get real

a discussion paper about whether a compliance-based approach to LGBTI economic empowerment can work in South Africa
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get real - a discussion paper about whether a compliance-based approach to LGBTI economic empowerment can work in South Africa

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1 The author acknowledges the contribution of Dr Linda Meyer, who assisted in conceptualizing parts of this discussion paper, and the research assistance of Tatenda Muponde, Ilke Hartslief and Anesu Fungai Manamike.
Workplace discrimination seriously harms the economic lives of LGBTI people. We urgently need to find ways to empower LGBTI South Africans to live their sexual identities openly in the workplace without fear of discrimination or victimization.

In 1996, South Africa made human rights history by being the first country in the world to prohibit unfair discrimination on the basis of sexual orientation in its constitution. But 25 years after this resounding document was passed by the Constitutional Assembly, the lived realities of most LGBTI South Africans lag well behind the constitution’s ringing promises.

This is as true in South African workplaces as in other areas of life. A 2016 report by the International Labour Organization (ILO) found that, despite the constitution and the various statutory protections that have followed it over the years, LGBTI people in South Africa continue to face workplace discrimination and exclusion, including “widespread discomfort—if not outright hostility—on the part of fellow employees and employers.”

Workplace discrimination seriously harms the economic lives of LGBTI people as business owners, directors, managers and employees at all levels, as well as those seeking employment. It also threatens the economic futures of hundreds of thousands of LGBTI South Africans in schools, universities and vocational training. We urgently need to find ways to empower LGBTI South Africans to live their sexual identities openly in the workplace without fear of discrimination or victimization.

At present, the workplace rights of LGBTI South Africans are protected through a non-discrimination compliance-based legal framework that has had some success but puts the onus of enforcement on individuals and does little to advance the economic empowerment of sexual minorities. This paper outlines the thinking behind the compliance-based approach, reviews the current legal framework, the instruments used to enforce it and the difference between command-and-control and market-based approaches to compliance, and analyses some of the successful uses of compliance-based protections to address violations of LGBTI employees’ human rights. We argue that, despite its successes, the current framework is not capable of responding to the urgent need to advance rather than simply protect the economic empowerment of LGBTI South Africans. We propose some of the steps that are needed to go beyond compliance-based approaches to LGBTI economic empowerment and end with a call for stakeholders to participate in jump-starting this process.

Is a compliance-based approach to LGBTI economic empowerment a realistic strategy in South Africa?
Inspired by Broad-Based Black Economic Empowerment (B-BBEE), a widely-known compliance-based programme of social transformation in South Africa, we ask two vital questions.

Is a compliance-based approach to LGBTI economic empowerment a realistic strategy in South Africa? In other words, is it feasible to expand this existing approach on the rights of racialised minorities in the workplace to the rights of sexual and gender minorities? And if this is not feasible, how might an alternative empowerment framework—a "beyond-compliance" approach—be used to secure true equality in the workplace for LGBTI South Africans?

These are complex questions. To answer them, we need to unpack the conceptual underpinnings as well as the legal and socio-economic contexts of the compliance-based approach to human rights in the workplace.

Diversity and Inclusion in the South African Workplace

Since 1994, workplaces in South Africa have become increasingly diverse. At the same time, we have come to realise that diversity in and of itself is not enough. In line with broader social movements, our focus is shifting more and more to inclusion, not just diversity. Diversity is a matter of numbers and proportions. It is vitally important as far as it goes, but it does not go to the attitudes and behaviours that determine whether workplaces will be safe and welcoming for a diverse workforce. Inclusion embraces these more intangible features of a workplace. A feeling of belonging, a sense of being respected and valued and of being welcome to contribute fully are among its key ingredients.

Workplace discrimination against LGBTI individuals can be formal—for example, dismissing or refusing to hire someone because of their sexual orientation or gender identity, passing them over for promotion, denying them or their partners company benefits—or informal, such as harassment, mockery, disrespect and stereotyping. Even when a workplace is highly diverse, its social dynamics may have exclusionary effects. For LGBTI people, heterosexism, heteronormativity, homophobia and transphobia, even when subtle or unconscious, can make workplaces unwelcoming, difficult or impossible.

