a contractor procures goods and services.

2. An organization that procures supplies per annum in excess of RXXXX shall include in its self-audit the following: --

- a. the number of suppliers with whom the organization did business during the preceding annual accounting period;
- b. the total amount of business that in that period the organization did with its suppliers;

Draft affirmative action bill with section-by-section comments 18

- c. by number of firms and by business done, the proportion of the procurement business done by the organization with entitled businesses;
- d. the availability from entitled businesses of the goods or services contracted or procured, as shown on the Authority's entitled business registry;
- e. explanations for the discrepancy between the firms with which the organization did contract or procure goods and services, and those goods' and services' availability, if any, from entitled businesses.

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1. Most formal-sector firms, both public and private, look only to other formal-sector firms for supplies and services. This bill attempts to remedy that discrimination against black and female-owned and managed businesses ("entitled businesses") in procuring goods and services for an organization, in both the public and private sectors. It does so by comparing the firms from whom the organization procured goods and services in the past year and the "entitled businesses" shown in a registry of entitled businesses that the Authority must keep.

2. Aside from enforcement of the affirmative action provisions based on the self-audit, the bill provides not specific remedy for an entitled business against whom an organization discriminates. It was felt that the complications of such a law suit -- for example, proving that the entitled business could offer goods of the same quality, timeliness of delivery and servicing and repair facilities would prove an impossible task. Was that a wise choice? Perhaps the bill might permit such an action, but having as a remedy not damages, but an order that the respondent in future permit the entitled business to bid on its procurement contracts.

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10. Self-audit provisions concerning educational decisions.

1. In this Act: --

- a. "student source area" means the geographical area within South Africa from which an educational or training organization or a training course seeks to

Draft affirmative action bill with section-by-section comments 19

draw its students, or an area with a twenty kilometer radius around the educational organization, whichever is larger;

- b. "training course" means a training course not part of the regular curriculum of a training organization; it includes seminars and workshops that have a significant training or educational component.

2. An educational or training organization or a person or organization that conducts a training course shall include in the self-audit the following: --

- a. as to an educational or training organization, a statement of the demographic composition of the students currently in each department, and, as to a training course, the demographic composition of the students taught by the training course;
- b. a statement of the student source area, together with a statement of its demographic composition;
- c. a statement of any discrepancy between the demographic composition of the student body and the student source area;
- d. a statement of black and women students' success in completing the course of education or the training course for which they were admitted, compared with the success of all other students; and
- e. explanations for the discrepancies mentioned in

subsections (c) and (d).

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1. The bill defines "student source area" as the area from which the school draws its students, but not less than an area 40 kilometers in diameter. That provision aims at an all-white school in the middle of an all-white area. Without the provision concerning the wider pool, it could readily claim that no discrepancy existed because all the area from which it draws its students consists of white families. Note that section 16 prohibits the use of property ownership as a criterion for student selection; that aims at preventing a school from excluding the children of black servants from attending a neighborhood school on the ground that their parents do not own or rent their property.

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11. Self-audit provisions concerning the delivery of governmental services.

1. In this Act, "governmental services delivery unit" means all the persons living within the geographical area within which a government agency's terms of reference or applicable law requires the agency to deliver services.

2. A government agency shall include in its self-audit the following: --

- a. A statement of the existing terms of reference of the government agency or the laws that define the services the agency shall deliver, and to whom;
- b. a statement of the cost and nature of the governmental services that in the preceding twelve months the agency delivered to members of the public;
- c. either --
 - (1) an explanation why because of the nature of the services rendered, the demographic composition of the recipients of the services

has no relevance, or,

(2) the following:

(a) a statement of the demographic composition of the recipients of the agency's services; and

(b) a statement of the nature and cost of each of the governmental services that in the preceding twelve months the agency delivered --

(i) to black members of the public; and

(ii) to women;

(c) a statement of the demographic composition of the agency's governmental services delivery unit;

(d) a statement of any discrepancy between the statements given pursuant to subsections (b) and (c); and

(e) explanations for any discrepancy described in subsection (d).

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1. This section aims at various government agencies (including parastatals and regional and local governments) that supply services to the public. An alternative might be to have separate acts for each parastatal, for local government, etc. That would delay passage of the relevant legislation until sufficient research could ensure that each bill adequately dealt with all the problems of that particular agency. Further, it would require far more personnel to implement. Finally, that necessarily would involve a top-down approach; the legislation would attempt to command the agency to behave in a certain way with respect to delivery of services. It was believed that the self-audit/affirmative action scheme, with its reliance on agency participation in correcting its

own discriminatory actives, would work better.

2. The "government services delivery unit" serves the same function here as the relevant labour pool plays in an employment self-audit. It defines that unit in terms of the jurisdiction of the government agency. That may work well with a parastatal with terms of reference for the entire society, or a national or regional agency. Will it work well with respect to local government, usually restricted to relatively monolithic ethnic areas?

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12. Self-audit provisions concerning appointment to policy-making positions.

1. In this Act: --

- a. "stakeholder" means a person, class or group of persons whose interests an organization's activities seriously affect, or whose interests a proposed change in the organization's activities may seriously affect;
- b. "organogram" means an organizational chart of the organization.

2. An organization shall include in its self-audit the following:

- a. an organogram of the organization;
- b. a statement of the demographic composition of the set of the senior officers identified in the organogram who regularly participate in policy-making for the organization, and, if the organogram indicates that a group constitutes the highest policy-making organ, a statement of the demographic composition of that group;

- c. the groups that constitute the organization's principal stakeholders, and their demographic composition;
- d. the sets of people who regularly supply issues for the decision-making by the senior officers and highest policy-making organ as indicated by the organogram, and their demographic composition; and
- e. a statement of any discrepancies between the demographic compositions set forth in subsections (b) and (c) and in subsections (d) and (c).

=====
Here the stakeholders of the organization constitute the relevant group for comparison, on the theory that the policy-makers should represent their interests. "Stakeholders" as defined, however, constitutes an extremely amorphous mass. "Employees, shareholders or owners, creditors, students and the recipients of the organization's services" might serve better. On the other hand, one might argue that the relevant group consists of experienced managers and decision-makers in the field -- e.g. education or nuclear power -- which might lead to an altogether different demographic composition against which to measure the existing set of policy-makers. To restrict it to the latter group seemed too narrow, since precious few blacks or women have had the opportunity to participate in high-level policy-making. The whole thrust of this clause consists of giving them access to those seats of power so that they can acquire the requisite experience to run things.
=====

13. Verification of equity self-audit, affirmative action plan and annual reports.

1. In this Act, "chief executive officer" means the chief executive officer of a company, the Vice Chancellor of a University or the Principal of a College, the Head of a Secondary School, the senior civil servant of a Ministry or, in other organizations, an officer of equivalent rank.

Draft affirmative action bill with section-by-section comments 24

2. The chief executive officer of the organization shall swear to the truth of the facts stated in a self-audit, an affirmative action plan or an annual report, or that he or she has reason to believe that they are true, and shall swear or affirm that he or she will make his or her best efforts to accomplish the affirmative action plan.

