



## Chapter Three: The limits of the Act itself – Assessing the South African parliament’s response

### 3.1 Introduction

In the following three chapters I consider a number of barriers to the more effective implementation of the Act.

In this chapter I consider the limits of orthodox anti-discrimination legislation and to what extent the Act attempts to address these shortfalls.<sup>1</sup> I also measure the Act against the suggested criteria for effective legislation that I identified in chapter 2.5 above.<sup>2</sup> I then discuss some of these suggested criteria in much more detail in chapters four and five.

In chapter four I concern myself with the criterion that “the enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise”,<sup>3</sup> and I criticise the initial training programmes for equality court personnel.

Chapter five links closely with three criteria: “the source of the new law must be authoritative and prestigious”,<sup>4</sup> “the purpose behind the legislation must at least to a degree be compatible with existing values”,<sup>5</sup> and “the required change must be communicated to the large majority of the population”.<sup>6</sup> In chapter five I report on an empirical survey that points to an ongoing legitimacy crisis in the South African legal system and an impoverished understanding of “discrimination”, “fair” discrimination and “unfair” discrimination by ordinary South Africans. I also criticise the public awareness campaigns that I am aware of that had been undertaken up to 31 October 2007.

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<sup>1</sup> Where appropriate I shall also discuss the effect of the use of typical lawyers’ language in an Act aimed at laypeople and the effect of lobbying by the banking and insurance industries during the Parliamentary drafting process.

<sup>2</sup> See pp 70-84 above.

<sup>3</sup> See pp 76-77 above.

<sup>4</sup> See p 74 above.

<sup>5</sup> See p 77-78 above.

<sup>6</sup> See p 83 above.

### 3.2 *The limits of traditional anti-discrimination legislation*

In this section, I consider theoretical critiques of anti-discrimination law and consider studies that have been undertaken to evaluate the effectiveness of anti-discrimination law. The theme that emerges quite strongly may not be surprising but remains depressing: Law has been doing little and perhaps will never be able to address discrimination effectively.

Based on academic writing from mainly Australia, Canada, the United Kingdom and the United States relating to discrimination law, I extracted typical defects in anti-discrimination legislation. I discuss these defects from an instrumentalist approach in paragraphs 3.2.1 to 3.2.13 below. Paragraph 3.2.14 briefly deals with the response of the critical left to anti-discrimination legislation.

3.2.1 It is notoriously difficult to prove a discrimination complaint.<sup>7</sup> Dickens, for example, points out that discrimination complaints in the United Kingdom usually do not succeed.<sup>8</sup> Bailey and Devereux shows that “the only cases in which complainants are consistently successful are the most direct, unequivocal acts of discrimination”.<sup>9</sup> The Australian High Court in *Briginshaw v Briginshaw*<sup>10</sup> held that a court must proceed cautiously in a civil case where a serious allegation has been made or the facts are improbable and if the finding is likely to produce grave consequences, the evidence must be of high probative value.<sup>11</sup> This “closer scrutiny” standard over time came to be adopted by all Australian anti-discrimination jurisdictions as a general rule without examining whether it was warranted in a specific case.<sup>12</sup> De Plevitz argues that this application of the *Briginshaw* principle has made parties before a tribunal unequal before the law.<sup>13</sup>

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<sup>7</sup> Moon (1988) 26 *Osgoode Hall LJ* 687; Varney (1998) 14 *SAJHR* 346; Lacey in Hepple and Szyszczak (eds) (1992) 101; Lacey (1987) 14 *J Law & Soc* 412.

<sup>8</sup> Dickens (1991) 18 *Melb Univ LR* 285-287.

<sup>9</sup> Bailey and Devereux in Kinley (ed) (1998) 308.

<sup>10</sup> (1938) 60 CLR 336.

<sup>11</sup> De Plevitz (2003) 27 *Melb U L Rev* 308.

<sup>12</sup> De Plevitz (2003) 27 *Melb U L Rev* 308.

<sup>13</sup> De Plevitz (2003) 27 *Melb U L Rev* 308.



- 3.2.2 The enforcement mechanisms are usually constrained by the range of remedies they are allowed to choose from.<sup>14</sup> In the United Kingdom the only remedies available to an equality tribunal are a declaration of rights, action recommendation and compensation, and tribunals cannot order what Dickens refers to as “remedial action”.<sup>15</sup> McKenna laments the absence of remedies that reflect the collective nature of discrimination in the Canadian anti-discrimination legislative system.<sup>16</sup>
- 3.2.3 Enforcement mechanisms are ill-equipped to deal with discrimination complaints: these bodies may be under-resourced, or may have insufficient powers to fulfil their statutory obligations.<sup>17</sup> Dickens points out that in the United Kingdom the individual enforcement mechanism that operates via industrial tribunals does not operate effectively: Tribunals make errors, apply incorrect legal standards, superficially investigate employers’ justifications and places reliance on irrelevant or subjective evidence.<sup>18</sup> He also argues that the United Kingdom Equal Opportunities Commission has not been funded sufficiently and runs at sub-optimum staff levels.<sup>19</sup>
- 3.2.4 Non-experts often chair tribunals.<sup>20</sup> Anti-discrimination legislation often contain complex provisions,<sup>21</sup> and if inexpert tribunals have to enforce these provisions, wrong judgments may often follow.<sup>22</sup>
- 3.2.5 Legal aid is not necessarily available to complainants.<sup>23</sup> Arguably a party to a suit that has legal representation will fare better than a non-represented litigant.<sup>24</sup>

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<sup>14</sup> Dickens (1991) 18 *Melb U L Rev* 284; Lacey (1987) 14 *J Law & Soc* 412; Lacey in Hepple and Szyszczak (eds) (1992) 101.

<sup>15</sup> Dickens (1991) 18 *Melb U L Rev* 285-287; Connolly (2006) 395.

<sup>16</sup> McKenna (1992) 21 *Man LJ* 325.

<sup>17</sup> Lacey in Hepple and Szyszczak (eds) (1992) 101; Lacey (1987) 14 *J Law & Soc* 412.

<sup>18</sup> Dickens (1991) 18 *Melb U L Rev* 286-287.

<sup>19</sup> Dickens (1991) 18 *Melb U L Rev* 286.

<sup>20</sup> Lacey in Hepple and Szyszczak (eds) (1992) 101.

<sup>21</sup> Eg see Annexures C and E.

<sup>22</sup> Lacey (1987) 14 *J Law & Soc* 413.

<sup>23</sup> Lacey (1987) 14 *J Law & Soc* 413; Lacey in Hepple and Szyszczak (eds) (1992) 101; Dickens (1991) 18 *Melb Univ LR* 285-287.

<sup>24</sup> Galanter (1974) 9 *Law & Soc Rev* 114.

- 3.2.6 Anti-discrimination Acts generally only allow a claim on a limited number of grounds.<sup>25</sup> The protected grounds may also be interpreted in an underinclusive way.<sup>26</sup> Anti-discrimination regimes also not do necessarily allow a claim on multiple grounds.<sup>27</sup> If the complainant's fact situation does not fit the legislation "arbitrary pigeonhole", the claim fails.<sup>28</sup>
- 3.2.7 Anti-discrimination Acts generally have a limited reach or area(s) of application.<sup>29</sup> Where anti-discrimination legislation focuses on particular grounds or has a limited reach, it implies that "less favourable treatment ... where they fall outside the limited ambit of the Act" is legitimate.<sup>30</sup> The optimistic corollary is that "this implication becomes less damaging the more thorough-going the legislation is".<sup>31</sup>
- 3.2.8 Another well-known complaint about anti-discrimination legislation is the use of a comparator;<sup>32</sup> which usually (consciously or subconsciously) turns out to be a white, heterosexual,<sup>33</sup> male.<sup>34</sup> Because of the insistence on a comparator, the more unequal the individual complainant and the (white male) comparator, the less likely that the legislation

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<sup>25</sup> Réaume (2002) 40 *Osgoode Hall LJ* 124. In the United Kingdom four separate Acts prohibit sex, race and disability discrimination. Hannett (2003) 23 *Oxford J LS* 65; Zimmer (1999) 21 *Comp Lab L & Poly J* 253. As will be expanded on below, the Act contains an open list of prohibited grounds but if a ground is explicitly listed it eases the complainant's evidentiary burden. Despite a report by the Equality Review Committee (established in terms of s 7 of the Act) recommending that the grounds of nationality, HIV status or perceived status, socio-economic status, and family responsibility and status be expressly added to the list of prohibited grounds, Parliament has not amended the Act - Lane (2005) 20 (internet version).

<sup>26</sup> For example in *Smith v Gardner Merchant* [1998] 3 All ER 852 (CA) it was held that "sex" in the Sex Discrimination Act 1975 (UK) does not include "sexual orientation".

<sup>27</sup> Réaume (2002) 40 *Osgoode Hall LJ* 132. For example, if a black woman complains of employment discrimination but the employer can show that he has employed black men and white women, some jurisdictions would not allow a claim - Hannett (2003) 23 *Oxford J LS* 69; *De Graffenreid V General Motors* 413 F Supp 142 (ED Mo 1976).

<sup>28</sup> Réaume (2002) 40 *Osgoode Hall LJ* 115.

<sup>29</sup> Réaume (2002) 40 *Osgoode Hall LJ* 124; Bailey and Devereux in Kinley (ed) (1998) 297.

<sup>30</sup> Lacey in Hepple and Szyszczak (eds) (1992) 105.

<sup>31</sup> Lacey in Hepple and Szyszczak (eds) (1992) 105.

<sup>32</sup> Cf Connolly (2006) 63-67.

<sup>33</sup> De Vos (2000) 117 *SALJ* 21; De Vos (1996) 11 *SAPL* 374.

<sup>34</sup> Dickens (1991) 18 *Melbourne Univ LR* 290; Hannett (2003) 23 *Oxford J LS* 67; Lacey (1987) 14 *J Law & Soc* 417; Lacey in Hepple and Szyszczak (eds) (1992) 103; Prendeville (1991) 1 *ISLR* 25. Feminist critique of the legal subject entails that he is a white middle-class man and not a neutral, genderless, classless and raceless abstract individual. Lacey 107. Departure from the white male perspective could be read as judicial bias, while at the same time it is not acknowledged that the white, male perspective is also biased. Minow (1992) 33 *W&ML Rev* 1207. A "feminist" judge would then be an "partial" or "biased" judge. Baker (1996) 45 *UNB LJ* 199. Hernández (2002) 87 *Cornell LR* 1158 contains an example of another kind of troubling comparator: in Latin America and Brazil race discrimination complaints are met by the defence "I cannot be prejudiced, I hire people of colour" - but the hired people happen to be light-skinned rather than dark-skinned.



will be of any assistance. For example, white middle-class women will probably benefit from such legislation, but it will do little for black working class women.<sup>35</sup>

If a court chooses the “wrong” comparator, a meritorious claim may fail. In *Secretary of State for Defence v MacDonald*,<sup>36</sup> a Royal Air Force officer argued that he was discriminated against on the basis of sex when he was forced to resign after his homosexuality was disclosed. The Court of Session compared his situation to that of a lesbian and held that a lesbian would have been treated in the same way. Had this court used the comparator of a heterosexual woman who also chose a male partner, the court could have held that he was discriminated against.<sup>37</sup> In *Case C-249/96 Grant v South West Trains*<sup>38</sup> the respondent denied a travel concession to the same sex partner of a woman. The court considered how the partner of a gay man would have been treated and concluded that discrimination did not occur. Had a comparison been made with an unmarried heterosexual man, discrimination would have been established.<sup>39</sup>

If an appropriate comparator is not seen to exist, a meritorious claim may fail as well. Thornton refers to *Curtis v T & G Mutual Life Society Ltd*,<sup>40</sup> in which case the complainant was unable to establish sex discrimination on the basis that she had to clean the silver, make the coffee and run errands in addition to her secretarial duties. She argued that a male secretary would not have been asked to perform such tasks. The Victorian Equal Opportunity Board, however, held that the respondent saw these tasks as part of the role of secretary, and dismissed the claim.<sup>41</sup>

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<sup>35</sup> O'Regan (1994) *AJ* 79.

<sup>36</sup> [2001] IRLR 431.

<sup>37</sup> See Hannett (2003) 23 *Oxford JLS* 82-83.

<sup>38</sup> [1998] IRLR 165.

<sup>39</sup> See Barnard and Hepple (2000) 59 *Cam LJ* 563.

<sup>40</sup> Unreported, Victorian Equality Opportunity Board, 3 July 1981, as discussed by Thornton (1991) 18 *Melb U L Rev* 300.

<sup>41</sup> Thornton (1991) 18 *Melb U L Rev* 300.

- 3.2.9 Some jurisdictions favour conciliation (and secrecy) in stead of public court hearings, which could frustrate attempts to create a broader consciousness of discrimination.<sup>42</sup> Complainants may remain unaware of similar proceedings with favourable outcomes.<sup>43</sup>
- 3.2.10 Specifically from an African (or developing world) perspective, the judicial system in general (and, it follows, anti-discrimination courts or tribunals in particular) are not accessible. Packer argues that this is so because of the legal costs involved; the length of time required to finalise a case; the kind of language used in most courts; “the non-receptive attitude of personnel and officers involved in the administration of justice”; and the geographical distance between courts and subjects.<sup>44</sup> Bohler laments the fact that traditional and westerns ways of living in Africa “confine women in similar and different ways”.<sup>45</sup> Her solution seems to be to encourage courts to listen to the stories of those individuals who live these cultures and that informal, flexible court proceedings should be used so that the real issues are not “swamped by legal technicalities”.<sup>46</sup> She does not answer the argument that rural (African) women do not utilise courts to relieve their systemic confinement.

Krishnan paints the following picture of litigating in India:<sup>47</sup>

[T]he Indian courts are clogged ... in reality, it is not that the courts are constantly receiving petitions from anxious litigants, but rather that so few cases are resolved by the legal system. Outdated procedural laws that allow for endless interlocutory appeals result in massive delays in judgments and contribute to the vast number of undecided cases ... Most social activists ... avoid a system that is fraught with delay and operates at a glacial-like pace.

- 3.2.11 Anti-discrimination provisions are generally enforced by a complaints-driven process; it is expected of complainants to initiate the procedure.<sup>48</sup> A typical potential claimant in terms

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<sup>42</sup> Contra Brand (2000) Autumn *W&A* 17 that believes that litigation should be the last option and that discrimination disputes should be solved in an amicable way.

<sup>43</sup> Bailey and Devereux in Kinley (ed) (1998) 303.

<sup>44</sup> Packer (2002) 149.

<sup>45</sup> Bohler (2000) 63 *THRHR* 292.

<sup>46</sup> Bohler (2000) 63 *THRHR* 292.

<sup>47</sup> Krishnan (2003) 25 *HRQ* 813. At 801 he notes that 20 000 cases are pending at the Supreme Court level and millions of matters are unresolved in the state High Courts.



of anti-discrimination legislation faces public and private officials that exercise discretionary power over her: the police, a teacher, a social worker, a doctor, a nurse, a landlord, an employer.<sup>49</sup> Theoretically the claimant may present information to the official to attempt to persuade him to make a favourable decision.<sup>50</sup> However, typical claimants are usually not in a position to do this effectively.<sup>51</sup> They do not know their rights and are not aware of available remedies, they lack assistance in pursuing a claim, and they fear retaliation because they likely have to continue dealing with that official.<sup>52</sup> Enforcement usually relies on a complaint-driven process.<sup>53</sup> Ideally a number of claims will be brought against the perpetrator until it becomes too expensive to continue in its errant ways.<sup>54</sup> However, poor, prejudiced potential claimants cannot deal with this process.<sup>55</sup>

Handler paints a depressing picture of the history of school desegregation in the United States.<sup>56</sup> Desegregation began almost immediately after the Supreme Court's decision in *Brown v Board of Education*<sup>57</sup> and by 1956 a few hundred school districts had voluntarily desegregated, but "then the tide turned".<sup>58</sup> Southern states began massive resistance campaigns.<sup>59</sup> Southern whites used social and economic pressure and court battles to challenge *Brown*.<sup>60</sup> In 1961 the United States Civil Rights Commission reported that integration took place only when ordered by court.<sup>61</sup> Handler notes that the legal battles were "hard fought, long and complicated" and typically it would take seven years from the

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<sup>48</sup> Cf Pound (1917) 3 *ABA J* 69: "For laws will not enforce themselves. Human beings must execute them, *and there must be some motive setting the individual in motion to do this* above and beyond the abstract content of the rule and its conformity to an ideal justice or an ideal of social interest". Dickens (1991) 18 *Melbourne Univ LR* 294. Smith (1977) 315-317 as referred to in Cotterrell (1992) 62 studied the effects of legislative attempts in Britain during the 1960 to improve race relations. He found that a high number of Asians and West Indians were reluctant to use the enforcement mechanism and that only a minority has heard of the enforcement body. He also lists the difficulty of proving discrimination and the absence of effective remedies.

<sup>49</sup> Handler (1978) 103.

<sup>50</sup> Handler (1978) 103.

<sup>51</sup> Handler (1978) 103.

<sup>52</sup> Handler (1978) 103-104.

<sup>53</sup> Handler (1978) 104.

<sup>54</sup> Handler (1978) 104.

<sup>55</sup> Handler (1978) 103-105.

<sup>56</sup> Handler (1978) 105-118.

<sup>57</sup> 347 US 483.

<sup>58</sup> Handler (1978) 106.

<sup>59</sup> Handler (1978) 106.

<sup>60</sup> Handler (1978) 106.

<sup>61</sup> As quoted by Handler (1978) 106-107.

start of litigation to the actual admission of black children to white schools.<sup>62</sup> Ten years after *Brown* two of the four original school districts had not yet admitted one black child and in ten Deep South states not even 1% of black schoolchildren attended integrated schools.<sup>63</sup> Handler mentions a number of reasons why the desegregation battle was so difficult: Fierce and resourceful white resistance; the black organisations received very little support from moderate whites and initially no support from the federal government; but perhaps most importantly, the intended beneficiaries of the desegregation campaign were mostly poor or near-poor blacks; most were sharecroppers, wage earners on farms, labourers and domestic servants; with no political power. Moreover, they were economically dependent on whites.<sup>64</sup> It is therefore not surprising that the NAACP struggled to persuade black parents to initiate legal action.<sup>65</sup> Another probable reason for lack of success was the low incentive offered to poor blacks vis-à-vis school desegregation: It is difficult to identify a tangible benefit arising from integrated schooling.<sup>66</sup> What Handler calls the “bureaucratic contingency” was extremely acute: Effective implementation of *Brown* would have meant that literally hundreds of school district boards in the American South would have needed to change their behaviour.<sup>67</sup> On-the-ground monitoring would have been needed and the black litigators would have needed enormous staying power to keep going despite setbacks.<sup>68</sup> Put bluntly, “social change through law-reform litigation simply required too many individual lawsuits in too many places”.<sup>69</sup>

A fundamental weakness of a complaint-driven process is that a complainant that does not perceive that she has been discriminated against will obviously not approach a court or tribunal and the resultant harm or disadvantage will remain unaddressed.<sup>70</sup>

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<sup>62</sup> Handler (1978) 107.

<sup>63</sup> Handler (1978) 107.

<sup>64</sup> Putting it in sociological terms, blacks were involved in multiplex relationships with whites and did not dare to “make trouble”.

<sup>65</sup> Handler (1978) 109.

<sup>66</sup> Handler (1978) 110.

<sup>67</sup> Handler (1978) 111.

<sup>68</sup> Handler (1978) 111.

<sup>69</sup> Handler (1978) 117.

