Categorisation to determine beneficiaries of affirmative action: Advantages and deficiencies

Abstract

Categorisation as a method is generally used in law to determine the beneficiaries of affirmative action. Inherent in the method are advantages but also deficiencies. The latter include over-inclusiveness, the fact that those better off in the categories generally benefit from affirmative action, under-inclusiveness, and the fact that multiple disadvantage is not recognised. In this article, the author argues that shortcomings of categorisation, which result in affirmative action measures not reaching their intended beneficiaries, should be acknowledged and dealt with.

1 Introduction

This article focuses on the South African Employment Equity Act,¹ the purpose of which is to achieve equity in the country’s highly unequal workplaces by, inter alia, implementing affirmative action.² This Act uses categorisation to determine beneficiaries of affirmative action. It creates ‘designated groups’ – black people, women and people with disabilities³ – whose ‘disadvantages’ must be redressed by affirmative action.⁴ The group ‘black people’ includes Africans, Indians and coloureds.⁵ Affirmative action must be applied by designated employers, who are basically denoted by larger institutions.⁶

Reference is made to other countries to give a broad overview of the use of categorisation as a method to determine the beneficiaries of affirmative action, and to consider useful practices to apply to deficiencies of categorisation as experienced by the Employment Equity Act.

2 Categorisation

2.1 International instruments and national law

Though some international instruments, such as the convention on the Elimination of All Forms of Racial Discrimination⁷ and the convention on the Elimination of All Forms of Discrimination against Women,⁸ are relevant to deciding on who should benefit from affirmative action measures, different countries’ constitutions and national legislation also identify beneficiaries. These usually fit the particular historical circumstances of the country⁹ and its political goals and intentions.¹⁰

Although not discussed in this article, it should be noted that the identity of those doing the categorisation is important, particularly for identifying minority groups that are not part of the dominant societal group. Being the categoriser is to occupy a position of power and to create ‘one side of the comparison as a ‘difference’, while constituting a particular constellation of attributes as the invisible background norm’ (CL Bacchi Affirmative Action (1996) 80ff). This implies that the dominant group need not notice its own ‘group being’ at all; it apparently occupies a neutral, universal position and is ‘outside’ the process of definition. Also, the categoriser has a particular social identity shared by members of the dominant group in the particular society. What is important is that categorisers are also in charge of offering ‘solutions’ or remedies to the problem, as well as of laying down the time frame for these. The decision makers are usually a majority and arguments set within existing theoretical and ideological terms of reference are used. The question who determines the categories of disadvantaged groups may thus prove to be problematic where minorities are affirmed, as in, for example, the United States and Canada. In South Africa, this does not appear to be problematic, as a majority is affirmed by a majority government.

² S 2 of the Employment Equity Act.
³ S 1 of the Employment Equity Act.
⁴ Ss 2, 13, 15, 16, 19 and 20 of the Employment Equity Act.
⁵ S 1 of the Employment Equity Act.
⁶ S 1 of the Employment Equity Act.
⁹ B McLachlin ‘Equality: The most difficult right’ (2001) 14 2(d) Supreme Court Law Review 19; M Bastarache ‘Does affirmative action have a future as an instrument of social justice?’ (1997 8) 29(2) Ottawa Law Review 501. Although not discussed in this article, it should be noted that the identity of those doing the categorisation is important, particularly for identifying minority groups that are not part of the dominant societal group. Being the categoriser is to occupy a position of power and to create ‘one side of the comparison as a ‘difference’, while constituting a particular constellation of attributes as the invisible background norm’ (CL Bacchi Affirmative Action (1996) 80ff). This implies that the dominant group need not notice its own ‘group being’ at all; it apparently occupies a neutral, universal position and is ‘outside’ the process of definition. Also, the categoriser has a particular social identity shared by members of the dominant group in the particular society. What is important is that categorisers are also in charge of offering ‘solutions’ or remedies to the problem, as well as of laying down the time frame for these. The decision makers are usually a majority and arguments set within existing theoretical and ideological terms of reference are used. The question who determines the categories of disadvantaged groups may thus prove to be problematic where minorities are affirmed, as in, for example, the United States and Canada. In South Africa, this does not appear to be problematic, as a majority is affirmed by a majority government.
¹⁰ Bacchi op cit (n 9) at 15ff.
Generally, in law, special categories or groups are created to benefit from affirmative action. This has been explained as follows:11

As a means of combating discrimination, law works through the creation of protected classes; this may result in only rough justice, since not all members of a class are equally placed . . . The creation of privileged classes benefiting . . . has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define the classes so exactly that only the most deserving benefit, the short run results may be open to criticism. (Emphases added).