14. Affirmative action plans required.

An organization shall prepare and file an affirmative action plan if, but only if, its current equity self audit reveals that: -

-

- a. the organization maintains segregated facilities or amenities as mentioned in its statement made pursuant to section 7;
- b. blacks and women make up a proportion less than 80% [????] of their proportion in the relevant labour market as mentioned in its statements made pursuant to sections 8(2) (a), (b) or (c);
- c. a discrepancy mentioned in its statement pursuant to section 9(2) (e);
- d. if an educational or training organization, or one that conducts a training course, the proportion of black and women students in their student bodies is less than 80% [????] of their proportion in the relevant student source area as mentioned in its statements made pursuant to sections 10(2) (c) or (d);

- e. a governmental agency whose self-audit reveals a discrepancy between the composition of the demographic groups mentioned in its statements pursuant to section 11(2)(c)(2)(d); and
- f. an organization whose self-audit reveals that the proportion of black and women holders of policy-making positions or suppliers of inputs to policy decision-making in the organization is than 80% [????] than their proportion among the organization's stakeholders, as mentioned in section 11(2)(e).

=====
The 80% limit gives the organization considerable leeway. That provision aims at a commo complaint elsewhere, that nobody can match the demographic composition of their work force or student body precisely to that of the relevant pool. The 80% figure was also snatched out of thin air. Is it right?
=====

15. Time limitations

- 1. An organization's affirmative action plan shall undertake to remedy all the matters described in section 14 by the year 2000.
- 2. An organization may petition the Authority for an extension of time for cause shown.

=====
This is mainly for political purposes; after all, whether an organization can meet the year 2000 deadline depends upon the existing pool, and how fast people can be trained to meet necessary qualifications. On the other hand, the 80% requirement gives the organization some space in which to meet this requirement.
=====

16. Content of an affirmative action plan.

- 1. An affirmative action plan shall include: --
 - a. A statement of the organization's mission in the

light of the changed circumstances of the new South Africa.

- b. a detailed plan, including goals and a timetable, to remove any discrepancy (as stated in section 14) revealed by the organization's equity self-audit;
- c. a detailed plan, including goals and a timetable, to eradicate segregation by ethnicity or gender in facilities or amenities supplied by the organization for employees, students, or those who hold policy-making positions;
- d. a detailed plan, including goals and a timetable, for removing each of the causes of the discrepancies as set out in the explanations contained in the equity self-audit, or a detailed explanation why the organization cannot remove that cause;
- e. a detailed plan, including goals and a timetable, of the actions the organization will take in order to increase: --
 - (1) the number of qualified blacks and women: --
 - (a) in the relevant labour pool;
 - (b) in the relevant student source area;
 - (c) among the recipients of governmental services;
 - (d) among potential appointees to policy decision-making positions; and

Draft affirmative action bill with section-by-section comments 27

- (2) the number of entitled businesses, including working with educational and community organizations to that end;
- f. a detailed plan, including goals and a timetable, of the steps that the organization will take to teach employees, students and other stakeholders about race and gender prejudice and discrimination;
- g. a detailed plan, including goals and a timetable, of the steps that the organization will take to ensure a work place, educational environment, and policy-making environment free of racial and gender harassment;
- h. a policy statement signed by the chief executive officer that: --
 - (1) the official and the senior policy decision-makers of the organization fully support the affirmative action plan;
 - (2) the organization's policy further requires all personnel in the organization to cooperate fully with the plan and to seek to carry out not only its letter but its spirit; and
 - (3) continued employment with the organization, and promotion and pay raises for personnel concerned with recruitment, selection, hiring, promotion, appointment to policy decision-making positions, and ordering or purchasing,

Draft affirmative action bill with section-by-section comments 28

or (if an educational or training institution) the selection of candidates for educational places or funding, and the grading and promotion of students, or, (if a government agency), the selection of recipients of governmental services, will depend in part upon their carrying out organization policy with respect to the plan; and

- i. comments the organization chooses to make concerning their own plans or the processes of equity self-audit and Affirmative Action planning.

2. With respect of employment decisions, an affirmative action plan shall include: --

- a. a detailed plan, together with goals and a timetable, so far as possible to meet targeted goals for promotions from among blacks and women employees of the organization, and if necessary to provide for their training, internship or bridging job assignments to make those promotions feasible, or a detailed explanation why that is not feasible; and
- b. a statement that the employer has eliminated the discrepancies between employees whom the employment self-audit reveals received unequal pay for equal work, together with a statement of how the employer has done so; and

Draft affirmative action bill with section-by-section comments 29

c. a plan, including goals and a timetable, for eliminating discrepancies in the compensation of employees performing work of equal worth.

3. An affirmative action plan may not include ownership of property in a definition of its student source area.

4. An government agency may not include in its affirmative action plan ownership of property as part of its definition of the persons to whom it owes an obligation to deliver services.

5. An employment affirmative action plan may not assert the existence of a collective bargaining agreement with a trade union that maintains discriminatory policies with respect of admission to membership or with respect to internal union activities as reason for not conforming to the requirements of this section.

=====

1. This section constitutes a key section for the bill. It states to what an organization must aspire in terms of affirmative action.

2. The plan requires the organization to state its mission in light of the new South Africa. That aims to cause the mission to think through what changes the new situation should make not only in specific rules and criteria, but its entire mission -- upon which its employment, procurement, student selection, and other procedures and criteria should depend.

3. At each point, the Affirmative Action Plan requires a detailed plan, including a statement of goals and timetables to achieve them. Without those (as any textbook on management teaches), decisions to bring about change will likely remain only in contemplation.

4. The Plan must immediately indicate the removal of segregation in facilities and amenities supplied by the organization.

5. The Plan must show how the organization will remove discrepancies between the demographic composition of its employees, students, etc., and of the relevant pool. That calls for some estimates of how many places it will likely fill in a given year, and how many will be black or women.

6. The Plan must go further, and indicate how it will remove the causes of the discrepancies, as revealed in the explanation in the self-audit. The organization must therefore detail how it will change its job or student criteria, its hiring or appointment procedures and rules, and so forth, and how soon it can do so.

7. The Plan must indicate how the organization will increase the size of the relevant pool -- for example, how a building contractor will try to use its influence to change the composition of the training courses for craft skills required by the employer, or how a university's engineering department will introduce bridging courses to make up for black or female deficiencies in applied mathematics.

8. The Plan must include a programme for teaching employees about race and gender differences and discrimination.

9. The Plan must include details on how the employer will keep the work place or school free of gender or racial harassment.

10. The Plan must include a statement indicating the organization's and its leadership's commitment to affirmative action, and warning employees concerned with hiring, choosing students, etc. that their future careers in the organization depend upon their adherence to the Plan.

11. The Plan must include provision for making promotions from within the organization, in an effort to give long-delayed recognition to black and women employees who have for decades seen less qualified white males promoted over their heads. That includes training where necessary, and perhaps creating bridging appointments (for example, as intern, or assistant to the Vice President).