<sup>70</sup> Millar and Phillips (1983) 11 *Int J Soc Law* 424 refer to research that have indicated that a minority of female employees perceives that discrimination is operating against them. The authors speculate that this may be because females are concentrated in teaching and the civil service where explicit discrimination is less likely to occur, or where almost the entire workforce is female. The authors also note the individualised nature of litigation, which does not





### 3.2.12 A formal concept of equality coupled with a liberal notion of individual autonomy and free choice has hampered the potential of anti-discrimination legislation:<sup>71</sup>

If the sexual segregation of the labour force, the concentration of women in low paid and part-time work, and the under-representation of women in highly paid and high-prestige jobs are seen as flowing from autonomous individual choices which flow in turn from women's and men's legitimately different lives, the tribunal will be more sympathetic to arguments of justification and less persuaded by the plaintiff's argument that the result represents a legally recognized injustice.

Freeman thinks little of the American version of anti-discrimination law. He is of the view that (American) anti-discrimination law is at its core embedded in a "perpetrator perspective" – it presupposes a world filled with atomistic individuals removed from the social fabric and without context, and racial discrimination is seen as an aberration, "misguided conduct of particular actors".<sup>72</sup> He traces Supreme Court precedent and

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address the power and resources differential of what is primarily a group-based and collectively-experienced harm. Also cf Packer (2002) 136: "Since women have been *brought up to believe that harmful traditional practices are the natural order of things* and since they are the victims of these practices, it is generally held that women, first and foremost, should receive human rights education" (my emphasis). Also see Thornton (1991) 18 *Melb U L Rev* 298: "Liberal theory is predicated upon the *'naturalness'* of the assignation of women to the private sphere and men to the public" (my emphasis). Bohler-Muller (2000) 16 *SAJHR* 638 argues that "legal interpretation and adjudication should take place in the context of the concrete experiences of, for example, women, disabled persons, gays and lesbians. *This approach would then result in the achievement of substantive equality ...* Critical Legal Theorists demand that we deal with individuals in the context of their disadvantage and that equality issues have to address the actual conditions of human life" (my emphasis). Bohler-Muller ignores the passive nature of courts in this argument. Of course courts should consider how their judgments facilitate the achievement of substantive equality, but if the "wrong" complainants bring the "wrong" kind of case, courts cannot necessarily do much to achieve substantive equality. Consider *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) – whether single mothers only or Hugo or even all single fathers were released, what would that have done for substantive equality between the sexes? (See Carpenter (2001) 64 *THRHR* 627 and Kende (2000) 117 *SALJ* 766.) Someone would have been looking after these convicts' children while they were in prison, probably other women. Had Hugo or all single fathers been released, what guarantee would we have that these fathers would suddenly take up primary child care responsibilities? No matter which way the court went, substantive equality would not have been furthered. Contra Vogt (2000) *PL* 190 who is optimistic to an absurd degree. Vogt analyses the *Hugo* judgment and states that "[E]ase of access to the Court's judgments because of the Internet means, moreover, that increasing numbers of interested citizens are liable to be influenced by the Court's reasoning. *And in practice, if only single mothers and not single fathers are released, the chances remain high that the children concerned will continue to be brought up by women*" (my emphasis).

<sup>71</sup> Lacey in Hepple and Szyszczak (eds) (1992) 102.

<sup>72</sup> Freeman (1978) 62 *Minn L Rev* 1053-1054.

concludes that for a while the Supreme Court's interpretation threatened to introduce a victim perspective,<sup>73</sup> but that the perpetrator perspective was again firmly entrenched.<sup>74</sup>

A formal concept of equality would also frown upon "affirmative action" policies, which is one of the more obvious ways in which laws could assist in alleviating systemic disadvantage.<sup>75</sup>

3.2.13 It is very hard to conceive of effective litigation strategies to combat structural discrimination.<sup>76</sup> In the context of the thesis, this limit deserves more extensive analysis than the preceding limits.

Structural discrimination is very difficult to attack, even if the concept of indirect discrimination is used, because an individual claim will likely be brought,<sup>77</sup> with the hope

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<sup>73</sup> The "victim perspective" prescribes that the underlying conditions associated with racial discrimination must be eliminated first before the problem will be solved, and requires positive remedies, not merely neutralising remedies. Freeman (1978) 62 *Minn L Rev* 1053. Freeman says that the closest the American Supreme Court ever came to adopting a victim perspective is *Griggs v Duke Power Co* 401 US 424 (1971). Freeman 327. Since then the court has moved to limit *Griggs's* possible implications. Freeman 1079 n128; 1114-1118. In South African parlance, the "victim perspective" corresponds closely with the concept of substantive equality.

<sup>74</sup> Freeman (1978) 62 *Minn L Rev* 1053-1057. Also see Fredman (2005) 21 *SAJHR* 163.

<sup>75</sup> Barnard and Hepple (2000) 59 *Cam LJ* 576.

<sup>76</sup> Fredman (2005) 21 *SAJHR* 168. Also compare Fuller's discussion of "polycentric problems" in Fuller (1978) 92 *Harv L Rev* 353, and his view that courts are not suited to solving these kinds of problems. Many if not all systemic discrimination cases are in reality polycentric problems. Loenen (1997) 13 *SAJHR* 427: "Of course it may be doubted whether any other legal concept [than substantive equality] could reach the more fundamental levels of gender relations. The same seems to hold true for race relations. Law, by its nature, is only a limited instrument in changing social reality". Contra Bohler-Muller and Tait (2000) 21 *Obiter* 415 who very optimistically declare that the equality courts "will afford an experimental yet *significant opportunity to reshape our society*" (my emphasis). The authors do not suggest *how* courts are to play this role. Mubangizi (2005) 21 *SAJHR* 32 is also optimistic about the ability of utilising human rights to reduce poverty, but his solution is naïve: Increase the knowledge and public awareness of human rights. (He cites studies that indicate a low level of awareness of human rights among the rural population, assumes that most rural people are poor, and then jumps to his conclusion that lack of awareness of human rights and poverty are linked.) He acknowledges that the low level of education contributes to high poverty levels, which begs the question: how does one utilise the law to increase education levels? Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 38 is extremely forthright: "The Judiciary cannot, of itself, correct all the systemic unfairness to be found in our society. Yet it can, at least, soften and minimise the degree of injustice and inequality which the eviction of the weaker parties in conditions of inequality of necessity entails ... [T]here are some problems based on contradictory values that are so intrinsic to the way our society functions that neither legislation nor the courts can 'solve' them with 'correct' answers". Kollapen in *Sunday Times* (2005-04-03) 18 seems to argue that (equality) courts are able to influence attitudes and behaviour but not necessarily effectively address structural discrimination.

<sup>77</sup> Class actions or representative actions are few and far between in anti-discrimination litigation. Bailey and Devereux (1998) 301. Also see Freedman (2000) 63 *THRHR* 320 and Freedman (1998) 115 *SALJ* 251. (He argues that "the adjudicative model is designed to deal with discrete wrongs and not with systemic inequality.") None of the early equality court cases that I am aware of were instituted as class actions (see Annexure F). Also cf Bauman and Kahana



that a successful outcome in one case will lead to ongoing effects.<sup>78</sup> Coupled with this limitation is the underlying implication of an individual lawsuit that what is being complained about is somehow abnormal; out of the ordinary; while the “truth” is that discrimination is the norm.<sup>79</sup> A tribunal treating an individual complaint as an “abnormality”; a tribunal that fails to understand that “but that is how things are” is not a defence, will not effect real change.<sup>80</sup>

Anti-discrimination legislation typically uses neutral terms in that it protects, for example, white people and men just as it protects black people and women, and therefore focuses on the *symmetrical* treatment of *individuals*.<sup>81</sup> Systemic, structural discrimination or as O’Regan puts it, “patterns of social disadvantage” is therefore almost impossible to target with this approach.<sup>82</sup> Symmetrical treatment causes difficulties where men and women are incomparably different, the best example being pregnancy: How are pregnant women to be treated to ensure “symmetrical” treatment with men?<sup>83</sup> Legislation usually deal with *symmetrical treatment* and not *impact*, which means that the social ill is not addressed.<sup>84</sup>

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in Bauman and Kahana (eds) (2006) x: “Courts ... are *designed to hear individual cases*, and therefore most often do well when they rule narrowly on the legal ... merits of the case” (my emphasis).

<sup>78</sup> Parghi (2001) 13 *CJWL* 144 argues that individual discrimination complaints that are expansively *remedied* can do a lot of systemic work. However, the claim still has to be brought in the first place: In a widely-cited and influential article, Galanter coins the phrases “one-shooter and “repeat player” and discusses why the repeat players generally come out ahead in litigation. The most obvious kind of case where structural reform could follow a court case is where a discriminated-against one shooter would have sued a discriminating and powerful repeat player. Cases where “one shooters” sue “repeat players” are rare however: Galanter (1974) 9 *Law & Soc Rev* 110.

<sup>79</sup> De Vos (2000) 63 *THRHR* 67; Lacey (1987) 14 *J Law & Soc* 417-418; Hannett (2003) 23 *Oxford J LS* 86. One should keep in mind though that courts generally deal with isolated, “abnormal” disputes; the “normal” position is that most people settle their disputes one way or the other far removed from courts. Courts cannot effectively solve wide-ranging violations – compare Plasket J’s plaintive wail in *Vumazonke v MEC for Social Development, Eastern Cape* 2005 (6) SA 229 (SE) para 10 (the case concerned non-payment of social grants): “[N]otwithstanding that literally thousands of orders have been made against the respondent’s department over the past number of years, it appears to be willing to pay the costs of those applications rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem ... [T]he courts are left with a problem that they cannot resolve; while they grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people ...” (my emphasis).

<sup>80</sup> Lacey in Hepple and Szyszczak (eds) (1992) 102-103.

<sup>81</sup> O’Regan (1994) *AJ* 66.

<sup>82</sup> O’Regan (1994) *AJ* 66.

<sup>83</sup> O’Regan (1994) *AJ* 67. Also see Loenen (1997) 13 *SAJHR* 418.

<sup>84</sup> O’Regan (1994) *AJ* 66-67.

The concept of substantive equality read with “affirmative action” does not achieve the results one would hope for. Arguably, affirmative action policies are put in place (and protected by law) to facilitate the creation of a more egalitarian society. However, the world-wide pattern seems to be that the well-off members of the targeted group become the main beneficiaries of affirmative action, instead of the “more deserving” members of that group.<sup>85</sup>

Hepple notes that anti-discrimination legislation has succeeded in removing barriers for at least some individuals and explicit (“in your face”) racism has been driven underground.<sup>86</sup> Such legislation also helps individuals who do not wish to discriminate but feel pressurised to do so by their social environment.<sup>87</sup> However, “cumulative racial disadvantage” is as part of social life in North America, Great Britain, Australia and New Zealand as it has always been.<sup>88</sup> A gap still exists in unemployment rates, wages, quality of housing and household income, which cannot only be explained with reference to differences in qualifications and experience.<sup>89</sup> Hepple believes that these statistics reflect ongoing discrimination by employers against blacks and the concentration of blacks in the lower rung occupations, most vulnerable to retrenchments.<sup>90</sup> Hepple notes that the United Kingdom Race Relations Acts of 1965, 1968 and 1976 have failed to address discrimination based on race effectively.<sup>91</sup> He refers to a survey by the Policy Studies Institute, confirmed by Labour Force surveys, of a differential between the unemployment rates, occupation level, wages, household income and housing quality between black and white.<sup>92</sup> He notes that the Acts did succeed in removing some barriers for some

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<sup>85</sup> Cf Fredman (2005) 21 *SAJHR* 167: “Those who lack the requisite qualifications as a result of past discrimination will still be unable to meet job-related criteria; women with child-care responsibilities will still not find it easier to take on paid work”. Also see Hirsch (2005) 7; Jagwanth (2003) 36 *Conn L Rev* 736; and Sowell (2004). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the “deserving sections” from designated groups should be the benefactors of affirmative action policies, which would imply excluding the “creamy layer” of designated groups from the benefits of affirmative action programmes. See Nair (2001).

<sup>86</sup> Hepple (1997) 18 *ILJ* 603-604.

<sup>87</sup> Hepple (1997) 18 *ILJ* 603-604.

<sup>88</sup> Hepple (1997) 18 *ILJ* 603-604.

<sup>89</sup> Hepple (1997) 18 *ILJ* 603-604.

<sup>90</sup> Hepple (1997) 18 *ILJ* 603-604.

<sup>91</sup> Hepple in Hepple and Szyszczak (eds) (1992) 19.

<sup>92</sup> Hepple in Hepple and Szyszczak (eds) (1992) 19.



individuals in employment, housing and the provision of services and that overt discrimination has decreased.<sup>93</sup>

In similar vein, in considering the effectiveness of the UK Race Relations Act of 1976, Coussey notes that three indicators may be used to measure racial inequality (in the employment sphere): Unemployment rates, occupational distribution (including employment levels) and levels of discrimination based on race.<sup>94</sup> She presents depressing statistics: Ethnic minorities were out of work longer than whites and their unemployment rate was double that of whites throughout the 1980s; ethnic minorities are mainly concentrated in certain categories of employment, in particular geographical areas and in lower-level employment levels.<sup>95</sup> She refers to a number of studies and surveys that highlight discrimination in employment applications and graduate recruitment.<sup>96</sup> She notes that neither the economic situation nor legislation has yet had a significant effect on the reach of racial discrimination and that the law had not been able to reduce the overall level of racial discrimination.<sup>97</sup>

To put it bluntly, law cannot cope with an argument that 350 years of colonialism, patriarchy and apartheid have caused the current state of affairs in South Africa: Who must be sued?<sup>98</sup> By whom? What is the cause of action?<sup>99</sup> The best one could hope for are

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<sup>93</sup> Hepple in Hepple and Szyszczak (eds) (1992) 20.

<sup>94</sup> Coussey in Hepple and Szyszczak (eds) (1992) 36.

<sup>95</sup> Coussey in Hepple and Szyszczak (eds) (1992) 36.

<sup>96</sup> Coussey in Hepple and Szyszczak (eds) (1992) 36-37.

<sup>97</sup> Coussey in Hepple and Szyszczak (eds) (1992) 37.

<sup>98</sup> The law of delict offers a similar problem where a “mass wrong” had occurred. Cf Marcus in Sarat and Kearns (eds) (1995) 253: “Throughout the twentieth-century history of torts, the most difficult cases have been those in which the connections between the injured and the injurers have been the most difficult to establish”. Marcus discusses the *Agent Orange* case in the United States as an example of such a “mass tort”: 2.4 million Vietnam veterans, their wives, their born and unborn children, soldiers from New Zealand and Australia versus 7 corporate defendants and the United States government. Marcus shows how the existing tort law could not cope with this situation. The “solution” was a mass settlement, orchestrated and coerced by the presiding judge. Had a different judge presided over the matter, the plaintiffs may well have received nothing, in the face of massive problems relating to causation. Also see Mamdani (1998) 15: “[P]erpetrators are personally and individually guilty, beneficiaries may not be. They may be unconscious beneficiaries of systemic outcomes, where benefits cannot necessarily be linked to individual agency”. I would argue that courts follow a “perpetrator paradigm” and searches for individual “fault”. Where someone has benefited from an immoral system, but did not actively participate in some evil deed whereby harm was caused to an identifiable “victim”, courts will likely not recognise a cause of action.

<sup>99</sup> Hepple (1997) 18 *ILJ* 604-605. Where an individual perpetrator may be identified, the remedy that a court will grant will probably only affect that individual perpetrator and not lead to ongoing, structural changes to society. Davel (2006)

occasional *ad hoc* “victories”. Below, I set out examples of such victories in three jurisdictions: the South African Constitutional Court, the equality courts, and the Canadian anti-discrimination tribunals.

*Pretoria City Council v Walker*<sup>100</sup> in an indirect way may have assisted in alleviating socio-economic inequalities when the Constitutional Court allowed the (then) Pretoria City Council to continue cross-subsidising the water and electricity rates of the under-served black townships. *Khosa v Minister of Social Development*<sup>101</sup> alleviated the plight of permanent residents, or at least those permanent residents who are aware of the judgment, in allowing them to apply for social assistance grants. Other than these two judgments, the Constitutional Court has not addressed structural discrimination in its equality judgments.

Likewise, the vast majority of the cases that have been brought to equality courts have not dealt with structural discrimination. Annexure F contains a profile of cases heard by the initial 60 pilot equality courts, as well as equality court cases referred to in the popular media. Of the approximately 65 cases dealing with discrimination,<sup>102</sup> to my mind only four of these could plausibly relate to structural discrimination: the case lodged in the Polokwane magistrate’s court,<sup>103</sup> the *Muller* and *Bosch* cases that both dealt with accessibility to state buildings by disabled people,<sup>104</sup> and the *Manong* decision

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12 *Fundamina* 119 optimistically refers to *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) as an example of “impact litigation as a tool to transform society”. This case related to the victim of sexual abuse that successfully sued her molester in delict. Davel does not explain how a monetary award made against a single perpetrator could in any way lead to a healthier society where men treats women with respect and dignity and do not physically or emotionally assault women.

<sup>100</sup> 1998 (2) SA 363 (CC).

<sup>101</sup> 2004 (6) SA 505 (CC).

<sup>102</sup> I do not consider cases based on hate speech and harassment under this heading. I cannot imagine that favourable outcomes in hate speech and harassment cases would lead to structural changes in South African society; at best the respondents in these cases would earnestly apologise to complainants and experience a change of heart, at worst respondents will pay for their prejudice and cynically sign without reading apologies drafted by their lawyers.

<sup>103</sup> In Polokwane a matter was brought by aggrieved residents of the township because they do not have electricity. They alleged that race discrimination occurred, presumably because white residents would broadly speaking have access to electricity. A possible outcome of a favourable (and extremely courageous) judgment would be to extend access to electricity to township/squatter camp residents on an expeditious basis.

<sup>104</sup> In the longer term decisions such as these could lead to structural changes to government buildings.



(Gauteng).<sup>105</sup> An equal number of cases – four – have been lodged or considered that could potentially *frustrate* attempts to address structural discrimination: In three cases white magistrates have brought claims in equality courts after they applied for promotion and were denied promotion in favour of black applicants,<sup>106</sup> and in the fourth matter a white member of the union Solidarity is considering bringing action against Nedbank because of its broad-based black empowerment shares scheme being open to black clients only.<sup>107</sup>

Few systemic discrimination complaints have been brought in the Canadian system as well.<sup>108</sup> Annexure C to the thesis sets out the various Canadian provinces' anti-discrimination provisions while Annexure D contains a profile of reported decisions by seven of the Canadian anti-discrimination tribunals from 1996-2003. Of the approximately 385 featured cases, only about 19 (5%) could plausibly relate to structural discrimination: *Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Limited and Air Canada*;<sup>109</sup> *Dumont-Ferlatte et al and Gauthier et al v Canada Employment and Immigration Commission, Department of National Revenue (Taxation), Treasury Board and Public Service Alliance of Canada*;<sup>110</sup> *Goyette and Tourville v Voyageur Colonial Limitée*;<sup>111</sup> *Laessoe v Air Canada and Airline Division, Canadian Union of Public Employees*;<sup>112</sup> *Moore & Akerstrom v Treasury Board, Department of Foreign Affairs & International Trade et al*;<sup>113</sup> *National Capital Alliance on Race Relations v Her Majesty the*

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<sup>105</sup> This matter relates to a black-owned engineering firm who applied to court for an order that the relevant Gauteng provincial department apply its affirmative action procurement policy. A possible outcome of this case would be that more black-owned firms obtain engineering contracts from the Gauteng province.

<sup>106</sup> The *Du Preez, King and Language* cases (see Annexure F.2.1 for more information.)

<sup>107</sup> *Kuypers v Nedbank* (see Annexure F.2.1 for more information.)

<sup>108</sup> Parghi (2001) 13 *CJWL* 141. The author lists the following reasons for the absence of these kinds of cases at 146-152: Subtle environmental factors must be identified that hinder true equality; complex empirical evidence may be needed to establish that equality-hindering attitudes and norms have resulted in unequal effects; expert evidence may be required to analyse the evidence, to explain the assumptions underlying it and to assist the court in drawing inferences from it; and it is doubtful how effective systemic remedies are. In short, "such cases require a great deal of effort".