To protect themselves, LGBTI individuals often feel they have to conceal their identities in the workplace. This has negative effects on both the individuals and the organisations they work in, but the risks of coming out in the workplace can be even more dire, despite South Africa’s progressive constitution and laws. As Progressive Prudes, a 2018 report from the Other Foundation, showed, a small but significant number of South Africans persist in thinking that violence against LGBTI people is justified.
The arguments for inclusion in the workplace can be grouped into four categories: a business case, an economic case, a social justice case and a compliance-based case.

The business case
Those who argue for the business case see inclusion as a means to an end. In this view, a diverse workforce that feels welcome and accepted in the workplace will have more job satisfaction and better relationships at work and be more committed and productive, all of which will improve the bottom line. A 2014 review by the Williams Institute of research on LGBTI-inclusive workplace policies in emerging economies confirmed a positive relationship between LGBTI inclusion and these workplace goods. Although the study could not establish exact quantitative effects on profitability, it found that businesses are increasingly acting on the belief that inclusion is good for the bottom line.

The economic case
Recently, the business case for LGBTI inclusion has been extended to the relationship between inclusion and overall economic development. In 2014, the Williams Institute, for example, found a clear correlation between per capita GDP and the legal rights of LGBTI people across 39 countries. It could not determine whether LGBTI rights lead to higher levels of economic development or whether higher levels of development lead to enhanced rights, but it did find that, by causing LGBTI people to be underemployed or unemployed, workplace discrimination prevents them from contributing fully to the economy.

The social justice case
A social justice perspective sees diversity and inclusion as goods in themselves. Regardless of the practical benefits, dignity and respect for LGBTI persons is a moral imperative, and equal treatment is as much a fundamental human right in the workplace as anywhere else. In this view, businesses have a moral responsibility to use corrective measures to change workplace cultures that are hostile to sexual and gender minorities.

The compliance-based case
The first three arguments expect employers to act voluntarily to make workplaces LGBTI-friendly, either because they believe doing so will improve their bottom line or because they recognise that it is simply the right thing to do. The compliance-based approach, on the other hand, is coercive. It relies on various forms of external pressure, usually (though not exclusively) stemming from state regulation. The forms of coercion may include state statutory requirements, court rulings, state human rights commissions, licensing and

LGBTI inclusion is good for the bottom line. But it’s also simply the right thing to do.
operating regulations of organisations that companies depend on (stock exchanges, financing institutions and parent companies) and even the policies and lobbying work of international and national NGOs such as the ILO or South Africa’s GALA. In the compliance-based approach, businesses act, regardless of whether they buy into the business, economic or social justice arguments, because they would otherwise be sanctioned.

A compliance-based approach usually involves a statutory obligation, a compliance instrument and an enforcement measure. The Employment Equity Act (1998), for instance, articulates a variety of statutory obligations. For example, it requires employers to prepare an employment equity plan that indicates how they are implementing affirmative action for people from designated groups. The plan is the compliance instrument. Failure to prepare or implement the plan can result in a fine, which is the enforcement measure.

South Africa has an extensive range of compliance and enforcement measures at its disposal. Some involve direct “command-and-control” actions by the state: defining standards, compelling organisations to file periodic reports and prosecuting non-compliers. Other measures involve incentive schemes—so called market-based actions—that push organisations to behave in the desired ways.

The best known compliance-based system for employment equity in South Africa is the Broad-Based Black Economic Empowerment Act of 2003 (B-BBEE). B-BBEE is a mainly market-based framework linked to a key incentive: access to state contracts. It also uses some command-and-control measures such as fines for abuse of the system by “fronting,” that is, misrepresenting a company’s compliance.

Workplace discrimination prevents LBTI South Africans from contributing fully to the economy.

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B-BBEE is a form of affirmative action for the economic empowerment of previously disadvantaged racial groups (African, “Coloured” and Indian). A compliance-based approach to LGBTI economic empowerment could involve a similar mix of market based and command-and-control measures.

Thanks to B-BBEE, economic empowerment is a household term in South Africa, but it is not often used in discussions of sexual and gender minorities. The broader concept of “inclusion” is heard more often. However, the idea of LGBTI economic empowerment has been explored elsewhere. In 2013, for example, the US Small Business Administration launched Many Faces One Dream in partnership with the National Black Justice Coalition (NBJC) to promote the economic power and creativity of LGBTI people of colour in 13 major US cities. An impressive array of LGBTI people of colour, including elected officials, corporate executives and entrepreneurs, acted as “National Ambassadors” for the programme.