12. The Plan must show that wherever unequal compensation for equal work exists, the organization has already abolished it.

13. The Plan must show how the organization plans to identify situations of unequal pay for work of equal worth, and deal with them.

14. Finally, the section makes it explicit that an employer may not give as an excuse for discrimination that his collective bargaining agreement with a trade union grants a closed shop, and that the union discriminates as to membership; in other words, that with respect to employee demographics, affirmative action trumps the collective bargaining agreement.

=====

17. Annual reports

1. TAN organization's affirmative action committee shall

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report to the Authority annually: --

- a. the demographic composition of the various employment categories, contractors and suppliers, student populations, the recipients of governmental services and its policy decision-making officials, as the case may be, and the number and amount of contracts and procurement for goods and services it has done with entitled businesses compared with the total amount done;
- b. changes in the demographic composition of the relevant labour pool, student source area or the number and size of entitled businesses;
- c. the progress the organization or person has made in accomplishing the goals and targets of the affirmative action plan, and the steps taken to accomplish those objectives.

2. On its own initiative or at the instance of a stakeholder, the Gender Commission, the Human Rights Commission, the Ombud, or an organization concerned with discrimination issues, the Authority shall investigate the accuracy of the statements made in the annual report, and whether the achievement and actions there described constitute a reasonable effort by the organization or person concerned.

3. If the Committee believes that sound reasons exist for amending either the equity self-audit or the affirmative action plan, the Committee may include such an Amendment in the annual

report, accompanied by an explanation for the proposed change. The amendment voids a previous acceptance of the plan by the Authority.

4. On its own initiative or at the instance of a stakeholder, the Gender Commission, the Human Rights Commission, the Ombud or an organization concerned with discrimination issues, the Authority may investigate whether in light of changed circumstances or manifest error an equity self-audit or an affirmative action plan should be amended.

- a. Before returning an equity self-audit or an affirmative action plan to the organization for amendment, the Authority shall hold a public hearing to determine whether it ought to order an amendment.

=====
The annual report constitutes the principal means for triggering implementing action by the Authority. Query: Does this section include sufficient guidelines for the Authority to write adequate subordinate legislation detailing the content of the annual report?
=====

CHAPTER FOUR. THE AFFIRMATIVE ACTION COMMITTEE AND OFFICER

18. The Affirmative Action Committee.

Before making an equity self-audit, the organization making the audit shall appoint an Affirmative Action Committee.

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The affirmative action committee of each organization constitutes the operative device by which blacks and women among the organization's stakeholders -- employees, students, potential suppliers, members of the public -- can make inputs to the affirmative action process.
=====

19. Composition of the Committee

1. The chair of the Committee shall have at least the rank of vice-president of a company, a dean of a school of an educational organization, or a deputy secretary of the public service, or, in

other organizations, their substantial equivalent.

2. The Committee shall consist of not more than twelve members, of whom at least half shall be elected by the black employees and by the women employees of the organization, if any, the black and the women students of the organization, if any, and by other black and women stakeholders. If one or more trade unions represent the employees of all or part of the organization, the trade unions shall nominate two members of the Committee.

3. If the Committee has no black or women employees, students, or stakeholders, and the case may be, the Committee shall notify the Authority, who shall, if possible, nominate at least one black and one woman outside member to serve on the committee.

4. The Committee shall nominate and the organization shall appoint an affirmative action officer to implement the affirmative action plan.

=====

1. To give the organization's affirmative action committee authority and to ensure easy access to the chief executive officer, the committee must have a very high officer as chair -- in the rank next below the CEO. Some authorities recommend that the CEO him- or herself take personal responsibility for affirmative action. This bill attempts to impose that by the requirement that the CEO certify the self-audit, affirmative action plan and annual reports, and that the plan include a statement that the CEO supports it. It seemed bootless to require the CEO to chair the organization's affirmative action committee; the CEO would likely delegate the task.

2. Its other members should assure both union and black and women representation. If the organization has so lily-white or so male a complexion that it cannot find blacks or women to serve on the committee, the committee must request the Authority to appoint outside members. Although these outside members likely will not have a great deal of authority within the committee, they can, if necessary, file dissenting reports (section 20(6)).

3. The Committee appoints the Affirmative Action Officer, who bears most of the burden of actually making the plan work.

=====
20. Powers and Duties of the Committee

1. The Committee shall have prepared and submit to the organization's chief executive officer the equity self-audit, the affirmative action plan, and the annual reports required by this Act, together with other documents that the Authority by subordinate legislation may require.

2. The Committee shall direct the affirmative action officer concerning policy issues in the administration of that officer's duties.

3. The Committee shall advise the chief executive officer concerning the organization's duties under this Act.

4. Before completing an equity self-audit, an affirmative action plan or an annual report, except for the Committee of a contractor, the Committee shall hold a meeting or meetings with all the employees of the organization to explain to them the process of making an equity self-audit, an affirmative action plan, an annual report, and workers' rights under this law. The Committee of a contractor shall hold similar meetings with the eligible businesses appearing in the Authority's entitled business registry who supply goods and services of the sort purchased by the contractor.

5. After completing an equity self-audit, and affirmative action plan or an annual report, the Committee shall circulate the document among the employees of the organization, in case of an educational or training organization, among the students, in case of a government agency, among the recipients of its services.

6. A member of the Committee may dissent from all or part of

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a proposed equity self-audit, affirmative action plan, or an annual report, and the Committee shall append the dissent to the document addressed in the dissent.

=====

1. The Committee's relationship to the affirmative action officer is similar to that of lay boards to the professional expert -- in town planning, education, and so forth.

2. The Committee must discuss the equity self-audit, the plan, and the annual report with the employees and other relevant stakeholders, and circulate these documents as widely as possible among them. This constitutes a way to educate employees about affirmative action, and also to get input from them.

3. A member of the Committee may dissent from a plan or report, and his dissent must be appended to the document filed with the Authority. This should alert the Authority to possible problems with the document.

=====

21. The affirmative action officer

1. An organization that prepares and files an equity self-audit shall appoint an affirmative action officer, who shall perform the duties of the office under the general direction and guidance of the Committee.

2. Subject to the directions of the Committee, the affirmative action officer shall: --

- a. conduct the necessary research and prepare the draft documents required by this Act or the regulations of the Authority;
- b. encourage stakeholder participation in the preparation of the self-audit, affirmative action plan and annual reports;
- c. keep records that the Authority requires;
- d. receive, investigate and evaluate complaints and

comments made by employees or stakeholders of the organization concerning issues of affirmative action, and refer to appropriate organization officers those that require action under the plan, and to the Committee those that require policy decisions;

- e. receive as a matter of course information about all employment decisions and education decisions, in such detail as the Authority may by subordinate legislation require;
- f. advise the Committee on all matters relating the affirmative action.

=====
At least for large organizations, in Canada and the United States, the affirmative action office and its director, the affirmative action officer, have become large and important actors within the corporation's personnel department. This section details the affirmative action officer's general duties.
=====

CHAPTER FIVE. THE AFFIRMATIVE ACTION AUTHORITY

22. Establishment of the Authority.

There shall be an Affirmative Action Authority.