<sup>109</sup> Employment-related discrimination; the salary structure was different for female employees.

<sup>110</sup> Employment-related discrimination; the 105 female complainants alleged that they were discriminated against by the respondents as they were not credited with annual leave and sick leave while they were on maternity leave.

<sup>111</sup> Employment-related discrimination; the complainant argued that the departmental seniority regime set up by collective agreements signed in 1981 and 1989 systemically discriminated against women.

<sup>112</sup> Employment-related discrimination; the complainant alleged that the respondent pursued a policy which limited spousal benefit coverage to heterosexual married and common law couples.

<sup>113</sup> Employment-related discrimination; the complainants alleged that the respondents pursued a policy or practice that tended to deprive a class of individuals (gay members) of employment opportunities.

*Queen as represented by Health and Welfare Canada et al*,<sup>114</sup> *Public Service Alliance of Canada v Government of the Northwest Territories*,<sup>115</sup> *Anderson et al v Alberta Health and Wellness*,<sup>116</sup> *Barrett et al v Cominco et al*,<sup>117</sup> *Miele v Famous Players Inc*,<sup>118</sup> *Neufeld (formerly Sabanski) v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Social Services*,<sup>119</sup> *Poirier v Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Municipal Affairs, Recreation and Housing*,<sup>120</sup>; *Reid et al v Vancouver (City) et al (No 5)*,<sup>121</sup> *Vogel and North v Government of Manitoba*,<sup>122</sup> *Brock v Tarrant Film Factory Ltd*,<sup>123</sup> *Dwyer and Sims v The Municipality of Metropolitan Toronto and The Attorney General for Ontario*,<sup>124</sup> *Roosma & Weller v Ford Motor Company of Canada and the CAW Local 707*,<sup>125</sup> *Gaudet v Government of Prince Edward Island*,<sup>126</sup> and *Magill v Atlantic Turbines Inc*.<sup>127</sup> Of these 19 cases, seven were dismissed – that leaves 12 cases out of 385 where structural changes may have followed a tribunal decision. 13 of the 19 cases were employment-related, which would then have limited any potential structural adjustments to that specific

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<sup>114</sup> Employment-related discrimination; the complainant alleged that the respondent discriminated against visible minorities as evidenced by the extremely low number of permanent visible minority employees in senior management positions, in the Administration and in the Foreign Service category, and the concentration of visible minorities in lower level positions, and the failure to promote them on an equitable basis.

<sup>115</sup> Employment-related discrimination; government employees in female dominated occupational groups received lower wages than employees in male dominated occupational groups performing work of equal value.

<sup>116</sup> The complaint related to discrimination in the provision of health care services; Alberta Health Care did not cover same-sex partnerships in terms of the definition of “dependants” in the relevant legislation.

<sup>117</sup> Representative claim of all the respondent’s employees between 46 and 55 years of age with more than 20 years of service; employment-related complaint (retrenchment); the severance benefits were calculated according to age at date of retrenchment and years of service.

<sup>118</sup> The complainant complained about the respondent’s policy that people in wheelchairs could only gain access to the premises by a locked and unstaffed entrance and that that entrance was used exclusively for people in wheelchairs.

<sup>119</sup> The complainant argued that the maintenance exemption in s 14(1) of Schedule B of the former *Guaranteed Available Income for Need Regulations BC Reg 316/92* was discriminatory.

<sup>120</sup> Employment-related complaint; the complainant alleged that the respondent did not allow her to continue to breast-feed her child at work or at seminars presented by the respondent.

<sup>121</sup> Employment-related discrimination; the complainants alleged that the communication operators, almost exclusively female, perform the same or similar duties as the fire dispatchers (all male) but are paid less.

<sup>122</sup> The complainants had been in a longtime relationship; the complainant argued that he and his partner were entitled to certain employment benefits, being in a same-sex spousal relationship.

<sup>123</sup> A disabled complainant lodged a claim because of insufficient wheelchair access to a movie theatre.

<sup>124</sup> The complainants challenged their employers’ pension benefits, insured health benefits and uninsured employment benefit plans for excluding same sex spousal relationships.

<sup>125</sup> Employment-related discrimination; the complainants were members of the Wordwide Church of God which prohibited work from Friday at sunset to Saturday at sunset. The complainants were progressively disciplined from missing Friday night shifts.

<sup>126</sup> Accessibility of the Prince County courthouse to wheelchairs.

<sup>127</sup> Employment-related complaint; the complainant referred to a large number of incidents where the female employees were treated in an adverse manner, compared to the male employees.





respondent-employer. From a South African perspective, where up to 40% of the population is estimated to be unemployed,<sup>128</sup> employment-related structural adjustments would be completely meaningless for a large portion of inhabitants.

3.2.14 From a critical left perspective, anti-discrimination legislation is also usually viewed with skepticism:

Critical Race theorists differ about the way in which to address racism. What Delgado describes as the “idealist school”, holds that race is a social construction.<sup>129</sup> Groups are “racialised” through thoughts, words, messages, stories and scripts that infuse people’s minds with images of inferiority.<sup>130</sup> Racism is to be overcome by speaking out against it, using education to expose whites to blacks, controlling hate speech, emphasise storytelling by minorities and to encourage whites to rid themselves of any unconscious racism.<sup>131</sup> If the social image of people of colour is changed, the racial fortune of these groups will rise.<sup>132</sup> “Materialists”, on the other hand, proclaims that material factors such as competition for employment, and the class interests of privileged or elite groups, play a larger role in a system of white dominance.<sup>133</sup> According to this train of thought, racism reinforces material or psychic advantages for powerful groups.<sup>134</sup>

Bell is very skeptical about the possibilities of anti-discrimination legislation.<sup>135</sup> The conflict in anti-discrimination disputes (specifically private discrimination) between racial equality and freedom of association, he believes, will not be resolved in court cases by reference to “neutral principles”, but by the “existing power relationships in society and the perceived self-interest of the white elite”.<sup>136</sup> He refers to Dubois who believes that *Brown* would not have happened had it not been for the perceived threat of communism and the United

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<sup>128</sup> Terreblanche (2002) 33; Christie in MacEwen (ed) (1997) 177-178; O’Regan in Loenen and Rodrigues (eds) (1999) 14; Liebenberg and O’Sullivan (2001) 2.

<sup>129</sup> Delgado (2002) 37 *Harv CRCL LR* 370.

<sup>130</sup> Delgado (2002) 37 *Harv CRCL LR* 370.

<sup>131</sup> Delgado (2002) 37 *Harv CRCL LR* 370.

<sup>132</sup> Delgado (2002) 37 *Harv CRCL LR* 370.

<sup>133</sup> Delgado (2002) 37 *Harv CRCL LR* 371.

<sup>134</sup> Delgado (2002) 37 *Harv CRCL LR* 371.

<sup>135</sup> Bell (1980); Freeman (1981) 90 *Yale LJ* 1880.

<sup>136</sup> Bell (1980) 435.



State's perceived role as leader of the Free World.<sup>137</sup> He agrees with Piven and Cloward, who hold that "the poor gain more through mass defiance and disruptive protests than by organising for electoral politics and other more acceptable reform policies and that the latter kind of activity actually undermines effectiveness".<sup>138</sup> He believes that the effect of anti-discrimination legislation will result in the upliftment of some blacks into the middle class while the large majority of blacks will remain poor.<sup>139</sup> Elsewhere he states that school desegregation has largely failed, despite *Brown*.<sup>140</sup> He utilises the concept of "interest convergence" to explain why *Brown* happened in the first place, and why the promise contained in the judgment ultimately turned out to be false. "Interest convergence" predicts that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites".<sup>141</sup> The Fourteenth Amendment on its own will not secure effective racial equality for blacks where what is asked from the court will threaten the superior social status of middle and upper class whites.<sup>142</sup> Bell points out that *Brown* was not the first time that school desegregation was at issue in a court case.<sup>143</sup> Pre-*Brown* judicial remedies entailed court orders directing that school facilities be equalised.<sup>144</sup> Bell then turns his attention to the value of *Brown* to whites: The decision helped to strengthen America's credibility in the fight against communism, black soldiers returning after the Second World War were disillusioned and angry at their treatment and could have "fallen" to communism and white elites realised that the South would only improve economically when state-sponsored segregation ceased.<sup>145</sup>

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<sup>137</sup> Bell (1980) 412.

<sup>138</sup> Bell (1980) 306.

<sup>139</sup> Bell (1980) 565.

<sup>140</sup> Bell (1980) 93 *Harv L Rev* 518.

<sup>141</sup> Bell (1980) 93 *Harv L Rev* 523. Also see Delgado (2002) 37 *Harv CRCL LR* 371: *Brown* happened because "the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage". At 386 his conclusion is depressing: "[P]rogress for marginalized groups comes most easily when a strategic concession benefits power brokers in government and industry. Without an alignment of interests, the road to reform is long and dark. At the moment, the mood of the country, as in much of the West, favors investment and revenge over social justice and redistribution".

<sup>142</sup> Bell (1980) 93 *Harv L Rev* 523.

<sup>143</sup> Bell (1980) 93 *Harv L Rev* 524.

<sup>144</sup> Bell (1980) 93 *Harv L Rev* 524.

<sup>145</sup> Bell (1980) 93 *Harv L Rev* 526.



In a more recent work Bell seems to believe that law has some role to play in achieving real equality.<sup>146</sup> On the legal front he identifies a serious challenge: The American constitution must be broadened to include economic rights by recognising an entitlement to basic needs such as a job, housing, health care, education and social security as a property right.<sup>147</sup> He suggests that where the choice is between justice for blacks and racism, racism wins every time, but where the choice is between racism and perceived self-interest for whites, the ostensible choice is justice for blacks.<sup>148</sup> Civil rights strategists must therefore decide how to present their challenges to persuade whites that what is being asked is in their interest.<sup>149</sup>

Delgado notes that racist ideology and social structures reinforce each other and therefore attacking this ideology will have some influence on the latter; however “the relationships between discourse and material conditions, thought and economic coercion, stereotypes and racial subordination are more complex than the discourse analysts may realize”.<sup>150</sup> Delgado says that by only treating the symptoms of racism (that is, discrimination) without focusing on the forces that create and maintain it (that is, economic oppression), effective strategies will not be devised.<sup>151</sup>

Crenshaw is perhaps less cynical.<sup>152</sup> She points out that neoconservatives and critical scholars alike question the viability of anti-discrimination legislation.<sup>153</sup> Conservatives postulate that the goals of such legislation have been reached and that the idea of an “ongoing struggle” is inappropriate.<sup>154</sup> Leftist scholars assert that rights-talk ultimately legitimise racial inequality and oppression that is ostensibly being remedied by using rights.<sup>155</sup> She holds that the civil rights struggle was a viable pragmatic strategy.<sup>156</sup> She

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<sup>146</sup> Bell in Hepple and Szyszczak (eds) (1992) 3-18.

<sup>147</sup> Bell in Hepple and Szyszczak (eds) (1992) 15.

<sup>148</sup> Bell in Hepple and Szyszczak (eds) (1992) 15.

<sup>149</sup> Bell in Hepple and Szyszczak (eds) (1992) 15.

<sup>150</sup> Delgado (2001) 89 *Geo LJ* 2287.

<sup>151</sup> Delgado (2001) 89 *Geo LJ* 2288.

<sup>152</sup> Crenshaw (1988) 101 *Harv L Rev* 1331.

<sup>153</sup> Crenshaw (1988) 101 *Harv L Rev* 1334.

<sup>154</sup> Crenshaw (1988) 101 *Harv L Rev* 1339.

<sup>155</sup> Crenshaw (1988) 101 *Harv L Rev* 1334.

states that the civil rights legislation appears to have succeeded in removing formal barriers and that the removal of these barriers was meaningful.<sup>157</sup> (However, a concept of formal equality coupled with the non-recognition of differences based on wealth will not lead to judicial remedies that facilitate the redistribution of wealth and yet economic exploitation and poverty is centrally related to racial discrimination.<sup>158</sup>) She believes that liberalism offers a transformative potential and that liberalism is receptive to at least some black aspirations.<sup>159</sup> As to Tushnet's view that "what really matters ... is not whether people are exercising rights, but whether their action is politically effective",<sup>160</sup> she suggests that the civil rights struggle may well have been politically effective action as it for example for the first time raised the idea of blacks exercising rights, which have been arguably a liberating activity and that rights-talk was a movement-building act.<sup>161</sup> She acknowledges the critical left's position that rights-talk has facilitated the deradicalisation and co-option of the challenge to achieve racial justice but points out that blacks have very limited options in challenging the *status quo* and that their claims would probably not have been heard if it was stated in other, "non-legal" terms.<sup>162</sup>

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<sup>156</sup> Crenshaw (1988) 101 *Harv L Rev* 1335. At 1378 she states "the response to the civil rights movement was the removal of most formal barriers and symbolic manifestations of subordination. Thus, "White Only" notices and other obvious indicators of the societal policy of racial subordination disappeared – at least in the public sphere. The disappearance of these symbols of subordination reflected the acceptance of the rhetoric of formal equality and signalled the demise of the rhetoric of white supremacy as expressing America's normative vision... The eradication of formal barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage. *Yet despite these disparate results, it would be absurd to suggest that no benefits came from these formal reforms, especially in regard to racial policies, such as segregation, that were partly material but largely symbolic. Thus, to say that the reforms were 'merely symbolic' is to say a great deal'* (my emphasis). I would argue that in South Africa, where the material deprivation is much greater than in the United States, the "symbolic" value of reform carries much less weight.

<sup>157</sup> Crenshaw (1988) 101 *Harv L Rev* 1348.

<sup>158</sup> Freeman as discussed by Crenshaw (1988) 101 *Harv L Rev* 1352.

<sup>159</sup> Crenshaw (1988) 101 *Harv L Rev* 1357.

<sup>160</sup> Tushnet (1984) 62 *Tex L Rev* 1371 as understood by Crenshaw (1988) 101 *Harv L Rev* 1364.

<sup>161</sup> Crenshaw (1988) 101 *Harv L Rev* 1364; 1365.

<sup>162</sup> Crenshaw (1988) 101 *Harv L Rev* 1385.



### 3.3 *Parliament's response to the limits of traditional anti-discrimination legislation*

The drafters of the Act attempted to address the traditional “defects” of anti-discrimination legislation. The Act contains a number of positive features and has the potential to effect (some) changes in South African society:

#### 3.3.1 The Act adopts a substantive notion of equality and addresses systemic discrimination

The drafters of the Act explicitly rejected a formal concept of equality.<sup>163</sup>

The Act defines “equality” as follows:<sup>164</sup>

The full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.

This definition of equality refers to the concept of “substantive equality”.<sup>165</sup> The Constitutional Court has accepted that the Constitution embraces this understanding of equality, in contrast with “formal equality”.<sup>166</sup> If one accepts the premise that the Constitution is a transformative document

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<sup>163</sup> See 3.2.12 above.

<sup>164</sup> S 1(1)(ix).

<sup>165</sup> A formal, abstract approach to equality entails treating all individuals in the same manner, regardless of their particular circumstances and without taking into account that their positions in society differ. A substantive approach to equality pays particular attention to the context in which a litigant asks a court for assistance. The position of a particular litigant in society, the group to which she belongs and the history of the particular disadvantage are analysed. This approach emphasises the need to not only get rid of discriminatory laws but to actively and with positive steps remedy disadvantage and to redistribute social and economic power. Albertyn and Kentridge (1994) 10 *SAJHR* 152; Albertyn and Goldblatt (1998) 14 *SAJHR* 250; De Vos (2000) 63 *THRHR* 67; Loenen (1997) 13 *SAJHR* 403. There is something patronising about substantive equality, however, which is probably inescapable – MacKinnon in Dawson (ed) (1998) 365 calls the idea that some people need “special” treatment a “doctrinal embarrassment”.

<sup>166</sup> Eg *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) par 73. Perhaps simplifying the concepts, formal equality entails treating people in the same way, irrespective of their differences while substantive equality holds that differences should not be ignored but accommodated. Freedman (2000) 63 *THRHR* 316; Van Reenen (1997) 12 *SAPL* 153; De Waal (2002) 14 *SA Merc LJ* 141. Formal equality masks inequality. De Vos (1999) 63 *THRHR* 67. For example, formal equality holds that everybody should receive the same standard of teaching, irrespective of differences. However, this would mean that a blind student would be disadvantaged if additional steps are not taken to address his or her particular needs. Put bluntly, substantive equality is more expensive than formal equality. Substantive equality is asymmetrical - Wentholt in Loenen and Rodrigues (eds) (1999) 61; Loenen (1997) 13 *SAJHR* 407, 408. The American Supreme Court seems to employ a symmetrical approach to equality by subjecting “race-specific policies designed to harm the historically oppressed” and “race-conscious policies designed to foster racial

then the right to equality cannot be viewed in the traditional, liberal way - A contextual, impact-based, remedial or substantive approach has to be adhered to.<sup>167</sup> At least theoretically, if the “right” kinds of cases are brought to the equality courts, on a large scale, and if equality courts give meaningful effect to the definition of “equality” as stated in the Act as including *de facto* equality and equality of outcomes, broad and large-scale social transformation must follow. (As pointed out in chapter 2, however, this is an unrealistic assumption.)

As is the case in section 9(3) and 9(4) of the Constitution, the Act outlaws direct and indirect discrimination. The intention to discriminate is not required in the case of either direct or indirect discrimination.<sup>168</sup> However, the intention to discriminate may be a factor to consider when deciding on the unfairness of discrimination.<sup>169</sup> Indirect discrimination links with a substantive and asymmetrical approach to equality.<sup>170</sup> Indirect discrimination refers to a facially neutral provision that disproportionately affects particular groups.<sup>171</sup> An often-cited example is the effect of childcare responsibilities on gender equality in the workplace.<sup>172</sup> Substantive equality and a concept of indirect discrimination would for example found an argument for the establishment of an in-house crèche or the introduction of “flexi-hours” to offset the disadvantage linked to childcare responsibilities (that overwhelmingly negatively affect female employees.<sup>173</sup>)

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equality” to the same strict scrutiny. See Higgins and Rosenbury (2000) 85 *Cornell L Rev* 1196. Some American commentators seem to distinguish between “real anti-discrimination laws” and “accommodation” laws and do not seem to accept a substantive approach to equality. Jolls (2001) 115 *Harv L Rev* 643 and further. There is a danger that substantive equality may turn into little more than formal equality if the “accommodation” of difference is read narrowly to merely entail a slight modification of existing structures. Barclay (2001) 19 and *Supreme Court of British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 1 at 41-42.

<sup>167</sup> De Vos “Equality Conference” (2001) 7-8.

<sup>168</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43.

<sup>169</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43; Currie and De Waal (2005) 263.

<sup>170</sup> Loenen (1997) 13 *SAJHR* 404. The Constitution lists the prohibited grounds in a symmetrical fashion without a strong textual indication that the prohibition against race discrimination was primarily put in place to assist blacks, the prohibition against sex/gender discrimination to assist women, and so forth. (Cf Sheppard (2001) 80 *Can BR* 896; Loenen at 407-408). Ss 7, 8 and 9 in the Act make it more clear which particular kinds of harms the legislature had in mind when it prohibited race, sex and disability discrimination.

<sup>171</sup> The Supreme Court of Canada has apparently done away with the difference between direct and indirect discrimination in *British Columbia (PSERC) v BCGSEU* [1999] 3 SCR 3. The Court held liability will be imposed if an act or policy has the effect of differentially treating an individual or a group identified by reference to one of the grounds of discrimination. See Réaume (2002) 40 *Osgoode Hall LJ* 142-143.

<sup>172</sup> Eg Albertyn and Kentridge (1994) 10 *SAJHR* 165.

<sup>173</sup> Cf Wentholt in Loenen and Rodrigues (eds) (1999) 57 and further. Also see Albertyn and Kentridge (1994) 10 *SAJHR* 166.