Economic empowerment as a “dual sphere”

In South Africa, the constitution is a strong potential enabler of LGBTI economic empowerment. It prohibits discrimination on a number of grounds, including sexual orientation, sex and gender, but also goes further. Recognising the entrenched disparities between groups created by apartheid, it allows for legislative and other measures not just to protect but also to “advance” those harmed by unfair discrimination in the past. Moreover, the constitution does not limit these measures to specific categories of persons; any group disadvantaged by unfair discrimination is eligible.

The South African constitution’s emphasis on both protecting and advancing marginalised groups opens a “dual sphere” understanding of economic empowerment in which protection against unfair discrimination and advancement through affirmative action can be seen as separate but connected spheres. This dual focus is consolidated in the Employment Equity Act of 1998 (EEA), which recognises that the “profound disadvantages” created under apartheid for certain groups of people cannot be addressed fully by repealing discriminatory laws and outlawing discriminatory practices.

The EEA therefore authorises “affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels of the workforce.” However, although the beneficiaries of measures against unfair discrimination include anyone discriminated against on an arbitrary ground, the beneficiaries of affirmative action are confined to “designated groups.” At the moment, this category excludes LGBTI South Africans.
Besides B-BBEE and EEA, the main statutes that affect LGBTI economic empowerment are the Labour Relations Act of 1995 (LRA), the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA) and the Companies Act (2008). In these statutes, South African law already has a compliance-based framework for the first of the dual spheres of LGBTI economic empowerment: unfair discrimination on the basis of sexual orientation.

Although the LRA and EEA have weak compliance and enforcement measures that mainly depend on individuals taking action against their employers, PEPUDA uses the Equality Courts to adjudicate disputes on harassment, hate speech and unfair discrimination. Enforcement still depends on individual complaints, but PEPUDA also creates a powerful and, until now, unexplored instrument in the form of equality plans. When the relevant provisions come into effect, equality plans will have to be submitted by all employers of more than 150 people, with criminal penalties for non-compliance. Equality plans are not limited to issues of race, gender and disability. They can be used to address discrimination on the basis of sexual orientation and gender identity as well.

The second of the dual spheres of LGBTI economic empowerment, advancement through affirmative action, is also present in these statutes, but only for the primary “designated groups.” There is also little space for addressing the socio-economic needs of LGBTI South Africans in these existing legal frameworks. As the South African Human Rights Commission (SAHRC) has recently noted, the categories that the EEA and BBBEE frameworks use for identifying marginalised groups are not sufficiently disaggregated. As a result, equality of outcomes cannot be guaranteed for marginalised groups that do not fit clearly within the primary designated groups.

Labour Relations Act (LRA)

The LRA is the primary statute governing labour relations in South Africa. It focuses on unfair labour practices and unfair dismissals, with discrimination or dismissal on the basis of sexual orientation regarded as “automatically unfair.” However, responsibility for enforcement rests with individual employees. Employees treated unfairly because they are LGBTI must first take their case to the Commission for Conciliation, Mediation and Arbitration (CCMA) and then, if unsatisfied, to the Labour Court or Labour Appeal Court.

Despite putting the onus on individuals, the LRA has been used with success to advance the first sphere of LGBTI Economic Empowerment. For example, in Ehlers v Bohler Uddeholm Africa, a transgender employee successfully brought a case for unfair dismissal on the basis of sex and gender. Besides ordering her reinstatement, the Johannesburg Labour Court gave the employer 90 days to submit a report on what steps it had taken to prevent similar discrimination in the future.

2 Section 187, LRA.
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Employment Equity Act (EEA)
The EEA prohibits discrimination on the specific ground of sexual orientation and requires employers to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Although the Act does not link these obligations to any specific compliance instrument, the courts have used it to issue orders to employers to root out unfair discrimination against LGBTI employees, as in the Ehlers case. The EEA provides some support for employees in that the burden of proof is on the employers, they have to prove they acted fairly. Again, however, enforcement requires action by the employee taking the case to the CCMA. The CCMA must first attempt to resolve the case through conciliation, but if this fails, either party may refer the matter to the Labour Court. If both parties agree, the case can go to arbitration.