=====
1. This section establishes the Authority. That vAuthority must have the necessary power and authority either after receiving a complaint or on its own initiative to initiate a thorough-going transformation proces in organizations subject to the act. Its members should receive their appointment precisely because of the concern with affirmative action and their ability to bring about those transformations.

2. Where should it find a home? To establish it as a department of the Department of Labour would seem to constrain it by the very department that must change. It might find a home under the Ombud ("Public protector" in the Interim Constitution) or the Human Rights Commission. (In both cases, the Interim Constitution provides that the legislature by law may impose additional duties upon them). On the whole, it seems best that it

become a separate agency; these other new agencies should have their plates full without the work imposed by this bill on the Authority..

3. A constitutional question arises, whether the Authority can be placed in a position of superiority over the Public Service Commission, See Interim Constitution, Section 210. The question is whether the words, "the Commission shall be competent: in section 210(1) excludes direction of the Commission's affirmative action work by the Authority. If it does, then the bill should make the PSC the Authority with respect of the departments and the public service. That might prove difficult in light of the fact that the PSC under section 238(1) and (2) will likely have the same personnel as at present. At any rate, under section 238(1) the Commission operates under the same laws as at present apply to it, until those laws are changed. Some research must be done to determine what those laws are, whether the Authority consistently with them could give directions about affirmative action to the Commission, and if necessary to amend them as consequential provisions of the affirmative action bill..

=====

23. Composition of the Authority.

1. The Authority shall consist of the Chair and four Members; of the entire composition of the Committee, at least two shall be women and four, black.

2. The President shall appoint the Chair and the Members.

3. Either through practical work or academic achievement, the Chair and each Member shall have demonstrated an interest and capacity in either the protection of human rights, gender equality, race equality, or development administration. At least the Chair or one Member shall have a legal qualification.

4. The Chair and the Members shall serve terms as follows:

a. The Chair and Members first appointed under this Act shall serve first terms as follows:--

- (1) The first Chair, six years;
- (2) one Member, five years;
- (3) one Member, four years;

(4) one Member, three years; and

(5) one Member, two years.

b. Thereafter, the Chair and Members shall serve terms of six years.

5. The Chair and a Member shall serve their full terms unless they earlier resign, become physically or mentally unfit to carry on as Chair or a Member, or suffer a conviction for a crime involving moral turpitude.

a. If the President believes that the Chair or a Member should be removed from the Authority, the President may prefer a complaint to that effect to the National Assembly, which shall promptly appoint a Committee to decide the matter.

6. In their quasi-judicial duties under this Act, the Chair and the Members shall enjoy the independence of the judiciary.

24. Procedure.

1. A member of the public shall have free access to all meetings, procedures and documents of the Authority.

[Details on meeting, agendas, quorum, etc. to be supplied]

25. Powers and duties. [Outline only]

1. The Authority shall implement this Act.

2. The Authority shall have the following powers and duties:

a. To engage in research, conduct studies, hold hearings and publish reports and recommendations to the public and to National Assembly concerning discrimination and affirmative action in public,

- economic or social life;
- b. to seek improved methods for eliminating the effects of apartheid and discrimination in all its forms;
 - c. to receive and place on file equity self-audits, affirmative action plans, and annual reports;
 - d. on its own initiative or on petition by an interested party, to negotiate with organizations concerning the content of audits, plans and reports, and, in the event that negotiations do not reach agreement, to review and approve or disapprove those self-audits, plans and reports;
 - e. to hear and determine claims under this Act of discrimination against organizations and individuals;
 - f. to provide help and assistance to organizations required to complete an equity self-audit, an affirmative action plan or an annual report;
 - g. to provide help and assistance to organizations in achieving their plans;
 - h. to hire a director and staff;
 - i. to make an annual report to National Assembly on its work and the nation's progress in eliminating discrimination in employment, contracting, education, the distribution of government services and policy decision-making positions;

- j. to recommend to the National Assembly changes in the laws that it deems necessary or desirable to lessen discrimination and advance affirmative action.
- k. to conduct training courses for agents and hearing officers, and for members of Committees.
- l. to conduct programmes to educate the public about affirmative action.
- m. to supply detailed instructions for completing a equity self-audit, an affirmative action plan and an annual report, including forms and time schedules for completion;
- n. to combine in a single form all or some of the documents required by this act.

=====
This list of powers and duties seems straightforward. Are there some that should be added to ensure adequate capacity in the Authority to carry out its duties to implement the affirmative action law?
=====

26. Subordinate Legislation

1. The Authority shall promulgate subordinate legislation consistent with this Act, including, where it deems it necessary or desirable, additional matters for inclusion in an equity self-audit, an affirmative action plan, or an annual report, or by requiring other and different reports or documents.

2. In making subordinate legislation: --

- a. the Authority shall use simple language;
- b. the Authority shall publish its regulations in at

least four of the official languages;

- c. the Authority shall publish notice of draft subordinate legislation, and send a notice of the draft to parties who have indicated an interest. On receipt of payment of the cost of reproduction, the Authority shall supply to a citizen a copy of the subordinate legislation accompanied by a memorandum justifying it;
- d. The Authority shall allow at least sixty days in which interested parties can make written and oral comments on the draft subordinate legislation and memorandum.
- e. The Authority shall reply to each comment explaining that the Authority has either accepted the comment and revised the draft subordinate legislation, or, if the Authority rejects the comment, why it has rejected it.
- f. In addition to a provision for written comments, the Authority may in its discretion hold a public hearing on the draft subordinate legislation.

=====
1. This bill constitutes a proposed "transitive" legislation - that is, legislation that does not detail in great particular the exact action required by its addressees (i.e., here, the organizations who must prepare and accomplish affirmative action plans). Instead, it gives widespread power to an agency to fill in the details by subsidiary legislation. This section purports to give the Authority that power. Viewing the bill as a whole, does the bill provide sufficient guidelines to the Authority's rule-making discretion?

2. Subsection 2 purports to lay down procedural requirements to ensure that in exercising its rule-making power, the Authority

does so in a way the allows as much public participation as feasible. If and when South Africa enacts an adequate Administrative Procedure Act, this section may become superfluous. Until then, is it adequate?

=====
27. Agents and hearing officers.

1. An agent and a hearing officer are officers of the Authority with duties and powers as defined by this law and by subordinate legislation of the Authority.

2. In the conduct of their quasi-judicial duties, agents and hearing officers shall have the independence of the judiciary.

3. The Authority shall assign Class A and Class B hearing officers to cases as seems appropriate in light of their capacity and training .

4. Agents and hearing officers shall have a language capacity in at least one African language.

5. At least one-third of agents and hearing officers shall be women. At least xx% shall be black.

6. An agent and a Class B hearing officer shall have at least a matric qualification or equivalent, and such other qualifications as the Authority by subordinate legislation shall determine.