In contrast to many other anti-discrimination statutes,<sup>174</sup> the Act does not expressly require a comparison between the complainant and a suitable comparator.<sup>175</sup> It would therefore seem possible to base a claim on the mere fact that the complainant may be identified by one or more of the prohibited grounds, with the important proviso that the complainant must have suffered some identifiable harm.<sup>176</sup> It would in any event always be open to a respondent to prove to a court that the ostensible discrimination did not take place on a ground identified in the Act.<sup>177</sup>

In its first judgment relating to the Act, the Constitutional Court in *MEC for Education: KwaZulu-Natal and others v Pillay*,<sup>178</sup> left open the question whether the Act requires a comparator.<sup>179</sup> The respondent argued that under the Act it was unnecessary to show a comparator or dominant group and that as long as a rule imposed disadvantage, it could be discriminatory.<sup>180</sup> The appellants argued that although a comparator was not specifically mentioned in the applicable definition in the Act, that a comparator should be implied as a requirement.<sup>181</sup> The Court held that a comparator was present in this matter: “It is those learners whose sincere religious or cultural beliefs or

<sup>174</sup> Eg see the Queensland Anti-Discrimination Act s 10, Victoria Equal Opportunity Act s 8 (Annexure B.) In *Andrews v British Columbia* [1989] 1 SCR 143 at 164 the Canadian Supreme Court opined that “[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises”. Also see 3.2.8 above.

<sup>175</sup> Albertyn and Kentridge (1994) 10 *SAJHR* 153-155 point out that the “similarly situated” test as developed in the United States and Canada is “insufficient because it does not supply criteria by which to judge (a) when a person is similarly situated and with whom; (b) when a person should be treated in the same way, or differently; and (c) what kind of different treatment is appropriate. Canadian courts have since developed a greater appreciation for targeting social, political and legal prejudice and vulnerability. Collins (2003) 66 *Mod L Rev* 32 advocates the use of a model of “social inclusion” to avoid a comparative approach: “The policy of social inclusion asks for proof that the rule or practice tends to reinforce the exclusion of an individual member of an excluded group or most members of the excluded group. A comparison can supply evidence of exclusionary effect, but it is not essential to proof”.

<sup>176</sup> Bohler-Muller and Tait (2000) 21 *Obiter* 410: “Critical Legal Theorists demand that we deal with individuals *in the context of their disadvantage* and that equality issues have to address the actual conditions of human life” (my emphasis). (The Act refers explicitly to disadvantage and the complainant’s context in the Preamble, and ss 3(1)(a), 4(2) and 14(2)(a)). Contra Davis (1999) 116 *SALJ* 407: “Refusing to engage in a fair comparison is hardly the way to develop a coherent jurisprudence of equality”.

<sup>177</sup> See 3.8.1 (“Burden of proof”) below. *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC) para 12 (“*DP*”) could perhaps be read to indicate that an actual *causal connection* must exist between the prohibited ground and the discrimination. See De Waal (2002) 14 *SA Merc LJ* 152. *DP* however dealt with a case of alleged legislative discrimination (or state discrimination), and not private discrimination. Furthermore *DP* interpreted the Constitutional approach to discrimination and not the Act’s (possible broader) understanding of “discrimination”.

<sup>178</sup> Case number CCT 51/06; unreported.

<sup>179</sup> Para 44 (per Langa CJ) and para 164 (per O’Regan J).

<sup>180</sup> Para 28. The “rule” in this case was the Durban Girls’ High School Dress Code which prohibited the wearing of any jewellery except ear rings or ear studs, one in each ear, at the same level. The respondent’s child wore a nose stud as part of a Hindu custom and was told to remove the stud, which she refused. Also see p 651-652, Annexure F.2.1, below.

<sup>181</sup> Para 42.

practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised”.<sup>182</sup> With respect to the Court, this is a circular argument. This ostensible comparison does not answer the question *how* one establishes if a learner’s cultural beliefs were compromised. The Equality Act’s definition of “discrimination” achieves that purpose, without the need to resort to a comparison: a learner’s cultural beliefs are compromised if a benefit is withheld from that learner, or a disadvantage is withheld, on the learner’s cultural belief. In *Pillay*, the learner was not allowed the benefit of expressing her cultural belief, and that would amount to discrimination. The court’s reliance on a comparator in this matter was rather contrived.

### 3.3.2 The Act contains an open-ended list of prohibited grounds

It cannot be said that the Act is overly restrictive by limiting the grounds on which a discrimination claim may be based. In addition, the Act also allows claims on intersecting grounds.<sup>183</sup>

The Act contains an open list of prohibited grounds.<sup>184</sup> In section 1(1)(xxii) a number of grounds are explicitly listed: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. In the same section, the Act creates a test in terms of which additional grounds may be recognised by equality courts:

[A]ny other ground where discrimination based on that other ground—

- (i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

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<sup>182</sup> Para 44 (per Langa CJ). O’Regan J in para 164 found the following comparator: “[T]hose learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case”.

<sup>183</sup> See 3.2.6 above.

<sup>184</sup> See Loenen (1997) 13 *SAJHR* 407: “In time, other grounds not mentioned may come to be considered ‘suspect’ if they begin to lead to patterns of disadvantageous treatment and exclusion. The open formulation as to the grounds of discrimination thus leaves room for development, or for new sensitivities to old forms of exclusion”.





Instead of having to follow the “pigeon-hole” approach of for example the Canadian anti-discrimination jurisdictions,<sup>185</sup> courts may of their own accord “invent” or “discover” new grounds that are worthy of protection.

A discrimination complaint may also be brought on “one or more” prohibited grounds, which means that a complainant does not have to choose a single, particular ground on which to base her claim, and risk losing the case for choosing the “wrong” ground.<sup>186</sup>

Chapter 7 contains a number of unremarkable provisions,<sup>187</sup> save for section 34.<sup>188</sup> In terms of this section, the Minister of Justice and Constitutional Development must specially consider the inclusion of the following grounds in the definition of “prohibited grounds”: HIV/AIDS status, socio-economic status, nationality, family responsibility, and family status. Equality courts would be allowed, however, to adjudicate complaints on these grounds and would be allowed to make determinations that these grounds are included in the definition of “prohibited grounds” in terms of paragraph (b) of that definition.

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<sup>185</sup> Réaume (2002) 40 *Osgoode Hall LJ* 113 describes how the Ontario legislature first only outlawed “Whites Only” signs in shop windows, a decade later targeted discrimination in employment in a separate statute, at much the same time passed the *Female Employees Fair Remuneration Act*, a few years later prohibited the “denial of accommodation, services or facilities”, then targeted rental accommodation, then expanded the prohibition to *all* goods, services and facilities. The same approach was followed relating to prohibited grounds. Instead of working out a general theory, the legislature fell back on the “ad hoc application of band-aids”. Initially race and religion was identified, then “colour, nationality, ancestry or place of origin”, age was added in 1966, sex and marital status in 1972, family status and handicap in 1981, and sexual orientation in 1986.

<sup>186</sup> Réaume (2002) 40 *Osgoode Hall LJ* 133 refers to *De Graffenreid v General Motors* 413 F Supp 142 (ED Mo 1976) in which a black woman’s discrimination complaint was dismissed, apparently on the basis that the respondent could show that he had hired black men and white women, which in turn showed that neither race nor sex discrimination was present. The author continues: “[T]he focus on each ground to the exclusion of the other makes the discrimination disappear. The enumeration of discrete prohibited grounds seems to foster this approach, as though the correct procedure were to run one’s finger down the list of prohibited grounds and noting that ‘black women’ is not one of the categories, deny a claim, just as one would deny a claim to recovery for discrimination on the basis of obesity because it is an attribute that is not on the list”. Also see Albertyn and Kentridge (1994) 10 *SAJHR* 168.

<sup>187</sup> S 32 creates the Equality Review Committee and s 33 sets out its powers and functions. S 35 sets out the Act’s short title and states that different dates of coming into operation may be set for different sections in the Act.

<sup>188</sup> “(1) In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status— (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of “prohibited grounds” by the Minister; (b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister. (2) Nothing in this section— (a) affects the ordinary jurisdiction of the courts to determine disputes that may be resolved by the application of law on these grounds; (b) prevents a complainant from instituting proceedings on any of these grounds in a court of law; (c) prevents a court from making a determination that any of these grounds are grounds in terms of paragraph (b) of the definition of ‘prohibited grounds’ or are included within one or more of the grounds listed in paragraph (a) of the definition of ‘prohibited grounds’”.

It would have been preferable to include these grounds in the definition of “prohibited grounds”. As the section quite rightly notes, these four grounds have a severe impact on society and lead to systemic disadvantage. To be differentiated from others on these grounds will also very likely infringe one’s dignity, at least in particular contexts. The Constitutional Court has already found that citizenship constitutes an unlisted ground in *Larbi-Odam v MEC for Education (North-West Province)*<sup>189</sup> and in *Hoffmann v SAA*<sup>190</sup> it held that HIV/AIDS status is worthy of protection.<sup>191</sup> The SAHRC held a workshop in Johannesburg on 20 March 2003 relating to these additional grounds, with a view to advising the Minister whether these grounds should be explicitly added to the list of prohibited grounds in the Act. At an Equality Review Committee workshop in 2003 the Committee concluded that these additional grounds should be explicitly included in the list of prohibited grounds.<sup>192</sup> The Act has however not been amended accordingly.

### 3.3.3 The Act eases the complainant’s burden of proof

The drafters of the Act took note of the evidentiary burden usually imposed on claimants in anti-discrimination legislation, and substantially eased the complainant’s burden of proof.<sup>193</sup>

Compared to the usual principles that apply in civil cases, the Act substantially eases the complainant’s evidentiary burden.<sup>194</sup> Briefly put, the complainant must establish that “discrimination” occurred. It is then up to the respondent to justify the discrimination.<sup>195</sup>

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<sup>189</sup> 1998 (1) SA 745 (CC).

<sup>190</sup> 2001 (1) SA 1 (CC).

<sup>191</sup> *Albertyn et al* (eds) (2001) 86 seem to argue that the Constitutional Court did not make an explicit finding that HIV/AIDS status is a prohibited ground in terms of the test laid down for the recognition of additional grounds. This argument is difficult to follow. The Court explicitly finds that the SAA “discriminated” against the appellant because of his HIV status (para 29). “Discrimination” can only take place on a ground protected in the Constitution, else it will be mere “differentiation”. At para 40 the Court repeats that “the denial of employment to the appellant because he was living with HIV *impaired his dignity and constituted unfair discrimination*” (my emphasis). The only question the court explicitly leaves open is if HIV status could also be read into “disability”. (Para 40). *De Vos* (2003) 7 *LDD* 85 fn 11 argues that the Constitutional Court in *Hoffmann* “found that differentiation on the basis of HIV status constituted unfair discrimination in terms of s 9(3) of the Constitution”.

<sup>192</sup> *Lane* (2005) 20 (internet version).

<sup>193</sup> See 3.2.1 above.

<sup>194</sup> S 13 provides as follows: (1) If the complainant makes out a *prima facie* case of discrimination— (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds. (2) If the discrimination did take place— (a) on a ground in paragraph (a) of the definition of “prohibited grounds”, then it is unfair, unless the respondent proves that the discrimination is fair; (b) on a ground in paragraph (b) of the definition of “prohibited



From the *Walker*<sup>196</sup> and *Harksen*<sup>197</sup> judgments the following may be stated regarding the burden of proof when dealing with a dispute in terms of section 9 of the Constitution:

- In human rights litigation generally, the onus is on the applicant to prove an infringement of his or her fundamental right(s). The onus is then on the respondent to show that the infringement was justifiable in terms of the limitation clause.
- Section 9 litigation follows a slightly different pattern:
- The applicant needs to prove differentiation and needs to prove that the differentiation occurred on one of the listed grounds contained in section 9(3). A presumption of unfair discrimination arises if the applicant succeeds. (The Court accepts that differentiation on a listed ground may not always amount to discrimination, but does not expand on this. A possible (banal) example would be separate bathroom facilities for males and females.) The respondent bears the burden of rebuttal of this presumption.<sup>198</sup> If the respondent cannot discharge this burden, the Court will accept that unfair discrimination occurred.
- Alternatively, the differentiation could have occurred on a ground not listed in section 9(3), eg nationality or HIV/AIDS status. In such a case, the applicant needs to prove that differentiation occurred and that the ground on which the differentiation occurred “is based on attributes and characteristics which may have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”.<sup>199</sup> The Court will then accept that the applicant has proven that discrimination has occurred. The applicant will also need to “establish”<sup>200</sup> (which I assume means “prove”) that the discrimination was unfair. If the applicant successfully manages this as well, the Court will accept that unfair discrimination occurred.

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grounds”, then it is unfair— (i) if one or more of the conditions set out in paragraph (b) of the definition of “prohibited grounds” is established; and (ii) unless the respondent proves that the discrimination is fair.

<sup>195</sup> Also see *Albertyn and Kentridge* (1994) 10 *SAJHR* 174.

<sup>196</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

<sup>197</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>198</sup> A burden of rebuttal is seemingly something less than a full onus. *Schmidt* (1990) 41-42. *Contra De Waal et al* (2000) 194 who are of the opinion that the respondent has to *prove* that the discrimination is not unfair.

<sup>199</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

<sup>200</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

- The respondent then bears the onus of justifying the breach of section 9. If it cannot do so, the Court will grant appropriate relief to the applicant.

The Act deals with an equality complaint in a different way:

- The applicant needs to show, on a *prima facie* basis, that “discrimination” as defined in the Act took place. This would mean that the applicant needs to show the following on a *prima facie* basis:
- That the applicant has been burdened or disadvantaged or an advantage has been withheld on a ground listed in the Act.<sup>201</sup> (This list follows the list in section 9(3) of the Constitution.) The respondent then bears the onus of either showing that the applicant was not so burdened or that an advantage was not so withheld or that the discrimination was not based on one of the listed grounds.
- Alternatively, the burden or withholding of an advantage could have occurred on a ground not listed in the Act, eg nationality or HIV/AIDS status. In this case, the applicant needs to show *prima facie* that the ground on which the burden was imposed or the advantage withheld is of such a nature that it causes or perpetuates systemic disadvantage or undermines human dignity or adversely affects the equal enjoyment of rights and freedoms in a serious manner that is comparable to the imposing of a burden or the withholding of an advantage on one of the listed grounds. If the applicant succeeds, the respondent either needs to prove that the applicant was not so burdened or that an advantage was not so withheld, or needs to prove that the ground on which the discrimination was based is of such a nature that it does not cause or does not perpetuate systemic disadvantage; or that it does not undermine human dignity; or that it does not adversely affect the equal enjoyment of rights and freedoms in a serious manner and that it is not comparable to the imposing of a burden or the withholding of an advantage on one of the listed grounds.
- A possible (theoretical) problem arises: assume the applicant shows on a *prima facie* basis that he has been burdened on a ground that is of such a nature that it eg causes systemic

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<sup>201</sup> It seems as if “discrimination” carries two different meanings in s 13. It would appear as if “discrimination” in s 13(1) carries the meaning as per the definition in s 1. “Discrimination” in s 13(1)(a) seems to carry the meaning of the definition but without the words “any person on one or more of the prohibited grounds”. This last-mentioned fragment is covered by s 13(1)(b).



disadvantage. The onus now shifts to the respondent to either prove that the applicant was not so burdened, or to prove that the ground on which the burden was imposed, does not fit the definition of “prohibited grounds”. Will the respondent be asked to meet the case of the applicant and prove that the ground is of such a nature that it does not cause systemic disadvantage, or may the respondent proceed to prove that the ground does not fit one of the other qualifiers in the definition of “prohibited grounds”? In other words, may the respondent adopt the following approach: “Your lordship, I accept that the applicant has shown on a *prima facie* basis that the ground on which he has been discriminated against causes systemic disadvantage. I will however prove that the ground on which he has been discriminated against does not undermine human dignity, and that the applicant's claim should therefore fail”.

- On a literal interpretation of the Act, this approach seems possible but I think that the respondent would need to meet the case of the applicant. If the applicant showed on a *prima facie* basis that the ground for example causes systemic disadvantage, the respondent will need to prove that the ground does *not* cause systemic disadvantage. Otherwise the unsatisfactory position will arise that the applicant's and respondent's arguments remain unanswered by their opponent and that the Court will not have the opportunity to review the *pro* and *contra* arguments relating to a particular qualifier. However, I do not believe that this poses a serious problem. It is extremely unlikely that an unlisted ground exists that does not fit all of the qualifiers. A ground that causes systemic disadvantage is very likely to also undermine human dignity, and is very likely to also adversely affect the equal enjoyment of the applicant's rights and freedoms in a serious manner, comparable to discrimination on the listed grounds.
- Assuming the applicant could *prima facie* show that the respondent discriminated against him and assuming that the respondent could not prove the contrary, the respondent has another opportunity to escape liability - he may proceed to prove that the discrimination was fair. Section 13(2) could have been drafted in a simpler fashion. Whether the discrimination was based on a listed or unlisted ground, the discrimination will be seen as unfair unless the respondent can prove that the discrimination was fair. Section 13(2)(b) states that unless the respondent can prove that the discrimination was fair, discrimination on an unlisted ground will be unfair if one of the conditions in paragraph (b) of the definition of prohibited grounds “is established”, but the applicant already had to make out a *prima facie* case that the unlisted

ground fits one of the conditions in paragraph (b) of the definition.<sup>202</sup> The only leg of the test that remains is for the respondent to prove that the discrimination was fair.

- In short, section 13 has the following effect:
- The applicant must establish a *prima facie* case of “discrimination” (as defined in the Act).
- If the applicant succeeds, the respondent must then prove one of the following to avoid liability:
  - discrimination did not take place; or
  - discrimination did not take place on a prohibited ground (as defined in the Act); or
  - the discrimination was fair.

The differences in approach between the Constitutional Court's interpretation of section 9 and the Act are the following:

- Regarding the evidence to be led, the Act expects less from an applicant than does section 9 of the Constitution. Section 9 requires the applicant to *prove* “differentiation”. The Act requires the applicant to *establish* “discrimination” on a *prima facie basis*. (There is no real difference between “differentiation” and “discrimination” in this context.)
- In terms of section 9, once differentiation on a listed ground has been proven, a presumption of unfair discrimination arises that the respondent must *rebut*. In terms of the Act, once discrimination has been shown to exist on a *prima facie basis*, the respondent must *prove* the contrary. A burden to rebut is a lesser burden than a full onus. Again, the Act expects less from a respondent than does section 9.
- According to section 9, if discrimination on an unlisted ground is in issue, it is the applicant that has to *prove* discrimination, that the unlisted ground is of such a nature that it offends dignity and that the discrimination was unfair. In terms of the Act, the applicant needs to show on a *prima facie basis* that discrimination on an unlisted ground exists and that the unlisted ground

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<sup>202</sup> “Established” in s 13(2)(b)(i) should be interpreted to mean “shown to exist on a *prima facie* basis by the applicant”. As a matter of logic, this burden can only fall on the applicant - it would be nonsensical to expect a respondent in an equality dispute to have to show that a ground for the complaint exists. If “established” is read to mean “*proven* by the applicant”, s 13 becomes somewhat farcical. First the applicant would have to show on a *prima facie* basis that the unlisted ground fits one of the conditions of paragraph (b) of the definition of prohibited grounds (to establish discrimination) and second, assuming that the respondent could not prove that discrimination did not take place, the applicant would then have to prove that the unlisted ground fits paragraph (b) to establish unfair discrimination. In other words, the applicant would have to do the same work twice, first to establish a *prima facie* case, and thereafter to discharge an onus.



fits one of the conditions of paragraph (b) of the definition of prohibited grounds. Once the applicant has done this, it is the respondent that has to *prove* that the alleged discrimination is not discrimination; alternatively that it was not *unfair* discrimination.

