Chapter Five: An empirical study illustrating the disjuncture between the ideals contained in the Act and popularly held beliefs

5.1 Introduction

This chapter is concerned with three of the requirements of effective legislation: "the source of the new law must be authoritative and prestigeful",[1] "the purpose behind the legislation must at least to a degree be compatible with existing values",[2] and "the required change must be communicated to the large majority of the population".[3]

The purpose of this chapter is to illustrate the disjuncture that may exist between ideals contained in an Act, and popular values or conceptions. In the context of the thesis, I set out to illustrate the "gap" between the concepts of "discrimination" and "equality" as stated in the Act, and the popular understanding of these terms. To this end, I undertook an empirical study in 2001 in parts of Tshwane.[4] I report on the outcome of this survey in this chapter. Where appropriate and relevant, I also refer to the results obtained in a survey conducted by the Human Sciences Research Council in 2003 that was published in 2006,[5] in order to place the 2001 data in a more contemporaneous context.

I also criticise the Department of Justice and Constitutional Development's public awareness campaigns relating to the Act.[6]

Broadly speaking, most of the questions posed to Tshwane residents in the empirical survey questionnaire may be placed in either of two categories:

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[1] See pp 74 and 163-164 above.
[2] See pp 77-78 and 166-167 above.
[3] See pp 83 and 171-173 above.
[4] See Annexure B for the following documents relating to this survey: The training document that I distributed to field workers; the questionnaire that field workers relied on to compile the data; codes to the open-ended questions in the questionnaires; the results of the survey in table format; respondents' descriptions of discrimination that they had encountered; respondents' descriptions of lawyers; and respondents' descriptions of South African courts.
[5] Pillay *et al* (eds) (2006).
[6] See chapter 5.5 below.

1. A number of questions related to Tshwane residents' impression of the South African judicial system. It is at least arguable that a legal system will not be utilised to resolve (discrimination) disputes if the "system" (courts, judges, legal practioners) is not trusted. Especially during the 1980s, a large number of authors commented on the lack of legitimacy or credibility of the South African legal system, describing it as a "legitimacy crisis".[7] The vast majority of these authors view "legitimacy" in this context as "widespread acceptance of the (moral) authority of the courts" and it is with this conception of legitimacy that I will concern myself in this chapter.[8] At least formally the "system" has been (partly) cleansed of its unacceptable traits: A Constitutional Court was created, a new appointment process for judges had been put in place, and judges appointed under the old system had to swear a new oath of office to uphold the new constitutional order.[9] However, whether these, sometimes subtle, changes have affected the perceptions of the broader South African public is questionable, and I set out to gauge these perceptions. This range of questions link with the requirement of effective legislation that "the source of the new law (in other words, the Act) must be authoritative and prestigious". The responses to these questions suggest that ordinary South Africans do not trust the courts, or, to put it differently, that courts are not seen as "authoritative and prestigious" institutions with which to combat discrimination.

2. The questionnaire also asked of residents to indicate whether they had suffered particular forms of discrimination in the six months preceding the questionnaire and to describe in words the most serious incident of discrimination. These questions aimed at ascertaining ordinary South Africans' understanding of the terms "discrimination", "fair discrimination" and "unfair discrimination". This range of questions link with two requirements of effective legislation; that "the purpose behind the legislation (to eradicate discrimination) must at

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[7] Cf Van der Westhuizen (1989) April *DR* 242; Corder (2001) 118 *SALJ* 772; Froneman (1997) November *Consultus* 121; Carpenter (1996) 11 *SAPL* 110; Van Blerk (1992) October *Consultus* 135; Olivier (2001) 118 *SALJ* 166; Lever (1992) April *Consultus* 57; Cameron, Davis and Marcus (1992) *Annual Survey* 766, 770 and 771; McQuoid-Mason (1995) 5 *SAHRY* 162-189; Editorial (1991) April *Consultus* 3; Cameron (1997) 114 SALJ 504; Olivier (2001) 118 *SALJ* 455; Olivier and Baloro (2001) 26 *TRW* 31; Nel (2001) 34 *DJ* 29 and the sources quoted in fn 3 of this article; Sarkin (2001) 118 *SALJ* 747; Skjelten (2006) 25.
[8] Botha (2001) 64 *THRHR* 177; (2001) 64 *THRHR* 368; (2001) 64 *THRHR* 523 problematises the concept "legitimacy".
[9] Cf Froneman (1997) November *Consultus* 121 and Olivier and Baloro (2001) 26 *TRW* 33 and further.

> least to a degree be compatible with existing values", and "the required change (in other words, the prohibition of unfair discrimination concretised in the Act) must be communicated to the large majority of the population". The responses to this range of questions suggest that there is a disconnect between ordinary South Africans' understanding of what "discrimination" entails and the "discrimination" that the Act sets out to eradicate. When the survey was undertaken, two years before the coming into effect of the Act, 31% of white respondents and 45% of black respondents indicated that they were aware of the Act. Available evidence suggests that this percentage may well have dropped since the survey was undertaken. In paragraph 5.5 below, I aim to illustrate that the Department of Justice mismanaged one of the suggested requirements of effective legislation, in that the main norms taken up in the Act have *not* been popularised.