7. Class A hearing officers shall have a university qualification or equivalent, together with such other qualifications as the Authority by subordinate legislation shall determine.

=====
The distinction between A Hearing Officers, and B Hearing Officers and agents, was designed to accommodate to what may prove a myth, that is, the insufficiency of black university-trained candidates for hearing officer and agent jobs. If that insufficiency prove real, however, Class B officers (with the same education as magistrates require in Zimbabwe and elsewhere in Africa) could serve well to handle smaller firms' affirmative

action problems, relatively small claims for discrimination, etc., reserving Class A officers for larger firms and larger claims. (That would also result in a saving in personnel costs).

=====
28. Approving an equity self-audit, an affirmative action plan or an annual report

1. The Authority shall approve or disapprove an equity self-audit, an affirmative action plan or an Annual report either pursuant to this section or to section 42.

2. Upon receipt of an equity self-audit or an affirmative action plan, if the Authority has reason to believe that the Authority should investigate whether the organization submitting the self-audit or the plan should revise it, the Authority shall negotiate with the organization concerning the content of the self-audit or plan.

3. Unless for good cause the Authority extends the period for not more than thirty days, if within sixty days after the commencement of the negotiations the parties have not reached agreement on the plan, the Authority shall hold a public hearing on the equity self-audit or affirmative action plan, all as the Authority by subordinate legislation shall determine.

4. Not less than ten days before the hearing, the Authority shall send notice of the hearing to the organization, its Committee and its affirmative action officer, its stakeholders, a trade union or association representing its employees, the Gender Commission, the HRC and the Ombud, and the National and the relevant Regional and Local Affirmative Action Advisory Boards, and give them opportunity for written comment.

5. On the receipt of an annual report, if the Authority has reason to believe that the Authority should investigate whether the organization submitting the report should revise it, and after notice of hearing as prescribed in subsection 4, the Authority shall hold a public hearing on the report.

6. After that hearing:--

- a. the Authority may approve the equity self-audit, or, if it finds that the equity self-audit rests upon misinformation, or that the explanations given do not exhaust the explanations for the discrepancies reported, or is otherwise deficient, it may disapprove the equity self-audit and return it to the organization for revision and refiling, and prescribing a time limit for refiling within a reasonable period not to exceed sixty days;
- b. it may approve the affirmative action plan, or, if it finds that the affirmative action plan does not adequately address the causes of the discrepancies revealed in the equity self-audit, or if it does not make best efforts to reduce them, in light of the situation in the new South Africa, it may disapprove the affirmative action plan and return it to the organization for revision and refiling within a reasonable period not to exceed sixty days; and
- c. it may approve the annual report, or, if it finds

that the annual report rests on misinformation, or if it reveals inadequate progress towards fulfilling the affirmative action plan, it may disapprove the annual report and return it to the organization for revision and refiling within a reasonable period not to exceed sixty days.

=====
As a matter of good drafting, perhaps this section should be included in Chapter Six.

How adequately does this procedure (coupled with the obligation of the organization's own Affirmative Action Committee to consult the organization's stakeholders) satisfy the requirement of maximum feasible participation in the formulation of equity self-audits, affirmative action plans and annual reports?

=====
29. Affirmative Action Advisory Boards

1. There shall be a National Affirmative Action Advisory Board, and Regional and Local Affirmative Action Advisory Boards.

2. The National Affirmative Action Advisory Board shall consist of the following:

- a. A Chair appointed by the President, to serve at the pleasure of the President;
- b. the Chair or a member designated by the Chair of the Human Rights Commission;
- c. the Ombud or a representative of the Ombud;
- d. the Chair or a member designated by the Chair of the Public Service Commission;
- e. a Member of National Assembly from the majority party, chosen by the majority party caucus;
- f. a Member of National Assembly from the opposition, chosen by the caucus of the opposition party;

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- g. a senior civil servant chosen by the Civil Service Association;
- h. a representative of each of the two largest trade union confederations in the country, chosen by each of those confederations;
- i. a representative of the Chamber of Commerce;
- j. a representative of the Chamber of Mines;
- k. a representative of the Chamber of South African Employers;
- l. three Public Members chosen by the President, to serve at the pleasure of the President. Either through practical work or academic achievement, each Public Member shall have demonstrated an interest and capacity in either the protection of human rights, gender equality, race equality, or development administration.

3. [Compensation?]

4. [Term of office? Removal for misconduct, etc.??]

5. The National Advisory Board shall have the following powers and duties: -- **[to be completed]**

- a. To advise the Authority as to any matter that the Board deems necessary or desirable, or as to which the Authority requests advice;
- b. hire staff [etc]

30. Regional and Local Affirmative Action Advisory Boards

- 1. The Regional Premier shall appoint a Regional Advisory

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Board consisting of a Chair and not less than six nor more than twelve members; the senior elected official of local government shall appoint a Local Advisory Board consisting of a Chair and twelve members.

2. Of the twelve members: --

- a. at least half shall be women;
- b. at least 80% shall be black, and shall include at least one Africa, Asian and coloured member;
- c. at least two shall have a trade union background;
- d. all either through practical work or academic achievement shall have demonstrated an interest and capacity in either the protection of human rights, gender equality, race equality, or development administration.

3. A Regional or a Local Advisory Board shall have the following powers and duties:

- a. To advise the Regional President or the senior local elected government official in local government about any matter concerning affirmative action that the Board deems necessary or desirable, or about which the Regional president or senior elected local government official requests advice.

b. [To be completed]

4. [Compensation?]

5. [Term of office?]

=====

The national and especially the local advisory boards are designed to include activists for affirmative action. They will

then serve to monitor the Act's implementation, suggest improvement, and, where necessary light fires under local and regional governments, or even the Authority, should they lag in affirmative action work.

=====

CHAPTER SIX. PROCEEDINGS BEFORE THE COMMISSION

31. Definitions

In this Act,

1. "Complainant" means a person or group making a claim of discrimination;

2. "respondent" means the organization of whose action the complainant makes complaint.

32. Laying a claim of discrimination

A person claiming that an organization or a person has discriminated against him or her, a stakeholder, an organization concerned with issues of equity, the Gender Commission, the Human Rights Commission, the Ombud, an Affirmative Action Advisory Board, or the General Counsel of the Authority, acting either on behalf of an individual or a class of individuals similarly situated, may orally or by letter lay before the Authority a complaint of discrimination, or a complaint that an organization or an individual should receive a sanction mentioned in Chapter Eight.

=====

This section seeks to give the widest possible standing to interested groups or individuals to trigger affirmative action implementation. The relatively small size envisaged for the Authority and its hearing officers necessarily makes it a relatively reactive agency. It therefore becomes necessary to enlarge the number of persons and groups who can participate in the enforcement process, informing the Authority of vilations, and, if necessary, lay a complaint to trigger Authority action.

=====

33. Mediation efforts in discrimination cases

1. In case of a claim of discrimination, the Authority shall

forthwith send an agent to the site of the claimed discrimination and seek to mediate the dispute.

