Public Service Alliance of Canada Submissions on the *Employment Equity Act* Review

TO THE

Taskforce on *Employment Equity Act* Review

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Summary of Recommendations

The following are PSAC's recommendations for amendments to the *Employment Equity Act* and related legislation that impacts employment equity initiatives in the workplace:

1. Terminology

Outdated terminology (i.e. "Aboriginal Peoples", "visible minorities", etc.) in the *Employment Equity Act* must be updated to reflect the language and terminologies currently used by those communities.

2. Disaggregated Data for Designated Equity Subgroups and Intersectionality

The *Employment Equity Act* must be amended to collect and analyze disaggregated data for every designated equity group. By so doing, representation rates and barriers faced by distinct groups within designated equity groups can be examined and addressed more appropriately. Each specific designated employment equity group should be broken down (e.g. Black, South Asian, Chinese, Arab, etc.) so that barriers for specific communities can be identified and addressed.

Data should also be collected in a manner that allows for intersectional analysis.

3. Inclusion of LGBTQ2+ Community

The *Employment Equity Act* must be amended to include the LGBTQ2+ community as a designated group and the necessary data (census data) must be collected like other designated groups.

Data collected must be disaggregated and allow for an intersectional analysis since the LGBTQ2+ community is not homogenous and does not experience workplace discrimination in the same manner.

4. Labour Market Availability / Workforce Availability Rate

The *Employment Equity Act* must be amended to ensure accurate and current labour market availability and workforce availability rates that are reflective of each designated equity group. The labour market availability and workforce availability rates must be regularly updated between censuses to reflect the changes in Canada's population (e.g. recent newcomers/immigrants who have international experience, non-Canadian Citizens).

5. Tensions between the *Employment Equity Act*, *Public Service Employment Act* and the *Financial Administration Act*

There be a thorough review and amendments made to the *Public Service Employment Act* and the *Financial Administration Act* to eliminate systemic barriers faced by equity-seeking groups. The review must include strengthening the role of central agencies, examining any provisions that hinder the objectives of the *Employment Equity Act*, and increasing the accountability of departments and agencies.

Furthermore, in situations of legislative conflict, the *Employment Equity Act* should supersede the *Public Service Employment Act* and *the Financial Administration Act.*

The recommendations in the Final Report of the Joint Management-Union Taskforce on Diversity and Inclusion should also be implemented.

6. Complaint Processes

The Taskforce must review all employment equity related complaint processes, including the Federal Public Service Labour Relations and Employment Board and Canadian Human Rights Commission processes carefully to determine the systemic barriers for equity groups in these processes, including removing provisions that prohibit employment equity related complaints. If there is no meaningful mechanism for recourses, then compliance requirements under the *Employment Equity Act* are meaningless.

The Employment Equity Review Tribunal should be replaced with an Employment Equity Commissioner with similar duties, functions and

processes as the Pay Equity Commissioner recently established at the Canadian Human Rights Commission.

The historical underfunding of the Canadian Human Rights Commission must be addressed. The Canadian Human Rights Commission must be properly resourced not only to meet its current mandate but also further resourced to include an Employment Equity Commissioner.

In addition, bargaining agents must be able to bring forward employment equity complaints under the *Employment Equity Act* and trigger an audit, including when they have not been properly consulted. Consultations and Collaboration should be clearly defined in the *Employment Equity Act* and if it does not occur, bargaining agents should be able to make a complaint.

All audit reports should be made public subject to provisions stipulated in Access to Information and Privacy laws.

7. Accessible Canada Act

The Taskforce examine the concurrent jurisdiction between the *Employment Equity Act* and the *Accessible Canada Act* to ensure that each legislation supports and re-enforces the other rather than overlapping each other and leaving gaps in the legislation.

8. Strengthening the role of bargaining agents

The role of bargaining agents must be strengthened in the *Employment Equity Act*. The *Employment Equity Act* should clearly outline the obligation for joint national and regional employment equity committees that meet regularly for meaningful consultation and collaboration. Meaningful consultations and collaboration must be defined in the *Employment Equity Act* to ensure that employers do not try to circumvent their obligations by minimizing their “consultation and collaboration” process.

To ensure compliance of consultation and collaboration, bargaining agents should be able to make a complaint if they believe that the employer failed this requirement. Furthermore, if employers are found to have failed to properly consult and collaborate, then there must be a consequence for them that would compel them to meet this requirement.

The following elements should be in the definition:

a) Establishing joint employment equity committees;
b) Employers and bargaining agents jointly review, prepare and develop, implement and revise together the employment equity plans; and
c) Employers and bargaining agents actively participate in all stages of the employment equity process from the start, to continuous reviewing and monitoring progress.

Bargaining agents should be able to negotiate provisions in the collective agreement that would go above and beyond the provisions in the *Employment Equity Act*. The *Employment Equity Act* should be the floor and not the ceiling for employment equity initiatives.

9. Federal Contractors Program

Contractors under the Federal Contractors Program must have the same requirements as other employers under the *Employment Equity Act*, including statutory requirements and reporting requirements so that the Minister of Labour cannot make changes arbitrarily.
The 2012 amendments to the *Employment Equity Act* must be reversed to decrease the threshold requirement to be under the Federal Contractors Program.

Furthermore, in order to ensure consistency, ESDC should either work with the Canadian Human Rights Commission, or the auditing function should be done solely by one body. Again, this requires the Canadian Human Rights Commission to be adequately resourced.

10. Pay Transparency

The *Employment Equity Act* must be amended to ensure wage gaps are addressed throughout the employment equity process and become part of employment equity plans. In addition, any audit or compliance processes must also take into consideration wage gaps in determining if compliant. If wage gaps aren't addressed in plans, then there should be a mechanism to make a complaint.

The pay transparency provisions should apply to both federally regulated private and public sectors, as well as Federal Contractors Program.

Introduction

The Public Service Alliance of Canada (PSAC) is pleased that the taskforce is mandated to thoroughly review the *Employment Equity Act* (*EEA*).

