Solidariteit
Solidarity

Part of the Solidarity Movement

Racial Discrimination

The South African Government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

www.solidarity.co.za 0861 25 24 23

The South African Government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination

1.

Introduction

1.1 Having regard to the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (the Convention), read with the relevant General Recommendations of the Committee on the Elimination of Racial Discrimination (CERD), as well as in light of the recent concluding observations of CERD on the fourth to eighth periodic reports of South Africa, Solidarity hereby requests the South African Human Rights Commission (SAHRC) to review the government's compliance with the Convention and the relevant General Recommendations.

1.2 The aforementioned request is submitted in the form of a petition/complaint and is limited to the following legislation, policies and practices:

i) The Employment Equity Act, Act 55 of 1998 (as amended) (EEA), read in light of the Constitutional Court's interpretation and application of the said Act in the matter of ***Solidarity and Others v Department of Correctional Services and Others (CCT 78/15) [2016] ZACC 18*** (hereinafter referred to as the DCS judgment)

ii) The Broad-Based Black Economic Empowerment Act, Act 53 of 2003 (as amended) (BBBEE Act)

iii) The system of racial classification in South Africa

iv) The 2015–2019 Employment Equity Plan of the Department of Correctional Services

1.3 It is submitted that section 13(1)(b)(vi) of the South African Human Rights Commission Act, Act 40 of 2013 (Human Rights Commission Act), specifically mandates the SAHRC to monitor the implementation of, and compliance with, international and regional human rights instruments.

1.4 Having regard further to the fact that as a national human rights institution (NHRI), the SAHRC is additionally guided by the Paris Principles adopted by the United Nations General Assembly in 1993[1], as well as the declaration entered into by the State under article 14(2) of the Convention, which confirms that ***'the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of a violation of any of the rights set forth in the Convention'*****(our emphasis),** it is submitted that the SAHRC is empowered to consider and to act upon this petition.

1.5 In this document we will deal with the following issues in support of the petition:

i) The concluding observations of CERD on the fourth to eighth periodic reports of South Africa;

ii) General Recommendation No 32 of 2009;

iii) Interpretation and application of the EEA in light of the DCS judgment;

---

[1] UN General Assembly Resolution 48/134 on National institutions for the promotion and protection of human rights (1993).

iv) Compliance of BBBEE legislation with the Convention;

v) The Employment Equity Plan of the Department of Correctional Services for the period 2015–2019;

vi) Concluding remarks.

2.

Concluding observations of CERD on the fourth to eighth periodic reports of South Africa

2.1 We wish to point out the following concerns and recommendations made by CERD[2] which, we submit, warrant a formal investigation by the SAHRC and a review of the relevant legislation and practices for reasons more fully set out further in the document.

Statistical Data (System of racial classification)

2.2 On the subject of Statistical Data, the following was said:

> **"6.** ***The Committee appreciates the statistics provided by the State party, though it notes with concern that the classifications used to gather statistical data are from the former apartheid era*** **(our emphasis).** ***While noting concerns of the State party on preventing ethnic division through the gathering of statistical data, the Committee emphasizes that it needs a more exhaustive set of demographic statistics that may have been disaggregated in the manner specified in article 1, paragraph 1 of the Convention,***

[2] Attached hereto as Annexure "A".

including economic and social indicators. Statistical data is also needed on non-citizens in particular (art. 1).

"7. The Committee reiterates its recommendation that the State party provide the Committee with comprehensive statistical data in its next report including economic and social indicators, in line with paragraphs 10 to 12 of its revised reporting guidelines (CERD/C/2007/1), its general recommendation No. 4 (1973) on reporting by States parties on the demographic composition of the population, and its general recommendation No. 8 (1990) on self-identification, to enable the Committee to obtain an accurate view on the enjoyment of the rights in the Convention."

2.3 In terms of paragraph 11 of the revised reporting guidelines (CERD/C/2007/1) it is specifically recorded that:

"***11. Many States consider that, when conducting a census, they should not draw attention to factors like race, lest this reinforce divisions they wish to overcome or affect rules concerning the protection of personal data. If progress in eliminating discrimination based on race, colour, descent, or national or ethnic origin (hereinafter racial discrimination) is to be monitored, <u>some indication is needed in the CERD-specific document of the number of persons who might be treated less favourably on the basis of these characteristics</u>*** **(our emphasis)*****. States that do not collect information on these characteristics in their censuses are therefore requested to provide information on mother tongues, languages commonly spoken, or***

other indicators of ethnic diversity, together with any information about race, colour, descent, or national or ethnic origins derived from social surveys. In the absence of quantitative information, a qualitative description of the ethnic characteristics of the population should be supplied. States are advised and encouraged to develop appropriate methodologies for the collection of relevant information."