2.2 Criteria for categories of beneficiaries of affirmative action

Although the criteria for the selection of beneficiaries vary from country to country, such criteria are (almost) always related to the objective of achieving equality in one form or another.12 Affirmative action is directed at those groups of people who have suffered past social, economic, political or educational disadvantages.13 These groups consist of individuals who all have a characteristic in common on which their membership of a particular group is based and who find themselves in a disadvantaged position. Although such a characteristic, for example gender, colour, nationality or membership of an ethnic minority, is often innate and inalienable, this is not necessarily always the case.14

Sometimes broader developmental and political objectives – unrelated to discrimination and equality – are taken into account. For example, groups that have not been victims of past discrimination may be selected as beneficiaries to accelerate their integration into society – so present and future discrimination is avoided. Protecting the separate identity of a group may also be a criterion, as in the case of programmes benefitting language minorities and aboriginal peoples in Canada.15 Another example is found in Malaysia, where affirmative action is aimed at the preservation of political power by the indigenous majority, the Bumiputra, with the Indian and Chinese peoples having the economic power. The societal goal of diversity is yet another objective often found nowadays in relation to affirmative action, particularly in the United States.16

13 Faundez op cit (n 12) at 34.
14 Ibid.
15 Ibid.
Past and present affirmative action programmes have then commonly involved women, blacks, other racial groups, immigrants, poor people, disabled people, war veterans, indigenous peoples, and specific minorities.17

While minorities are most often the beneficiaries of affirmative action, such as in the United States and Canada, some countries, such as South Africa and Malaysia, have implemented affirmative action for majorities. In South Africa, affirmative action policies primarily protect and advance the black majority population, as well as women, and groups who were disadvantaged as a result of apartheid policies and patriarchy. In Malaysia, affirmative action relates to the preservation of political power for the indigenous majority, as was seen above.

The use of the group notion of categorisation has certain advantages. First, such an approach is relatively simple. Most people are easily identified as either male or female, or as black or white.18 This ties in with the origin of affirmative action when society first became aware of discrimination and its injustice in the context of white-black relations.19 Affirmative action was a response to this realisation, and it thus made sense originally to base affirmative action on this socially clear-cut, black-white dichotomy. It appears that the addition of women as a targeted group did not

19 Van Wyk op cit (n 18) at 41.
significantly complicate matters. Secondly, categorisation is an easily monitored system in that employers and enforcement agencies simply have to do a headcount and compare it with the statistics available.

Over time, however, more and more groups demanded protection, which meant that it was no longer possible simply to do a headcount on the basis of easily identified external characteristics such as race and gender.

2.2.1 Multiple discrimination

Another complicating factor was the realisation that, apart from simple, ‘main-effects’ discrimination, a person might also suffer compounded or multiple discrimination. For example, one person may be female, old and disabled. The intensity or severity of the disadvantage a person may experience thus depends on the number and interplay of the personal characteristics that generate discrimination against a person. In this regard, it has been argued that (1) there is a need to understand that complex forms of disadvantage based on race, gender and geographic location form ‘distinct categories’ of disadvantage which cannot be reduced to the sum of their parts; and (2) the intersectional nature of disadvantage creates different and multiple forms of inequality which cannot be explained or understood simply by reference to one ground of discrimination, such as gender.