The PSAC represents approximately two hundred and fifteen thousand workers. Our members work for federal government departments and agencies, separate employers, federal crown corporations and agencies, territorial governments, universities and a variety of other public and private sector employers. Our members fall both under federal public service and the federal contractors' program.

The PSAC views the *EEA* as a critical tool in combatting workplace discrimination. We understand that employment equity will not in itself eradicate all forms of discrimination, or harassment, from our members' workplaces - but proactive and preventative measures have clear advantages to addressing systemic employment discrimination over reactive processes. When direct and systemic employment barriers are removed, then all workers feel valued, included, and recognized for their abilities and contributions rather than be judged based on intangible and inherent characteristics.

At the outset, it must be noted that unions play an important role because they bring perspectives of workers who may otherwise not have a voice in the development, implementation, monitoring and review of employment equity processes and plans in their workplaces. As such, the PSAC takes its role seriously in critiquing the effectiveness of the current legislation. We reaffirm the need for a comprehensive legislative process to bring equity into the workplaces of all members we represent.

Internal Survey

In preparation for this review the PSAC consulted our members at large and union activists engaged in employment equity work through two internal surveys – one for the membership and another for union activists. Because of the importance of employment equity in workplaces, there were over 5300 responses to our on-line membership survey. Members' and

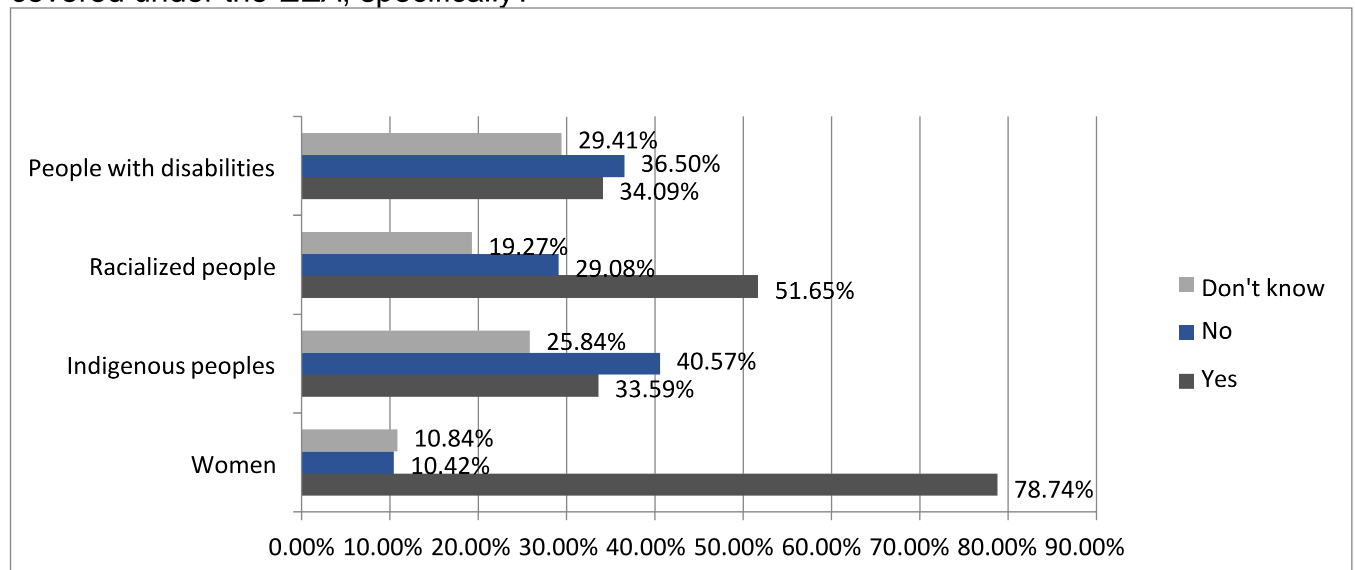
activists' input, and our many years of experience with the *Employment Equity Act*, shaped our recommendations.

The following are some highlights from the survey:

Only 17.6% of participants said they had joint workplace committees that examined employment equity, 66.55% of respondents indicated that they were unaware or not sure of any employment equity initiatives. Only 33.5% said they were aware of equity initiatives in their workplace.

Many participants did not think their workplaces were representative of equity groups.

Figure 1-Q11. Do you believe your workplace is representative of the equity groups covered under the *EEA*, specifically?



As shown above, only 33.6%, 34.1%, 52%, 79% believe that their workplaces are representative of Indigenous workers, workers with disabilities, racialized workers, and women respectively.

Some findings include:

- 48% believed their workplaces are representative of LGBTQ2+ workers and 30.1% believed their workplaces to be representative of religious minorities.
- Participants believe there are barriers in recruitment, hiring, training, promotion, and retention, varying from 24.8% to 37.6% in each of these areas.

- Only 24.8% to 39.3% of participants believe their employer has done something to reduce or eliminate the barriers in each of these areas.
- 38.5% believe the role of the bargaining agent could be strengthened under the *EEA*, while 9.3% said it could not and 52.2% were unsure.
- 42.3% believe that the accountability and enforcement under the *EEA* could be strengthened, while 8.6% said it could not and 49% were unsure.

The report on the PSAC internal survey can be found in **Annex A**.

Analysis and Recommendations

1. Terminology

The language in the *EEA* must be updated. As our understanding of human rights continues to evolve, so does the language used to discuss it. Terms such as "Aboriginal" and "visible minority" are outdated and offensive terms. Consultations with the appropriate communities must be undertaken in examining new terminology. For example, Indigenous communities are using "Indigenous Peoples" in replacement of "Aboriginal Peoples". However,there is no consensus on the terminology to replace "visible minority". It should be amended to reflect more appropriate terminology used to describe this community such as racialized, people of colour, etc.

Recommendation 1:

Outdated terminology (i.e. "Aboriginal Peoples", "visible minorities", etc.) in the Employment Equity Act must be updated to reflect the language and terminologies currently used by those communities.