2. If within five working days the agent cannot mediate the dispute, the agent shall within five working days thereafter make findings of fact and a decision concerning the liability of the respondent and the appropriate remedy, as defined in section 44, and forward them to the parties and to the Authority.

=====
Requiring preliminary efforts at negotiation of course makes sense. With respect of educational institutions, it may be a constitutional requirement: See Interim Constitution, section 247(1) and (2). Note, however, that those sections do not prohibit altering the duties of an educational body -- only its "rights, powers and functions".
=====

34. Hearing before a hearing officer

1. In a discrimination case, within thirty days, a party aggrieved by the agent's decision may appeal to the Authority.

2. In a discrimination case after appeal from an agent's decision, and in other cases upon receipt of a complaint or petition pursuant to this Act, the Authority shall forthwith direct a hearing officer to hold a de novo, quasi-judicial hearing concerning the issues.

3. The hearing officer shall hold the hearing as directed by the Authority within a time prescribed by the Authority by subordinate legislation, but in any event within not more than thirty days.

4. At the hearing, the hearing officer shall take special care to protect the rights and interests of an unrepresented party.

5. The hearing officer shall keep a careful record of the proceedings at the hearing.

6. If the hearing officer finds for the complainant, the officer shall recommend a remedy as described in section 44.

7. At that hearing and thereafter during the proceeding, with the petitioner's consent the Authority's General Counsel shall represent the petitioner.

8. Within a time limited by the Authority in subordinate legislation, the hearing officer shall forward to the Authority the record of the proceedings, and his recommendations about findings of fact, conclusions of law and, if required, a remedy.

=====
This bill aims to keep adjudication as far away from the courts as constitutionally possible. Courts should police the boundaries of Authority discretion, not substitute their discretion for the Authority's. A glance at the composition of the Authority compared with the composition of the present judiciary (which will largely remain unaltered for some years in future) will explain why. A key device to ensure that courts confine themselves to their appropriate function in policing the work of the Authority lies in permitting one, but only one evidential hearing, and that before a hearing officer with expertise in affirmative action work. Almost nobody today admits to discriminatory intent; invariably, employers, educational authorities and others mask it under innocent-seeming devices. The Hearing Officers will receive training, and with experience will develop an expertise in ferreting out discriminatory subterfuge. They will also develop expertise in devising workable affirmative action plans. Generalist courts should not upset these determinations except when made arbitrarily or illegally.
=====

35. Burden of proof in a discrimination case, in general

After the complainant has demonstrated a prima facie case of discrimination, at every subsequent stage in the proceedings the respondent shall have the burden of proving by clear and convincing evidence that it did not discriminate as alleged.

=====
This section merely operationalizes section 8(4) of the Interim Constitution. The constitution does not specify the degree by which the person claimed to have discriminated must rebut a prima facie case of discrimination; this section makes it clear that the respondent must prove non-discriminatory action by a standard

higher than that required in an ordinary civil suit, but not so high as the criminal standard of "beyond a reasonable doubt".)

=====
36. Complainant's burden of proof in a discrimination case

The complainant may prove a prima facie case of discrimination by demonstrating either: --

- a. that the respondent has not timely filed an equity self-audit, affirmative action plan, or current annual report; or
- b. one of the matters detailed in section 14, or
- c. other sufficient prima facie proof.

37. Employer's burden of proof in a discrimination case.

1. In this Act, "qualified candidate" means a person qualified in terms of lawful criteria for appointment to a job or educational place or funding.

2. In a case alleging wrongful refusal to employ or to promote the complainant, the respondent shall prove that: --

- a. the respondent advertised the job or the promotion widely in a way likely to reach blacks and women;
- b. the respondent publicly stated clear, explicit and objective criteria for the job, which criteria --
 - (1) do not have a disparate impact upon blacks or women, or,
 - (2) if they do have such an impact, have a clear relevance to the job's content, and have the least disparate impact on blacks and women of any alternative clear, explicit and objective criteria that identify a person as a qualified

candidate for that job; and

c. that either: --

(1) the respondent's rules, procedures, structures, practices and customs concerning employment decisions do not have a disparate impact upon blacks and women, or

(2) if they do have such an impact, they --

(a) have a clear relevance to the respondent's mission, and

(b) have the least disparate impact on blacks and women of any alternative set of rules, procedures, structures, practices and customs concerning employment that would serve that mission.

3. A respondent may not as a defence to an action in terms of this Act assert the existence of a collective bargaining agreement with a trade union that maintains discriminatory policies with respect of admission to membership or with respect to internal union activities.

=====
1. Subsection 2 permits criteria or employment practices only if fairly required for the employer's business -- that is, if they have a clear relevance to the job's content, and if they have the least possible disparate impact. (U.S. discrimination law calls these "bona fide occupational qualifications").

2. Section 3 reiterates the position taken in Section 16, that affirmative action trumps a collective bargaining agreement.

=====
38. Educational or training organization's and training course's burden of proof in a discrimination case.

1. In a case alleging wrongful refusal to award the

complainant an educational place or funding, the respondent shall prove that: --

- a. It advertised the educational place or funding widely in a way likely to reach blacks and women;
- b. it publicly stated clear, explicit and objective criteria for the educational place or funding, which criteria --

- (1) do not have a disparate impact upon blacks or women, or,

- (2) if they do have such an impact, have a clear relevance to the educational or training programme involved, and have the least disparate impact of any alternative clear, explicit and objective criteria that identify a person as a qualified candidate for that place or funding; and

- c. either that: --

- (1) the respondent's rules, procedures, structures, practices and customs concerning award of an educational place or funding do not have a disparate impact upon blacks and women, or

- (2) if they do have such an impact, have a clear relevance to the respondent's mission, and have the least disparate impact on blacks and women of any alternative set of rules,

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procedures, structures, practices and customs concerning award of an educational place or funding that would serve the respondent's mission.

2. Ownership of property cannot serve as a criterion for an educational place, either by the candidate or someone in a relationship to the candidate.

39. Affirmative action in employment and educational cases.

1. Subject to subsection 3, in cases involving employment or educational decisions, the respondent shall further prove that a reasonable person would have believed that the person appointed had substantially and markedly superior qualifications for the job or educational place or award than did the complainant, if, but only if: --

a. the complainant proves intentional discrimination;
or

b. the respondent fails to prove: --

(1) that it, or, if the respondent is a person in charge of a training course, its sponsor, does not have in place a employment affirmative action plan, an education affirmative action plan or a policy-making affirmative action plan, as the case may be, that the Authority has approved or approves in the course of the proceedings, where the law requires that it have one in place; and

(2) reasonable past and continuing efforts to implement the plan.

2. In the following cases, an educational or training organization or a person in charge of a training course shall admit a qualified black applicant to an educational place or funding:--

a. if the complainant proves intentional discrimination; or

b. if the respondent fails to prove: --

(1) that the respondent, or, in the case of a person in charge of a training program, whose sponsor, does not have in place an education affirmative action plan that the Authority has approved, where the law requires that it have one in place; or

(2) reasonable past and continuing efforts to implement the plan.