Ideally, the empirical survey I conducted in 2001 would have to be repeated at some point in the near future. The 2001 survey may then act as an important signpost, against which the results of future similar surveys could be measured, to track progress or setbacks on the road to societal transformation.[10] Ideally such a follow-up empirical study should have formed part of the thesis, but empirical research of that nature is costly and time-consuming. Consequently, I hope to conduct such a survey as a continuation of this research. Further research possibilities would then include tracking, over time, awareness of the equality courts, perceptions relating to these courts, and questions surveying the general public's understanding of the concepts "indirect discrimination", "substantive equality", "equality of outcomes", and the like. A Human Sciences Research Council (HSRC) survey on social attitudes was undertaken in 2003 and published in 2006.[11] Where appropriate and relevant, I compare the findings of the HSRC survey with the results obtained from the survey I undertook.

5.2 Research methodology

Epstein and King are highly critical of the methodology used in empirical research by members of the legal community and claim that all the studies they have analysed employing empirical

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[10] Pillay in Pillay *et al* (eds) (2006) 2; Orkin and Jowell in the same source at 279.
[11] Pillay *et al* (eds) (2006).

research violate at least one of the "rules" they believe should be followed when empirical research is undertaken.[12] These "rules" are:[13]

1. The research must be replicable: another researcher must be able to understand, evaluate, build on, and reproduce the research without any additional information from the author.
2. Research is a social enterprise: the author is irrelevant; his or her attributes, reputation or status are unimportant; what is important is his or her contribution to scholarly literature.
3. All knowledge and all inference in research is uncertain: all conclusions reached in empirical research are uncertain to a degree.

Keeping these criticisms in mind, with the assistance of Ms Rina Owen, Department of Statistics, University of Pretoria, I developed the following method to conduct a survey in the Greater Tshwane area – that is, "white Pretoria", Eersterust, Laudium, Atteridgeville, Saulsville and Mamelodi.

Because South Africans continue to live in suburbs and residential areas that are still segregated according to race to a large degree, and because I wanted to compile a sample of the population that was as representative as possible of the various race groups that lived in the larger Tshwane region, I used stratified random sampling[14] to select the 300 individuals that were asked to complete the questionnaires.

I used the information contained in a document entitled "Financial particulars, statistical data and tariffs 2000/2001" as compiled by the Department City Treasury, Subdivision Management Information of the (then) City Council of Pretoria to divide Tshwane into eight strata. My aim was to obtain a fairly representative sample population according to race and socio-economic status. For the "black", "Asian" and "coloured" residential areas detailed information on number of houses per

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[12] Epstein and King (2002) 69 *Univ Chicago L Rev* 17.
[13] Epstein and King (2002) 69 *Univ Chicago L Rev* 38, 45 and 49.
[14] De Vos (2002) 205 states that this kind of sampling is used to "ensure that the different groups or segments of a population acquire sufficient representation in the sample". Within each stratum, people are selected proportionally according to the size of that stratum.

suburb and population per suburb were not available, while information on "white Pretoria" was more detailed. I therefore divided "white Pretoria" into four strata, broadly representative of the differing socio-economic conditions in these areas:[15] "White" North,[16] "White" West,[17] "White" East,[18] and "White" Central, North and East.[19] From the stratum "White North" the suburb Sinoville was randomly selected, from stratum "White West" the suburb Wespark was randomly selected, from stratum "White East" Constantia Park and Newlands were randomly selected and from stratum "White Central, North and East" Moregloed and Meyerspark were randomly selected.

As for the "black", "coloured" and "Asian" residential areas, I asked senior law students who resided in Eersterus, Laudium, Atteridgeville and Mamelodi to identify the different socio-economic areas within each of these suburbs (inelegantly referred to as "rich" areas, "poorer" areas and "informal settlements".) Using a random table we identified the smaller areas within each of these suburbs where the questionnaires would be distributed.

Based on the various strata's population figures, the questionnaires were proportionally divided:

Sinoville	21 questionnaires
Meyerspark	23 questionnaires
Moregloed	23 questionnaires

[15] I accept that the decision as to where to allocate the suburbs on the boundaries was somewhat arbitrary.

[16] Consisting of the suburbs Dorandia, Wolmer, Tileba, Florauna, Pretoria North, Annlin, Wonderboom, Sinoville, Magalieskruin, Montana, Montana Gardens, Doornpoort, Derdepoortpark, Montana Park, Bon Accord AH, Christianville AH, Cynthia Vale AH, Kenley AH, Pumulani AH and Wolmaranspoort AH. This stratum consisted of approximately 67 738 residents.