2. Disaggregated Data for Designated Equity Subgroups and Intersectionality

Disaggregated data for Designated Equity Subgroups and Intersectionality should be collected for every designated equity group. No equity group is homogenous and, as such, people within designated equity groups experience workplace discrimination and barriers differently. For example, in the 2021 Public Service Commission's *Audit of Employment Equity*

Representation in Recruitment report, Black federal public service workers had a lower job appointment rate than their job application rate.[1] The federal public service must further analyze any gaps that may exist in the hiring and promotion of Black employees. Just last year, Black federal public service workers mobilized to file the Black Class Action lawsuit. It specifically is seeking long-term solutions to permanently address systemic racism and discrimination in the Public Service. Anti-Black racism is pervasive throughout society and is witnessed through the treatment of the Black community in policy, healthcare, education and other public institution; but we strongly believe the public service should be making a concerted effort to make its' workplaces safe and inclusive.

The Public Service Commission's report also demonstrates that Chinese federal public service workers were found to have the lowest application rates among the four largest racialized sub-groups. It is unclear how anti-Asian hate is impacting employment opportunities for the Asian community. There also may be under-representation of racialized sub-groups in the federal public service, but to really understand this, further analysis with disaggregated data must be undertaken[2]. Clearly, discrepancies in representation, and experiences and barriers within designated equity groups, are not exposed when all racialized groups are categorized into one equity group.

As another example taken from the survey, we can see that depending on their identities, members answer questions differently. For question 10, members were asked if there is clear support for employment equity in the workplace, answers from Indigenous members and members belonging to the LGBTQ2+ community were different. 39% of LGBTQ2+ members think the support exist while that number is at 33.7% for the Indigenous members. While the difference is not huge, it is still notable. As a disclaimer, we also have to keep in mind that for some members those two identities intersect.

Similarly, disaggregated data for Indigenous peoples should include First Nations, Inuit and Métis people. The Call to Actions in the Truth and Reconciliation Commission's Report and the recent discoveries of unmarked graves at residential school territory show that there is much to do in order to achieve reconciliation with Indigenous communities as a result of

[1] https://www.canada.ca/en/public-service-commission/services/publications/audit-of-employment-equity-representation-in-recruitment.html#3_8
[2] https://www.canada.ca/content/dam/tbs-sct/documents/employment-equity-report/20210406-eng.pdf

colonialization and cultural genocide. Therefore, in the spirit of reconciliation, it is important to understand that Indigenous communities are not all homogenous and that First Nations, Metis and Inuit have their own distinct experiences of anti-Indigenous racism.

Disaggregated data for people with disabilities should be based on the Canadian Survey on Disabilities subgroups used to collect census data[3]. The 2016 census revealed that persons with severe disabilities had higher unemployment and lower accommodation rates. Similarly, people with disabilities are also not a homogenous community, with varying severity and types of disabilities.

Disaggregated data also needs to consider the various intersectional identities of women such as women with physical disabilities, learning disabilities, First Nations women, Black women, South Asian women, etc. Finally, when the LGBTQ2+ community is included in the *EEA* then disaggregated data for that community should also be provided.

The PSAC submits that the disaggregated data must be collected in a way that allows for cross-references and an intersectional analysis. As equity analysis has evolved over the last two decades so has our understanding that multiple identities create unique experiences for individuals. For example, systemic barriers faced by Indigenous women with disabilities will be uniquely different than those faced by non-Indigenous women with disabilities. Indigenous communities have distinct lived experiences (e.g. residential schools, inter-generational trauma, stereotypes of Indigenous women, etc.). We note specifically the tragic deaths of Indigenous people in the health care system, policing and other institutions.

Recommendation 2:

The Employment Equity Act must be amended to collect and analyze disaggregated data for every designated equity group. By so doing, representation rates and barriers faced by distinct groups within designated equity groups can be examined and addressed more appropriately. Each specific designated employment equity group should be broken down or be distinct employment equity groups (e.g. Black, South Asian, Chinese, Arab,

[3] https://www150.statcan.gc.ca/n1/pub/89-654-x/89-654-x2018002-eng.htm

etc.) so that barriers for specific communities can be identified and addressed pursuant to the Employment Equity Act.

The data should also be collected in a manner that allows for intersectional analysis.

3. Inclusion of LGBTQ2+ Community

There is growing evidence that the LGBTQ2+ community experiences systemic workplace barriers and discrimination. The 2016 LGBT Purge class action lawsuit also demonstrated the discrimination in employment faced by former federal public service workers[4]. The most recent Public Service Employee Survey results demonstrate that LGBTQ2+ workers continue to face harassment and discrimination in the Federal Public Service. Given this continued systemic problem, LGBTQ2+ workers must be included as a designated group in the *EEA*. Furthermore, collection of data that adequately reflects the representation rates of these workers through census data or other data collection is required to determine labour market availability and workforce availability rates and representation gaps.

Recommendation 3:

The Employment Equity Act must be amended to include the LGBTQ2+ community as a designated group and the necessary data (census data) be collected like other designated groups.

Data collected must be disaggregated and allow for an intersectional analysis since the LGBTQ2+ community is not homogenous and do not experience workplace discrimination in the same manner.

4. Labour Market Availability (LMA) / Workforce Availability Rates (WFA)

The process in how the labour market availability and workforce rates are calculated for the purposes of the *EEA* must be changed. Currently, it is based on census data that is collected every five years. By the time Employment and Social Development Canada (ESDC) and Treasury Board Secretariat (TBS) calculate their respective rates, these rates are already

[4] https://lgbtpurgefund.com/about/#the-purge

outdated since it takes them a few years after the census to calculate the LMA and WFA rates, respectively.
We note that some of the data is unreliable. For example, there is a perception that census data on Indigenous workforce is not accurate because the census does not fully collect the representation of Indigenous communities. Kate McBride observes that:

> The lack of involvement of communities in the development and use of data, and the drive for data collection from outside authorities, has led to a situation where Indigenous communities do not trust the data collection process and are often resistant to sharing their information (Royal Commission on Aboriginal Peoples, 1997). "This approach has created a situation in which there is a lack of trust, 'buy-in,' and participation on the part of Indigenous communities – inevitably affecting the overall quality of the data" (Steffler, 2016, p. 151).[5]

The changing nature and increased precarity of work – who is included in the employment equity data and who is not – is also of concern. For example, the federal government hires workers through temporary agencieswho do the same work as indeterminate workers but may not be counted inworkforce.