In the case of Atkins v Datacentre, an applicant was offered employment but later revealed an intention to have gender affirmation treatment. Datacentre then withdrew the employment offer, and the applicant went to the Johannesburg Labour Court, claiming unfair discrimination under the EEA and unfair dismissal under the LRA. The Labour Court agreed that the employer’s actions amounted to unfair dismissal and unfair discrimination on the basis of sex and gender and ordered it to pay R100,000 in compensation. As in the Ehlers case, the court also ordered the employer to take measures to prevent the same discrimination in any employment policy or practice. Although the Act does not link these obligations to any specific compliance instrument, the courts have used it to issue orders to employers to root out unfair discrimination against LGBTI employees, as in the Ehlers case. There is little space for addressing the socio-economic needs of LGBTI South Africans in the private sector, where the SAHRC in a recent report noted that promotion of equality has been “painstakingly slow.” Greater equality, as the SAHRC noted, would not only address long-delayed constitutional imperatives but also spur economic growth.

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)
PEPUDA was enacted expressly to enforce the constitutional right to equality, and its prohibited grounds include sexual orientation, gender and sex. It also institutionalises Equality Courts and designates all High Courts as such. There is also a process for designating magistrates’ courts as Equality Courts after appropriate training of presiding officers, and almost every magistrates’ courts with civil jurisdiction are now able to hear equality matters. PEPUDA prohibits not just unfair discrimination but also hate speech, harassment and the publication of sensitive information that unfairly discriminates.

Equality plans could make a big difference in LGBTI economic empowerment in the private sector. As with the LRA and EEA, the onus for enforcement is on individuals. Aggrieved parties have to submit their case to an Equality Court. This process has also been used successfully in Strydom v Nederburgs Geriewenboere Gemeente Molema Park. For instance, a music teacher dismissed from the church’s kurste-academia for his sexuality could not use the EEA because he was an independent contractor. However, he was able to invoke PEPUDA’s prohibition against unfair discrimination on the ground of sexual orientation to show that his contract had been unlawfully terminated.

PEPUDA will one day have a further compliance instrument. A provision of the Act that has not yet come into effect will require companies, closed corporations, partnerships, clubs, sports organisations, corporate entities and certain other associations “in a manner proportional to their size, resources and influence, to prepare equality plans or abide by prescribed codes of practice or report to a body or institution on measures to promote equality.”

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Companies Act
Although the Companies Act is the primary legislation governing for-profit and non-profit companies in South Africa, it does not contain any express reference to LGBTI rights. Nevertheless, the Act states that one of its purposes is to promote compliance with the Bill of Rights. This would obviously extend to the right to equality in section 9. Therefore, references in the Act to the “best interests of the company” should be construed in this light. The only direct reference to the equality clause in the Companies Act is Item 4 of Schedule 1, which states that a non-profit company with members “must not regulate or restrict … membership in a manner that amounts to unfair discrimination in terms of section 9 of the Constitution.”

However, the act does require every state-owned company, every listed public company and certain other large companies to create social and ethics committees to monitor implementation of the legal requirements and codes of practice relating to marginalised groups, which includes sexual and gender minorities. Since the committees are required to take “any relevant legislation” into account, part of their duties should include monitoring any steps the company takes to promote equal opportunity even before the requirement for equality plans comes into effect.

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1. Section 6, EEA.
3. Sections 1, 7, 10(9), 10(10), 10(11). EEA.
4. Section 1(1), EEA.
6. Section 16(1)(a), PEPUDA.
7. Sections 6, 10, 11 and 12, respectively.
8. For example, directors are tasked with exercising their powers and performing their functions in the “best interests of the company” (see section 70(3)(b), Companies Act).
9. The specific wording of the regulation is “every company that scores above 550 points according to the scoring system set out in regulation 85D in any two of the previous five years.”
10. For example, references are made to enforcing the constitutional right to equality, and its prohibited grounds include sexual orientation, gender and sex. It also institutionalises Equality Courts and designates all High Courts as such. There is also a process for designating magistrates’ courts as Equality Courts after appropriate training of presiding officers, and almost every magistrates’ courts with civil jurisdiction are now able to hear equality matters. PEPUDA prohibits not just unfair discrimination but also hate speech, harassment and the publication of sensitive information that unfairly discriminates.
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The EEA’s regulatory tools apply only to “designated groups,” defined as “black people,” women and people of disabilities. “Black people” is defined as Africans, “Coloureds” and Indians. Thus race, gender and disability are privileged compared to other dimensions of marginalisation, and since these definitions are in the EEA itself, a parliamentary process would be required to add to them. What’s more, the duty to “advance” the designated groups only applies to designated employers defined by number of employees, annual turnover and type of organisation, although other employers have the option of volunteering to comply with the Act.