[17] Consisting of Andeon, Suiderberg, Booysens, Claremont, Mountain View, Daspoort, Pretoria Gardens, Elandspoort, Danville, Kwaggasrand, Valhalla, Mayville, Wonderboom South, Hermanstad, Proclamation Hill, Capital Park, Roseville, Eloffsdal, Gezina, Pretoria CBD/Pretoria West, Phillip Nel Park, Monrick AH, Wespark, Asiatic Bazaar, Daspoort Estate, Glen Lauriston, Kirkney, Les Marais and Parktown Estate. This stratum consisted of approximately 117 551 residents.

[18] Consisting of Groenkloof, Monument Park, New Muckleneuk, Muckleneuk, Lukasrand, Waterkloof, Waterkloof Ridge, Pierre van Ryneveld, Elarduspark, Wingate Park, Erasmuskloof, Moreleta Park, Pretorius Park, Constantia Park, Garsfontein, Faerie Glen, Wapadrand, Willow Glen, Menlo Park, Lynnwood, Maroelana, Menlyn, Lynnwood Glen, Lynnwood Manor, Lynnwood Ridge, Die Wilgers, Waterkloof Glen, Newlands, De Beers, Brooklyn, Erasmusrand, Waterkloof Heights, Waterkloof AH, Equestria, Hazelwood, Lynnwood Park, Sterrewag, Valley Farm AH, Waterkloofpark, Alphen Park and Ashlea Gardens. This stratum consisted of approximately 152 133 residents.

[19] This stratum contained the suburbs Sunnyside, Arcadia, Hatfield, Riviera, Deerness, Rietfontein, Villiera, Rietondale, Lisdogan Park, Bryntirion, Colbyn, Waverley, Moregloed, Queenswood, East Lynne, Weavind Park, Brummeria, Bellevue, Silverton, Meyerspark, Murrayfield, La Montagne, Nell Mapius, Hillcrest, Eastwood, Kilberry, Kilner Park, La Concorde, Lindopark, Val-de-Grace, Lydiana, Lynnrodene, Trevenna, Willowbrae and Willow Park Manor. This stratum contained approximately 148 023 residents.

Wespark	35 questionnaires
Newlands	23 questionnaires
Constantia Park	23 questionnaires
Atteridgeville	54 questionnaires (18 questionnaires each for a "richer" area, "poorer" area and an informal settlement.)
Mamelodi	88 questionnaires (29 questionnaires each for a "richer" area, "poorer" area and an informal settlement.)
Laudium	8 questionnaires (4 each for a "richer" and "poorer" area.)
Eersterus	8 questionnaires (4 each for a "richer" and "poorer" area.)

Each of the field workers (senior law students) received a map of the area to be surveyed and the relevant number of questionnaires. Each field worker visited a pre-selected suburb. The number of houses in the particular area had to be counted and the number of houses were then divided by the number of questionnaires to ascertain the interval of houses to be visited. At each of the houses selected the field worker had to compile a list of residents, oldest to youngest, not including children younger than 18, and using a random table the field worker had to ascertain which of the residents had to be interviewed. The field worker had to ask for a contact telephone number but could obviously not compel anybody to provide a number – the telephone number was requested as a control measure and was not used for any other purpose. The field workers received R20 per questionnaire. No remuneration was payable to the respondents. I provided training of about one hour to the field workers and handed a "training document" to every field worker who participated in the project (see table A, Annexure B).

The field workers either completed the questionnaires in the presence of the selected resident, or asked the selected resident to complete the questionnaire.

The questionnaire can broadly be divided into four categories: (a) the respondent's biographical details;[20] (b) the respondent's view on whether a particular number of situations amounted to fair or unfair or no discrimination; (c) the respondent's views on the South African judicial system (lawyers; courts; law enforcement); and (d) the respondent's personal experience of discrimination

[20] These questions related to race, home language, gender, age, educational level and current occupation.

in the six months preceding the questionnaire. The complete questionnaire is reproduced in table B, Annexure B.

With the wisdom of hindsight, the question relating to the respondents' views on whether particular situations amounted to fair or unfair or no discrimination could have been better phrased.[21] Some of the questions required respondents to make a number of assumptions, for example "a golf club charges an annual membership fee of R40 000 'to keep out undesirable elements'". "Undesirable" could be read in a number of ways. Some of the questions were vague, for example "banks refuse to grant loans to people wanting to buy properties in certain areas". "Red-lining" primarily concerns poor suburbs,[22] and I should have concretised the question with reference to a particular poor suburb in the Tshwane region.

It is arguable that I should have phrased the questions relating to Tshwane residents' perception of the South African court system and legal practitioners differently. Question 16.1 asked respondents to indicate "how many times in the last six months" they have experienced unfair discrimination against them on one or more of the grounds of race/colour, gender, age or language/culture. Question 16.3 asked of residents who had suffered discrimination whether they approached a court, but this question did not explicitly refer to discrimination suffered in the six months preceding the survey. Question 19.1 asked residents to indicate how many times they have appeared as witnesses or as a party in a lawsuit in a court while question 20.1 asked residents to indicate how many times they have consulted with a lawyer. Questions 19.2 and 20.2 then asked residents to convey their impressions of South African courts and legal practitioners. Question 19.1 and 20.1 also did not contain the six month limitation. It is arguable that I should have used a uniform time limitation for all of these related questions. A more sensible approach could, for example, have been to use 27 April 1994 as the time limit, as it could be argued that courts could do very little to censure state and private discrimination before this date.

