



## *Employment Equity Act* Review Submissions

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Submitted to: Employment Equity Act Review Task Force  
[EDSC.LEE-EEA.ESDC@labour-travail.gc.ca](mailto:EDSC.LEE-EEA.ESDC@labour-travail.gc.ca)

Submitted by: The Canadian Association of Professional Employees (CAPE)

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Contact:

Greg Phillips  
National President, CAPE  
[gphillips@acep-cape.ca](mailto:gphillips@acep-cape.ca)

## **Preamble**

With over 20, 000 members, the Canadian Association of Professional Employees (CAPE) is the third-largest federal public sector union in Canada — dedicated to advocating on behalf of federal employees in the Economics and Social Science Services (EC) and Translation (TR) groups, as well as employees of the Library of Parliament (LoP), the Office of the Parliamentary Budget Officer (OPBO) and civilian members of the RCMP (ESS and TRL).

CAPE recommends amendments to the *Employment Equity Act* and related legislation, policies and practice that impacts workplace employment equity as follows:

### **CAPE's Key Recommendations**

1. Amend the number of Employment Equity Groups to include the LGBTQ2+ Community as a designated group.
2. Amend current terms such as “Aboriginal peoples” and “members of visible minorities” to reflect the language and terminologies currently used by those communities.
3. Amend the Act to require collection and analysis of disaggregated data for every designated equity group and in a manner that will allow intersectional analysis.
4. Amend the *Employment Equity Act* to ensure accurate and current labour market availability and workforce availability rates that reflect each designated group.
5. Amend the *Employment Equity Act* and related legislation such as the *Public Service Employment Act*, the *Financial Administration Act*, and the *Public Service Modernization Act* to strengthen the roles of central agencies to reduce and eliminate systemic barriers faced by equity-seeking groups.
6. Implement the 2017 Joint Union/Management Task Force recommendations with respect to staffing #26-28.
7. Strengthen the requirement to conduct Employment Systems Reviews (ESR).
8. The Employment Equity Review Tribunal must 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.
9. 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.
10. All audits should be made public subject to Access to Information and Privacy laws.
11. There are concerns regarding possible overlap between the *Employment Equity Act* and the *Accessible Canada Act*. It will be vital that this be considered in the next iteration of the *Employment Equity Act*.
12. Existing statutory barriers which prevent bargaining agents from negotiating equity related provisions should be eliminated.

- 1. Amend the number of Employment Equity Groups to include the LGBTQ2+ Community as a designated group.**

This community has faced historic patterns of discrimination and exclusion in what is often referred to as “The Purge”. Census 2021 data will be released about LGBTQ2+ communities in 2022 including trans and non-binary populations. The Public Service Employee Survey shows that members of this community experience harassment and discrimination because of their identity. Including LGBTQ2+ as a designated group is an important step towards addressing systemic barriers for this community.

- 2. Amend current terms such as “Aboriginal peoples” and “members of visible minorities” to reflect the language and terminologies currently used by those communities.**

Outreach with the community is critical. It is important that communities have input into the terminology that is used in the *Employment Equity Act*.

- 3. Amend the Act to require collection and analysis of disaggregated data for every designated equity group and in a manner that will allow intersectional analysis.**

This will allow for closer examination of representation rates and barriers within groups. Every designated equity group should be broken down by subgroup (Black, South Asian, Chinese, Arab, etc.). Intersectional analysis will allow for closer examination of employment equity groups facing multiple barriers at the same time. Disaggregated data and intersectional analysis are critical for the LGBTQ+ community because it is not homogenous.

- 4. Amend the *Employment Equity Act* to ensure accurate and current labour market availability and workforce availability rates that reflect each designated group.**

The labour market availability and workforce availability rates should be updated between censuses to reflect the changes in Canada’s population (for example: recent newcomers/immigrants who have international experience and non-Canadian Citizens). Current rates are outdated because of the delays between the release of Census data and calculations made by the Treasury Board and Employment and Social Development Canada.

### **Labour market availability**

The *Employment Equity Act* establishes equity targets based on the availability of designated groups in the Canadian labour market - labour market availability (LMA). Section 5 of the Act states that employers can base their representation targets on “*segments of the Canadian workforce identifiable by qualification, eligibility, or geography and from which they may reasonably draw employees.*”<sup>1</sup> Employment equity targets are, to this day, based on 2016 census data. Data from the 2021 census are not yet fully available but will be gradually released during 2022-2023. The table below shows the evolution of LMA of the four designated groups by census period.