Compounded discrimination is, however, seldom recognised under categorisation. But Canada, though not providing for multiple disadvantage in its Employment Equity Act of 1985, is the exception and has recently recognised this in practice for being both female and a member of another designated group, that is visible minorities, the disabled and native people. It was argued that failure to explicitly recognise double or triple disadvantage suppressed recognition of multiple disadvantage and consequently led to an incomplete and misleading picture of the level of representation and of the nature of disadvantage for certain groups. If it were possible to identify the

20 Van Wyk op cit (n 18) at 41.
21 Ibid.
23 Van Wyk op cit (n 18) at 41.
25 International Labour Conference 91st Session Report of the Director-General Time for Equality at Work Global Report under the Follow-up to the International Labour Organisation Declaration on Fundamental Principles and Rights at Work Report 1(B) op cit (n 24) at 36 7.
27 It can thus be said that little attention is given to the fact that lives are not ‘neatly packaged’ as ‘women’, ‘blacks’ and so on (Bacchi op cit (n 9) at 24).
29 See s 2 of the Canadian Employment Equity Act.
30 Report New Employment Equity Act and Regulations strengthen Canadian Workplace op cit (n 28) at chapter VI 4.
areas of greatest need, then legislative measures could be ‘fine-tuned’ to deal with those areas specifically. It was accordingly recommended that a means be developed to separately identify individuals who were members of more than one designated group and to provide a comparative analysis of their disadvantages in employment that might result from belonging to more than one designated group.31

In recognising multiple disadvantage, on the one hand, the number of protected groups may exceed manageable numbers32 and lead to an increase in administrative costs.33 Recognising multiple disadvantage, on the other hand, may lead to more effective policies for combating this particular phenomenon.34

2.3 Deficiencies of categorisation

Notwithstanding the fact of categorisation as a useful mechanism, its accompanying definitions are not always clear. Moreover, its workings are not necessarily exact and all-encompassing.35

At the one end of the continuum is the argument that affirmative action measures are under-inclusive because they do not reach the members of the group most in need of them.36 It is often found that those who benefit are the better off, those who are least in need (the better educated, well-connected, best-organised, most-visible or most-popular groups) within the categories, or those who actually do not need the assistance provided by the programme.37 This is a very practical problem. It may

31 Report New Employment Equity Act and Regulations strengthen Canadian Workplace op cit (n 28) at chapter VI 5. For disabled people, it has been held that people who belong to more than one of the designated groups face ‘proportionately more’ discrimination, but that quantitative data was insufficient to clearly indicate in which combinations the disadvantage is the greatest (9th Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities: Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act (2002) 4; 11). Consequently, the Parliamentary Coordinating Committee on Employment Equity Data undertook to examine how the data could be aggregated from current statistics to meet the needs identified.

32 Van Wyk op cit (n 18) at 41.

33 Faundez op cit (n 12) at 35. In addition, some countries do not have the technical know-how and ability to administer a programme for multiple disadvantage.

34 International Labour Conference 91st Session Report of the Director-General Time for Equality at Work Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work Report 1(B) op cit (n 24) at 37.

35 Related issues, not covered in this article, include: (a) whether it is possible to refuse to consider individuals as members of groups; (b) whether membership of a group can be acquired or obtained by marriage, religious conversion or integration; (c) how to classify children from mixed relationships and marriages; (d) the fact that only some people qualify to be members of certain groups; and (e) the fact that members of groups who do not observe the rules of groups may ultimately be expelled (see Faundez op cit (n 12) at 35; Banton op cit (n 11) at 78 9).


37 Van Wyk op cit (n 18) at 43; Bacchi op cit (n 9) at 27; J Hodges Aeberhard ‘Affirmative Action in Employment: Recent Court Approaches to a Difficult Concept’ in MF Loutfi (ed) Women, Gender, and Work: What is Equality and How Do We Get There? (2001) 442; R Kennedy ‘Persuasion and distrust: A comment on the affirmative action debate’ in JF Donohue III Foundations of Employment Discrimination Law (1997) 62; UNESCO Final Report Prevention of Discrimination op cit (n 17) at par 11; Banton op cit (n 11) at 73 4. This is particularly notable in India where members of Discrimination op cit (n 17) at par 11; Banton op cit (n 11) at 73 4. This is particularly notable in India where members of Discrimination op cit (n 17) at par 11; Banton op cit (n 11) at 73 4. This is particularly notable in India where members of Discrimination op cit (n 17) at par 11; Banton op cit (n 11) at 73 4. 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cause the deepening of divisions within the targeted groups\textsuperscript{38} and may stigmatise its beneficiaries. Also, because of the non-recognition of degrees of disadvantage within groups, differences within categories may be ‘masked’.\textsuperscript{39}