2.4 We note that the SAHRC has expressed the same concerns regarding classification of the population in its June 2006 Shadow Report[3] where it was specifically recorded that:

"*South Africa also retains the colonial and apartheid classification of the population into two groups, namely the Black (comprising Africans, Indians and Coloureds including indigenous people like the Khoi and San groups) and White people.[65] This does not seem to be in line with General Recommendation VIII requesting that if no justification to the contrary, "such identification of the population should be based upon self-identification by the individual(s) concerned". Such forced identification of the indigenous people tends to conceal the fact that they were and still remain the first group to be discriminated against and whose members should yet be the first beneficiaries of affirmative action measures."*

[3] At page 18.

2.5 We submit that the Convention, as well as the recommendation of the Committee, is reconcilable with section 1 of the Constitution, which states as follows:

> **"*Republic of South Africa***
>
> ***The Republic of South Africa is one, sovereign, democratic state founded on the following values:***
>
> ***(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.***
>
> ***(b) <u>Non-racialism and non-sexism</u>* <u>(our emphasis).</u>**
>
> ***(c) Supremacy of the constitution and the rule of law.***
>
> ***(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."***

2.6 The government's failure to review the current system of race classification and especially their failure to consider the impact which the current system of classification has on affected groups should be viewed in a serious light. As will be noted from the arguments presented below, "Affirmative Action" legislation such as the EEA and BBBEE Act differentiates, provides preference and excludes certain race groups based on the same system of classification.

Special Measures

2.7 On the subject of Special Measures, the following was said:

> ***"14. The Committee appreciates the particular challenges the State party faces with implementing special measures to redress inequalities of the former apartheid era, and notes the information provided by the State party on the implementation of special measures including the Employment Equity and Black Economic Empowerment Acts. While the Committee appreciates some statistics provided by the State party on the current distribution of persons belonging to various ethnic groups at management levels and in the judiciary, the Committee is concerned at the lack of comprehensive disaggregated data on the impact of special measures on affected groups, especially on the most disadvantaged and vulnerable among them, in the areas of employment, education and representation in public and political affairs at all levels* (our emphasis*). The Committee is also concerned at the lack of information on the impact of special measures on indigenous peoples (arts. 2 and 5).***
>
> ***"15. Recalling its general recommendation no. 32 (2009) on the meaning and scope of special measures, the Committee requires the State party to provide detailed qualitative and quantitative information in its next periodic report on the impact of the special measures in employment, education and public and political affairs. The***

Committee also requests further information on specific special measures for indigenous peoples and their impact."

2.8 In the media statement released by the Committee after the presentation of the South African report, the Committee, amongst other things, made the following remarks:

"*Experts took note of the rather rigid approach to the application of quotas, which seemed to favour quantitative over qualitative, and urged South Africa to ensure that its affirmative action was aligned to the Convention and the Committee's General Recommendation N° 32 of 2009* (our emphasis).

In order to reduce the disparities and inequality between the different population groups, South Africa had adopted a range of temporary special measures under the guise of affirmative action, and the Country Rapporteur urged South Africa to pay attention to the Committee's General Recommendation N° 32 of 2009 on the importance and range of temporary special measures under the Convention.

Temporary special measures did not need to be applied forever; otherwise they would not qualify as temporary special measures."

2.9 Having regard to the aforementioned comments by the Committee, as well as in light of the fact that no formal process has been undertaken by the government to determine whether or not the said legislation (EEA and BBBEE Act) complies with the Convention and specifically General Recommendation No 32 of 2009, it is submitted that such a review is in fact compulsory and should be conducted by the SAHRC.

General Recommendation No 32 of 2009

3.1 We submit that the Committee's recommendation that the State should ensure that its affirmative action is aligned to the Convention and the Committee's General Recommendation No 32 of 2009, cannot be left unanswered and that it in fact obliges the SAHRC to conduct an investigation itself, so as to assist the State but also to ensure that the interests of the people of South Africa are protected. In light of the aforementioned we wish to highlight some of the provisions of the Recommendation.

"***B) Direct and Indirect Discrimination***

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple

discrimination – such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences **(our emphasis).**

"8. On the core notion of discrimination, General Recommendation 30 of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim **(our emphasis)*.'[4] As a logical corollary of this principle, General Recommendation 14 observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'.[5] The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal**

[4] General Recommendation No. 30, paragraph 4.
[5] A/48/18, chapter VIII B.

manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration."