3. Notwithstanding subsection 1, if the complainant is a black, and the respondent is an employer who has appointed or promoted a white woman, or if the respondent is an educational or training organization or a person in charge of a training programme who has awarded an educational place or funding to a white woman, the respondent shall further prove that a reasonable person would have believed that the person appointed had substantially and markedly superior qualifications for the job or educational place or award than the complainant.

=====

1. This section aims to require affirmative action even if an employer or educational or training organization fails to file an

adequate affirmative action plan. It applies only where the complainant proves intentional discrimination, or that the respondent does not have in place an equity self-audit, affirmative action plan and annual reports. It requires affirmative action as between blacks and women as against all other candidates, and blacks as against white women. With respect of employment, it does that in two ways: (a) by requiring the employer to prove its case by clear and convincing evidence; and (b) by requiring that it prove that compared to the complainant the selected candidate had "substantially and markedly superior qualifications". It uses the same standard for distinguishing between white women and blacks.

2. With respect to educational and funding places, the section goes further: It states that where a black proves that the educational or training organization chose a white male rather than a black, the organization must give the black a place or funding, as the case may be. These provisions will likely come into play mainly with respect to tertiary education. Blacks fully qualified for university places come relatively few and far between. In such cases, it seems appropriate to require the university either to have in place an affirmative action plan, or to accept any qualified black. (With respect to a contest between a white woman and a black, the standard mentioned above obtains).

=====
40. Burden of proof in a discrimination case involving a policy-making position.

In a case in which the claimant asserts that the respondent discriminated against the complainant in making an appointment to a policy-making position, the respondent shall prove that: --

- a. the respondent canvassed broadly among qualified blacks and women for a person to appoint;
- b. the respondent publicly stated clear, explicit and objective criteria for the position, which criteria

--

(1) do not have a disparate impact upon blacks or women, or,

(2) if they do have such an impact: --

(a) have a clear relevance to the position's

content, and

- (b) have the least disparate impact of any alternative clear, explicit and objective criteria that identify a person as a qualified candidate for that position; and

c. either: --

- (1) the respondent's rules, procedures, structures, practices and customs concerning decisions to appoint to a policy-making position do not have a disparate impact upon blacks and women, or
- (2) if they do have such an impact, have a clear relevance to the respondent's mission, and have the least disparate impact on blacks and women of any alternative set of rules, procedures, structures, practices and customs concerning decisions to appoint to a policy-making position that would serve the respondent's mission.

41. Proof of educational qualifications.

In any action under this Act, the respondent may prove the quality of the educational institutions that the complainant attended only by reference to course content and teaching methods used at the institution. The respondent may not introduce evidence of the common repute of the quality of education received at those

educational institutions.

=====

Too often, and sometimes quite erroneously, admissions officers at universities discount degrees earned at "black" universities on the basis of common repute. This section requires the officer to tie his opinion to more solid evidence.

=====

42. Challenge to an equity self-audit or an affirmative action plan or an annual report.

1. In a discrimination case, if the defendant organization has filed an equity self-audit, an affirmative action plan or an annual report that the Authority has not earlier approved, in the course of the proceedings before the agent or the hearing officer the complainant can challenge the adequacy of either the plan, the self-audit or the report.

2. If the complainant in a discrimination case does so,
- a. the agent or the hearing officer shall suspend the proceedings, and
 - b. refer the matter to the Authority for further proceedings, which shall deal with the matter pursuant to subsection 3.

3. If after the public hearing mentioned in section 17 (concerning an affirmative action plan) or in section 28 (concerning an annual report), a party petitions for an quasi-judicial hearing on an affirmative action plan or an annual report, or after a referral by a hearing officer pursuant to subsection 2, the Authority shall refer the petition to a hearing officer, who shall proceed as in section 34.

43. Review and decision by the Authority

1. Upon receipt of the record of the proceedings and the

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hearing officer's recommendations, the Authority shall promptly afford the parties and other interested stakeholders or groups an opportunity to be heard and to submit written arguments.

2. Within a time limit that the Authority shall set by subordinate legislation but in any event within two months, the Authority shall issue its decision on the basis of the record of the hearing before the hearing officer, the hearing officer's recommendations, and the oral and written submissions before it, the Authority shall either approve the hearing officer's recommendations, modify them, return the matter to the hearing officer for further proceedings, or dismiss the petition or complaint.

44. Remedies

1. In a case claiming wrongful discrimination under this Act, if the complainant sustains its burden of proof and the respondent does not sustain its burden of proof, an officer, the Authority or a court having jurisdiction shall award:--

- a. reasonable costs;
- b. reasonable attorney's fees;
- c. in the case of a discriminatory employment decision,
 - (1) an order requiring the employer to install the complainant in a job or position, or otherwise repairing the discriminatory employment decision; and
 - (2) damages for loss of wages or salary that but

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- for the wrongful act of the respondent, the complainant would have earned, not offset by sums earned by the complainant during that period, or R1000, whichever is the greater;
- d. in the case of a discriminatory educational decision,
- (1) an order requiring the educational or training institution or the person in charge of the training course to remedy the discriminatory action complained of; and
 - (2) damages for potential loss of wages occasioned by delay in obtaining an educational place, or R1000, whichever is greater;
- e. in the case of discrimination in the delivery of governmental services,
- (1) an order requiring the government agency to supply the services forthwith, and
 - (2) damages for the delay in providing the services, or R1000, whichever is the greater, and
- f. in the case of discrimination in appointment to a policy-making position,
- (1) an order installing the complainant in the policy-making position involved, and
 - (2) damages for loss of wages or salary that but for the wrongful act of the respondent, the

complainant would have earned, not offset by sums earned by the complainant during that period, or R1000, whichever is the greater; and

- g. an order or an interdict requiring the employer to remedy a discriminatory rule, procedure, practice or custom, or to change a discriminatory criterion for a job, educational place, or policy-making position.

2. In a case in which the Authority awards damages pursuant to subsection 1, it shall award treble damages if the respondent fails to prove that : --

- a. it did not discriminate intentionally; or
- b. that, if the law requires that it have an equity self-audit or an affirmative action plan in place, it, or, if the respondent is a person in charge of a training pension, its sponsor, has in place an equity self-audit or an affirmative action plan that: --

- (a) the Authority determines the respondent made in a good faith effort to meet the requirements of this Act, or

- (b) the Authority has approved or approves in the course of the proceedings;

and

- (1) reasonable past and continuing efforts to

implement the plan.

3. In cases arising under a section of Chapter Eight, the Authority shall award an appropriate remedy, as the Authority by subordinate legislation shall prescribe.

4. Notwithstanding any other law or rule, unless the tribunal finds that the complainant brought the proceeding frivolously, no officer, the Authority, nor a court may award costs or attorney's fees against a complainant.

=====

1. This section lays out the remedies available to the Authority. In every case, if successful, it permits the complainant to recover costs and attorney's fees; it never permits costs or attorney's fees against the complainant, except where the Authority or a court deems the complaint frivolous.