In contrast, it has been argued that the advancement of, for example, any black person benefits all black people, because the group as such is then better represented. This may be true, because such advancement provides role models for other blacks.\textsuperscript{40} Also, it has been argued that the mostly younger women who are nowadays benefiting from affirmative action are doing so at the expense of the previous generation, who were discriminated against to a much larger degree.\textsuperscript{41} This is because young women today have reaped the benefits of feminism and live in an era in which women are encouraged to further their education and have professional careers. In this regard, it may be said that affirmative action then improves the position of women as a group, which will now have even more suitable role models (similar to the racial argument above).\textsuperscript{42}

In practice it has been found that affirmative action aimed at women will often benefit white, middle-class women more than lower-class women from other ethnic backgrounds.\textsuperscript{43} This may be due to the fact that middle-class white women have generally attained fairly high educational qualifications, which is not the case for minority women in the United States and Canada, and for black women in South Africa. And, when affirmative action benefits a broad category, such as Hispanics or Asian Americans (in the United States), some ethnic groups within those categories will be advantaged more than others, because they already rank highly in terms of economic, educational and occupational status.\textsuperscript{44} This may in turn lead to yet ‘another’ disadvantaged ‘minority’ within the minority.\textsuperscript{45} In other words, affirmative action programmes may create new disadvantaged groups.

Indeed, it has been found that members of majority groups who miss out on a desired social good as a consequence of affirmative action are likely to come from the bottom of the white or male distribution, whereas the minority members who benefit are likely to come from the top of the minority or female distribution.\textsuperscript{46} Thus, affirmative action may well shift the social burden from one group to another, or from one subgroup to another.\textsuperscript{47}

At the other end of this continuum, it has been argued that the categories are over-inclusive in that all people in a category are deemed to be disadvantaged.\textsuperscript{48} In other words, what is not recognised is that, within a protected group, some people may in fact not have been disadvantaged.

\textsuperscript{38} Faundez op cit (n 12) at 35.
\textsuperscript{41} Smith op cit (n 40) at 246.
\textsuperscript{42} Ibid.
\textsuperscript{43} UNESCO Final Report Prevention of Discrimination op cit (n 17) at § 11. See also Banton op cit (n 11) at 73 4.
\textsuperscript{44} Ibid.
\textsuperscript{45} UNESCO Final Report Prevention of Discrimination op cit (n 17) at § 11.
\textsuperscript{46} UNESCO Final Report Prevention of Discrimination op cit (n 17) at §§ 11 and 12.
\textsuperscript{47} Ibid.
\textsuperscript{48} La Noue & Sullivan op cit (n 40) at 913; 924; E Kallen Ethnicity and Human Rights in Canada 2ed (1995) 237 8.
Disadvantaged people also display degrees of disadvantage between groups.\(^49\) For example, it is argued that Indian and coloured people were less disadvantaged than blacks under apartheid in South Africa.\(^50\)

Another deficiency of categorisation is that it means emphasising commonalities and downplaying differences between the categories. Moreover, categories are often seen as ‘interest’ groups and are set in competition with one another.\(^51\) Criticism in this regard is that a ‘zero-sum’ mentality or ‘hierarchies of oppression’ are created, which suggests that there is a finite number of opportunities for ‘others’.\(^52\) If a member of one group obtains a position, this is seen as being at the expense of another group.\(^53\) This creates particular problems for groups experiencing multiple disadvantage.\(^54\) It has been explained that such ‘hierarchies of oppression’ occur where targeted groups compete with one another for resources.

A last deficiency relates to the fact that, generally, definitions for purposes of affirmative action measures and programmes are combined with the individual’s willingness to self-identify as a member of a specific category.\(^55\) This approach – favoured in South Africa, Canada and the United States – recognises and respects the individual’s right to privacy.