Also, of concern is the lack of recognition of international work experience and educational credentials of newcomers / immigrants who come to Canada for better employment opportunities. As a result, the census may not accurately reflect the workforce availability (set by TBS) for racialized groups because they are unjustly ineligible for careers in their profession due to the lack of recognition of their experience and credentials.

A further issue was the exclusion of non-Canadian citizens in TBS's workforce availability rates for the federal public service. This was the result of a barrier embedded in the *Public Service Employment Act (PSEA)* which had given preference to hiring Canadian citizens over others. Recently the *PSEA* was amended to expand this preference to include permanent residents. However, for many years, this requirement under the *PSEA* prevented non-Canadian citizens from being included in the workforce availability rates and thus leading to an under-representation of racialized

[5] McBride, Kate, *Document Review and Position Paper: Data Resources and Challenges for First Nations Communities* prepared for the Alberta First Nations Information Governance Centre at page 6.

workers in the labour force. It is yet to be determined whether TBS will adjust the WFA accordingly.

***Recommendation 4*:**

The Employment Equity Act must be amended to ensure accurate and current labour market availability and workforce availability rates that are reflective of each designated equity group. The labour market availability and workforce availability rates must be regularly updated between censuses to reflect the changes in Canada's population (e.g. recent newcomers / immigrants who have international experience, non-Canadian Citizens, etc.).

5. Tensions between the Employment Equity Act (EEA), Public Service Employment Act (and the Financial Administration Act (FAA)

The *EEA* aims to achieve "equality in the workplace" for equity-seeking groups who should not be "denied employment opportunities or benefits for reasons unrelated to ability". Unfortunately, the important goals of the *EEA* will not be achievable until there are changes made to other co-existing legislation that currently impede these objectives.

In the federal public service, staffing and human resource framework fall under the *PSEA* and the *FAA*. These legislations create the Public Service Commission (PSC), the body responsible for all appointments to, and within, the federal public service and, gives Treasury Board (TB) general human resources management authority for the federal public service. The *PSEA* also outlines staffing criteria including the principle of merit.

Section 4(4) of the *EEA* outlines the responsibilities of TB and the PSC, specifically stating that they are the "employer" for the purposes of the *EEA* "as within their scope of powers, duties and functions" under the PSEA and the *FAA*. Section 4(7) of the *EEA* allows for TB and PSC to delegate their obligations under the *EEA* to chief executive officers or deputy heads.

It is often argued that the provisions of the *PSEA*, such as the merit principle and delegated authority to the lowest level of management within departments, are not in conflict with the *EEA*. However, employment equity groups have consistently perceived these as barriers to their career progress in the federal public service. Currently, any employment equity

initiative under the *EEA* must not be inconsistent with the *PSEA* and the *FAA*.

Furthermore, equity groups perceive that hiring managers make decisions on staffing processes without much accountability. According to both TBS and PSC, they are unable to hold departments and agencies accountable because they only have an “enabling” role under the *PSEA* and the *FAA*. It should be noted that the PSC has an audit and investigation role in limited circumstances.

Although TBS and PSC have issued policies or directives, neither can mandate departments to take corrective actions related to employmentequity because of the delegated authority. In fact, it is uncertain if either TBSor the PSC receive detailed information about employment equity initiativesfrom the departments other than the minimum requirements for TBS’sAnnual Report on Employment Equity that is tabled at Parliament.

It is noteworthy that this issue was raised in the Employment Review undertaken by the House of Common’s Standing Committee on Human Resources Development and the Status of Persons with Disabilities[6] in 2002. The Standing Committee felt it was an important issue and required Treasury Board to develop an action plan:

> As the public service employer, Treasury Board remain accountable for all policies, programs and actions within the federal department and agencies with regards to the *Employment Equity Act.*
>
> Where it has delegated authority under the *Employment Equity Act* to departments and agencies … Treasury Board should put in place effective measures to ensure that employment equity policies and programs are in place in the departments. Treasury Board should submit to this Committee an action plan by April 1, 2003 outlining the measures that have been put in place and the ways that these will be monitored.”[7]

[6] https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf
[7] 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)*

Lastly, there have been recent amendments to the *PSEA* to remove barriers for equity-seeking groups. However, despite the recent changes, systemic barriers continue to exist. During the *PSEA* Review in 2021, PSAC made submissions on the barriers in staffing for equity groups. (These submissions are in **Annex B**).

In 2018, the Joint Management-Union Taskforce on Diversity and Inclusion[8] examined systemic barriers in staffing in great depth. These barriers were not fully addressed by the PSEA amendments. (For this submission, the PSAC fully endorses the observations, findings and recommendations of the Taskforce related to central agencies, staffing, and people management).

Recommendation 5:

There be a thorough review and amendments made to the Public Service Employment Act and the Financial Administration Act to eliminate systemic barriers faced by equity-seeking groups. The review must include strengthening the role of central agencies, examining any provisions that hinder the objectives of the Employment Equity Act, and increasing the accountability of departments and agencies.

Furthermore, in situations of legislative conflict, the Employment Equity Act should supersede the Public Service Employment Act and the Financial Administration Act.

The recommendations in the Final Report of the Joint Management-Union Taskforce on Diversity and Inclusion should also be implemented.

6. Complaint Processes

i. Federal Public Service Labour Relations and Employment Board (FPSLREB)

Since the sweeping changes to the *Public Service Employment Act* under *Public Service Modernization Act* (*PSMA*) in 2003, many PSAC members, including equity members, feel that the recourse processes and remedies

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p.65. https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf.