The questionnaire contained a number of open-ended questions which had to be coded. "Current occupation" was divided into 15 categories. Question 16.2 ("describe the most serious incident of

[21] See question 10.1 of the questionnaire in table B, Annexure B, below.
[22] Cf para 4(b) of the Schedule to the Act read with s 29 of the Act.

unfair discrimination that you have suffered in the past six months") was divided into 6 categories: "workplace", "social interaction", "police", "educational facilities", "medical care institutions" and "resorts, restaurants and shopping complexes". I divided the responses to question 19.2 ("describe your impression of South African courts") into 3 categories: positive view, negative view and ambivalent view. Question 20.2 ("what is your impression of lawyers?") was divided into ten categories: positive view, ambivalent view, and eight categories that reflected negative views. The complete lists of codes for the various open-ended questions appear in tables C – F, Annexure B, below.

5.3 Results of the survey

I set out the results of the survey in paragraphs 5.3.1 to 5.3.7 below, and I analyse these results in paragraph 5.4.

5.3.1 Demographical profile of the respondents

294 respondents completed the questionnaires. As to race, 48.3% of the respondents indicated that they were black; 44.56% white, 4.42% coloured and 2.72% Asian.[23] Most of the respondents spoke one of four home languages: 40.89% Afrikaans, 31.27% one of the Sotho languages, 12.71% one of the Nguni languages and 11.34% English.[24] As to the respondents' sex, 48.8% were female and 51.2% male. An analysis of the respondents' age indicates that almost a quarter (24.56%) were between the ages of 18 and 25. Retirees (presumably respondents older than 60) amounted to 20.7% of the group.[25] 18.49% of the respondents indicated "unemployed" when asked their occupation. Pensioners (12%) and students (11%) were the second and third largest groups.[26] As to educational status, 41.24% of the respondents had completed the matriculation examinations and 15.12% had completed a Baccalaureus degree. 20.96% of the respondents

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[23] According to the population figures contained in the "City Council of Pretoria" document, in 2001 the black population accounted for 55.3% of Tshwane's population, whites for 41.6%, coloureds for 2.74% and Asians for 1.97%.

[24] Of the remaining 11 respondents, 7 respondents indicated "other", 3 respondents indicated "other African language" and 1 respondent indicated "other European language" as home language.

[25] The complete breakdown of the respondents' age is as follows: 18-25 24.56%; 26-30 13.8%; 31-40 18.1%; 41-50 16%; 51-60 13.2%; 61-70 7.5% and 71-100 4.2%.

[26] The complete breakdown of the respondents' occupation is as follows: unemployed 18.49%; pensioners 12%; students 11%; educational 4.45%; legal 1.03%; arts 1.71%; sales 8.9%; management 4.11%; medical 3.42%; banking and financial services 2.74%; police or security 2.05%; clerical or secretarial 5.48%; unskilled or manual labour 6.16%; housewives 7.53% and other 10.62%.

indicated that they had completed grade 8 to 11. 1.37% (4 respondents) had received no schooling.[27] Based on the age and employment profiles, it would appear that at least some of the field workers took the path of least resistance and interviewed whoever they found at the selected household, instead of following a truly random approach – the 18-25 year old bracket seems overrepresented, as well as students, housewives, unemployed and pensioned respondents. It could be argued that this possible overrepresentation of certain groups affects the validity of the conclusions drawn from the survey data.

5.3.2 Profile of the respondents' attitudes towards the political situation in South Africa and racial tolerance

Question 14 asked of respondents to "describe your attitude regarding the general political situation in South Africa at present". Taken as a whole, more respondents indicated that they had a "negative" or "very negative" attitude (40.47%) than those who had a "positive" or "very positive" attitude (26.19%). A third of the respondents indicated that they had a "neutral" attitude. White respondents were generally speaking more negative than black, coloured and Asian respondents. Table G, Annexure B contains a detailed breakdown.

Question 15 asked of respondents "do you think that South Africans from different races and cultures have become more tolerant towards each other in the last three years?" Taken as a whole, most respondents (36.77%) thought that South Africans had become "more tolerant". 27.15% of respondents thought that the situation had "remained the same" while 29.55% thought that attitudes had hardened. 6.53% were uncertain.[28] The largest percentage of each of the race groups thought that South Africans had become more tolerant. Table H, Annexure B contains a detailed breakdown.

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[27] The complete breakdown of the respondents' educational status is as follows: none 1.37%; primary school 4.47%; grade 8-11 20.96%; grade 12 41.24%; B degree 15.12%; honour's degree 3.09%; master's degree 1.37% and other 12.37%.