Self-identification, however, presents certain problems. Relying on individuals may result in undercounting and thus affect the effective application of affirmative action.\(^56\) For example, there are people with disabilities who do not wish to draw attention to these and who choose not to identify themselves as such. Also, if some individuals are accounted for as white and others as black, some people must be borderline.\(^57\) Globalisation, immigration and intermarriage over centuries have blurred the once very exact and clear racial lines to such an extent that modern scientific theory now acknowledges that it no longer categorises races in exact, distinct groups, as was done in earlier years.\(^58\) It may therefore be complex in some instances to establish whether or not an individual belongs to a target group.\(^59\)

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\(^{49}\) Bacchi op cit (n 9) at 28; Banton op cit (n 11) at 78.


\(^{51}\) Bacchi op cit (n 9) at 24.


\(^{53}\) Bacchi op cit (n 9) at 24.

\(^{54}\) Ibid.

\(^{55}\) Faundez op cit (n 12) at 36; Banton op cit (n 11) at 78.

\(^{56}\) Undercounting, though undesirable, is, however, not of great consequence if the affirmative action policy does not penalise for not complying with goals, as is the case in Canada. In contrast, the Office of Federal Contract Compliance Regulations in the United States provides for severe penalties in this regard.

\(^{57}\) UNESCO Final Report Prevention of Discrimination op cit (n 17) at par 12. It thus appears that it is not purely a matter of self-identification in respect of categories (Banton op cit (n 11) at 78). A person could assign him- or herself to one colour or racial category, but be treated by others as if belonging to a different one. It may be no use for an individual to count himself or herself as a member of a group if he or she is not accepted as a fellow member by others. Although acceptance by members of the group may thus be regarded as an important factor, it has been said that it can never be the sole factor (Faundez op cit (n 12) at 36).

\(^{58}\) Banton op cit (n 11) at 48.

\(^{59}\) UNESC Final Report Prevention of Discrimination op cit (n 17) at par 14.
3 Deficiencies of categorisation as used by the Employment Equity Act

Four main deficiencies of categorisation as utilised by the Employment Equity Act in South Africa have been pointed out in the literature. First, the categories are over-inclusive in that the categorisation assumes that all people from the designated groups are disadvantaged – people who have not in fact been disadvantaged may therefore benefit under affirmative action.60

The Employment Equity Act does not contain the notion of degrees of disadvantage. Thus the differences of disadvantage between groups are not acknowledged and no hierarchy of designated groups exists.61 Put differently, the Employment Equity Act does not recognise that members of the designated groups were not equally affected and disadvantaged by apartheid and patriarchy. Instead, the Act advocates ‘equitable representation’ in occupational categories and levels in the workforce of a designated employer to determine the appointment (or promotion) of members of different designated groups on the basis of affirmative action.62

The notion of degrees of disadvantage was established in case law.63 This notion has, however, not been followed with much vigour. Later, though the court accepted that African people had been severely discriminated against under apartheid, and other non-white groups not to the same extent, it held it to be ‘impossible’ to make distinctions as to degrees of disadvantage in practice.64

Secondly, subgroups within a designated group display degrees of disadvantage.65 For example, the group ‘women’ is made up of black and white women, rich and poor women, urban and rural women, and mothers and those who do not have children.66 Moreover, the position of white, middle-class women is qualitatively different from that of poor, black rural woman.67 It seems likely that middle-class white women will benefit first from affirmative action in South Africa.


61 Although in s 54(1)(a) footnote 8 of the Employment Equity Act it is provided that a code of good practice may provide guidelines for the prioritisation of certain designated groups.

62 Sections 2(b) and 15 of the Employment Equity Act.

63 See Motala & another v University of Natal (1995) 3 BCLR 374 (D) at 383C-D.

64 See Stoman v Minister of Safety & Security & others (2002) 23 ILJ 1020 (T) at 1035F-G. In another example, Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another (2004) 25 IIJ 1716 (LC) at 1736A-B, the court accepted that white women had been discriminated against under apartheid, but not to the same extent as black people, and, in particular, African people.