Designated employers have a statutory duty to implement affirmative action for people from designated groups. These measures must be “designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels.” The main compliance instrument is an employment equity plan that ensures “reasonable progress towards employment equity.” Annual progress reports have to be submitted to the Director-General of Labour and published in the employer’s annual financial report. If the employer is a state entity, the appropriate Minister must also table the report in Parliament.

Enforcement measures include compliance orders by the Labour Court and fines for non-compliance, but since the EEA does not embrace sexual orientation as a ground for affirmative action, it does not advance the second sphere of LGBTI economic empowerment. In pointing out that the designated groups were not sufficiently disaggregated, the SAHRC argued that this opens the door to “new patterns of future inequality and economic exclusion within and amongst vulnerable population groups.” It recommended revising the EEA “to target more nuanced groups on the basis of need.”

This move could advance LGBTI economic empowerment, but at present, Stats SA does not collect census data on sexual orientation. However, the SAHRC also recommended that employment equity plans should have flexible targets rather than rigid quotas. This could set the stage for a beyond-compliance approach that would take into account differences based on sexual orientation.

B-BBEE framework

The B-BBEE framework aims at undoing the economic harm inflicted on the majority of South Africa’s people by apartheid not simply because this is the morally correct thing to do but also because failure to address this injustice endangers the future stability and prosperity of South Africa. The B-BBEE’s definition of “broad-based black economic empowerment” refers to “all black people” that is, Africans, “Coloureds” and Indians) but highlights particular groups of black people: “women, workers, youth, people with disabilities and people living in rural areas.” These categories were inserted to respond to criticism that the initial conceptualisations of Black Economic Empowerment failed to take into account groups suffering intersecting discrimination.

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6 the compliance-based approach to advancement of designated groups

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In 2013, the B-BBEE Act was amended to give the state stronger enforcement powers. Among other reforms, a number of criminal offences relating to the B-BBEE Commission were defined, further offences and penalties relating mainly to misrepresentation and fronting were introduced, and the Commission was given the power to receive complaints and undertake investigations relating to B-BBEE compliance.\(^3\) A conviction under the B-BBEE Act results in a ten-year embargo on state contracts, a powerful disincentive.

Unfortunately, there is no acknowledgment in the B-BBEE Act that sexual orientation and gender non-conformity are also important intersecting grounds of marginalisation. Thus, the “diverse but integrated” strategies and goals envisaged by BBBEE leave sexual and gender minorities out in the cold.

\(^3\) Section 13J, B-BBEE Act.
Three key realities affect the marginalisation of sexual and gender minorities in South Africa: the past and present sociocultural contexts, the current economic and employment situation and the “invisibility” of many LGBTI people.

Sociocultural Contexts

LGBTI groups have experienced discrimination and psychological and physical violence throughout history in virtually every region of the world. South Africa is no exception. Under apartheid, male-to-male sex between consenting adults was a crime under the common law and female-to-female sex was prohibited as indecent by an act of Parliament. Marriage was not open to persons of the same sex, and none of the statutory and common law benefits enjoyed by heterosexual partners were available to homosexual partners. This legal stigmatisation was rooted in a deeply ingrained intolerance of sexual non-conformity in society.

Together, the social hostility and the legal danger took a terrible toll on the lives of LGBTI people. Besides the fear and misery of living as what LGBTI champion Judge Edwin Cameron called “unapprehended felons,” LGBTI South Africans faced discrimination in churches, schools, social settings and workplaces. The laws against same-sex relations exposed them to police entrapment, blackmail and constant risk of arrest, while the social stigma resulted in ostracism, insults, harassment and “queer bashing.” Since the beginning of the democratic era, thanks largely to the new constitutional protections, the legal obstacles to living open LGBTI lives have been removed, and social attitudes have softened. However, as the study reported in Progressive Prudes shows, as many as seven out of ten South Africans still feel that same-sex relations and gender non-conformity are “plain wrong” or “disgusting.” A significant minority say they have verbally or physically abused gender non-conforming people or could do so in the future. Homophobic violence, including so-called corrective rapes, kidnappings, torture and murder remain far too common, and the prejudice and violence cuts across racial and age categories.