2. Subsection 2 requires treble damages in cases where either the Authority finds intentional discrimination, that the respondent has not filed an equity self-audit, an affirmative action plan or annual reports that the Authority finds the organization made in good faith, or that the respondent has not made reasonable efforts to carry out the plan. This should serve as an incentive to organizations to prepare and file these documents.

=====

45. Review by the Appellate Division

1. Within sixty days after the decision of the Authority, an aggrieved party may appeal to the Appellate Division.

2. After hearing the parties on the record before the hearing agent and the decision of the Authority, the Appellate Division may affirm the decision of the Authority, or amend or reverse it. The Appellate Division may amend or reverse the decision only on the following grounds:

- a. fraud or personal bias against a party;
- b. illegality;

c. the lack of a scintilla of evidence to support the decision.

=====
The appeal lies directly to the Appellate Division, an appeals court, and not to a trial court. That emphasizes once again that on review the Court looks only at the record made before the hearing officer. The narrow scope for review also emphasizes that the court is not to substitute its discretion for that of the Authority, but only to police the Authority's decisions for arbitrary action (as evidenced by the absence of supporting evidence).
=====

46. Entry of decision of the Authority as a judgment of a court

After the Authority has made a decision under this Act and has given notice of it to the parties, and: --

- a. the time for appeal has elapsed without a party having taken an appeal, or
- b. if a party has appealed to the Appellate Division and has exhausted rights of appeal within the judicial system,

the Authority may enter its order, or, if a court has modified the order, the modified order, in the high court of Johannesburg as a final judgment of the court.

=====
This section provides a procedure for enforcing a decision of the Authority. Once entered a court judgment, the authority or the complainant's attorney can enforce it as they would any court judgment. The Johannesburg high court is selected as the court for entry of judgment in order to centralize the judgments and for the convenience of the Authority.
=====

47. Failure to meet time limits

The failure of the Authority or a hearing officer to meet a time limit stipulated in this Act shall not invalidate a decisions made under this Act.

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This section makes it clear that the directions in the bill as to time limits are directory merely, and not mandatory.

=====

CHAPTER EIGHT. SANCTIONS

48. No government agency may enter upon a contract in excess of R.xxxx with an organization that does not have on file an equity self-audit and, if required, an affirmative action plan, or has not filed a current annual report, or one of whose affiliated companies does not have those documents on file, [nor, once in default, may it enter upon such a contract for two years after filing.][?????]

49. No public officer in charge of a government agency that this Act requires to prepare and file an equity self-audit or an affirmative action plan may remain in charge of that agency if after one year from the time appointed for filing an equity self-audit and an affirmative action plan the department or division does not have those documents and a current annual report on file.

50. An organization which fails to file an equity self-audit, an affirmative action plan or an annual report within the time limited for filing shall become liable to a civil penalty of RXXXX for each day that without a reasonable excuse it fails to file. [REWRITE!]

51. No government official may pay government funds to an educational or training organization or training course: --

- a. that does not have on file an equity self-audit and, if required, an affirmative action plan and a current Annual report, or,
- b. if the organization or the sponsor of the training course is a member of an educational system whose governing body after one year from the time

appointed for filing an equity self-audit or an affirmative action plan the Authority has not done so.

52. No government official may pay any funds to a Regional or a Local Government or to an agency of either if after one year from the time appointed for filing an equity self-audit or an affirmative action plan the Regional Government or the Local Government or the agency, as the case may be, has not done so.

53. A person or organization who knowingly or intentionally victimizes an individual or an organization for anything legally done under this Act shall be forever debarred from holding a position of trust and confidence under the government, or to be an officer of a parastatal, or to be an officer of a company registered in South Africa or to be employed as an officer of the company in South Africa by a foreign company doing business in South Africa.

54. A person who knowingly or intentionally victimizes an individual or an organization for doing anything legally done under this Act shall be convicted of a crime and sentenced to not less than two years five years in prison without possibility of suspension of sentence.

=====
What other sanctions could one devise to ensure that organizations of all sorts prepare and file adequate self-audits, affirmative action plans, and annual reports, and make bona fide best-efforts to carry out the plans?
=====

CHAPTER NINE. EVALUATION

55. Annual reports by the Authority

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The Authority shall annually lay before National Assembly a report detailing the progress in affirmative action in the organization within its jurisdiction, recommendations about changes in the laws, and other matters as it may determine.

=====
This bill attempts to initiate an on-going democratic participatory process to implement affirmative action in all sectors of society. New problems will inevitably constamtly arise. Both to correct and improve implementation of the existing law, and to imprpove the law itself where necessary, requires constant feedback to the legislature. This section provides one form of that feedback.
=====

56. Evaluation by Advisory Board

1. Not less than one month before sending its annual report to the National Assembly, the Authority shall send to the Affirmative Action Advisory Board and each regional and local Advisory Board, a copy of the Authority's draft annual report.

2. Each recipient of the Authority's annual report mentioned in subsection 1 shall discuss the report and, in its discretion, prepare and forward to the Authority and to the National Assembly its evaluation of the report.

57. After three years, the Advisory Board shall conduct a formal evaluation of the Authority and the progress of affirmative action, and report to the National Assembly.

MISCELLANEOUS

58. Definitions.

In this Act: --

1. "Advisory Board" means the Affirmative Action Advisory Board established in section 22.
2. "affirmative action plan" means the plan prescribed in

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section 18;

3. "Authority" means the affirmative action authority created in section 22;

4. "chief executive officer" has the meaning given it in section 13.

5. "Committee" means the affirmative action plan Committee prescribed by section 9;

6. "compensation" has the meaning given it in section 8.

7. "complainant" has the meaning given it in section 31

8. "demographic composition" has the meaning given it in section 6(1).

9. "discrepancy" means a discrepancy as described in section 14.

10. "discrimination" has the meaning given it in section 5;

11. "educational decision" has the meaning given it in section 4;

12. "educational or training organization" has the meaning given it in section 10;

13. "employer" has the meaning given it in section 6;

14. "employment category" has the meaning given it in section 8.

15. "employment decision" has the meaning given in section 4;

16. "government agency" has the meaning given it in section 3;

17. "mission statement" means a statement of the ends that the organization perceives itself as attempting to achieve;

18. "organization" has the meaning given it in section 3;

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19. "organogram" has the meaning given it in section 12;

20. "qualified candidate" has the meaning given it in section 36;

21. "quango" means a quasi non-governmental organization, for example, a university mainly funded by government;

22. "relevant labour pool" has the meaning given it in section 8;

23. "respondent" has the meaning given it in section 31;

24. "stakeholder" has the meaning given it in section 12;

25. "student source area" has the meaning given it in section 10;

26. "training course" has the meaning given it in section 10.

59. This Act shall come into effect with respect to the appointment and functioning of the Authority upon enactment.

=====
The Authority cannot function until it has an adequate staff. That may take some time to assemble. Hence the two-step introduction of the Act defined in this and the following section.
=====

60. The remainder of the Act shall come into effect upon declaration by the President.