[28] Daniel *et al* in Pillay *et al* (eds) (2006) 37 report that in the 2001 HSRC survey, 42% of respondents had thought that race relations had improved. The 2003 HSRC survey indicated that 55% of respondents thought that race relations had improved. A survey undertaken by Markinor in April and May 2007 indicated that 57% of South Africans thought that race relations had been improving while the respective percentage for a similar survey undertaken in 2006 was 60% - *Beeld* (2007-05-25) 5.

Question 21 probed respondents' views on the government's use or abuse of the term "racist". The question asked respondents to agree or disagree with the statement "whenever [the government] do not like what someone is saying about their policies, they describe such a person as a racist". The vast majority of white respondents (91.6%) agreed with the statement while almost half (47.53%) of black, coloured and Asian respondents agreed. 67.24% of the respondents taken as a whole agreed with the statement. Table I, Annexure B contains the detailed breakdown.

Question 22 asked "how effectively has the government been able to implement its anti-discrimination laws and policies?" Exactly half of the respondents indicated that government's attempts had been "not effective". 19.08% of white respondents and 40.49% of black, coloured and Asian respondents indicated that government's attempts had been "effective" or "very effective". Table J, Annexure B contains the detailed breakdown.

Even if unknown law is ineffective law,[29] the results of the survey do not paint a conclusive picture. Just short of six out of ten respondents (59.11%) indicated that they were aware of "legislation that outlaws unfair discrimination". 51.15% of white respondents and 65.63% of black, coloured and Asian respondents indicated that they were aware of such legislation. When asked of respondents whether they had heard of the Act specifically and from which source, fewer respondents answered affirmatively. Radio seems to be the major source of information for black respondents – almost half (49.02%) of black, coloured and Asian respondents indicated that they had heard of the Act from radio. Table K, Annexure B contains the detailed breakdown.

It does not seem as if awareness of the Act has increased over time. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act.[30] During these hearings, the AIDS Law Project (ALP) argued that the level of awareness and use of the Act was insufficient. The ALP referred to research by the Centre for the Study of Violence and Reconciliation, the

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[29] Allott (1980) 73.

[30] 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).

Institute for Democracy in South Africa, the South African National Anti-Discrimination Forum and the South African Human Rights Commission. All of these organisations' research bore out the conclusion that a general lack of awareness of the equality courts existed.[31]

5.3.3 Profile of the respondents' views on discrimination

Question 10.1 asked of respondents to indicate whether they regarded a number of described situations as "not discrimination", "fair discrimination", "unfair discrimination" or whether they were "uncertain". Tables L to P in Annexure B below contains the detailed breakdown of responses for the whole group; white respondents; black, coloured and Asian respondents; respondents who indicated that their home language was Afrikaans; and respondents who indicated that their home language was English. A relatively small percentage of respondents indicated that they were "uncertain" whether the situation amounted to fair or unfair or no discrimination – on average only 5.56%. The question that elicited the highest number of "uncertain" respondents – nearly one in ten – related to gay couples not being allowed to adopt children. A relatively large group of respondents thought that the following four situations did not amount to discrimination: "Insurance companies refuse to issue a life insurance policy to a HIV+ person" (16.44%), "The South African Medical and Dental Council refuses to allow dentists who are HIV+ to operate on patients" (21.65%), "Gay couples are not allowed to adopt children" (20.48%) and "A pleasure park does not allow children under a certain age to go onto their rides" (32.53%).

Question 10.2 probed the possible existence of a variance between the respondents' own views on discrimination and what they believed *a court* would decide on a given issue. I chose three possibly contentious situations: discrimination against same-sex couples;[32] direct discrimination against whites;[33] and indirect discrimination against whites based on their privileged position in

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[31] The ALP cited Lane (2005) (http://www.csvr.org.za/papers/paprctp5.htm); http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1352; http://www.ohchr.org/english/bodies/cerd/docs/Alternative_Report_by_SAF_Civil_Society_Org_English.doc; and http://www.sahrc.org.za/sahrc_cms/downloads/SectionTwo2004_2005.pdf.

[32] "Gay couples are not allowed to adopt children".

[33] "The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered".

South African society.[34] Tables Q to U in Annexure B below contains the detailed breakdown of responses for the whole group; white respondents; black, coloured and Asian respondents; respondents who indicated that their home language was Afrikaans; and respondents who indicated that their home language was English. I analyse these results in paragraph 5.4 below.

5.3.4 Profile of the respondents' experiences of discrimination

A surprisingly large number of respondents indicated that they had not suffered discrimination based on race/colour, gender, age or language/culture in the six months preceding the questionnaire:[35]

Ground	Never	Once	Twice	Three times	Four times	Five or more
Race/Colour	66.78	14.19	4.84	4.5	1.04	8.65
Gender	85.66	4.2	3.85	1.4	1.75	3.15
Age	87.02	7.72	2.11	1.4	0	1.75
Language/Culture	80.07	6.29	3.5	1.4	0.7	8.04

[34] "Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat rate, irrespective of actual consumption, because of inferior services in Mamelodi compared to Faerie Glen".