Economic and Employment Context

Unemployment is a critical problem in South Africa. In the third quarter of 2018, the official unemployment rate was at least 27.5 percent, rising to over 37 percent when those who had given up looking for work were counted. For persons aged 15 to 34 (the formal definition of youth), the official unemployment rate is almost 40 percent.

No statistics are kept on LGBTI unemployment in South Africa, but the current dire economic and employment situation in South Africa is highly pertinent to the issue of LGBTI economic empowerment. High rates of unemployment raise the stakes for all workers, but workers from disadvantaged groups are even more likely to be afraid of standing up for their rights. Fearful of putting their jobs at risk, LGBTI employees will often prefer to remain quiet about workplace discrimination and harassment.

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LGBTI “Invisibility”

It is usually not possible to know a person’s sexual orientation or gender identity on sight. Sexuality and gender identity are essentially private realities. The physical features that may reveal gender identity are ordinarily concealed, while sexual acts occur in private. Other than through self-revelation, sexual orientation and gender identity will normally be “invisible” in workplace settings.

This makes the social identities of LGBTI people different from those of race, gender, and disability. The much lower visibility of LGBTI identities, at least to casual observers, is sometimes used to argue that being LGBTI is not persistently stigmatising and, on that basis, to deny specially protected status to sexual and gender minorities.

The “invisibility” of sexual orientation and gender identity is an important drawback to a compliance-based approach to LGBTI advancement. It requires detailed forms of verification that demand high visibility. For each of the elements of the B-BBEE framework, for example, the Generic Code of Good Practice demands evidence verified by certified B-BBEE auditors. Over and above the risks associated with being out at work, many LGBTI employees may find the verification process distasteful and intrusive. Nevertheless, as a 2016 study by the ILO revealed, the need to address the situation of LGBTI South Africans in the workplace is urgent.

“high rates of unemployment raise the stakes for all workers, but LGBTI workers are even more likely to be afraid of standing up for their rights.”
In 2016, the ILO published an important study of LGBTI-based discrimination in the South African workplace.

“Pride at Work” acknowledged the steps South Africa had taken to advance LGBTI rights as well as the country’s global leadership on LGBTI issues but concluded that LGBTI South Africans continue to face workplace discrimination and exclusion despite strong constitutional and legal protections. LGBTI employees “reported widespread discomfort—if not outright hostility—from fellow employees and employers.”

Employers were reported to be “mostly ignorant” about fostering LGBTI inclusion in the workplace and preventing or dealing with discrimination. The study’s interviews and focus groups identified a wide range of problems.

Hostile working environments

The study heard numerous stories of sexual harassment, insults, mockery and underlying prejudice towards sexual and gender minorities in work environments. In some workplaces, discrimination and homophobic harassment were so pervasive they were perceived as the norm. Sexual harassment and even violence were also reported when job hunting. Not surprisingly, many LGBTI employees and job seekers said they conceal their sexual or gender identities at work or when applying for work. Of those who were out at work, many said they faced sustained attempts by employers and coworkers to erode their sense of belonging and self-confidence.

Heteronormative dress codes

Freedom to dress in ways that affirm LGBTI identities was a key factor for those who did report a feeling of belonging and inclusion at work. However, the study heard numerous stories of LGBTI employees having to conform to heteronormative dress codes in the workplace or be fired. Heteronormative standards of dress and appearance, whether enforced explicitly or informally, are frequently used to alienate, intimidate and marginalise LGBTI workers.

Stereotypes

LGBTI workers reported having to contend with many problematic stereotypes. These ranged from “positive” stereotypes (such as gay male workers being more “fun”) to negative and demeaning ones (for example, that lesbians are sexually predatory towards coworkers). All stereotypes, regardless of content, make people uncomfortable and LGBTI inclusion more difficult.

LGBTI South Africans continue to face workplace discrimination and exclusion, including widespread discomfort—if not outright hostility—from employers and fellow employees.
The ILO’s Pride at Work study reported numerous stories of sexual harassment, insults, mockery, and underlying prejudice towards sexual and gender minorities in work environments.