[8] https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/task-force-diversity-inclusion.html

are completely ineffective in addressing systemic and individual barriers in staffing processes. In order to hold employers accountable for promoting and implementing employment equity initiatives, the staffing complaint process must be changed – specifically, meaningful recourses must be made available in cases of discriminatory staffing.

In 2011, the PSAC made detailed submissions on the impact of the *Public Service Modernization Act* on staffing and other areas in 2011 as part of the five-year legislative review of that Act. Much of the criticism of the changes to the *Public Service Employee Act* remain. (The 2011 submissions are in the **Annex C**).

Since 2014, the Public Service Staffing Tribunal no longer exists. It has been replaced by the Federal Public Service Labour Relations and Employment Board (FPSLREB). Thus, the FPSLREB is responsible not only for dealing with collective agreement related grievances but also staffing complaints pursuant to the PSEA related to internal appointments, appointment revocations and layoffs in the federal public service.[9] More recently the FPSLREB will hear grievances and complaints under the *Accessible Canada Act* (*ACA*).

The ability to address staffing complaints is limited. For example, staffing complaints can only be made once a final notification of an internal appointment or proposed appointment has been issued. The grounds for a complaint are limited to three areas: abuse of authority in the application of merit; abuse of authority in choice of process (advertised or non-advertised); and failure to access the complainant in the language of their choice.

It is asserted that very few cases go forward successfully that deal with discrimination under the grounds of abuse of authority, for a variety of reasons including, the fact that evidence required to demonstrate individual

or systemic barriers are very high and, often in the control of the employer. It is very difficult for a complainant to be able to access information needed to demonstrate discrimination.

In addition, although the FPSLREB is authorized to award damages pursuant to the *Canadian Human Rights Act (e.g. $20,000 for pain and*

[9] See *https://pslreb-crtefp.gc.ca/en/resources/guides/staffing-complaints-guide.html#a12*

suffering and $20,000 for reckless behaviour), other remedies are limited. The FPSLREB states that:

> In relation to appointment related complaints, the Board **cannot order that a complainant be appointed or that a new appointment process be conducted** [s. 82 of the ***PSEA***]. However, the Board has the power, amongst other things, to order the revocation of an appointment, make a declaration of abuse of authority, order the complainant to be assessed or make any recommendation that it sees fit given the circumstances of the case.[10]

> It will be important for the taskforce to closely examine whether the FPSLREB provides a meaningful recourse for equity-seeking complainants to address individual or systemic barriers in the staffing processes, whether the process needs to be overhauled or, whether a completely different process is needed.

ii. Canadian Human Rights Commission (Complaint Process)

The *Canadian Human Rights Act (CHRA)* provides another recourse process to federal public service workers. The Canadian Human Rights Commission's (CHRC) role is to screen whether complaints warrant an inquiry and then be referred to the Canadian Human Rights Tribunal.

However, there are provisions in the CHRA that prevent the CHRC from fully addressing employment equity related complaints. Currently, the CHRC cannot deal with any allegations that could be, or have been, addressed through the grievance procedure, staffing complaint processes or other processes available under another *Act*[11].

Furthermore, changes made to the CHRA in 1995 now prevent employment equity related complaints to be adequately addressed through the complaint process. This is important because there have been very few successful cases dealing with systemic employment barriers since the changes. It essentially eliminated the success of the precedent-setting case *National Capital Alliance on Race Relations (NCARR) v. Canada (Department of Health and Welfare)*[12]. At the time, this case was important because it

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[10] https://www.fpslreb-crtespf.gc.ca/en/resources/guides/staffing-complaints-guide.html#a12
[11] Canadian Human Rights Act, section 41(1)(a), (b), and (d)
[12] 1997 CANLII 1433 (CHRT)

highlighted systemic racial discrimination and employment equity in the human rights complaint process and examined the barriers for racialized workers in obtaining senior management positions. Note that this case was filed in 1992, prior to the 1995 amendments.

Also, Section 41(2) of the CHRA prevents the CHRC from dealing with complaints that have been "adequately addressed by an employment equity plan prepared pursuant to section 10 of the *Employment Equity Act*". Nor can complaints be made based solely on statistical information that shows a designated group is underrepresented by employers' workforce data under section 40.1 of the CHRA.

Lastly, Section 54.1(1) of the CHRA limits the Canadian Human Rights Tribunal's ability to offer an employment equity remedy. The Tribunal cannot order an employer to adopt a special program, plan or arrangement containing positive policies and practices to increase representation of designated groups or goals and timetables for achieving that increased representation.

In sum, employment equity related complaints are likely to encounter barriers through the CHRC's complaint process. Even if a complainant was able to overcome these barriers (e.g. demonstrate that it does not fall within the provisions mentioned above), the evidence required to demonstrate systemic employment discrimination is high and again, most likely in the control of the employer.

iii. Canadian Human Rights Commission (Employment Equity Audit process)

The CHRC conducts employment equity compliance audits of federally regulated employers, Crown corporations and federal public sector employers.

The nine legislative requirements for employers under the *EEA* consist of:

1. Collection of workforce information;
2. Workforce analysis;
3. Employment Systems Review (ESR);
4. Employment Equity plan (EE plan);
5. Implementation and monitoring of EE plan;
6. Periodic review and revision of EE plan;

7. Communication and Information about employment equity;
8. Consultation & collaboration with bargaining agents/employee representatives; and
9. Employment equity records.

Once conducting robust audits, the CHRC's audit function has shifted over the years – it is now less proactive and conducts less frequent individual audits. The CHRC now focuses on examining trends of a specific equity group within a sector. This shift is partially due to necessity given the ongoing underfunding and inadequate resourcing of the CHRC.