- In short, the Act never burdens the applicant with a full onus and affords the same status to unlisted grounds than listed grounds regarding the presumption of unfairness, with the added advantage to the applicant that the respondent not only carries a burden of rebuttal once unfairness has been presumed, but a full onus.

This structure is neither controversial nor unconstitutional.<sup>203</sup> The Constitution sets a minimum benchmark regarding the protection of human rights. What the Act does in essence is to grant more protection to equality than the Constitution does by expecting less from an applicant in an equality dispute than the Constitution.<sup>204</sup> If this argument does not suffice, the Constitutional Court stated in *Prinsloo v Van der Linde*<sup>205</sup> that as long as the onus in a civil case<sup>206</sup> is not imposed arbitrarily, no constitutional complaint exists.<sup>207</sup> The shifting of the onus to the respondent by section 13 is not arbitrary. Seen in the light of South Africa's history and the vast inequalities between various sections of the population on various grounds (race, gender, class etc) it is very appropriate and rational that the respondent should do the "hard work" and provide good reasons why the alleged unfair discrimination is not what it seems.<sup>208</sup> (Another possibility exists: at best for a respondent in an equality dispute, the Act infringes section 9 of the Constitution by burdening the respondent with a heavier load than section 9 allows. Such infringement will most likely be found to be justifiable in terms of section 36 of the Constitution, based on the arguments listed directly above.)

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<sup>203</sup> This aspect of the Bill / Act received wide coverage in the press. See eg *The Citizen* (1999-11-27) 7; *Financial Mail* (1999-12-03) 54; *Beeld* (1999-12-06) 8; *Business Day* (1999-11-03) 11.

<sup>204</sup> Cf *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06 para 43: "The legislature, when enacting national legislation to give effect to the right to equality, may extend protection beyond what is conferred by section 9. As long as the Act does not decrease the protection afforded by section 9 or infringe another right, a difference between the Act and section 9 does not violate the Constitution".

<sup>205</sup> 1997 (3) SA 1012 (CC).

<sup>206</sup> None of the powers accorded to equality courts listed in s 21 of the Act relate to criminal penalties.

<sup>207</sup> Para 38.

<sup>208</sup> A study of Australian anti-discrimination bodies have indicated that "the only cases in which complainants are consistently successful are the most direct, unequivocal acts of discrimination" and "unless the conduct is unequivocal, the burden of proof in the Tribunal setting is virtually insuperable for complainants". Bailey and Devereaux in Kinley (ed) (1998) 308.

In cases alleging discrimination on a listed ground, the complainant must show that a benefit was withheld or a disadvantage imposed and that this could be linked to one or more of the grounds listed in the Act. The complainant would probably have to show that “but for” the listed ground, the harm would not have followed. This will usually be a factual enquiry.

Where it is alleged that discrimination occurred on an unlisted ground, the complainant would also have to show that the ground complained of fits one of the requirements set out in the Act. This would likely occur by way of argument. It is possible that statistical or sociological evidence may also have to be led to, for example, illustrate the vulnerability of people belonging to a group identified by an unlisted ground (eg HIV status).

### 3.3.4 The Act creates an accessible enforcement mechanism: Equality courts

The drafters realised that the justice system in South Africa is inaccessible and attempted to alleviate this defect in respect of claims brought in terms of the Act.<sup>209</sup>

As I argued in chapter 1, the Act was explicitly put in place by its drafters to facilitate societal transformation. The main mechanism created to achieve this transformation was equality courts at the magistrate’s court and High Court level. The equality courts were ostensibly set up to play the double role of dispute processing institutions and engine drivers of the larger societal transformation project.

Once the decision had been made to use the existing court structure as the enforcement mechanism, the drafters did what they could to make the equality courts as accessible as possible: A complainant may bring a claim unrepresented, and as pointed out above in some detail, the Act places a relatively light evidentiary burden on the complainant. The presiding officer may, and sometimes must, play an interventionist role in ensuring that all relevant information is put before the court. Broad standing provisions have been enacted and the ordinary restrictive common law

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<sup>209</sup> See 3.2.3, 3.2.4, 3.2.5 and 3.2.10 above.



principles relating to standing have been discarded. The ordinary monetary limit on the jurisdiction of magistrates' courts has been done away with as well.<sup>210</sup>

The regulations to the Act pertaining to the prevention of unfair discrimination were published in the *Government Gazette* on 13 June 2003.<sup>211</sup> (The regulations pertaining to the promotion of equality had not been promulgated yet at 31 October 2007). I set out the main features of the regulations below, particularly as it relates to the court proceedings.

The regulations require equality court clerks to provide assistance to disabled, illiterate and unrepresented litigants.<sup>212</sup> Where a complainant is unrepresented, the clerk of the equality court is supposed to step into the breach and fulfill the role of a pseudo-paralegal. A poorly trained or unsympathetic clerk could therefore destroy the ability of the Act to effect social change if a complainant's case is not treated appropriately.<sup>213</sup>

Case management also relies heavily on the clerks of the equality courts. An equality court case is initiated by the filling in of a form at the court, whereafter the clerk has to ensure that the form is forwarded to the respondent. On receipt of the respondent's response the file is forwarded to the presiding officer, who decides whether the matter properly belongs in the equality courts or whether it should be referred to an alternative forum. If the case is to be heard in the equality courts, the clerk has to inform the parties of the date of the directions hearing.<sup>214</sup>

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<sup>210</sup> S 19(3) allows a magistrate's court functioning as an equality court to make an award exceeding the ordinary monetary jurisdiction of the magistrates' courts. A judge of the High Court must confirm such an order.

<sup>211</sup> GN No R764, *Government Gazette* No 25065, 2003-06-13.

<sup>212</sup> The appropriate regulation reads as follows: "5. In addition to the functions prescribed by the Act, a clerk must- ... (e) assist to the best of his or her ability a person who is illiterate or disabled with the completion of any document relating to the proceedings in the court; (f) if a person instituting proceedings is not represented or assisted- (i) inform the person of his or her right to representation; (ii) inform the person of the assistance available to him or her by constitutional institutions or other non-governmental organisations; (iii) inform and explain to that person his or her rights and remedies in terms of the Act to the best of his or her ability; (iv) assist a person further by reading or explaining any documentation to him or her; and (v) explain the process and procedures relating to the attendance of witnesses ..."

<sup>213</sup> It has been reported that single mothers applying for child maintenance are faced with unhelpful court staff and that they are treated like criminals and ridiculed at the maintenance courts by court staff: *The Daily News* (2006-07-18) 11. Battered women also face compassionless court clerks: [http://www.eherald.co.za/herald/2005/09/29/news/n05\\_29092005.htm](http://www.eherald.co.za/herald/2005/09/29/news/n05_29092005.htm) (accessed 2005-10-04).

<sup>214</sup> The appropriate regulation reads as follows: "6. (1) A person, an association or a commission contemplated in section 20 of the Act, wishing to institute proceedings in terms of the Act, must notify the clerk of his or her intention to do so on a form which corresponds substantially with Form 2 of the Annexure. (2) The clerk must within seven days

The Act creates a departure from the usual rules of civil procedure in its establishment of this directions hearing. The clerk assigns a date for the hearing, at which time the presiding officer hears the views of the parties and then makes an order relating to such issues as discovery of documents, the limiting of disputes, the manner of service of documents, the giving of further particulars, the place and time of future hearings and the giving of evidence at the actual hearing.<sup>215</sup>

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after receipt of the notice referred to in subregulation (1)- (a) notify the respondent on a form which corresponds substantially with Form 3 of the Annexure that proceedings have been instituted against him or her; and (b) invite the respondent, if he or she so wishes, to submit the information contemplated in paragraph C of Form 3 of the Annexure in writing within 10 days of the receipt of such notice. (3) The clerk must, within seven days after receipt of the response of the respondent contemplated in subregulation (2) (b), submit a copy thereof to the complainant. (4) The clerk must, within three days after the expiry of the period contemplated in subregulation (2) (b), refer the matter to a presiding officer, who must, within seven days after receiving the documentation relating to the matter, decide whether the matter is to be heard in the court or whether it should be referred to an alternative forum. (5) If the presiding officer decides that the matter is to be heard in the court, the presiding officer must refer the matter to the clerk who must, within three days after such referral, assign a date for the directions hearing. (6) The clerk must, after a date of the directions hearing has been assigned, notify the complainant and the respondent on a form which corresponds substantially with Form 4 of the Annexure, of the date of the directions hearing”.

<sup>215</sup> The appropriate regulation reads as follows: “10. (1) The inquiry must be conducted in an expeditious and informal manner which facilitates and promotes participation by the parties. (2) The regulations regulating the proceedings of the inquiry must, as far as possible, be interpreted in a manner that gives effect to the guiding principles contemplated in section 4 of the Act. (3) The proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties ... (5) (a) On the date assigned by the clerk contemplated in regulation 6 (5), a directions hearing must be held by the presiding officer to resolve matters of an administrative or procedural nature in respect of the inquiry. (b) At a directions hearing the presiding officer must give such directions in respect of the conduct of the proceedings as he or she deems fit. (c) Without detracting from the generality of paragraph (b), the presiding officer may, after hearing the views of the parties to the proceedings, make an order in respect of- (i) discovery, inspection and exchange of documents; (ii) interrogatories; (iii) admission of facts or of documents; (iv) the limiting of disputes; (v) the joinder of parties; (vi) amicus curiae interventions; (vii) the manner of service of documents not provided for in the regulations; (viii) amendments; (ix) the filing of affidavits; (x) the giving of further particulars; (xi) the place and time of future hearings; (xii) procedures to be followed in respect of urgent matters; and (xiii) the giving of evidence at the hearing, including whether evidence of witnesses in chief is to be given orally or by affidavit, or both. (d) In order to give effect to- (i) the guiding principles contemplated in section 4 of the Act; and (ii) sections 21 (1) and 30 (1) (a) of the Act and in exercising his or her discretion in terms of subparagraphs (b) and (c), the presiding officer must, as far as possible, follow the legislation governing the procedures in the court in which the proceedings were instituted, with appropriate changes for the purpose of supplementing this regulation where necessary, but may, in the interests of justice and if no one is prejudiced, deviate from these procedures after hearing the views of the parties to the proceedings. (e) At a directions hearing, the presiding officer must, if a party is unrepresented- (i) inform him or her of his or her right to be represented at his or her own expense by a legal representative of his or her own choice and if he or she cannot afford legal representation, that he or she may apply for legal aid and of the institutions which he or she may approach for legal assistance; and (ii) explain the contents and implications of any direction or order made in terms of subparagraphs (b) and (c) ... (7) Save as is otherwise provided for in these regulations, the law of evidence, including the law relating to competency and compellability, as applicable in civil proceedings, applies in respect of an inquiry: Provided that in the application of the law of evidence, fairness, the right to equality and the interests of justice should, as far as possible, prevail over mere technicalities ... (9) (a) Any party to the proceedings may, during the proceedings in court, be represented by an attorney or advocate or any person of his or her choice. (b) The presiding officer must, if a party is represented by a person other than an attorney or advocate and if the presiding officer is of the opinion that such person is not a suitable person to represent the party, inform the party accordingly. (10) (a) A

The regulations explicitly attempt to create informal courts where substance is supposed to triumph over technicality. The regulations also envisage active, interventionist presiding officers who may dispense with the ordinary court rules and ordinary time limits in effecting justice. Presiding officers may of their own accord question witnesses and to this end the equality courts are allowed to act as inquisitorial institutions, similar to the Small Claims Courts.

The regulations largely follow the ordinary rules of civil litigation as it relates to costs and the non-appearance of a particular party. The default option however seems to be that both parties should pay their own costs, instead of the position in ordinary civil litigation that the loser pays the winner's legal costs. The equality court presiding officer is allowed to depart from the default position, for example when a vexatious complaint is lodged.<sup>216</sup>

The regulations also envisage an active, interventionist presiding officer. In "ordinary" litigation presiding officers do not generally subpoena witnesses.<sup>217</sup>

### 3.3.5 The Act creates a very broad scope of application; contains a single "fairness" defence; allows no sector-specific defences or exclusions

On the face of it, the Act does not have a limited reach or limited areas or sectors of application.<sup>218</sup>

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party may cross-examine any other party who elects to give evidence or who is called by the other party. (b) The presiding officer must, where necessary and appropriate, ascertain the relevant facts about the complaint and to that end he or she may question any party who elects to give evidence or who is called as a witness at any stage of the proceedings".

<sup>216</sup> The appropriate regulation reads as follows: "12. (1) No court fees are payable in respect of the institution of proceedings in the court. (2) Each party bears his or her own costs unless the presiding officer directs otherwise. (3) (a) If a complainant, without reasonable excuse, does not attend a directions hearing or the inquiry and the presiding officer is satisfied that proper notice of the directions hearing or the inquiry has been given to the complainant, the presiding officer may- (i) dismiss the complaint; and (ii) order the complainant to pay the costs of the respondent. (b) The clerk must in the event of a dismissal of the complaint or a cost order contemplated in paragraph (a) inform the complainant in writing accordingly. (4) (a) If a respondent, without reasonable excuse, does not attend a directions hearing or the inquiry and the presiding officer is satisfied that proper notice of the directions hearing or the inquiry has been given to the respondent, the presiding officer may- (i) order that the proceedings continue in the absence of the respondent; and (ii) order the respondent to pay the costs of the complainant. (b) The clerk must in the event of an order contemplated in paragraph (a) (i) or (ii) inform the respondent in writing accordingly.

<sup>217</sup> The appropriate regulations read as follows: "8. ... (2) (a) The attendance of proceedings by a witness by direction of the court is secured by means of a subpoena, issued by a clerk, which corresponds substantially with Form 6 of the Annexure. (b) The subpoena referred to paragraph (a) must be served on the witness at state expense by a sheriff ... 10. ... (c) The presiding officer may on his or her own initiative call a person to appear before him or her as a witness in the proceedings".

The prohibition against unfair discrimination is not qualified in the Act – in principle and on a strict literal interpretation the Act applies everywhere, anywhere and to all cases of “private” and “public” discrimination. The Act contains no (sector-specific) exclusions or defences,<sup>219</sup> except the general “fairness” defence. Equality courts will have to develop principles over time as to what constitutes “fair” discrimination in particular contexts.<sup>220</sup>

Section 14 sets out the criteria that a court must analyse to decide whether a respondent has proven that the discrimination was fair. As this section is the heart of the Act’s prohibition of unfair discrimination, I quote it in full in the text:

- (1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
  - (a) The context;
  - (b) the factors referred to in subsection (3);
  - (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection (2)(b) include the following:
  - (a) Whether the discrimination impairs or is likely to impair human dignity;
  - (b) the impact or likely impact of the discrimination on the complainant;

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<sup>218</sup> See 3.2.7 above.

<sup>219</sup> Eg, would a cause of action exist in terms of the Act if I decide not to invite any of my black co-workers to my wedding? What about an old man who rents out a room in his house and explicitly tells prospective tenants “No blacks please”? Would it be different if the old man owned a block of flats and extended his “no blacks” policy to the entire block of flats? Could a house owner be taken to court if he or she does not have ramp outside his or her house to allow disabled people easy access to his house? Would it be different if a state department or a large company does not have ramps outside their buildings? The Act does not provide easy answers. Some foreign jurisdictions provide for explicit defences or exclusions. I refer to a few examples: S 36 of the ACT Discrimination Act allows for single sex educational institutions and s 46 allows for religious educational institutions (Annexure E1). S 51 of the Northern Territory Anti-Discrimination Act provides that the Act does not apply to the ordination of priests (Annexure E3). S 43 of the Queensland Anti-Discrimination Act provides that educational institutions may set a minimum qualifying age (Annexure E4).

<sup>220</sup> Australian and Canadian anti-discrimination legislation contains extensive exclusions and defences. See Annexures C and E below. Watkin (1992) 2 *NJCL* 63 laments the existence of four tests relating to justification under Canadian anti-discrimination law.



- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to—
  - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
  - (ii) accommodate diversity.

Below I discuss these factors in the sequence that they appear in section 14.

Section 14(1) mirrors section 9(2) of the Constitution and seems to create a complete defence to a claim of unfair discrimination. Albertyn *et al* argue that section 14(1) does not set up an independent test, but should be read as part of a single section 14 inquiry.<sup>221</sup> However, in *Minister of Finance v Van Heerden*<sup>222</sup> the Constitutional Court held that if a measure properly falls within the ambit of section 9(2) of the Constitution it does *not* constitute unfair discrimination. Section 9(2) of the Constitution is less explicit about the nature of the defence than section 14(1) in the Act. Section 9(2) only states that legislative and other measures “may” be taken while section 14(1) of the Act clearly states that “it is not unfair discrimination” to take such measures.

Section 14(2) contains a large number of factors that a Court needs to take into account when deciding whether the alleged discrimination was “unfair”.

Section 14(2)(a) makes it clear that each case will be a contextual enquiry.<sup>223</sup> This “context” includes the existing South African social, economic and political circumstances when the specific

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<sup>221</sup> Albertyn *et al* (eds) (2001) 38.

<sup>222</sup> 2004 (6) SA 121 (CC) at para 36.

<sup>223</sup> For example, a billionaire’s right to vote cannot be taken away because he has so many other privileges that it does not matter to him, but he may be taxed at a higher rate than a low wage earner.

case is heard.<sup>224</sup> This approach is also in accordance with Constitutional Court judgments.<sup>225</sup> Bohler interprets a contextual approach to equality as “individualised justice”:<sup>226</sup>

Judges should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases. This means that the law must be more open-ended ...<sup>227</sup>

Section 14(2)(c) contains a number of factors that will be of assistance to a respondent who wishes to disprove that he unfairly discriminated against the applicant: if the discrimination was “reasonable” and “justifiable”, followed “objectively determinable criteria” and if the discrimination was “intrinsic to the activity”, such discrimination may be found to be fair. This subsection is the result of a very clumsy attempt by the drafters of the Act to address the concerns of mainly the insurance industry and to distinguish between “discrimination” and “(mere) economic differentiation”.<sup>228</sup>

Section 14(2)(b) refers the reader to section 14(3) which in turn lists a number of criteria, most of which has their origin in *Harksen v Lane NO*.<sup>229</sup>

Section 14(3)(a): If the discrimination impairs or is likely to impair dignity such discrimination will most likely be held to be unfair.<sup>230</sup>

Section 14(3)(b): The more severe the impact of the discrimination on the applicant, the more likely that the discrimination will be held to be unfair.<sup>231</sup>

<sup>224</sup> De Vos (2000) 63 *THRHR* 67; De Vos (2000) 117 *SALJ* 19.

<sup>225</sup> Eg *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>226</sup> Bohler (2000) 63 *THRHR* 291.

<sup>227</sup> “Open-ended” could mean indeterminate. (Cf Van der Walt and Botha (1998) 13 *SAPL* 35). See the discussion below relating to the indeterminacy of the unfairness test contained within s 14 of the Act.

<sup>228</sup> Liebenberg and O’Sullivan (2001) 37 are concerned about the possible effect of this subsection: If market generated inequalities are regarded as reasonable and justifiable differentiation in all circumstances, the goal of substantive equality for women will become increasingly remote. The weight that courts give to this factor in relation to other factors in subsections (2) and (3) is critical”. They even raise the possibility that this subsection is unconstitutional as it may be argued that this subsection subtracts from the protection offered by the Constitution in s 9. I argue in chapter 6 below that s 14(2)(c) should be deleted from the Act.

<sup>229</sup> 1998 (1) SA 300 (CC).

<sup>230</sup> Albertyn *et al* (eds) (2001) 40.

<sup>231</sup> Loenen (1997) 13 *SAJHR* 412.



Section 14(3)(c): A powerful or privileged applicant will have to make out a very strong case that he is the victim of unfair discrimination. Section 9 of the Constitution does not protect “pockets of privilege”.<sup>232</sup> The more disadvantaged the particular group that the applicant belongs to, the more likely that the discrimination will be held to be unfair.<sup>233</sup>

Section 14(3)(d): If the discrimination is of a minor nature or of small extent such discrimination will more likely be found to be fair. Recurring discrimination is more likely to be unfair.<sup>234</sup>

Section 14(3)(e): Systemic discrimination will more likely be unfair discrimination than non-systemic discrimination.