**Evading responsibility**

Ultimately—and by law—it is the responsibility of employers to ensure an inclusive, safe workplace, but participants in the study repeatedly confirmed that the onus of challenging discrimination and educating fellow workers was being placed on LGBTI employees themselves.

**A leadership vacuum**

Starting with the president and other political leaders and filtering down from there to workplace management and even trade union representation, a leadership vacuum on LGBTI issues was a persistent theme in the study. Participants also complained about a disproportionate focus on race and gender in workplace diversity policies and initiatives.

**An information gap**

It remains difficult for LGBTI employees to find information on laws and policies that protect them against discrimination in the workplace. In particular, they are often unaware or misinformed about their rights or the procedures to follow when their rights were violated. Employers have a legal obligation to advance equality, but many employers are ignorant about how to address LGBTI issues in the workplace or lack the human and financial resources to be more proactive.

The findings of “Pride at Work” are sobering. They reveal continuing, extensive discrimination against LGBTI South Africans in the workplace and an urgent need to find mechanisms that will not only protect LGBTI workers from discrimination but also advance their economic interests as an identifiable minority that has been treated inequitably.

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This paper set out to answer two questions. First, can we extend the existing compliance-based approach to protecting sexual and gender minorities from unfair discrimination in the workplace to one that actively advances the economic empowerment of sexual and gender minorities? And second, if this is not feasible, can we develop an approach that goes beyond compliance?

As we have seen, a compliance-based approach is one that relies on legislative backing for diversity and workplace inclusion. The compliance tools available to the state may take the form of statutory obligations (with formal compliance instruments and sanctions for non-compliance), market-based measures or a mixture of the two.

We have also seen that economic empowerment is a dual sphere of distinct but connected issues: protection against unfair discrimination and advancement through affirmative action. These aspirations can be justified by both economic arguments around increased productivity and moral arguments around fairness and social justice.

Our overview of the existing B-BBEE framework and the provisions of the LRA, EEA, PEPUDA and Companies Act shows clearly that the compliance-based approach to discrimination against LGBTI people is a realistic proposition in South Africa. The law provides for obligations, compliance instruments, and enforcement measures aimed at the first of the two spheres of LGBTI economic empowerment. There are statutory prohibitions against unfair discrimination and unfair dismissal based on sexual orientation under the LRA and the EEA that can be enforced through the CCMA, the Labour Court and the Labour Appeal Court. South African law also gives employers a positive duty to promote equal opportunity in the workplace, and the courts have been prepared to enforce this duty.

PEPUDA includes a general prohibition against unfair discrimination, hate speech, harassment, and the dissemination and publication of information that unfairly discriminates, and this has been interpreted by the Equality Courts to include independent contractors as well as formal employees. PEPUDA also gives employers a duty to promote equality, especially when acting in the public domain or contracting with the state, and makes future provision for employer equality plans, with potential criminal prosecution for

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9 beyond compliance: a new approach to LGBTI economic empowerment

Economic empowerment is a “dual sphere.” It includes both protection against unfair discrimination and advancement through affirmative action.

Existing provisions for affirmative action exclude LGBTI South Africans.
non-compliance. To date, the requirement for equality plans has not come into effect, but the SAHRC recently called for the provision to be operationalised as soon as possible to deal with the slow pace of transformation.

The Companies Act requires that company law must promote the Bill of Rights and thereby the rights of sexual and gender minorities. To this end, state-owned enterprises, listed public companies and larger companies are required to have a social and ethics committee, which implies a legal duty to address unfair discrimination on the basis of sexual orientation in their workplaces.

But if a compliance-based approach to discrimination against LGBTI people is to be a realistic proposition in South Africa, extending the current compliance-based approach, built around protection, to one that actively advances sexual and gender minorities similar to the B-BBEE framework is unrealistic. The legal framework for affirmative action is confined to designated groups based on race, gender, and disability. Expanding the list of designated groups would require a parliamentary process.