Lack of resources is not a new issue for the CHRC. In the 2002 *EEA* Review, it was recommended that the CHRC be provided with sufficient resources to conduct compliance audits so that they could conduct follow-up audits more quickly and facilitate employers in fulfilling their obligations under the *EEA*.[13] Sadly, two decades later, this continues to be an issue.

While specific employer audits can be time consuming and, given the large number of employers within the CHRC's jurisdiction to audit, some employers may not be audited at all or for lengthy periods of time. It is, however, critical that proper compliance audits are undertaken on a regular basis to ensure that employers are meeting the requirements under the *EEA*.

Currently, bargaining agents are unable to request a compliance audit even if they have relevant information that should trigger an audit. This is very frustrating, especially as employers are getting away with actions or behaviours that may be contrary to employment equity objectives. When there is evidence of (or even an appearance of) an employer's failure to meet its obligations under the *EEA*, bargaining agents must be able to request a compliance audit by the CHRC. Bargaining agents often have information that would not be provided by the employer because of their representative role and access to their membership.

Even when the CHRC does undertake an audit, the CHRC bargaining agents' representatives have limited involvement. During a meeting with bargaining agents, the CHRC indicated that any unionized worker or any union representative in the workplace can be consulted regardless of

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[13] 2002 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, p.57.*

whether the bargaining agent assigned them to that role or not. However, even when the proper representatives are consulted, their input into the audit is limited. During that meeting, the CHRC indicated that the employer can meet its obligation under section 15 by the simple act of providing bargaining agents the documents for input and nothing more.

This is further supported by the PSAC internal survey of union activists where 83.9% said that they had not been involved in employment equity audits conducted by the CHRC, while 12.9% said they had been contacted and 2.2% didn't know.

It is important to note that bargaining agents have not always been sidelined in the process. The *Consultation and Collaboration between Departments Under Section 15 of the Employment Equity Act*, a document by Public Service Human Resources Management Agency of Canada (PSHRMAC) (now the Office of the Chief Human Resources Officer – OCHRO) sets out the consultation and collaboration process that is no longer followed.

Lastly, audit results are not public. It is difficult for bargaining agents or individuals from particular departments to examine or challenge the audits. Therefore, summaries of compliance audits should be made public in a manner that is consistent with Access to Information and Privacy laws. This was also recommended in the 2002 *EEA* Review.[14]

iv. Employment Equity Review Tribunal (EERT) Canadian Human Rights Tribunal

The *EEA* outlines the types of employment equity "complaints' that can be addressed through the Employment Equity Act Tribunal. Either the Commission or an employer can apply to the Chairperson of the CHRT to establish an EERT. For example, the Commission can request an EERT be established if an employer has not complied with its direction. An employer can request an EERT, if it does not agree with a direction of the CHRT[15].

[14] 2002 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, p.59.*

[15] See CHRT website: https://www.chrt-tcdp.gc.ca/procedures/employment-equity-review-tribunal-en.html for an overview of the EERT role and responsibilities

It is important to note that there are very few publicly reported EERT cases from the last two decades.[16] While it is possible that there have been applications made by parties that were not made public, the fact is that the lack of public cases is demonstrative of the ineffectiveness of this recourse mechanism.

It may be argued that the Commission is directed by a "guiding policy" under section 22(2) of the *EEA.* The "guiding policy" states that the Commission shall discharge its responsibilities in cases of non-compliance through *persuasion and negotiation* of written undertakings and that directions or applications for orders should only be a *last resort*. To that end, one can assume that applying for an order is a recourse that should rarely be used. It does not appear that there are many public decisions of the EERT.

Obviously, persuading employers to comply with the *EEA* is a logical first step. However, it should not be the only step. If there are few to no consequences for non-compliance, there is no incentive for employers to comply with the *EEA*. It will be important for the Taskforce to carefully examine what role the EERT has played over the last two decades and whether there is a better alternative to this forum.

It is asserted that, with the recent addition of an Accessibility Commissioner and a Pay Equity Commissioner, that it is time to establish an Employment Equity Commissioner who would be responsible for enforcing and ensuring compliance of the *EEA* and eliminate the EERT. Like the "Pay Equity Unit" under the CHRA, an "Employment Equity Unit" would support the

Employment Equity Commissioner in the exercise of their powers and performance of their duties and functions. Again, like the "Pay Equity Division", the "Employment Equity Division" could receive complaints dealing with employment equity. The Employment Equity Commissioner would exercise the powers and duties and functions under the *EEA*, again similar to the Pay Equity Commissioner.

[16] The few public cases available dealt with applications made alleging reasonable apprehension of bias of a tribunal or challenging the direction of the Commission. See: *Laurentian Bank of Canada v. Canadian Human Rights Commission*, 2001 CanLII 38294 (CHRT), retrieved on 2021-10-26) and *Canada (Environment Canada) v. Canada (Canadian Human Rights Commission*), 2000 CanLII 28878 (CHRT).

Recommendation 6:

The Taskforce must review all employment equity related complaint processes, including the Federal Public Service Labour Relations and Employment Board and Canadian Human Rights Commission processes carefully to determine the systemic barriers for equity groups in these processes, including removing provisions that prohibit employment equity related complaints.

If there is no meaningful mechanism for recourses, then compliance requirements under the Employment Equity Act are meaningless.

The Employment Equity Review Tribunal should be replaced with an Employment Equity Commissioner with similar duties, functions and processes as the Pay Equity Commissioner recently established at the CHRC.

The historical underfunding of the Canadian Human Rights Commission must be addressed. The Canadian Human Rights Commission must be properly resourced to both meet its current mandate and further resourced to include an Employment Equity Commissioner.

In addition, bargaining agents must be able to bring forward employment equity complaints under the Employment Equity Act and trigger an audit, including when they have not been properly consulted. Consultations and Collaboration should be clearly defined in the Employment Equity Act and if it does not occur, bargaining agents should be able to make a complaint.

All audit reports should be made public subject to provisions stipulated in Access to Information and Privacy laws.