65 Bacchi op cit (n 9) at 28; Banton op cit (n 11) at 78.

66 Albertyn & Goldblatt op cit (n 26) at 253.

67 Ibid.
Another example in this regard is that it has been held that Indian and coloured people have been less disadvantaged than blacks in South Africa.68 The various subgroups – Africans, coloureds and Indians – as part of the category ‘black people’, may therefore ‘mask’ differences between one another.69 Also, it has been stated that, in practice, affirmative action has focused on blacks at the expense of coloureds and Indians.70 Related causes for concern have been expressed: (1) that black managers subtly reserve jobs for comrades in the struggle against apartheid; and (2) that it is common practice to recruit blacks into senior positions to secure government or parastatal contracts.71 In this regard, it has been observed that a black ‘managerial aristocracy’ is emerging in South Africa at the expense of a large number of other blacks who are (still) unskilled, unorganised and unemployed.72 It has been argued that affirmative action that is based on race in order to benefit blacks as a group, and which does not distinguish between relatively privileged blacks and those who are truly disadvantaged, in fact detracts from focusing on those most in need, particularly in a society in which they constitute the majority.73 Moreover, affirmative action that focuses on race facilitates the acquisition of wealth by an already privileged section of the black population, because it does not seek to eliminate, or reduce, class distinctions.74 This argument has, however, been neutralised by proponents of race-based affirmative action who concede that, while not all blacks will benefit from such a policy, facilitating the opportunity for ‘some’ enhances the standing of ‘all’ in the group.75

Thirdly, no links exist between the various designated groups or between subgroups in a specific category. Put differently, multiple discrimination is not recognised in the Employment Equity Act. African women may fall under both the designated groups ‘women’, as well as ‘black people’. The Employment Equity Act does not indicate whether an employer has to take this into account, and, if so, how this should be put into practice.

In this regard, in the early days of the debate on affirmative action, it was argued that black women generally, and African women in particular, have shown themselves to be the most disadvantaged members of South African society.76 Accordingly, it was proposed that African and/or black women should be targeted

68 See Motala & another v University of Natal supra (n 64) at 383C; Stoman v Minister of Safety & Security supra (n 64) at 1035F.
69 Andrews op cit (n 50) at 52; 61 footnote 17 (see § 2.4 above).
70 Thomas op cit (n 52) at 250. It seems possible that the last two groups might possibly end up constituting minorities.
71 Thomas op cit (n 52) at 249 50.
72 See Adam op cit (n 36) at 239; Rapport ‘ “Wen-wen”-ooreenkomste is moontlik vir uitdagings’ 2 February 2003.
73 Adam op cit (n 36) at 249.
74 Adam op cit (n 36) at 247.
75 Adam op cit (n 36) at 247 (see § 2.4 above).
76 Albertyn & Goldblatt op cit (n 26) at 253.
as a special category or as special categories under affirmative action programmes.\textsuperscript{77} This has, however, not materialised under the Employment Equity Act.

In similar vein, it was recently reported that the poor representation of black females among the total representation of blacks and the total representation of females in the workplace suggested that inadequate attention was being paid to their compounded disadvantage.\textsuperscript{78} It thus appears that affirmative action measures do not reach this particular group. It was reported that African female representation, in particular, had dropped drastically at the professionally qualified and middle management level,\textsuperscript{79} and that their representation at top management level was unacceptably low.\textsuperscript{80} It was suggested that the position of African females, with only two per cent in top management positions, required drastic intervention.\textsuperscript{81} More aggressive and innovative strategies aimed at recruiting, developing, advancing and retaining African female workers were advocated.\textsuperscript{82}

Fourthly, the categories of beneficiaries of affirmative action are under-inclusive. In this regard, much has recently been written on ‘poor whites’ and young whites in South Africa.\textsuperscript{83}

\section*{4 Recommendations to refine categorisation as used by the Employment Equity Act}

While the deficiencies of over-inclusiveness, under-inclusiveness and degrees of disadvantage\textsuperscript{84} may be logical consequences of categorisation in that the categories

\textsuperscript{77} See Andrews op cit (n 50) at 61 footnote 17. For example, the Restructuring the South African Labour Market Policy conference chaired by DH Lewis and MM Ngoasheng (1996) 140 3 recommended that specific attention be paid to the position of black women; the Green Paper on Employment and Occupational Equity \textit{GG} 1 July 1996 GN No 1730, chapter 3 §§ 3.2.10, 3.2.12, 3.2.13 & 3.3.4 and chapter 4 §§ 2.1; 2.2.4 & 2.2.7 considered black women to be an especially neglected group.