Moreover, the mechanics of affirmative action in the B-BBEE Act—the Generic Code of Good Practice, Sector Codes and Transformation Charters—not only focus strictly on the designated groups but are also linked to elaborate verification processes. Not only would extensive, persistent political lobbying be needed to persuade political leaders to add sexual orientation as a ground for advancement within the current compliance-based frameworks, intensive research and consensus-building would also be needed to establish forms and procedures of verification acceptable to LGBTI people, employers and the state. And as we have seen, the “invisibility” of sexual orientation and gender identity make it difficult for LGBTI communities to be folded into the concept of designated groups in use now, which presupposes a high degree of visibility.

“Economic empowerment is a “dual sphere.” It includes both protection against unfair discrimination and advancement through affirmative action.”
get real - a discussion paper about whether a compliance-based approach to LGBTI economic empowerment can work in South Africa

Existing law gives LGBTI South Africans the legal means to advance the first sphere of LGBTI economic empowerment. However, even though the LRA, EEA and PEPUDA have been used successfully to address unfair discrimination on the basis of sexual orientation or gender identity, they all put the onus to seek redress on the victims of discrimination.

In a context of serious historic and continuing discrimination and a highly precarious employment climate, this is likely to discourage many people from claiming their legal rights. At the same time, research shows that many LGBTI employees and job seekers are unaware of their rights or how to claim them.

Our first recommendation, therefore, is to intensify human rights education, training and group support programmes for LGBTI workers, job seekers and students at tertiary and vocational institutions. And since research shows that many employers are also not well informed, more work needs to be done to ensure that they are aware of their legal obligations under EEA, PEPUDA and the Companies Act to promote equality.

Our next recommendation is to develop approaches to LGBTI economic empowerment that go beyond compliance. What would be the contours of a beyond-compliance approach? Answering this question might seem like a tall order in the current compliance-based environment, but in fact the outlines of a workable beyond-compliance approach to LGBTI economic empowerment emerge clearly enough from the existing legal framework.

This approach would focus on developing instruments and forms of proof to show that employers are promoting equality and preventing unfair discrimination on the basis of sexual orientation. These instruments and forms of proof could take various forms, such as equality plans and reports by social and ethics committees on their monitoring of workplace equality. In a beyond-compliance context, summaries of these plans and reports in companies’ annual reports would become as indispensable as financial statements. It will also be important to extend the mandates of social and ethics committees to every aspect of employment practice, including an express focus on dress codes and other expectations around self-presentation. Serious cases of harassment and evidence of systemic intimidation should, of course, continue to be the main focus.

Existing provisions for affirmative action exclude LGBTI South Africans.

Human rights education, training and group support programmes for LGBTI workers, job seeker, and students at tertiary and vocational institutions have to be intensified. Employers, too, need to be better informed about their legal obligations to promote equality.

the way forward

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Existing provisions for affirmative action exclude LGBTI South Africans.

Human rights education, training and group support programmes for LGBTI workers, job seeker, and students at tertiary and vocational institutions have to be intensified. Employers, too, need to be better informed about their legal obligations to promote equality.
New approaches to LGBTI economic empowerment that go beyond compliance are needed, and the outlines of a workable beyond-compliance approach are already clear in the existing legal framework.

The intensified awareness-raising and training that has already been recommended on procedures that LGBTI individuals can follow to claim their rights will be an essential aspect of a beyond-compliance approach. So will awareness-raising on LGBTI identities and realities for all employees and management. A leadership program similar to the US Small Business Administration’s One Dream Many Faces initiative to promote and showcase LGBTI participation in senior management could be used to jump-start a more proactive, beyond-compliance way of thinking about LGBTI inclusion at the workplace and make it easier for LGBTI employees to come out in the workplace and have confidence in their ability to contribute and to advance their careers.

The constitutional injunction is crystal clear. Sexual and gender minorities have as much right to safety, fairness and advancement in the workplace as anyone else. It is equally clear that equality for sexual and gender minorities in the South African workplace is far from being realised and that it can only be achieved by moving beyond a narrow compliance-based framework. Until now, individuals have unjustly shouldered the burden of compliance and enforcement. Going forward, employers must “get real” about LGBTI equality for sexual and gender minorities and demonstrate their commitment in a much more proactive fashion that does not depend on coercion.

Developing feasible and effective beyond-compliance approaches to LGBTI economic empowerment is still a work in progress. A lot of thinking, planning and lobbying remains to be done. We urge stakeholders and any other interested parties to contribute ideas and suggestions.
get real - a discussion paper about whether a compliance-based approach to LGBTI economic empowerment can work in South Africa