[35] In a 2001 national survey conducted by the South African Institute of Race Relations, only 8% of respondents mentioned racial issues when asked what was the biggest problem in their lives. However, when explicitly asked about racism, 59% of respondents thought that it was a serious problem – *Citizen* (2001-08-29) 15. Daniel *et al* in Pillay *et al* (eds) (2006) 37 report that in the 2003 HSRC survey 31% of respondents indicated that they felt they had been the victims of one form of prejudice or another. Of this 31%, two-thirds thought they were discriminated against based on race, 10% based on "unemployment" and 0.5% based on gender. Roefs in Pillay *et al* (eds) (2006) 88 report that the survey indicated that 63% of black African respondents "never" felt racially discriminated against. The respective figures for coloured, Asian and white respondents were 68%, 50% and 53%. Orkin and Jowell in the same source at 285 suggest that the relatively high number of white respondents who reported perceptions of discrimination "must be seen in the context of affirmative action in recent years, which many white South Africans would probably categorise as discriminatory". In a 2006 empirical study, designed to measure "overt resentment, where people deliberately treated others in a way that was prejudicial and could be perceived as racism", almost 50% of respondents reported that they received "racially inspired prejudicial treatment" in hospitals and clinics. The respective figures for shops, government agencies and municipalities were 39%, 32% and 26%. 27% of respondents felt that they had received prejudicial treatment from whites when they south out services in public places while 45% of respondents said that they had experienced discrimination from black Africans. *Sunday Times* (2006-08-20) 1. A survey commissioned by COSATU in 2006 on workplace discrimination found that 25% African workers, 10% coloured workers and 5% white workers reported race discrimination at work. *Business Day* (2006-08-31) 3.

The breakdown of these figures according to race is as follows:

White respondents' experience of discrimination

Ground	Never	Once	Twice	Three times	Four times	Five or more
Race/Colour	70	13.85	4.62	5.38	0	6.15
Gender	85.38	3.08	4.62	0	2.31	4.62
Age	87.02	8.4	2.29	1.53	0	0.76
Language/Culture	80.07	6.29	3.5	1.4	0.7	8.04

Black, coloured and Asian respondents' experience of discrimination

Ground	Never	Once	Twice	Three times	Four times	Five or more
Race/Colour	64.15	14.47	5.03	3.77	1.89	10.69
Gender	85.9	5.13	3.21	2.56	1.28	1.92
Age	87.01	7.14	1.95	1.3	0	2.6
Language/Culture	80.89	5.73	2.55	1.27	0.64	8.92

Men were a little more likely to have perceived that they were the victims of discrimination, compared to women:

Male respondents' experience of discrimination

Ground	Never	Once	Twice	Three times	Four times	Five or more
Race/Colour	57.64	17.36	7.64	5.56	0.69	11.11
Gender	86.9	4.14	2.76	2.07	1.38	2.76

Age	83.45	11.72	2.07	1.38	0	1.38
Language/Culture	77.93	6.9	2.76	2.07	1.38	8.97

Female respondents' experience of discrimination

Ground	Never	Once	Twice	Three times	Four times	Five or more
Race/Colour	76.06	11.27	2.11	3.52	1.41	5.63
Gender	84.89	4.32	5.04	0.72	2.16	2.88
Age	91.3	3.62	2.17	1.45	0	1.45
Language/Culture	82.61	5.8	4.35	0.72	0.00	6.52

Of those respondents that indicated that they had suffered discrimination, and chose to describe the worst incident, the vast majority experienced discrimination in the workplace or what I termed "social interaction":[36]

Profile of nature of discrimination experienced by respondents

Workplace	52 (42.62%)[37]
Social interaction	38 (31.15%)
Police	5 (4.1%)
Educational institutions	4 (3.3%)
Health facilities	3 (2.5%)
Restaurants, resorts, similar recreational establishments	4 (3.3%)

[36] Roefs in Pillay *et al* (eds) (2006) report that the 2003 HSRC survey showed that of those respondents who had perceived that they had been discriminated against, 33% indicated that this happened "at work" and 16% indicated that it happened "when applying for a job" – ie 49% of discriminatory incidents were employment-related.

[37] Of the 52 respondents who indicated that they had suffered workplace discrimination, 18 were white respondents who indicated that they had been overlooked for employment or promotion based on race; 4 were black respondents who indicated that they were overlooked in favour of a white applicant; and 12 respondents complained about age-related workplace discrimination.

Other	16 (13.1%)

In table V, Annexure B below I set out the *verbatim* responses of those respondents that indicated that they had experienced discrimination during the six months preceding the questionnaire and that elected to describe the most serious incident, sorted according to the categories listed above. I analyse these responses in paragraph 5.4 below.

Of the respondents that indicated that they had suffered discrimination, the following number approached the institutions listed below:

Respondents' approach of formal institutions

SAPS	5 (2.72%)
Courts	2 (1.1%)
SAHRC	7 (3.76%)
Law clinic or lawyer	2 (1.09%)

It is clear that the vast majority of respondents either decided to bypass the legal system in solving their dispute, or decided not to solve the dispute.