\textsuperscript{78} Commission for Employment Equity Annual Report 2002 2003 viii; 59.

\textsuperscript{79} Commission for Employment Equity Annual Report 2002 2003 op cit (n 78) at viii; 59. This was held to be an area in which employers should be creating a ‘critical mass’ to provide a pool from which to draw disadvantaged people for appointment into senior and top management positions.

\textsuperscript{80} Commission for Employment Equity Annual Report 2002 2003 op cit (n 78) at 59.

\textsuperscript{81} Ibid.

\textsuperscript{82} Ibid.

\textsuperscript{83} See, for example, \textit{Rapport} ‘“Wen-wen” ooreenkomste is moontlik vir uitdagings’ op cit (n 72); \textit{Rapport} ‘Beskerming gevra vir wit werknemers’ 1 June 2003; \textit{Rapport} ‘Afrikaanse aksie teen regstel-aksie’ 11 January 2004; \textit{Rapport} ‘Los jonges uit in regstel-aksie’ 5 September 2004; \textit{Beeld} ‘Solidariteit belig invloed op jonges van regstel-aksie’ 21 December 2004. It was mooted that young whites joining the labour force for the first time should not be affected by affirmative action.

\textsuperscript{84} See § 3 above. With regard to the concept of degrees of disadvantage, an appropriate contextualised approach seems to be practical in the workplace. In terms of such an approach, the nature of the position, the demographic profile of a particular section in a workplace, and the qualifications and work experience of the candidates, should all be relevant to decisions about whom to appoint. Decisions must be based on the actual representivity of the different designated groups in the various occupational categories and levels at a given point. To this effect, it is recommended that the employer’s employment equity plan be relied on in determining under-representivity in each occupational category and level in the workforce, and, consequently, to inform the decision about whom to appoint or promote to a particular post. If the figures in the longer term show that some of the designated groups are no longer under-represented in a particular occupational category or level, the employer may then rely on the merit of the candidates in decisions about whom to appoint.
cannot be defined so exactly that only the most deserving benefit, such deficiencies
may, in the longer term, resolve themselves. However, the non-recognition of
multiple disadvantage appears to be different in nature and extent. This shortcoming
results in affirmative action measures not reaching black women generally and
African women particularly.

Because of this, it is submitted that consideration be given to tackling this
deficiency by legal intervention (as illustrated by Canada which, 15 years after
implementing affirmative action, recognised that multiple disadvantage needed
particular attention\textsuperscript{85}). It is therefore recommended that the Employment Equity Act
be amended to build the concept of multiple disadvantage into its categorisation
process: (1) the concept should be included in the Act to mean that disadvantage
may have two or more elements; and (2) it should be provided that the multiple
disadvantage of people from designated groups \textit{must} be taken into account by
designated employers when an employment equity plan is prepared and
implemented.\textsuperscript{86} It is further suggested that the Code of Good Practice: Preparation
and Implementation of Employment Equity Plans be amended to give guidance to
employers on how to amend their employment equity plans accordingly.\textsuperscript{87}

It is lastly suggested that the issue should be debated at National Economic
Development and Labour Council (NEDLAC) by business, labour and the
government in order to set the process in motion.

5 Conclusion

Recognising multiple disadvantage will lead to more effective combating of this
phenomenon in South African workplaces and will strengthen the position of
doubly or triply disadvantaged people and, in particular, that of African women,
who have during the course of investigations been shown to be in a particularly
precarious position. It may thus also assist in achieving gender equality in South
Africa.

\textsuperscript{85} See § 2.3.1 above.
\textsuperscript{86} See s 30(c) of the Employment Equity Act. In terms of the Employment Equity Act, the Commission for
Employment Equity will have to advise the Minister of Labour on such policy amendments to the Employment
Equity Act.
\textsuperscript{87} S 54 (1)(b) of the Employment Equity Act provides that the Minister of Labour may, on the advice of the
Commission for Employment Equity, change a code of good practice (see also s 30(a) of the Employment Equity
Act).