7. Accessible Canada Act

The *Accessible Canada Act* (*ACA*), enacted in 2019, aims to make Canada barrier-free by 2040 by identifying, removing and preventing barriers for people with disabilities in federal jurisdiction in priority areas including employment. One key component of the *ACA* is the requirement for employers to have an accessibility plan. Although the requirements for an accessibility plan is not as detailed as for an employment equity plan under the *EEA*, there will be overlap between the two legislative requirements. The *ACA* does not reconcile the overlapping jurisdiction. It is also important to

note that the recourse process for most unionized federal public service workers' allegations of *ACA* violations will be dealt with by the FPSLREB through the grievance process. Federally regulated workers who do not fall within the FPSLREB jurisdiction will have access to a complaint process via the Accessibility Commissioner.

The ACA is new legislation that hasn't fully taken into effect and employers are in the process of developing accessibility plans. It is vital that the taskforce examine how the *EEA* can support the requirements under the *ACA* rather than become competing priorities or plans.

Recommendation 7:

The Taskforce examine the concurrent jurisdiction between the Employment Equity Act and the Accessible Canada Act to ensure that each legislation supports and re-enforces the other rather than overlapping each other and leaving gaps in the legislation.

8. Strengthening the role of bargaining agents

Currently, bargaining agents play an important role under the *EEA*. They are specifically mentioned in sections 3 and 15. Section 3 defines who is a representative, which includes bargaining agents in unionized workplaces.

Section 15 requires employers to consult and collaborate with bargaining agents on the preparation, implementation and revision of their employment equity plans. While consultation and collaboration are not explicitly defined, ss. 15(4) requires that the consultation cannot be a form of co-management.

Bargaining agents play a unique and important role pursuant to the *EEA*. Historically, national and departmental joint employment equity committees were created where employers and bargaining agents collaborated on developing self-ID surveys, conducting workforce analyses, participating in employment systems reviews, developing employment equity plans and then monitoring and revising plans.

However, over time, employers consulted less and less with bargaining agents to the point where employment equity committees no longer exist in many departments. If there are joint departmental committees, their mandates have changed to "diversity and inclusion committees" and some

no longer are involved in the “technical work” that employment equity committees used to do.

Results of the PSAC internal survey for members indicate that 90.7% of the respondents either think that the role of the bargaining agent could be strengthened under the *EEA* or were unsure. This means more work needs to be done for members to be fully aware of the role and the importance of bargaining agents. In addition, where bargaining against were once invited to collaborate and consult, bargaining agents are now reduced to simply providing “feedback” on already developed initiatives.

In the PSAC internal survey for union activists, the following question was asked:

> Section 15 of the *EEA* requires the employer to consult and collaborate with bargaining agents during the employment equity process. Does the employer consult and collaborate with you on the following:

	YES	**NO**	**DON’T KNOW**
Voluntary self-identification survey	41.94%	41.94%	16.13%
Employment systems review of formal and informal policies and practices	16.13%	38.71%	45.16%
Development of employment equity plan/initiatives	12.90%	51.61%	35.48%
Monitoring the employment equity plan	22.58%	45.16%	32.26%
Providing information to employees about employment equity	3.23%	63.52%	32.26%
Voluntary self-identification survey	16.13%	48.39%	35.48%
Employment systems review of formal and informal policies and practices	32.26%	35.48%	32.26%

The *EEA* must be amended to ensure that joint employment equity committees with a clear mandate are established and receive training on employment equity processes and their role. Furthermore, regular and meaningful well-defined consultations and collaborations must take place As well, it is submitted that national and regional committees be implemented for larger organizations.

It is also posited that additional provisions should be negotiable and included in workplace collective agreements if required to meet the needs their workplaces that may not be covered by the *EEA*. It is not uncommon for health and safety provisions to be negotiated that go beyond the required

legislation because workplaces may have unique considerations that are not covered by the legislation.

Recommendation 8:

The role of bargaining agents must be strengthened in the Employment Equity Act. The Employment Equity Act should clearly outline the obligation for joint national and regional employment equity committees

that meet regularly for meaningful consultation and collaboration. Meaningful consultations and collaboration must be defined in the Employment Equity Act to ensure that employers do not try to circumvent their obligations by minimizing their "consultation and collaboration" process.

To ensure compliance of consultation and collaboration, bargaining agents should be able to make a complaint if they believe that the employer failed this requirement. Furthermore, if employers are found to have failed to properly consult and collaborate, then there must be a consequence for them that would compel them to meet this requirement.

The following elements should be in the definition:

- *establishing joint employment equity committees;*
- *employers and bargaining agents jointly review, prepare and develop, implement and revise together the employment equity plans; and*
- *employers and bargaining agents actively participate in all the stages of employment equity process from the beginning to continuous reviews and monitoring.*

Bargaining agents should be able to negotiate provisions in the collective agreement that would go above and beyond the provisions in the Employment Equity Act. The Employment Equity Act should be the floor and not the ceiling for employment equity initiatives.

9. Federal Contractors Program

The Federal Contractors' Program (FCP) provision must be strengthened in the *EEA*. Under section 42(2) of the *EEA*, the Minister of Labour is responsible for the administration of the FCP. This is the only reference in

the *EEA* to the FCP. It is asserted that it does not provide enough direction to the Minister to properly govern the FCP and allows for arbitrary policy and process changes such as threshold requirements.

Currently, the FCP applies to provincially regulated employers with a combined workforce of 100 or more permanent full time and part time employees in Canada, and who have received an initial federal goods and services contract valued at $1 million or more.

ESDC – Labour Program is mandated to conduct compliance assessment of all federally regulated employers that fall under the FCP. As stated on its website, ESDC:

> conducts compliance assessments to ensure that organizations fulfill the terms of their Agreement to Implement Employment Equity (AIEE). This includes meeting the requirements of the FCP by implementing employment equity in their workplace.[17]

It is important to note that a significant amendment was made to the *EEA* in 2012 which removed the requirement for the Minister to ensure that contractors are subject to the "equivalent ... requirements with respect to the implementation of employment equity by an employer" under the *EEA*. With the removal of this provision, the FCP is no longer required to meet the same criteria as other employers. The amendment allowed the Minister to reduce the threshold requirement without much rationale.