Section 14(3)(f): If the discrimination has a worthy goal, such as the furthering of equality for all,<sup>235</sup> it will most likely be fair.<sup>236</sup>

Section 14(3)(g): If no rational link exists between the discrimination and its (worthy) purpose, the discrimination will most likely be unfair.<sup>237</sup> If the discrimination did not achieve the alleged purpose, the discrimination is more likely to be unfair.

Section 14(3)(h): This section has its origin in section 36(1)(e) of the Constitution. If the respondent could have achieved its (worthy) purpose in a less restrictive way, the discrimination is more likely to be found unfair. In theory it is almost always possible to think of less serious ways of

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<sup>232</sup> *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 48.

<sup>233</sup> *Albertyn and Kentridge* (1994) 10 SAJHR 162; *Loenen* (1997) 13 SAJHR 408, 411 and 412; *De Waal* (2002) 14 SA Merc LJ 154; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 64. This factor perhaps best illustrates the asymmetrical nature of discrimination. *Loenen* (1997) 13 SAJHR 411-412; *Kende* (2000) 117 SALJ 751.

<sup>234</sup> *De Waal* (2002) 14 SA Merc LJ 155. The *kind* of discrimination may affect the outcome of the fairness enquiry. A presidential pardon (*Hugo*) was treated with more deference than other forms of exercise of state power. (*Carpenter* (2001) 64 THRHR 626.)

<sup>235</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) may be used as an example. President Mandela freed a number of female prisoners who had children under 12. The respondent was a male prisoner with a child under 12 and complained that the President unfairly discriminated against him. The Court held that the discrimination was fair, *inter alia* because the purpose of the discrimination was to create a more equal society.

<sup>236</sup> *De Waal* (2002) 14 SA Merc LJ 154.

<sup>237</sup> In equality litigation based on s 9 of the Constitution, this factor overlaps with the threshold “rational connection” test. *Rautenbach* (1997) TSAR 578 and *Rautenbach* (2001) TSAR 332. The Act does not explicitly prohibit irrational differentiation.

achieving the same purpose. This factor should therefore not be used to mark almost all instances of discrimination as unfair. A value judgment must be made taking into account all relevant factors. If an entirely inappropriate method had been used to achieve a (legitimate) purpose, such discrimination is more likely to be unfair.

Section 14(3)(i) rewards discriminating respondents who take steps to alleviate the damage caused by the discrimination. When a respondent takes such steps, the discrimination is less likely to be found to be unfair. If the respondent did nothing to minimise the disadvantage, it is more likely that the discrimination was unfair.

An argument could possibly be raised that the Act does not provide sufficient protection to a respondent in an equality dispute because it does not offer a respondent the opportunity to argue that *unfair* discrimination may still be *justifiable* – section 14 only contains a defence based on fairness.<sup>238</sup> The Constitution (at least in theory) allows a respondent to argue that unfair discrimination is still justifiable. (Section 9 read with section 36.) Two counterarguments may be raised:

- It is very difficult to distinguish between factors that establish whether discrimination was “fair” in terms of section 9 of the Constitution, and factors that establish whether unfair discrimination was “justifiable” in terms of section 36.<sup>239</sup> Currie and De Waal argue that

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<sup>238</sup> Vogt believes that “unfairness” and “justification” should have been kept apart. She believes that by combining the two concepts in one section, the drafters broadened the understanding of “unfairness” to an unacceptable degree and makes the guarantee of (racial) equality “practically worthless”. She reads s 14 as allowing a respondent to escape censure by “simply testifying that there was a legitimate purpose and that there was no less-restrictive means to reach that purpose”. Vogt (2001) 45 *JAL* 201-202.

<sup>239</sup> Carpenter (2001) 64 *THRHR* 420; Carpenter (2001) 64 *THRHR* 626; De Waal (2002) 14 *SA Merc LJ* 156; Loenen (1997) 13 *SAJHR* 410; Watkin (1992) 2 *NJCL* 110. However compare the comments of Kriegler J in *President of the Republic of South Africa v Hugo* para 78. Albertyn and Kentridge (1994) 10 *SAJHR* 175 sees the fairness/unfairness enquiry as dealing with conduct that “finds no justification in the political morality embraced by the Constitution” and the reasonable/justifiable enquiry as focusing on “whether incursions into the freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end which they seek to achieve”. Albertyn and Goldblatt (1998) 14 *SAJHR* 271 admits that the Constitutional Court’s formulation of the unfairness test has led to the “two stages of justification ... to have become confused”. At 272 they “acknowledge that the line between evidence in support of the ‘unfairness’ justification stage and evidence in support of the limitations justification stage can become relatively blurred since both enquiries may consider similar issues relating to the underlying intention in the enactment of the impugned measure”.





section 36 probably does not have any meaningful application to section 9.<sup>240</sup> Van der Vyver is of the view that the “interpretational embarrassment” of having to distinguish between fairness and reasonableness will be resolved by courts by more or less ignoring the fairness criterion and focusing on reasonableness.<sup>241</sup> Courts have actually tended to do the opposite – they have focused on fairness/unfairness and have tended to ignore reasonableness/justifiability.

- The threshold requirement in section 36 is that any limitation of a fundamental right must be “law of general application”.<sup>242</sup> In cases of private discrimination, where law of general application is not likely to apply,<sup>243</sup> a “reasonableness” defence will not be available and the discriminator will have to argue that the discrimination was fair. The Act does not make a distinction between state discrimination and private discrimination and both these kinds of discrimination are subject to the same test as set out in section 14. Section 14 incorporates some of the elements of section 36. In cases of private discrimination, a discriminator will therefore be able to argue that the discrimination was fair, alternatively that it was reasonable and justifiable. Therefore, in effect the Act provides *more* protection to respondents in *private* discrimination complaints than the Constitution does.

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<sup>240</sup> Currie and De Waal (2005) 237.

<sup>241</sup> Van der Vyver (1998) 61 *THRHR* 391.

<sup>242</sup> Albertyn and Goldblatt (1998) 14 *SAJHR* 270.

<sup>243</sup> It is not clear to what extent the requirement of “law of general application” applies in cases of private discrimination. Van der Vyver (1998) 61 *THRHR* 376 is of the view that “law” of general application includes the internal conduct rules of social entities such as a church association, sport body, mercantile company and so on. He refers to the *Barthold Case* 1985 PECHR Series A vol 90 par 46 where it was held that the internal rules of the veterinary board forms part of “law”. The Constitutional Court has not yet had the opportunity to express itself on the relationship between s 9 and s 36 in the context of private discrimination. In *Hoffmann* the Constitutional Court held that the SAA was an organ of state (para 23) and further held that its employment practice of refusing to employ HIV positive cabin stewards was not law of general application. (Para 41.) In *Walker*, where decisions by the City Council of Pretoria’s officials were under scrutiny, the Court held that the justification query also did not arise as the respondent council’s conduct was not authorised, expressly or by necessary implication, by a law of general application (para 82.) Rautenbach (2001) *TSAR* 340 points out that if the “fairness” and “justifiability” defences are not kept strictly apart, the “law of general application” requirement is likely to be subverted. That is exactly what happened when the Act was drafted – fairness/justifiability was seen as one step and the “law of general application” threshold requirement fell away, although some of the other factors listed in s 36 have been incorporated into s 14.

A number of authors are critical about the wording of section 14.<sup>244</sup> The section should probably be redrafted to distinguish between state discrimination and private discrimination, and between discrimination and differentiation.<sup>245</sup>

It is also clear that despite the explicit list of factors to be considered, the test remains relatively indeterminate.<sup>246</sup> Pragmatic judges will be able to take what they want from the test.<sup>247</sup> Consider the following factors as set out in section 14:

- The impact or likely impact of the discrimination on the complainant. It is easy enough to state that the more severe the impact, the more likely that the discrimination will be unfair, but *how* should a court decide when the cut-off is reached between permissible and impermissible harm?
- The position of the complainant in society whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage. Barring white, able-bodied, heterosexual males, the other members of South African society may all be described as suffering in one way or the other from patterns of past

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<sup>244</sup> Cf Albertyn *et al* (eds) (2001) 41 and further. Carpenter (2002) 65 *THRHR* 182-183 argues that ss 14(f) – (i) are inappropriate in the context of private or domestic relationships and that this should have been better set out in the Act.  
<sup>245</sup> I return to this issue in chapter 6.

<sup>246</sup> Van der Walt and Botha (1998) 13 *SAPL* 35. The authors contend that the indeterminacy follows from “the margin for contextualisation” allowed by this approach. Any test is likely to be indeterminate. Consider the test suggested by Bohler-Muller (2000) 16 *SAJHR* 640: A court must consider all circumstances “and listened to all voices before reaching a conclusion which is the least harmful to the most vulnerable party or group”. How are different harms to be compared? How are degrees of vulnerability ascertained?

<sup>247</sup> Cf Kende (2002) 117 *SALJ* 770. Also see Davis (1999) 116 *SALJ* 413: “The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer”. Carpenter (2002) 65 *THRHR* 58, discussing the *Walker* case, believes that “race issues in particular may turn out to be essentially ‘undecidable’”. Kentridge (1996) 112 *The Law Quarterly Review* 250: “It would be naïve to imagine that there is a single ‘right’ answer to all the issues which the court will have to decide. Some may say that the search for objective standards is an illusion”. In the context of discrimination complaints, s 14 would make many answers possible. Woolman (1997) 13 *SAJHR* 121 offers the following “solution”: “What our gut tells us and what we choose to do after extended reflection are sometimes two very different things ... The difference between storytelling and cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be – for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to be”. In other words, s 14 offers judges the chance to offer “better explanations” than simply saying “my gut feeling is that the discrimination is fair/unfair”. McAllister (2003) 15 *NJCL* 35 criticises the Supreme Court of Canada equality test set out in *Law v Canada (Minister of Employment & Immigration)* [1999] 1 SCR 497 as ultimately unhelpful and too unpredictable.



disadvantage: women, blacks, Indians, coloureds, gays and lesbians, disabled people of all races, HIV-positive people, poor people, and rural people.<sup>248</sup> It may be easy enough to state, as the Constitutional Court has done on one occasion,<sup>249</sup> that black women has been the most disadvantaged group in South African society, and it would follow from this statement that discrimination against (rural) black women would almost always be unfair,<sup>250</sup> but how to decide about the relative disadvantage of other vulnerable groups in South African society?<sup>251</sup>

- Whether the discrimination is systemic in nature. The same argument applies to this factor: The vast majority of South Africans have been victims of systemic discrimination in one way or the other and it is not necessarily helpful to state that systemic discrimination is more likely unfair than non-systemic discrimination.
- Whether the discrimination has a legitimate purpose. How is a court to decide when a discriminatory purpose would be “legitimate”?
- Whether there are less restrictive and less disadvantageous means to achieve the purpose. It is almost always possible to think of a less extreme way to achieve a particular result. How is a court to decide on the cut-off point?

Two judgments of the Constitutional Court strikingly illustrate the indeterminacy of the “fairness” test.<sup>252</sup> The factors set out in section 14 of the Act have largely been extrapolated from the Constitutional Court’s equality jurisprudence. It is therefore illuminating to consider the marginal

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<sup>248</sup> Cf *Jagwanth* (2003) 36 *Conn L Rev* 738: “... the only group which does *not* qualify for preferential treatment is able bodied white men, a group which, at 4.64%, comprises a relatively small percentage of the population”.

<sup>249</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44.

<sup>250</sup> Cf *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 7 and *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 118.

<sup>251</sup> To complicate matters even more, the Constitutional Court has said that the prohibition on unfair discrimination was not designed solely to avoid discrimination against people who are members of disadvantaged groups: *Carpenter* (2001) 64 *THRHR* 634; *Hugo* para 41; *Harksen* para 50. Where a previously disadvantaged group is treated less favourably than another previously disadvantaged group, the issue becomes even more vexed. (Cf *Motala v University of Natal* 1995 (3) BCLR 374 (D)). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the “deserving sections” from designated groups should be the benefactors of affirmative action policies – see *Nair* (2001).

<sup>252</sup> *Carpenter* (2002) 65 *THRHR* 58 goes so far as to describe race issues as “undecidable”.

victories of the state in *S v Jordan*<sup>253</sup> and the applicant in *Harksen v Lane NO*.<sup>254</sup> In the *Jordan* case, six of the 11 presiding judges held that the sex or gender discrimination complained of was fair, and five judges dissented and held that it was unfair discrimination. In *Harksen* five of the nine presiding judges held that the discrimination based on marital status was fair while four judges held that the discrimination was unfair. If the application of the fairness/unfairness test had been an easy, straightforward or determinate task, there would not have been so much divergence among the judges.<sup>255</sup>

Another reason why the fairness test will not yield easy answers lies in the list of prohibited grounds. The prohibited grounds are listed in symmetrical fashion, with the exception of race, sex and disability, with no textual indication whether discrimination on the other grounds are somehow less serious and therefore more likely to be fair discrimination. For example: If the argument is accepted that addressing poverty is South Africa's main challenge, then socio-economic discrimination is the worst evil to be combated in terms of the Act, yet socio-economic status is not even explicitly listed in the Act.<sup>256</sup> Is discrimination on some grounds less serious than discrimination on other grounds, or to put it more accurately, is the application of the fairness/unfairness test less or more exacting when dealing with certain kinds of discrimination?<sup>257</sup>

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<sup>253</sup> 2002 (6) SA 642 (CC).

<sup>254</sup> 1998 (1) SA 300 (CC).

<sup>255</sup> Compare Goldstone J's remark in *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 19: "[R]easonable minds may well differ on the outcome of similar or even identical cases". Also see Schutz JA in *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) 185: "Notoriously the views of Judges as to what the ordinary man expects sometimes differ. This happens when value judgments have to be made ..."

<sup>256</sup> Cf Fredman (2005) 21 *SAJHR* 172.

<sup>257</sup> Cf Carpenter (2001) 64 *THRHR* 420: "Thus even though the Constitution says nothing about varying levels of scrutiny, there may well be intuitive differentiation between the different kinds of classification that could lead to discrimination". Van der Walt and Botha (1998) 13 *SAPL* 30 argue that the *Harksen* court showed a greater degree of deference to (mere) economic discrimination than to other forms of differentiation and at 38 argue that the judges felt they owed a certain degree of deference to Parliament relating to the regulation of trade and industry. Also see Carpenter (2001) 64 *THRHR* 640. For the same general reason Moon (1988) 26 *Osgoode Hall LJ* 691 criticises the American Supreme Court's "colour-blind" approach to affirmative action. Moon argues that if the goal of the anti-discrimination principle is to overcome societal prejudice, then a racial classification which benefits a historically disadvantaged group should not be subjected to strict scrutiny.



### 3.3.6 The Act creates broad standing provisions

The Act embraces a broad notion of standing in section 20, and in this way also attempts to broaden access to justice.<sup>258</sup>

The Act allows standing to the following individuals and institutions:

#### A complainant acting in his or her own interest

This is the common law requirement and was developed to deter frivolous litigation. A litigant needs to show that damaged was caused to him/her or that a duty owed to him/her was breached. In this respect, the Act retains the common law position. The other relevant subsections broaden standing considerably.

#### A complainant acting on behalf of another person who cannot act in their own name

In *Wood v Ondangwa Tribal Authority*<sup>259</sup> the then Appellate Division decided that when a person's life, liberty or physical integrity is at stake and if it is impossible for that person to come to court to claim relief, another person with some connection to the "real" litigant, may approach the court instead. This is the only exception that our then highest court allowed to the common law rule. This exception has been further relaxed in the Act – an infringement of the Act will allow another person to litigate on behalf of the "real" plaintiff, with the obvious proviso that the "real" litigant must have a sufficient interest in the remedy that the applicant seeks from the court.

In *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council*<sup>260</sup> the High Court granted standing to the applicant based on section 38(b) of the Constitution on the basis that the indigent claimant could not act in his own name based on poverty. This courageous approach is yet to be confirmed by the Supreme Court of Appeal or Constitutional Court.

#### A complainant acting as a member of or in the interests of a group or class of persons

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<sup>258</sup> See 3.2.10 above.

<sup>259</sup> 1975 (2) SA 294 (A).

<sup>260</sup> 2002 (6) SA 66 (T) 79A.

South African law has not in the past known so-called “class actions”. Usually notice has to be given to potential members of the class about the proposed litigation. The court’s judgment may be or may not be binding on the entire class, depending on the particular legal system.

In *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and another v Ngxuza*<sup>261</sup> the Supreme Court of Appeal gave recognition to the existence of a class action in South African law. The Court set out the nature of a class action as follows:

The issue between the members of the class and the defendant is tried once. The judgment binds all, and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually.<sup>262</sup>

The Court held that most class actions would be maintained with some element of hearsay.<sup>263</sup> A complainant would ordinarily not have personal knowledge of the size and individual members of the class. Most class actions would therefore be accompanied by a “disclosure order” to identify the size and members of the class.<sup>264</sup>

The Court also held that once an applicant has established jurisdiction for his or her own case, that court would have jurisdiction to hear the class action, even though other members of the class would not ordinarily have had jurisdiction in that court.<sup>265</sup>

These principles would obviously also apply in the equality courts.

### A complainant acting in the public interest

This is another innovative provision that is aimed at broadening the traditional requirements of standing. Hopefully courts will not narrowly construe “public interest” as a narrow interpretation will defeat the aims of section 20(1)(d).<sup>266</sup>

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<sup>261</sup> 2001 (10) BCLR 1039 (A)

<sup>262</sup> Para 5 of the judgment.

<sup>263</sup> Para 17 of the judgment.

<sup>264</sup> For an example of such a disclosure order, see the trial court’s order as set out in *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2000 (12) BCLR 1322 (E).

<sup>265</sup> Para 24 of the judgment.



## An association acting in the interests of its members

South African courts have not easily granted *locus standi* to an association in the past. They have particularly refused to recognise *locus standi* when members of the association did not suffer harm in their capacity as members of the association.<sup>267</sup>

The Act makes it clear that an association may litigate on behalf of its members. It does not matter what kind of association it is and it does not matter what kind of litigation it is, as long as the association alleges that a cause of action exists in terms of the Act.

## SAHCR; CGE

Section 20(1)(f) adds another category of institutions that may institute proceedings in an equality court: the South African Human Rights Commission and the Commission for Gender Equality. This is not objectionable: The Constitution provides a minimum standard relating to human rights matters. If the legislature decides to grant *locus standi* to a wider group of institutions than that set out in the Constitution, so be it. It is likely that the Human Rights Commission will have more resources and expertise than the individuals most likely to be victims of unfair discrimination and will be better placed to come to the assistance of such individuals who will most likely be ignorant of their basic rights.<sup>268</sup>

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<sup>266</sup> In *Ferreira v Levin NO* 1996 (1) SA 984 (CC) O'Regan J thought that the applicants had *locus standi* based on the public interest. She said the following (at para 234): "This Court will be circumspect in affording applicants standing by way of [acting in the public interest] and will require an applicant to show that he or she is genuinely acting in the public interest. Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case". In *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) the Constitutional Court accepted O'Regan J's interpretation. It added that the list suggested by O'Regan J was not closed and referred to such grounds as the degree and vulnerability of the people affected, the nature of the right alleged to be infringed and the consequences of the infringement of the right.

<sup>267</sup> See *Natal Fresh Produce Growers' Association v Agroserve* 1990 (4) SA 749 (N) 758F-759E.