3.2 Three main principles can be identified:

3.2.1 Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference' (our emphasis).

3.2.2 Differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.'

3.2.3 The application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

"III. The Concept of Special Measures

A) Objective of Special Measures: Advancing Effective Equality

11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one

component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions."

"D) Conditions for the Adoption and Implementation of Special Measures

16. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned**(our emphasis).**

"17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.

"18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities".

3.3 From the above is clear that “special measures” should be:

3.3.1 temporary in nature;

3.3.2 appropriate to the situation to be remedied;

3.3.3 legitimate and necessary in a democratic society;

3.3.4 based on the need and a realistic appraisal of the current situation of the individuals or communities concerned;

3.3.5 carried out on the basis of accurate data.

“IV. Convention Provisions on Special Measures

26. Article 1, paragraph 4 provides for limitations on the employment of special measures by States parties. The first limitation is that the measures ‘should not lead to the maintenance of separate rights for different racial groups’. This provision is narrowly drawn to refer to ‘racial groups’ and calls to mind the practice of Apartheid referred to in Article 3 of the Convention which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention. The notion of inadmissible ‘separate rights’ must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights.

"27. <u>The second limitation on special measures is that 'they shall not be continued after the objectives for which they have been taken have been achieved'. This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved.</u> The length of time permitted for the duration of the measures will vary in light of their objectives, the means utilised to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned."

3.4 Having regard to the aforementioned it is clear that the limitations to special measures are as follows:

3.4.1 They should not create separate rights for different racial groups. (See below the *"Barnard principle",* which was developed by the Constitutional Court in this regard.)

3.4.2 They should not be continued after the objectives for which they have been taken have been achieved, which implies that they should be goal-orientated, fixed and measureable. (See the discussion below regarding the employment equity plan of the Department of Correctional Services.)

"B) Article 2, paragraph 2

34. Beneficiaries of special measures under Article 2, paragraph 2 may be groups or individuals belonging to such groups. The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests

of individuals. The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary.

3.5. We already know that in South Africa we do not have a system of self-identification and both the EEA and BBBEE legislation, in as far as it relates to the system of racial classification, is based on the Apartheid racial classification system.

Interpretation and application of the EEA in light of the DCS judgment

4.1 Having thus considered the recommendations of the Committee and having identified the requirements for and limitations to "special measures", Solidarity now wishes to point out to what extend the EEA does not comply with the Convention and the General Recommendations. The focus will be on how the apex court in the country has interpreted and applied the EEA seeing that this interpretation binds all organs of state, private institutions and indivduals who apply the Act.

4.2 Before we deal with the aforementioned judgment we think it prudent that we first establish what "affirmative action" entails in terms of the said Act and who stands to benefit from these "special measures".

The EEA

4.3 The Act has a twofold purpose, namely (a) the elimination of unfair discrimination, which is dealt with in Chapter II of the Act and applies to all individuals irrespective of race or gender, and (b) the implementation of "affirmative action measures" so as to achieve equitable representation of people from the designated group, which is dealt with in Chapter III of the Act.

4.3 It is clear from the Act that, in as far as it relates to the implementation of "affirmative action measures", it distinguishes between the designated group and the non-designated group. The designated group is defined as *"black people, women and people with disabilities".* Black people is defined as "*a generic term which means Africans, Coloureds and Indians".*

4.4 Section 15(1) of the Act confirms what affirmative action measures are:

"Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer."

4.5 It is common knowledge that the Act, and specifically the Affirmative Action provisions thereof, is for an indefinite period and is aimed at achieving "equitable" representation of the designated groups at all levels in the workplace. Further to the aforementioned it is also clear that the Department of Labour, who is the custodian of the Act, has confirmed that equitable representation should be equated with representation in line with the National Economically Active Population (NEAP). See attached hereto as Annexure "A"

correspondence from the Department which confirms this. This was also confirmed by the Constitutional Court in the DCS judgment, which we will discuss more fully below.

4.6 It cannot be contested that the NEAP changes from quarter to quarter and as such is variable. The effect thereof is that the goalpost for which Affirmative Action has been implemented shifts every time new statistics become available.

4.7 It is further common knowledge that for the purpose of implementing or applying the Act, individuals are classified in terms of a system so designed by the Apartheid Government and as such the outcome of the implementation of Affirmative Action measures are based on a “quantitative” assessment rather than a “qualitative” assessment. This much the Committee has also confirmed.