5.3.5 Profile of the respondents' views on hate speech

The following number of respondents thought it *is* or *is not* a crime to call someone a "kaffir":

	Whole group	White	Black, coloured and Asian
It is a crime	176 (60.27%)	44 (33.85%)	132 (81.48%)
It is not a crime	93 (31.85%)	69 (53.08%)	24 (14.81%)
Uncertain	23 (7.88%)	17 (13.08%)	6 (3.7%)

The following number of respondents thought it *should* or *should not* be a crime to call someone a "kaffir":

	Whole group	White	Black, coloured and

			Asian
It should be a crime	172 (58.5%)	39 (29.77%)	133 (81.6%)
It should not be a crime	105 (35.71%)	82 (62.6%)	23 (14.11%)
Uncertain	17 (5.78%)	10 (7.63%)	7 (4.20%)

The breakdown of the answers to similar questions regarding the phrase "kill the boer, kill the farmer" was as follows:

Respondents' views on the use of the phrase "kill the boer, kill the farmer" (1)

	Whole group	White	Black, coloured and Asian
It is a crime	203 (69.05%)	78 (59.54%)	125 (76.69%)
It is not a crime	75 (25.51%)	46 (35.11%)	29 (17.79%)
Uncertain	16 (5.44%)	7 (5.34%)	9 (5.52%)

Respondents' views on the use of the phrase "kill the boer, kill the farmer" (2)

	Whole group	White	Black, coloured and Asian
It should be a crime	214 (73.29%)	101 (77.69%)	113 (69.75%)
It should not be a crime	64 (21.92%)	27 (20.77%)	37 (22.84%)
Uncertain	14 (4.79%)	2 (1.54%)	12 (7.41%)

The majority of white respondents thought the use of the word "kaffir" is not a crime (53.08%) and should not be a crime (62.6%) while the vast majority of black respondents thought the use of the word is a crime (81.48%) and should be a crime (81.6%). As to the use of the phrase "kill the boer, kill the farmer", the majority of black and white respondents thought the use of the phrase is a crime (white 59.54%; black 76.69%) and should be a crime (white 77.69%; black 69.75%).

If racism played a part in the commissioning of an offence, the following number of respondents thought it should play a part in sentencing:

	Whole group	White	Black, coloured and Asian
Higher sentence	154 (52.56%)	51 (38.93%)	103 (63.58%)
Lower sentence	9 (3.07%)	3 (2.29%)	6 (3.7%)
Should not make a difference	130 (44.47%)	77 (58.78%)	53 (32.72%)

The majority of white respondents thought that the presence of racism should not influence the sentence (58.78%) while the majority of black respondents (63.58%) thought that a higher sentence should result. If this result is read with the data relating to hate speech, it seems as the majority of white respondents have disconnected from the values driving the Act and the broader social transformation project underpinning the Act and have not accepted that racism is antithetical to this project.

5.3.6 Profile of the respondents' opinion of lawyers

Most respondents (nearly two thirds) have never consulted with a legal practitioner regarding a personal problem; 15.41% of respondents had consulted once while 8.6% had consulted twice with a legal practitioner.

Respondents expressed the following views on lawyers:

Positive view	74 (33.64%)[38]
Ambivalent views	52 (23.64%)[39]
Rich / Charged too much	34 (15.45%)
Dishonest	28 (12.73%)

[38] In Annexure B, table W I set out the *verbatim* responses of those respondents that had a positive view of lawyers and the legal profession.
[39] In Annexure B, table Y I set out the *verbatim* responses of those respondents that had an ambivalent view of lawyers and the legal profession.

Inaccessible; use language that ordinary people do not understand	8 (3.64%)
Simply performs a job	6 (2.73%)
Very busy	3 (1.36%)
Helps criminals	2 (0.91%)
Selfish	1 (0.45%)
Other negative views	12 (5.45%)

Almost two thirds of the respondents (66.36%) expressed either a negative or ambivalent view about legal practitioners. I consider the implications of these results in paragraph 5.4 below.

5.3.7 Profile of the respondents' views on South African courts

The following number of respondents have appeared in a South African court as a witness or party to a lawsuit:

Never	165 (59.14%)
Once	62 (22.22%)
Twice	20 (7.17%)
Three times	6 (2.15%)
Four to ten times	14 (5%)
Twelve to twenty times	5 (1.79%)
"Very often"	7 (2.51%)

To the question "do you think SA courts grant fair decisions?" the respondents answered as follows:

Respondents' views on courts' decisions

	Whole group	White	Black, coloured and Asian
"always"	21 (7.14%)	7 (5.34%)	14 (8.59%)
"usually"	50 (17.01%)	36 (27.48%)	14 (8.59%)