<sup>268</sup> In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. <http://www.pmg.org.za/viewminute.php?id=8330>; <http://www.pmg.org.za/viewminute.php?id=8349>; <http://www.pmg.org.za/viewminute.php?id=8373> and <http://www.pmg.org.za/viewminute.php?id=8378> (accessed 2007-05-15). During these hearings, the Chief Executive Officer of the SAHRC reported that the Commission would want to increase its ability to litigate equality court complaints rather than merely compiling case reports. Murray performed a detailed survey of the SAHRC during 2003

### 3.3.7 The Act creates wide-ranging remedies

The Act in no way constrains presiding officers in the range of remedies they are allowed to impose.<sup>269</sup>

The Constitutional Court in *Fose v Minister of Safety & Security*<sup>270</sup> implored courts to “forge new tools” and “shape innovative remedies” in the context of a country where extensive human rights violations have taken place and where few people have effective access to courts.<sup>271</sup> The drafters of the Act could not have been too pleased with courts’ efforts to date as the Act lists an extraordinary long (and open) list of explicit remedies that may be utilised by the equality courts, and empowers equality courts to make “appropriate” orders.<sup>272</sup> It includes interim and declaratory

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and recommended that the SAHRC should develop clearer strategies and use the courts to fight selected cases. She stated that “the commission has been involved in some important cases but has never initiated any litigation in such cases and has not been involved in others when there was an expectation that it should have been, with accompanying allegations that it was prone to government influence”. See *Pretoria News* (2003-03-22) 5. Calland (2006) 13 suggests that the SAHRC is under-resourced. A Parliamentary *ad hoc* committee on the review of the so-called Chapter Nine institutions during April 2007 heard that the SAHRC had not been doing much to help the poor access its rights but had instead moved its focus to high profile matters, such as an investigation into racism in the media - <http://www.citizen.co.za/index/popup.aspx?Type=PrintPage&pDesc=37334,1,22> (accessed 2007-04-24). Based on these observations it seems that the potential role to be played by the SAHRC in utilising the Act will not be unleashed to its fullest extent, at least not in the short term. During the October 2006 Parliamentary enquiry referred to above, the SAHRC reported that at that stage it had only taken 15 cases to equality courts (p 8 of its written report, copy in my possession.) During March 2007 an *ad hoc* committee of Parliament reviewed the so-called “Chapter Nine Institutions” – the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. <http://www.pmg.org.za/viewminute.php?id=8738> (accessed 2007-05- 15). At these hearings the SAHRC reported that it had to date litigated 26 equality court cases. The CGE seems to be even more ineffectual in relation to utilising the Act. During the Chapter Nine hearings referred to above, it was put to the commission’s chairperson that of the more than 2000 complaints the CGE had received during 2006, not a single one had been referred to the equality courts. *Beeld* (2007-03-03) 6.

<sup>269</sup> See 3.2.2 and 3.2.13 above.

<sup>270</sup> 1997 (3) SA 786 (CC).

<sup>271</sup> Para 69.

<sup>272</sup> The relevant parts of s 21 read as follows: 21. (1) The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged. (2) After holding an inquiry, the court may make an appropriate order in the circumstances, including— (a) an interim order; (b) a declaratory order; (c) an order making a settlement between the parties to the proceedings an order of court; (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question; (e) after hearing the views of the parties or, in the absence of the respondent, the views of the complainant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation; (f) an order restraining unfair discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment; (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question; (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question; (i) an order directing the reasonable accommodation of a group or class of persons by the respondent; (j) an order that an unconditional apology be made; (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court; (l)





orders, payment for damages, interdicts, implementation of special measures such as a court-supervised audit, an unconditional apology and costs orders.<sup>273</sup> Section 21 should be read as an invitation to presiding officers to devise creative remedies to further the aims of the Act.<sup>274</sup> There is no difference between the remedies that may be awarded by magistrates' court and High Courts acting as equality courts.<sup>275</sup>

### 3.3.8 The Act creates a duty to promote equality

Section 24 of the Act provides that the state “and all persons” have a duty and responsibility to promote equality. Section 7(2) of the Constitution obliges the state to do this in any event. Section 9(4) of the Constitution states that no person may unfairly discriminate against any other person, which implies a passive approach – every person simply needs to make sure that his or her action (or inaction) does not lead to unfair discrimination. Section 24 of the Act goes further and directs all persons to actively pursue and promote equality. Sections 26 and 27 seem to limit this duty and responsibility to individuals who contract directly or indirectly with the state or exercise public

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an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the licence of a person; (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order; (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation; (o) an appropriate order of costs against any party to the proceedings; (p) an order to comply with any provision of the Act. (3) An order made by an equality court in terms of or under this Act has the effect of an order of the said court made in a civil action, where appropriate. (4) The court may, during or after an inquiry, refer— (a) its concerns in any proceedings before it, particularly in the case of persistent contravention or failure to comply with a provision of this Act or in the case of systemic unfair discrimination, hate speech or harassment to any relevant constitutional institution for further investigation; (b) any proceedings before it to any relevant constitutional institution or appropriate body for mediation, conciliation or negotiation. (5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.

<sup>273</sup> The South African Institute of Race Relations in *The Star* (1999-10-19) 10 expressed the view that equality courts would not be able to award costs against a vexatious applicant. The Bill did not contain the qualifier “appropriate”, but even in its absence it would have been unfathomable that a Court would not punish a vexatious litigant with an adverse cost order.

<sup>274</sup> Varney (1998) 14 *SAJHR* 336 argued for the introduction into South African law of the innovative remedy of awarding “preventative damages”. Such damages would be awarded to a body capable of carrying out activities designed to deter future infringements. The award of damages would then be accompanied by a directive to utilise the award in increasing their activities in the relevant area, or to establish an effective presence. The amount of the award would then be calculated in terms of the cost of deterrence, not the extent of the infringement. S 21(2)(e) allows for the introduction of preventative damages.

<sup>275</sup> Cf McKenna (1992) 21 *Man LJ* 324: “Legislation must also revise procedures for and the substance of remedies for discrimination to reflect the collective nature of discrimination”. S 21(2)(g), (h), (i), (k) and (m) are appropriate to target collective (or systemic) discrimination.

power. It also appears that this duty only arises in relationships with other (public) bodies and when dealing with public activities.

Section 27(2) of the Act states that the Minister of Justice must develop regulations that will require persons to prepare equality plans, abide by prescribed codes of practice or report to a body on measures to promote equality.

In this regard, regulations have been published for comment,<sup>276</sup> but have not been given legal effect as at 31 October 2007. The regulations distinguish between the promotion of equality by the state, and the promotion of equality by “all persons”. As to the state’s obligations, the regulations envisage the drafting of equality plans by state departments. These plans must be drafted for a five year period. These plans must then be submitted to the SAHRC who in turn must submit the plan to the CGE for purposes of consultation. The SAHRC must consider and assess each of these equality plans and must make appropriate recommendations to the relevant state department and must report to the National Assembly in terms of section 181(5) of the Constitution. Each state department must also submit annual progress reports to the SAHRC. The SAHRC must assess each of these progress reports and if necessary must advise relevant departments on measures to be put in place to expedite the implementation of the equality plan.

As to the promotion of equality by “all persons”, the regulations distinguish between “entities” that employ more than 150 employees, more than 50 but less than 150 employees, and less than 50 employees. Entities that employ more than 150 employees must submit equality plans to the Director-General of the Department of Justice. These plans are valid for five years. Annual progress reports must also be submitted to the Department. The Director-General then forwards the plan to the appropriate national state department and that department then analyses the plan. The progress reports are dealt with on a similar basis. Entities that employ between 50 and 150 employees must adopt written measures to promote equality and must report in writing thereon upon the written request of a national state department. It must also on request of a member of the public cause its plan to be made available for inspection at the office of the entity. Entities with less

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<sup>276</sup> GN No 563, *Government Gazette* No 26316, 2004-04-30.



than 50 employees must adopt written measures to promote equality and must report in writing thereon upon the written request of a national state department.

The most obvious question relating to these regulations is whether the SAHRC and the various state departments will have the capacity to rigorously assess and monitor compliance with the equality plans and progress reports.<sup>277</sup> It is probably for this reason that these regulations have not been given effect yet.

### ***3.4 Measuring the Act against the characteristics of effective legislation***

To establish whether the Act will be an effective law, I measure the criteria set out in chapter 2.5 against the Act. As discussed in chapter 1, the Act aims at the socio-economic transformation of South African society, as well as fundamentally restructuring public and private relationships. In this section, I consider whether it is likely that the Act will attain these goals, measured against the criteria for effective legislation.

When compared with “typical” or orthodox anti-discrimination statutes, the Act fares well as an innovative anti-discrimination legislative provision *on paper*. Most of the typical limits of anti-discrimination legislation have been addressed in the Act:

The burden of proof lies primarily on the respondent, not the complainant. Equality courts are not limited in the remedies that they may grant. Equality courts are peopled by trained (at least in theory) experts and not lay people. Complainants may appear before equality courts without obtaining (expensive) legal representation.<sup>278</sup> The Act allows for claims based on discrimination on a wide variety of prohibited grounds and includes a general catch-all test to allow for the recognition of other, not yet recognised grounds. The Act does not have an explicitly limited field of application and may even be extended to the most intimate spheres of life. The usual problems

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<sup>277</sup> Cf Jagwanth (2003) 36 *Conn L Rev* 744.

<sup>278</sup> This ostensible strength is also a weakness. Evidence suggests that a positive correlation exists between competent legal representation and success in a hearing. Christie in MacEwen (ed) (1997) 182; Galanter (1974) 9 *Law & Soc Rev* 114. Unrepresented litigants are likely to lose their cases, especially if faced by a well-resourced respondent’s competent legal representation. The Act’s “solution” is to allow the presiding officer to intervene directly in such cases to ascertain all relevant information, and to subpoena witnesses should that be necessary, but in a legal system that ordinarily follows an adversarial process, there is no guarantee that presiding officers will have been duly sensitised to unrepresented litigants’ needs.

relating to choosing the correct comparator may possibly be avoided when utilising the Act, as the definition of “equality” and “discrimination” do not necessarily lead to comparing a complainant’s position to a “neutral” comparator. The main enforcement mechanism created in the Act is equality courts, which will eventually be available in every magistrate’s district in South Africa. This is probably as accessible a forum as could be created in South Africa given current budgetary constraints. Open hearings are held, which could in the long term lead to greater awareness of the Act and its powers, if the mass media will play its part in promoting the potential uses of the Act. The Act very explicitly recognises a substantive notion of equality and the examples listed in the Act clearly envisages far-reaching structural adjustments in South African society. Through its broad standing provisions the Act creates an opportunity for social movements, NGOs, the SAHRC and the CGE to proactively identify “ideal” cases to litigate and the success of the Act need not depend on individual complainants lodging cases.<sup>279</sup>

However, when measuring the Act against the characteristics of effective legislation set out in chapter 2.5, it fares less well:

1.1 “The goal of the lawmaker must be realisable through law”.

If read as an extremely ambitious Act, the Act could be understood as a commandment to “be good”: not only the state but all persons are enjoined to refrain from unfairly discriminating against anyone else, and all persons are asked to promote the value of equality wherever they are. If the Preamble is treated as rhetoric and the (potentially) more far-reaching aspects of the Act are ignored, a more modest aim can be identified: the establishment of an inexpensive, accessible, informal enforcement mechanism (the equality courts) to make it as easy as possible for those individuals who are so inclined, to institute court action against transgressors of the Act.<sup>280</sup> Read in this less expansive way, the Act has achieved its purpose of creating a less formal and potentially less expensive method of enforcing section 9 of the Constitution. On the ambitious reading though, the Act will fail spectacularly.

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<sup>279</sup> Cf Galanter (1974) 9 *Law & Soc Rev* 141 and further.

<sup>280</sup> Cf ss 2(d), 2(f) and 16 of the Act.



1.2 “The required change must be able to be implemented and to be strongly enforced”.

In principle, the Act applies everywhere and to everyone. Handler’s examples of difficult-to-monitor entities are all supposed to adhere to the Act’s provisions: The police, welfare agencies, hospitals, mental institutions and prisons.<sup>281</sup> For every equality court case dealing with these kinds of entities, it may safely be assumed that hundreds of similar situations will go undetected.

Recent evidence suggests that equality court personnel are not necessarily committed to implementing the Act. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act.<sup>282</sup> The South African Human Rights Commission (SAHRC) reported that equality courts were underused and as a result personnel were losing knowledge and confidence in dealing with equality court complaints.<sup>283</sup> During March 2007 an *ad hoc* committee of Parliament reviewed the so-called “Chapter Nine Institutions”.<sup>284</sup> During these hearings the SAHRC reported that some magistrates were not taking these courts seriously and have developed an “attitude” (sic) towards the courts.<sup>285</sup> It reported that some magistrates thought the Act burdensome and rejected or deferred complaints.<sup>286</sup>

Parliament, as the collective body of democratically elected representatives, is arguably more legitimate than the judicial system but Parliament’s “solution” to the problem of effectively combating discrimination has been to throw the problem back to the courts. It

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<sup>281</sup> Handler (1978) 19.

<sup>282</sup> Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. <http://www.pmg.org.za/viewminute.php?id=8330>; <http://www.pmg.org.za/viewminute.php?id=8349>; <http://www.pmg.org.za/viewminute.php?id=8373> and <http://www.pmg.org.za/viewminute.php?id=8378> (accessed 2007-05-15).

<sup>283</sup> *Cape Argus* (2006-10-17) 10; p 3 of the minutes as they appear on the PMG website.

<sup>284</sup> I.e., the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. <http://www.pmg.org.za/viewminute.php?id=8738> (accessed 2007-05-15).

<sup>285</sup> *Cape Argus* (2007-03-12) 9.

<sup>286</sup> *Cape Argus* (2007-03-12) 9.

follows logically that if South Africans do not trust the judicial system, the equality courts will be underutilised.<sup>287</sup>

Anti-discrimination legislation from other jurisdictions usually contains very explicit exclusions,<sup>288</sup> which is not the case in the South African version. Instead the Act employs the concept of “fair” and “unfair” discrimination. Presiding officers have been given some guidance in section 14 of the Act as to the determination of fairness or unfairness but until a large number of cases have been decided, and until very clear parameters have been laid down by the equality courts, violators of the Act will have ample room to argue that they committed “fair” discrimination. Conversely, complainants will not be able to easily establish whether they have been discriminated against “unfairly”. Almost all of the examples listed in the Act contain the qualifier “unfairly” or “unreasonably”, which begs the question.

The Act does not contain any targets or deadlines. The provisions in the Act relating to the drafting of equality plans and progress reports have not come into force yet. It is questionable if sufficient state capacity exists to monitor compliance with suggested results set out in equality plans and progress reports.<sup>289</sup>

### 1.3 “The change-inducing law must provide for effective remedies”.

The Act contains an innovative array of remedies but these remedies obviously mean very little if litigants will not argue in favour of far-reaching remedies or if presiding officers shy away from granting such remedies. Where structural discrimination is the target, courts will have to issue structural interdicts and will have to grant itself supervisory power over the implementation of remedial programmes. Up to September 2005, based on my limited

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<sup>287</sup> Also refer to chapter 5 of the thesis. The results of an empirical survey in parts of greater Tshwane in 2001 suggest that most South Africans do not trust the judicial system.

<sup>288</sup> See chapter 6 and Annexures C and E for examples.

<sup>289</sup> See ss 25(4)(b) and 26(a) of the Act.

telephonic empirical survey, equality courts have been mainly granting orthodox remedies.<sup>290</sup>

- 1.4 “As resistance to a new law increases, positive sanctions are probably as important as negative sanctions”.

The Act does not contain any incentives for compliance, except section 14(3)(i), albeit in an indirect way – If a respondent has taken reasonable steps to alleviate disadvantage, the discrimination may be branded “fair”.

- 1.5 “To have any hope of effective enforcement, the state driving social change must be relatively powerful, and must have significant technological surveillance facilities available”.

In the introduction to chapter 4 below, I refer to a number of authors who hold that the South African bureaucracy suffers from a skills deficit.<sup>291</sup> If the evidence from the implementation of the training programme is anything to go by, the Department of Justice is not capacitated to play a meaningful role in enforcing compliance with the Act. It currently does not have an accurate database of trained equality court personnel,<sup>292</sup> and there are serious discrepancies in the available statistics as to complaints received by the various equality courts.<sup>293</sup> (In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act.<sup>294</sup> A “Draft Equality Review Report” was prepared

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<sup>290</sup> Refer to Annexure F.

<sup>291</sup> See pp 177-180 of the thesis.

<sup>292</sup> In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. <http://www.pmg.org.za/viewminute.php?id=8330>; <http://www.pmg.org.za/viewminute.php?id=8349>; <http://www.pmg.org.za/viewminute.php?id=8373> and <http://www.pmg.org.za/viewminute.php?id=8378> (accessed 2007-05-15). At these hearings the Department of Justice presented a Microsoft™ Powerpoint presentation in which it recorded that it had a “draft database which gives some indication of the available pool of human capacity for equality courts; the database still needs verification by the provinces”.

<sup>293</sup> See fn 1, p 623 (Annexure F.1) of the thesis.

<sup>294</sup> Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. <http://www.pmg.org.za/viewminute.php?id=8330>;

pursuant to the October 2006 hearings and tabled at a meeting of the Justice and Constitutional Development Portfolio Committee on 27 March 2007.<sup>295</sup> This report records that the Chief Directorate Promotion of the Rights of Vulnerable Groups was officially established in April 2005 and tasked with the administration of the equality courts.<sup>296</sup> The report also notes that not all posts in the Directorate were filled and that the statistics collated by the Directorate may not be completely accurate, as insufficient capacity existed to follow up with courts that may have been receiving cases but who had not been submitting statistics to the Directorate.<sup>297</sup>)

- 1.6 “The enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise”.

In theory specialised enforcement bodies – equality courts – have been set up across the country but it is highly questionable whether presiding officers have received adequate and sustained training, as set out in much detail in the next chapter, where I illustrate that the implementation of the training programme for equality court personnel has been inadequate. It is at least arguable that from an accessibility viewpoint, a “one stop shop” should have been created for discrimination complaints. In terms of section 5(3) of the Act, currently two *fora* exist for discrimination complaints: almost all workplace-related instances of unfair discrimination will be heard in terms of the Employment Equity Act,<sup>298</sup> while other complaints will be heard by the equality courts. The possibility of referring a case to a more appropriate forum allows bureaucratically-minded presiding officers to clear their desks of difficult cases, which makes nonsense of the Act’s promise of the expeditious finalisation of discrimination complaints.

- 2.1 “The purpose behind the legislation must to a degree be compatible with existing values”.

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<http://www.pmg.org.za/viewminute.php?id=8349>; <http://www.pmg.org.za/viewminute.php?id=8373> and  
<http://www.pmg.org.za/viewminute.php?id=8378> (accessed 2007-05-15).

<sup>295</sup> <http://www.pmg.org.za/viewminute.php?id=8875> (accessed 2007-05-15).

<sup>296</sup> P6 of the “Draft Equality Review Report”.

<sup>297</sup> P 8 of the “Draft Equality Review Report”.

<sup>298</sup> Act 55 of 1998.





It is perhaps arguable that most South Africans have come to accept that explicit race discrimination is unacceptable and to the extent that the Act confirms this view, the Act will be adhered to by the majority of South Africans. However, many South Africans would probably not consider indirect and subtle discrimination based on race as problematic.<sup>299</sup> Sexism, homophobia and HIV-phobia are still deep-rooted pathologies in South African society and quick changes should not be expected.

2.2 “Laws set up in opposition to powerful economic values and interests may also (eventually) fail”.