Prior to the 2012 amendment, the FCP applied to employees with a contract valued at $200,000. After the amendments, the requirement went up to $1 million. As a result, the number of employers under the FCP dropped significantly. It was estimated that pre-amendment, there were 1,000 workplaces (which included over one million workers) that were required to have employment equity plans under the FCP.[18] In ESDC's *Employment*

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[17] https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors/compliance-assessment.html,

[18] https://ipolitics.ca/2013/06/28/harper-government-reduces-employment-equity-requirements-for-contractors/ . Also see HRSDC's Employment Equity Annual Report 2010 for breakdown of employer prior to the amendment: https://publications.gc.ca/collections/collection_2012/rhdcc-hrsdc/HS21-1-2010-eng.pdf.

Equity Act: Annual Report 2020, as of December 2019, there were only 350 employers covered under the FCP[19].

It is noteworthy that the Standing Committee reviewing the 2002 *EEA* Review had recommended that the Minister of Labour examine the FCP with a view to re-structuring it to ensure that the employment equity obligations of federal contractors are the same as the obligations of federally regulated employers[20]. It was further recommended that the Minister of Labour also examine the feasibility of covering employers who had less than 100 employees and contracts less than $200,000.

The number of staff dealing with employment equity, particularly with compliance assessments, was significantly reduced during the last major federal workforce adjustment both nationally and regionally. It is asserted that the requirements for compliance assessment were changed to accommodate the loss of staff.

Also noteworthy is the change in how many employers were found in non-compliance pre-amendments. For example, in 2010, there were 130 employers who were ineligible to receive contracts due to non-compliance.[21]

The 2020 Employment Equity Annual Report from ESDC contains insufficient information regarding the specific designated groups and does not even provide a list of employers under the FCP. Furthermore, according to ESDC's on Federal Contractors Program Compliance Assessment Policy, very few contractors failed to comply with the requirements[22].

With little public information available on FCP, there is no easy way to access information about specific contractors or to challenge the findings of ESDC. If contractors provide services or goods to the federal public service, then there must be public accountability of their progress. It is noteworthy that the Standing Committee for the 2002 *EEA* Review recommended that the Minister of Labour table an annual report to

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[19] *Employment Equity Act: Annual Report 2020* (ESDC): https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/reports/2020-annual.html#h2.6.1.

[20] https://www.ourcommons.ca/Content/Committee/371/HUMA/Reports/RP1032138/humarp09/humarp09-e.pdf

[21] https://publications.gc.ca/collections/collection_2012/rhdcc-hrsdc/HS21-1-2010-eng.pdf

[22] https://www.canada.ca/en/employment-social-development/corporate/portfolio/labour/programs/employment-equity/federal-contractors/compliance-assessment.html

Parliament on the operations of the FCP similar to the annual report tabled for federally regulated employers.[23]

Lastly, the CHRC audit process and the ESDC compliance processes are different. It is unclear why there is a need to have different processes and why two different organizations are needed for these roles. There should be consistency in the application of employment equity requirements.

Recommendation 9:

Contractors under the Federal Contractors Program must have the same requirements as other employers under the Employment Equity Act, including statutory requirements and reporting requirements so that the Minister of Labour cannot make changes arbitrarily.

The 2012 amendments to the Employment Equity Act must be reversed to decrease the threshold requirement to be under the Federal Contractors Program.

Furthermore, in order to ensure consistency, ESDC should either work with the Canadian Human Rights Commission, or the auditing function should be done solely by one body. Again, this requires the Canadian Human Rights Commission be adequately resourced.

10. Pay transparency

The *Employment Equity Act Regulations* were amended in 2020 to measure pay transparency in federally regulated private-sector workplaces subject to the *EEA*. Under the regulations, employers are required to report new salary data for the designated employment equity groups in their annual reporting. These measures, which came into force on January 1, 2021, requires employers to provide information on wages, bonuses, and overtime gaps in the workplaces. Employers will be required to report the new salary data in their 2021 annual employment equity reports which needs to be submitted by June 2022.

[23] 2002 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, p.63.*

This is a good first step to address pay inequities for designated groups beyond women. However, the regulations merely require employers to report on wage gaps. The new regulations may raise awareness and prompt employers to act, but there is insufficient incentive that these measures will result in any reduction of wage gaps for designated employment equity groups in a significant way.

The information required under the regulations should be included in the employment equity process like other information under the *EEA*. Wage gap information should be incorporated into the employment equity process and plans. In addition, there must be a mechanism for oversight and compliance to ensure that employers address any and all wage gaps.

Lastly, these requirements must also apply to the federal public service and the FCP. As the *EEA* covers federal and private and public sectors, as well as applicable employers under the FCP, pay transparency provisions must apply to all these employers.

Recommendation 10:

The Employment Equity Act must be amended to ensure wage gaps are addressed throughout the employment equity process and become part of employment equity plans. In addition, any audit or compliance processes must also take into consideration wage gaps in determining if compliant. If wage gaps aren't addressed in plans, then there should be a mechanism to make a complaint.

The pay transparency provisions should apply to both federally regulated private and public sectors, as well as Federal Contractors Program.

Conclusion

Thank you for providing the opportunity to provide submissions on this very important review. As shown in our submissions, the *Employment Equity Act* requires a major overhaul and not just tinkering with a few sections. Our extensive experience with the *Employment Equity Act* gives us a unique perspective on the progress of employment equity initiatives. It must be acknowledged that some gains were made through the *Employment Equity Act,* but progress has stagnated due to the lack of strong accountability, oversight and recourse mechanisms. If progress is to

continue so that we have an inclusive workplace that values the abilities, skills, experience and knowledge of everyone, then an extensive overhaul of the *Employment Equity Act* is imperative.

We look forward to further discussing our recommendations.