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<sup>1</sup> *Employment Equity Act* S.C. 1995, c. 44

### LMA of Designated Groups per Census Cycle

Census cycle	1996	2001	2006	2011	2016
Women	46.4%	47.3%	47.9%	48.2%	48.2%
Aboriginal peoples	2.1%	2.6%	3.1%	3.5%	4.0%
Members of visible minorities	10.3%	12.6%	15.3%	17.8%	21.3%
Persons with disabilities	n/a	5.3%	4.9%	4.9%	9.1% <sup>2</sup>

### Employment equity in the core public administration

The most recent federal public service employment equity data is for the 2019-2020 fiscal year. The federal public service does not use LMA to benchmark its employment equity target for the four designated groups, but a subset of it called Workforce availability (WFA).<sup>3</sup> The *Employment Equity Act* does not specify which one to use. According to The Treasury Board Secretariat (TBS), “WFA considers certain factors, such as citizenship, location, working age (15 to 64) and education specific to the public service, to determine a more precise estimate than LMA can provide of designated groups members available for hire in the federal public service.”<sup>4</sup> This calculation method has the effect of raising the gender equity target and lowering the target for visible minorities. The table below shows the comparison between LMA, WFA and the core public administration representation for 2019-2020.

### Core Public Administration Representation (CPA) of Designated Groups Compared with LMA and WFA

Employment equity designated groups	LMA (Census 2016)	WFA	2019-2020 CPA representation
Women	48,2%	52.7%	55%
Aboriginal peoples	4%	4%	5.1%
Members of visible minorities	21.3%	15.3%	17.8%
Persons with disabilities	9.1%	9%	5.2%

Source: Employment Equity in the Public Service of Canada 2019-2020 annual report

There is a significant difference between LMA and WFA in terms of the proportion of visible minorities. For the core public administration, WFA is based on the population of *Canadian citizens* who are active in the workforce and work in those occupations that correspond to the occupations in the core public administration. Including citizenship status in the WFA likely is what reduces the visible minorities equity target for CPA. Unfortunately, we cannot be sure, as employment equity reports from the Treasury Board of Canada lack transparency as to exactly how WFA is calculated.

<sup>2</sup> Population ageing and changes to questions in the Canadian Survey on Disability accounted for most of the increase.

<sup>3</sup> Treasury Board of Canada Secretariat, 2020, Employment Equity in the Public Service of Canada for Fiscal Year 2018 to 2019. <https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/employment-equity-annual-reports/employment-equity-public-service-canada-2018-2019.html>

<sup>4</sup> *Ibid.*

We tested the labour market data we have access to with the education variable, and it only raised the target for visible minorities.

To obtain the baseline data on designated groups' LMA, all respondents who are first identified as a member of a designated population in the 2016 Census are further screened for their labour market status at the time the Census was conducted. They are included in the Employment Equity Workforce if they were: employed when the Census data were collected, unemployed (out of work and looking for a job) at the time of the Census and had work experience in 2015 or 2016.

Historically non-Canadian citizens were excluded from WFA rates for the FPS. The preference for Canadian citizens has recently been amended in the PSEA and has expanded to include permanent residents. It is unknown at this time whether the Treasury Board will adjust the WFA in response.

**5. Amend the *Employment Equity Act* and related legislation such as the *Public Service Employment Act*, the *Financial Administration Act*, and the *Public Service Modernization Act* to strengthen the roles of central agencies to reduce and eliminate systemic barriers faced by equity-seeking groups.**

The Taskforce should review all employment equity related complaint processes, including the Federal Public Sector 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 are no meaningful recourse mechanisms, then compliance requirements under the *Employment Equity Act* are meaningless.

The devolution of staffing authority from central agencies (TBS and the Public Service Commission (PSC)) to departments (stemming from the changes to the PSEA and *Public Service Labour Relations Act (PSLRA)* under the *Public Service Modernization Act (PSMA)* in 2003) contributed to current systemic barriers.

Within the current legislative framework, the Treasury Board and the Public Service Commission have limited ability to hold departments, boards and agencies accountable for systemic barriers to employment equity in staffing. With the exception of a limited audit function at the PSC, the role is limited to enabling departments to make reasonable progress towards the goal of employment equity under the EEA.

Equity groups navigating barriers in staffing face a legislative and regulatory labyrinth with significant limits on what remedies are available. For example, the FPSLREB cannot order that a complainant be appointed or that a new appointment process be conducted [s. 82 of the PSEA]. This is the case even when the complainant can demonstrate the selection board has a bias against the complainant. Example: <https://decisions.fpslreb-crtespf.gc.ca/fpslreb-crtespf/d/en/item/359271/index.do?q=%22right+fit%22+%26+discrimination>

The remedies are limited 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. Recommendations are not binding on the employer.