As could be seen when the Promotion of Equality and Prevention of Unfair Discrimination Bill was subjected to public hearings in November 1999 to January 2000, the banking and insurance industries were vociferously opposed to certain of the provisions in the Bill,<sup>300</sup> and managed to obtain a compromise from Parliament in the form of section 14(2)(c) to the Act. Based on available data, banks and insurance companies have not been dragged to equality courts in many, if any, cases. If this starts to happen, however, further lobbying aimed at facilitating pro-business amendments to the Act may be expected from these quarters. The then Minister of Justice is on record when he said at the second reading debate of the Promotion of Equality and Prevention of Unfair Discrimination Bill on 26 January 2000 that “I have made a personal undertaking to the [then leader of the National Party] that we will monitor the effect of the Bill on business and the economy in general. Indeed, if it turns out that it becomes necessary to review some aspects thereof, nothing will prevent this House from doing so”.<sup>301</sup> Too many business-friendly amendments to the Act may well send the message to equality court presiding officers that market-generated inequalities are instances of reasonable discrimination, which may seriously harm the transformative potential of the Act.<sup>302</sup>

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<sup>299</sup> See the results of an empirical survey undertaken in 2001 in parts of greater Tshwane as set out in chapter 5 below. The survey *inter alia* indicated that most respondents did not have a clear grasp of the substantive meaning of “indirect discrimination” and “substantive equality”.

<sup>300</sup> See fn 497 (p 106) and pp 324-328 of the thesis.

<sup>301</sup> Reproduced in Gutto (2001) 27.

<sup>302</sup> Liebenberg and O’Sullivan (2001) 37. Parghi (2001) 13 *CJWL* 137 is extremely forthright. The author considers the suggestion that “social condition” be added as a prohibited ground to the Canadian Human Rights Act and concludes

- 2.3 “Laws that facilitate action that people want to take or that encourage voluntary change is likely to be more effective than compulsory change”.

The Act follows a programme of compulsory change; individuals who ignore section 6 of the Act run the (admittedly rather remote) risk of facing court action. The more extreme step of the *criminalisation* of unfair discrimination has not (yet) taken place.<sup>303</sup> The Act does not for example make provision for tax incentives for those individuals who decide to adhere to the letter and spirit of the Act.

- 2.4 “Models or reference groups must be used for compliance”.

Based on the official documentation in my possession relating to the implementation of the Act, this approach was not adopted in public awareness campaigns.

- 2.5 “Laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity”.

Acts attempting to change the emotional areas of life generally succeed to a lesser degree than Acts aimed at instrumental areas of life. This Act attempts to do both: The Schedule to the Act highlights instrumental areas of life, such as insurance and banking, but at the same time the Act aims at creating a society “marked by human relations that are caring and compassionate”.<sup>304</sup> Courts and equality plans do not create kind, caring people.

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at 170 that “adding this new ground would not prevent the market from discriminating against poor people who are truly unable to pay for goods such as housing or food ... Social condition would therefore not effect the degree of social change that some of its proponents expect it to and that some of its opponents fear it will”. In similar vein Freeman (1981) 90 *Yale LJ* 1894 cynically argues that the goal of anti-discrimination legislation “is to offer a credible measure of tangible progress without in any way disturbing class structure generally. The more specific version of what would be in the interest of the ruling classes would be to ‘bourgeoisify’ a sufficient number of minority people in order to transform those people into active, visible, legitimators of the underlying and basically unchanged social structure”.

<sup>303</sup> Gutto (2001) 153; 167-170 states but does not explain why the criminalisation of systemic and repeat unfair discrimination, hate speech and harassment would give the Act greater efficacy and impact. In my view, criminalisation would not necessarily lead to greater impact. Should the state wish to prosecute offenders, it would need effective monitoring mechanisms. And if the state will only rely on victims laying charges, how would that be different from the current position of allowing victims to approach civil courts free of charge?

<sup>304</sup> See the Preamble to the Act.

2.6 “Law must make conscious use of the element of time in introducing a new pattern of behaviour”.

As pointed out in the next chapter, the training of equality court personnel did not run smoothly. Had the training been completed relatively speedily after the promulgation of the Act the equality courts could have been set up much faster. The drafting of the Act was controversial and led to much publicity in late 1999 and early 2000 in the popular media.<sup>305</sup> Has this momentum been used, it is at least arguable that more people would have been aware of the existence of the courts and more cases could have been forthcoming.<sup>306</sup> Three years passed before some equality courts were set up and by then public awareness had arguably waned.<sup>307</sup>



<sup>305</sup> Gutto (2001) 114-119. The publication of the Bill (for the Bill as it read in October 1999, see <http://www.info.gov.za/gazette/bills/1999/b57-99.pdf>) and the promulgation of the Act stirred up controversy. I refer to three opponents of the Bill, as examples: (a) The insurance industry argued that the Act would cripple its legitimate business of differentiating between categories of people and charging premiums commensurate with risk (Eg *Rapport* (1999-11-28) 2, *Beeld* (1999-12-06) 8, *Financial Mail* (1999-12-03) 54, [http://www.deneysreitz.co.za/seminars/item/insurance\\_seminar\\_september\\_2000\\_the\\_impact\\_of\\_recent\\_civil\\_rights\\_legislation\\_on\\_the\\_insurance\\_industry,158.html](http://www.deneysreitz.co.za/seminars/item/insurance_seminar_september_2000_the_impact_of_recent_civil_rights_legislation_on_the_insurance_industry,158.html) (accessed 2007-08-06)). (b) Banks raised their concerns about the effect of the Act on their lending policies (Eg *Beeld* (1999-12-28) 15). (c) The media focused on hate speech provisions in the Bill and speculated that the Bill would severely limit freedom of expression (Eg *Rapport* (1999-11-28) 2; *Mail & Guardian* (1999-11-11) 40; *The Cape Times* (1999-10-08) 5; *Beeld* (1999-12-06) 8; *The Star* (1999-10-29) 16 (cartoon); *The Star* (1999-11-08) 8 (cartoon)). See p 169 for the two cartoons.

<sup>306</sup> Cf para 5 of the Report of the Ad Hoc Joint Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill [B 57-99] dated 21 January 2000 as reproduced in Gutto (2001) 25: “The Committee further urges the Minister to initiate the establishment of the equality courts as soon as possible. A long delay in the training of presiding officers and clerks and the establishment of these courts will seriously hamper the achievement of the objects of the Bill”.

<sup>307</sup> At its presentation of the Bill to Parliament, the ad hoc joint committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill [B 57-99] *inter alia* in its accompanying report (reproduced in Gutto (2001) 25) urged “the Minister to initiate the establishment of the equality courts as soon as possible. A long delay in the training of presiding officers and clerks and the establishment of these courts will seriously hamper the achievement of the objects of the Bill”. This sound advice was not heeded.

- 3.1 “Large organisations with specialised personnel that is well-equipped to interpret rules will probably be committed to implementing new laws, but small businesses, individual home-owners, small landlords and individuals will probably not have sufficient knowledge and implementation on this level will be very difficult to achieve”.

Many potential users of the equality courts, that is individual victims of discrimination, will not be aware of the courts.<sup>308</sup> Many small-time violators of the Act will not be aware of the anti-discrimination norms contained in the Act and will not be in a position to change their conduct to conform to the Act’s standards.

- 3.2 “Laws put in place to assist or protect the economically weak will have limited impact”.

Any anti-discrimination Act will by its very nature aim to protect weaker groups as it is those without power and knowledge who are most easily discriminated against. One of the Act’s further stated aims is to eradicate economic inequalities.<sup>309</sup> Socio-legal theories<sup>310</sup> and comparative experience tend to suggest that the Act will not achieve this aim: Minority (and arguably vulnerable) groups bring relatively few matters to discrimination tribunals in Canada. Approximately 28% of cases brought to the Canadian Human Rights Tribunal for the period 1997-2003 were brought by minority groups. The respective percentages for Alberta, British Columbia and Ontario are 15%, 16% and 29%.<sup>311</sup>

The SAHRC and CGE suffer from budgetary constraints. The SAHRC has assisted some complainants in bringing their complaints to equality courts but, based on my limited telephone and media survey,<sup>312</sup> have not proactively and in their own name instituted any equality court cases. Civil society has not mobilised in any meaningful way around the Act.

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<sup>308</sup> Cf Griffiths in Loenen and Rodrigues (eds) (1999) 319: “[M]uch of the public to whom anti-discrimination rules are addressed is diffuse, inexpert: small businesses, individual home-owners and small landlords, individual members of organizations ... Producing a significant level of accurate legal knowledge in such a public is not an easy project”.

<sup>309</sup> Refer to the discussion in chapter 1.

<sup>310</sup> Refer to chapter 2.

<sup>311</sup> Refer to Annexure D.

<sup>312</sup> See Annexure F.



- 4.1 “The use of law will increase if the educational system is used in a well-directed way as a nationally inclusive socialising agent”.

It is not envisaged in any official documentation in my possession relating to the implementation of the Act that the national educational system will be used in any way to publicise the potential uses of the Act.

- 4.2 “The required change must be able to be communicated to the large majority of the population”.

Public awareness must be maintained over the long term. The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change. As will be discussed in more detail in chapter 5, the public awareness campaigns relating to the Act has been inadequate. Unlike when the Labour Relations Act<sup>313</sup> and the 1996 Constitution were drafted,<sup>314</sup> plain legal language was not a consideration when the Act was drafted, or to put it more accurately, time pressure did not allow the drafters to pay much (if any) attention to plain and accessible English.<sup>315</sup> During the Parliamentary hearings process COSATU and NADEL both urged the drafters to write a plain language Act. COSATU argued that the Bill was difficult to follow, that its provisions were long-winded and that it contained a proliferation of definitions and concepts. NADEL submitted that the language of the Bill was confusing and complex and that a Bill of this nature and importance should be drafted in plain language and made accessible to the people.<sup>316</sup> These submissions were not heeded and the end-product was a typical “lawyer’s Act”.<sup>317</sup>

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<sup>313</sup> Act 66 of 1995.

<sup>314</sup> See van der Westhuizen in Viljoen and Nienaber (eds) (2001) 61-70 and Armstrong in the same source at 71-77.

<sup>315</sup> Interview by the author with Shadrack Gutto, one of the drafters of the Act, 27 March 2003. In a document prepared by the Equality Legislation Drafting Unit (ELDU), “Draft Discussion Document 4, first outline of a draft bill”, p 23, it is stated that “[T]he intention is to finally prepare a draft in plain and simple, but legally correct, language”.

<sup>316</sup> Although not directly in point, during the Parliamentary hearings Focus on Elder Abuse proposed that the following clause be added to the Act: The state may not discriminate against any member of the population regarding (i) the knowledge of the proposed formulation of new or amended legislation (ii) the manner in which submissions can be given (iii) the knowledge of the date of commencement of new legislation (iv) the knowledge of existing legislation including how to access this in any manner including the following: (a) the failure to alert the general public regarding (i), (ii), (iii) and (iv) via various media including via acceptable ways of communication in rural areas, and where access

Hunt is not convinced that plain language is the solution.<sup>318</sup> He agrees that legislation should be accessible and understandable to the layman but if the key audience of a particular piece of legislation is lawyers, he states that the arguments for using plain language *in the Act* disappears, what the layman needs is explanations and summaries.<sup>319</sup> Bohler-Muller and Tait have argued, in similar vein, that the media should be involved to make the processed more accessible to the public.<sup>320</sup> However, even on these authors' more forgiving terms the project has failed: The Department of Justice has made available a booklet explaining the content of the Act,<sup>321</sup> but the booklet follows the legalistic wording used in the Act and does not attempt to simplify the Act.<sup>322</sup> It is unknown to what extent

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to the media is limited (b) the failure to promote public awareness campaigns on the above issues (c) the failure to promote oral submissions on tape or by phone where difficulty in writing is experienced (d) the failure to provide facilities to produce copies of recorded oral submissions or transcriptions for consideration by drafting teams (e) the failure to promote the active participation of all groups in the legislative process especially the disabled and older persons (f) the failure to ensure that the Government Gazette is easily available and obtainable by those who wish to purchase copies throughout South Africa, taking into account that the Government Printers are not easily accessible by the majority of the population (g) the lack of the promotion of knowledge of existing legislation to the public, including the rural, peri urban and urban areas, the knowledge, use and access of which would promote Constitutional rights and access to the law where necessary and which was not accessed previously due to insufficient knowledge with regard to existing enacted legislation".

<sup>317</sup> See Bekink and Botha (2007) 28 *Stat L Rev* 37 who argue that a legal document (presumably including legislation) written in plain language improves communication, shares information more effectively, and informs all the role players better of what is expected of them. Nienaber (2002) 27 *TRW2* argues that the promise in the Preamble of the Act is effectively nullified because the Act is written in language that is accessible only to legislators and the legal profession. At 9 she argues that the Act was written in pompous language that creates distance between the legislature and the people. At 12 she submits that the Act is (ostensibly) aimed at bringing about social change and that the Act should therefore be accessible to the average population and to people of average intelligence and education. At 12 fn 26 she refers to a previous study by her (Nienaber (2001) 34 *De Jure* 113) that has found that people with education less than matric made no sense of extracts of the Constitution given to them. Arguably the Act was written in more obtuse fashion than the Constitution. From own experience as a lecturer of first and second year law students, the Act is extremely inaccessible to people with limited exposure to the law. My students struggle immensely to apply the Act's definition of "discrimination", not to mention the list of factors to determine "fairness/unfairness" in s 14. If law students struggle to interpret the Act, it will arguably be completely incomprehensible to ordinary South Africans.

<sup>318</sup> Hunt (2002) 23 *Stat L Rev* 24. Also see Bekink and Botha (2007) 28 *Stat L Rev* 63.

<sup>319</sup> Hunt (2002) 23 *Stat L Rev* 28.

<sup>320</sup> Bohler-Muller and Tait (2000) 21 *Obiter* 414.

<sup>321</sup> The 12-page booklet is titled "Equality for All" and contains the following headings: "Introducing the Equality Act", "purpose of the Act", "when to use the Act", "the Act in action", "institution of proceedings in the equality court", "representation", "appeals and reviews", "the powers of the equality court" and "list of centres".

<sup>322</sup> When the Constitution was adopted the Constitutional Assembly produced pocket-size versions of the Constitution as well as a booklet entitled "You and the Constitution". This booklet was drafted in plain language and contained many examples to explain the purpose of the Constitution. See Skjelten (2006) 96.

the booklet has been distributed. As to the media's involvement, the Department has acknowledged that the public awareness campaign has not been a success.<sup>323</sup>

- 4.3 “Laws that include incentives to encourage lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective”.

This novel suggestion (for South Africa) has not been employed in the Act, let alone in any piece of South African legislation, to my knowledge. Complainants may approach equality courts without legal representation,<sup>324</sup> which tends to suggest that public awareness campaigns will focus on the potential users of the Act – victims of discrimination – and will not attempt to draw the legal profession into the implementation of the Act.

- 4.4 “The state driving social change must be able to rely on vast mass media communication”.

As pointed out in the next chapter, the necessary funds have not been made available to the equality legislation project and the equality courts are not properly resourced. Mass media reporting on the equality courts have been sporadic.<sup>325</sup> The Department of Justice has certainly not utilised the mass media in a sustained, vigorous manner.

### 3.5 Conclusion

[The Act] does some absolutely laudable things in terms of unfair discrimination. But it paints a canvas so wide in terms of the principle of equality as a social norm that, if we give that power to lawyers, I fear that we will be

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<sup>323</sup> Eg *Sunday Independent* (2005-04-03) 2; *Pretoria News* (2005-04-14) 8. On p 43 of a document entitled “Project Plan Implementation Report April 2004” provided to the author by Mr Rob Skosana, Department of Justice, it is stated that “to meet our [Department of Justice] marketing objectives an additional amount of R4 m is required to ensure that even people in the rural areas can receive and understand the intended information as contemplated in the act (sic). The Department of Justice must promote the act (sic) together with the chapter nine institutions by assisting and providing relevant information to the public. *However at this stage due to lack of funds we encounter difficulties in carrying out our mandate*” (my emphasis). At TMT/TMB meetings (see chapter 4) an item called “public awareness” invariably appeared on the agenda to meetings, but was never discussed. Lack of public awareness perhaps (partially) explains the small number of cases that have been brought to the equality courts since their inception - see chapter 5.5 for more detail.

<sup>324</sup> See fn 212 (p 143) above.

<sup>325</sup> I have been able to source only eight newspaper reports relating to publicising the existence of the equality courts and how to approach the equality courts. See chapter 4.11 for more detail.

incapable of really reproducing a coherent view of society. The Act attempts it through the power of law in a way that I think ultimately is implausible.<sup>326</sup>

What does equality mean for a person who is illiterate, unemployed, lacks a decent shelter, cannot afford adequate food or health services and is disabled? What does equality mean in the face of massive poverty and deprivation in our country?<sup>327</sup>

In this chapter I discussed the limits of orthodox or traditional anti-discrimination legislation and I have shown how the Act moves considerably beyond these limits in a laudable attempt to combat discrimination. The most serious shortcoming of anti-discrimination legislation in general, and the Act in particular, which is in my view ultimately an unsolvable dilemma, is the inability to *meaningfully* address structural discrimination.

Consider (then) Chief Justice Chaskalson's very optimistic opening address at the National Seminar for Equality Court Judicial Educators held at Aloe Ridge Hotel, 16-21 April 2001.<sup>328</sup> Chaskalson CJ called for an understanding of and commitment to the fulfillment of the constitutional vision of a truly equal society underpinning the Act. He indicated that the realisation of this vision and successful implementation of the Act required judicial understanding of an unwavering commitment to playing a role in bringing an end to the current reality of poverty and inequality. Amongst the key indicators of this inequality to be addressed through successful implementation of the Act, Chaskalson CJ mentioned *poverty and disease, homelessness, poor education, unemployment, underemployment and lack of ownership of property amongst many black people in contrast to the abundance experienced by most white people with regard to each of these*.<sup>329</sup>

Equally optimistic was the (then) Deputy Minister (Department of Justice and Constitutional Development) at the consideration of the Bill in the National Council of Provinces:<sup>330</sup>

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<sup>326</sup> Unterhalter "Liberty Conference" (2000) 38.

<sup>327</sup> Dlamini (2002) 27 *TRW* 36.

<sup>328</sup> A summary of his opening address is contained in the "Executive Summary Report" of the National Seminar (see fn 107 (p 191), fn 148 (p 204) and p 202.)

<sup>329</sup> My emphasis.

<sup>330</sup> Speech made on 28 January 2000, reproduced in Gutto (2001) 71 and further; my emphasis.





The compound oppression suffered by African, rural, working-class, poor women has made them one of the most tragic casualties of discrimination in our society. *This Bill provides the mechanism to cast off those shackles of oppression.* No person should be doomed to having their lives narrowly circumscribed by them in outmoded and degrading stereotypes. The energies and resources of this country must be channeled into unleashing the best we can be as individuals and as a society. *A dynamic and nuanced implementation of this legislation will contribute significantly to that aspiration.*

It is very difficult to imagine how equality courts are supposed to play a role in eradicating Chaskalson's "indicators of inequality" and the Deputy Minister's "shackles of oppression". Who will be the respondents in cases such as these? What will be the remedy to be asked for? (South African) law is simply not up to the task.<sup>331</sup>

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<sup>331</sup> Trengove (1999) 1 *ESR Review* 3 (internet version) gives the following example of a structural discrimination problem: "How does one for instance compensate the victims of unfair race discrimination in the provision of education, pervasive throughout a town, region or province over a long period of time? Assume that the victimised group received some education, but of a quality inferior to that given to the privileged group". He suggests the following possible remedy: "[O]rder the state ... to provide appropriate remedial services for the benefit of the victimised class as a whole, rather than to resort to individualised awards of damages in cash ... It would ... require the Court to involve itself in the specifics of the remedial action to be taken and often also in ongoing supervision of its implementation". This kind of remedy is yet to be created in a South African court. Where a class action has been brought in the interests of the poor (social grants litigation in *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza* 2001 (4) SA 1884 (SCA)), the reality on the ground has not changed. In this regard Williams (2005) 21 *SAJHR* 454 pessimistically argues that South African courts "do not seem equipped with sufficient institutional capacity or remedial powers to ensure that even statutory (as opposed to constitutional) entitlements are retrievable in practice".