4.8 Further to the aforementioned in terms of the Employment Equity Regulations, item 8, employers are required to request each employee in the workforce to complete a declaration by using the EEA1 form. An employer may add information to the EEA1 form and where an employee refuses to complete the EEA1 form or where the employee provides inaccurate information, the employer may establish the designation of an employee by using reliable historical and existing data. This clearly does not comply with the self-classification system prescribed by the Convention and General Recommendations.

4.9 Based on the above alone it is submitted that the Act falls short of the provisions of the Convention and the General Recommendations and should be reviewed and amended to the extent possible and necessary.

4.10 This brings us to the Constitutional Court's interpretation of the EEA.

The DCS judgment

4.11 The judgment of the Constitutional Court is relevant for two main reasons:

4.11.1 The Constitutional Court has confirmed that even within the designated group there is a racial hierarchy of preference. We submit that this is contrary to the provisions of the Convention which prohibit separate rights for separate racial groups.

4.11.2 The Court has confirmed the legitimacy of relying on the national and racial demographics as the criteria for implementing affirmative action and as such supports a quantitative assessment rather than a qualitative assessment.

The Barnard principle

4.12 The Constitutional Court has formulated the so-called *"Barnard Principle"*[6], which the Court has explained to entail the following:

> ***"Part of the case that the applicants put up in that statement suggests that as a matter of principle the Department had no right in law to refuse to appoint a candidate for appointment to a position by reason of the fact that he or she was a Coloured person or was a woman. There was also some suggestion by the applicants that an employer could not do that against Coloured people because they are Black people which is one of the designated groups***

[6] See page 19, paragraph 37.

intended to be beneficiaries of employment equity. It is necessary to deal with this issue because, if the Barnard principle may not be used against a Black candidate or a woman, then that conclusion would be fatal to the whole case of the Department and it would not be necessary to consider other aspects of the case other than remedy.

"The important question that arises is, therefore, whether the Barnard principle applies to African people, Coloured people, Indian people, people with disabilities as well as women or whether its application is limited to White people. Ms Barnard was refused promotion on the basis that White people were already overrepresented in the occupational level to which she wanted to be appointed. This Court upheld this reason. The question is, therefore, whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment. The question also arises whether the Barnard principle applies to gender with the result that a man or woman could be denied appointment to a position at a certain occupational level on the basis that men or women, as the case may be, are already adequately represented or overrepresented at that level."

4.13 The answer the Court arrived at was in the affirmative and was based on the following reasoning[7]:

> ***"In my view the application of the Barnard principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the Barnard principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of***

[7] At paragraph 40.

representation of each group must broadly accord with its level of representation among the people of South Africa."

4.14 The Court goes further at paragraph 46:

"Nobody can justifiably dispute that, although under apartheid and racial discriminatory laws and practices all Black people suffered hardships, the greatest hardships were suffered by the African people. Indeed, this much was recognised by the High Court in Motala29 and by the Labour Court in this case. Therefore, any corrective measure, such as an employment equity plan or an affirmative action programme, cannot succeed in reversing the imbalances of the past if it is based on the notion that Black people would be equitably represented in a workforce or in a particular occupational level if there are enough Coloured people or Indian people even if there are no African people or there are only a few African people."

4.15 We wish to point out that the Constitutional Court made no mention of the Convention and/or General Recommendations, which we submit further warrants an investigation and review of the said Act by the SAHRC.

4.16 In light of the above it is clear that an individual's right to be appointed and/or promoted, in terms of the Court's interpretation, is limited to the level of representation of his or her race group within the said department and/or company. It is therefore clear that the EEA, as interpreted by the Constitutional Court, creates separate rights for separate racial groups. An individual's needs and circumstances are irrelevant, all that is considered is the level of representivity of the race group to which he or she belongs.

4.17 As such, the EEA requires from employers to place individuals in racial silos and in terms thereof employers decide whether or not an individual is entitled to "special measures" taking into consideration the level of representation of that individual's race group.

4.18 In summary then Solidarity submits that the EEA contravenes the provisions of the Convention and General Recommendation No 32 of 2009 in the following respects:

4.18.1 Affirmative Action in terms of the EEA is based on a system of racial classification designed by the Apartheid Government and does not provide for a system of self-classification which the Convention supports and demands.

4.18.2 Affirmative Action in terms of the EEA is not based on a realistic appraisal of the current situation of the individuals and communities concerned but is solely aimed at achieving representation of these specific groups in line with the national racial demographics. The rationality and proportionality of the Act are therefore left wanting, seeing that it does not take into

consideration the preference of employment which might exist within racial groups, the level of education and qualification per race group and the composition of specific racial groups within the borders of the Republic of South Africa.