Another key issue is the requirement of “best fit” in staffing. Even when there are representation gaps, managers are still not hiring equity groups because they do not have to, especially for acting positions, due to “best fit” criteria. “Best fit” is a subjective criterion when considering an applicant’s ability to succeed in the workplace.

For acting opportunities of less than four months, candidates cannot file a complaint at all unless there is a cumulative period of four months or more. The *Public Service Employment Regulations* excludes these appointments from the provisions of the PSEA dealing with staffing complaints to the FPSLREB.

Equity groups face jurisdictional challenges when trying to bring grievances alleging systemic barriers to the FPSLREB if the discrimination issue is marginally connected to classification (FPSLRA) or staffing policies and practices (PSEA). Example, [Public Service Alliance of Canada v. Treasury Board (Immigration and Refugee Board) 2017 2017 FPSLREB 5]

Our members tell us selection boards lack diversity; accommodations take an excessive time to implement. There is a lack of mandatory training on implicit bias although progress is being made. There is a lack of communication with our members seeking accommodation.

These barriers may explain in part why Indigenous people and persons with disabilities still experience lower rates of promotion than their respective reference groups and why the share of promotions for members of visible minorities is below their representation as applicants.

## **6. Implement the 2017 Joint Union/Management Task Force recommendations with respect to staffing #26-28.**

**Recommendation #26:** Apply the diversity and inclusion lens to staffing and people management policies, programs, services, practices and workplace assessments. ([See recommendation #26](#))

**Recommendation #27:** Deputy heads should be required to institute rigorous human resources planning to:

- a) ensure diversity and employment equity representativeness within their departments
- b) monitor the representativeness of appointments, including all acting appointments
- c) monitor the use of pre-qualified pools through the diversity and inclusion lens ([See recommendation #27](#))

**Recommendation 28#:** The Public Service Commission of Canada should be required to perform periodic system-wide thematic audits on the use of “right fit” criteria and existing employment equity flexibilities under the Public Service Employment Act, including:

- a) limiting or expanding the area of selection to employment-equity designated groups
- b) establishing and applying employment equity as an organizational need
- c) using employment equity as a criterion for non-advertised processes ([See recommendation #28](#))

## **7. Strengthen the requirement to conduct Employment Systems Reviews (ESR).**

Amendments must require ESRs to be carried out in relation to employment equity groups even if one designated group is not currently under-represented. ESRs should be centralized and overseen by a central agency. Self monitoring by departments of staffing makes elimination of systemic barriers to employment equity in the Public Service difficult.

**8. The Employment Equity Review Tribunal must 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.**

Commissioners have broader powers. In addition to hearing complaints, they conduct inquiries and can intervene in the courts.

**9. 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.**

Consultation and collaboration should be clearly defined in the *Employment Equity Act* and related regulations. However, this needs to be more detailed. Bargaining Agents need to be able to trigger a rigorous enforcement mechanism and have standing to make a complaint when meaningful consultation does not occur.

**10. All audits should be made public subject to Access to Information and Privacy laws.**

Transparency is key for employment equity initiatives.

**11. There are concerns regarding possible overlap between the *Employment Equity Act* and the *Accessible Canada Act*. It will be vital that this be considered in the next iteration of the *Employment Equity Act*.**

It is expected *The Accessible Canada Act* of 2019, will identify, remove and prevent employment barriers (including ones created by policies) for people with disabilities. Identifying barriers through employment systems reviews is also contained within the *Employment Equity Act*. We see an overlap in the two pieces of legislation with respect to employment systems reviews and the requirement to develop accessibility plans. There is nothing in the *Accessible Canada Act* to reconcile the overlap. We ask the taskforce to examine how *the Employment Equity Act* can support the requirements under the *Accessible Canada Act*.

**12. Existing statutory barriers which prevent bargaining agents from negotiating equity related provisions should be eliminated.**

The *Employment Equity Act* should represent the minimum for employment equity initiatives. Currently Bargaining Agents cannot negotiate staffing or classification of their members under the current legislative framework. This should be eliminated as the Employer's unilateral ability to determine the policies regarding staffing, and limited classification grievance rights have contributed to a lack of progress on Employment Equity.

Thank you for the opportunity to provide CAPE's submissions on the review of the *Employment Equity Act*.