4.18.3 The measures are not temporary and are not goal-orientated, firstly, seeing that in terms of the Act the implementation of Affirmative Action is for an indefinite period and, secondly, seeing that the goal which the Act is set out to achieve is not fixed or certain but is shifting in tandem with the statistics of the population.

4.18.4 Affirmative Action as it is currently implemented clearly leads to the maintenance of separate rights for separate racial groups. The reasoning of the Constitutional Court in the DCS matter clearly illustrates this. The fact remains that racial groups are afforded rights and preferences based on the same system of racial classification which the world has condemned.

4.18.5 There can never be a point where Affirmative Action in South Africa has reached its goal and as such be discontinued, seeing that the goal is not fixed or certain but depends on racial statistics which change every quarter.

4.18.6 The government has never considered what the impact of the legislation is on the affected and/or vulnerable groups.

5.

Compliance of BBBEE legislation with the Convention

5.1 The most profoundly racialistic of all the statutes is the BBBEE Act. It creates a structure that makes government procurement dependent upon the extent to which a prospective supplier is, in racial terms, 'transformed'. Points are awarded for black equity and asset ownership, black representation within the managerial and staff hierarchy, and the awarding of contracts on preferential terms to black contractors.

5.2 In practice it is nothing other than expropriation based on considerations of race alone, seeing that should a company fail to achieve the relevant threshold its contract is terminated and/or its licence not renewed.

5.3 The Act contravenes the very nature and purpose of the Convention. **White men and white women cannot be the sole owners of any company if they wish to do business with the state and/or any company that requires a BBBEE status (our emphasis).** That is the reality, which clearly flies in the face of the limitations which the Convention and the General Recommendation put on "special measures".

5.4 As with the EEA it is indefinite, based on no specific outcome that is fixed, measurable and realistic. It does not promote a legitimate goal nor does it meet the needs of those most in need of assistance. It is not based on reliable data, and no assessment has been done of the impact it has on the affected and/or vulnerable groups.

5.5 The BBBEE Act has never been scrutinised for compliance with the Convention and General Recommendations, and in light of the functions and responsibilities of the SAHRC it is submitted that such scrutiny is necessary.

6.

The Employment Equity Plan of the Department of Correctional Services for the period 2015–2019

6.1 We attach hereto as Annexure "B" the Employment Equity Plan of the Department of Correctional Services for the period 2015–2019. We submit that this is the fourth plan of its kind. The Affirmative Action objectives and targets have changed with each new plan and the goalpost has shifted in line with the racial demographics of the country.

6.2 Further to the above it will be noted that people are categorised according to race and gender, and that it is specifically recorded how many members of each race group need to be appointed to each level within the workforce.

6.3 It will also be noted how national demographics receive preference over regional demographics in any appointment and that there are limited if any chances of a deviation from the plan.

6.4 The plan and the history of the preceding plans clearly illustrate that Affirmative Action in South Africa does not comply with the intended “special measures” of the Convention and General Recommendation No 32 of 2009.

6.5 In light of the arguments presented above as well as the fact that the plan clearly does not comply with the Convention, Solidarity – acting on behalf of its members employed by the Department of Correctional Services and who are victims of the rights set forth in the Convention – hereby petitions that the SAHRC review the said plan.

7.

Concluding remarks

7.1 Having regard to the above, Solidarity is of the opinion that the petition/complaint is justified and factually correct and warrants further investigation by the SAHRC.

7.2 In respect of the outcome required, Solidarity is of the opinion that in terms of the Human Rights Commission Act the SAHRC:

7.2.1 is competent and obliged to request any organ of state to supply it with information on any legislation or executive measures adopted by it relating to human rights;

7.2.2 must review government policies relating to human rights and may make recommendations;

7.2.3 must prepare and submit reports to the National Assembly pertaining to any convention, treaty, covenant or charter relating to the objects of the Commission; and

7.2.4 is competent to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights.

7.3 As such, Solidarity requests that the SAHRC:

7.3.1 conduct a formal investigation/review of the EEA and BBBEE legislation so as to determine whether or not it complies with the provisions of the Convention and General Recommendation No 32 of 2009 and also to determine the impact thereof on the affected and vulnerable groups;

7.3.2 conduct an investigation so as to determine why the government has failed to implement a system of self-classification and also to determine the impact the current system of classification has on the affected and vulnerable groups;

7.3.4 conduct a formal investigation/review of the Employment Equity Plan of the Department of Correctional Services and determine whether or not it complies with the Convention and General Recommendation No 32 of 2009; and

7.3.5 submit a report to the National Assembly as well as CERD on the findings in respect of the above.

7.4 We are more than willing to engage with the SAHRC and to make further representations on the issues discussed in this document.