"sometimes"	127 (43.2%)	57 (43.51%)	70 (42.94%)
"never"	65 (22.11%)	21 (16.03%)	44 (26.99%)
"uncertain"	31 (10.54%)	10 (7.63%)	21 (12.88%)

As to the question "Do you think SA courts grant fair decisions in cases dealing with discrimination?" the breakdown was as follows:

Respondents' views on courts' decisions relating to discrimination

	Whole group	White	Black, coloured, Asian
"always"	14 (4.79%)	3 (2.31%)	11 (6.79%)
"usually"	37 (12.67%)	27 (20.77%)	10 (6.17%)
"sometimes"	95 (32.53%)	39 (30%)	56 (34.57%)
"never"	95 (32.53%)	27 (20.77%)	68 (41.98%)
"uncertain"	51 (17.47%)	34 (26.15%)	17 (10.49%)

Of those respondents that have been to a South African court, 27.5% expressed a positive view,[40] 52.5% expressed a negative view,[41] and 20% were ambivalent.[42] I consider the implications of these results in paragraph 5.4 below.

5.4 Analysis of the results of the survey

> It is one thing to marshal the facts, and another to know what to make of the facts.[43]

5.4.1 An ongoing legitimacy crisis

The results of the survey tend to suggest that the legitimacy of the courts and the legal system had not been restored by 2001. Almost two thirds of the respondents had never consulted with a

[40] In Annexure B, table Z I set out the *verbatim* responses of the respondents that had a positive view of South African courts.
[41] In Annexure B, table AA I set out the *verbatim* responses of those respondents that had a negative opinion of South African courts.
[42] In Annexure B, table BB I set out the *verbatim* responses of the respondents that had an ambivalent view on South African courts.
[43] Patterson (2000) 98 *Mich L Rev* 2738.

lawyer while four in ten held a negative view of lawyers and two thirds held a negative or ambivalent view of lawyers. 60% of respondents had never appeared in a court. Less than a third of the respondents expressed positive views on the courts. Only 24% of respondents believed that courts "always" or "usually" granted fair decisions. In the black, coloured and Asian communities only 17% of the respondents believed courts "always" or "usually" granted fair decisions. Only 13% of the black, coloured and Asian communities believed courts "always" or "usually" granted fair decisions in discrimination disputes. The corresponding figure in the white community was 17%. This attitude is also reflected in the absurdly small number of individuals who had approached a law clinic or lawyer after having suffered from discrimination: only two respondents. A further two had approached a court directly: that is, only 2.2% of all respondents who had suffered from discrimination.

In 2001 the equality courts were not yet operational. However, given the above figures, it is not surprising that the equality courts have not been inundated by discrimination complaints: why would complainants approach an institution that they do not trust to deliver a fair verdict?

The results of question 10.2[44] tend to suggest that the white community to a much larger degree than the black, coloured and Asian community believes that courts will come a *different* conclusion than their own relating to the three examples of possible discrimination set out in this question. Below I provide a number of graphs that illustrate the percentage of the community that believes that the particular example is "not discrimination", "fair discrimination", "unfair discrimination" or who were "uncertain", versus what they believed a *court* would decide.[45]

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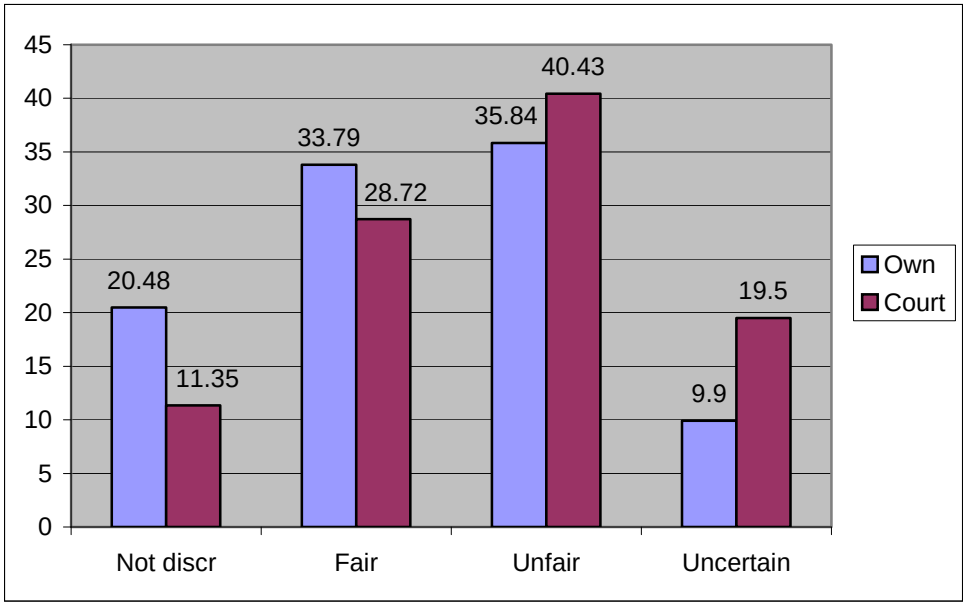
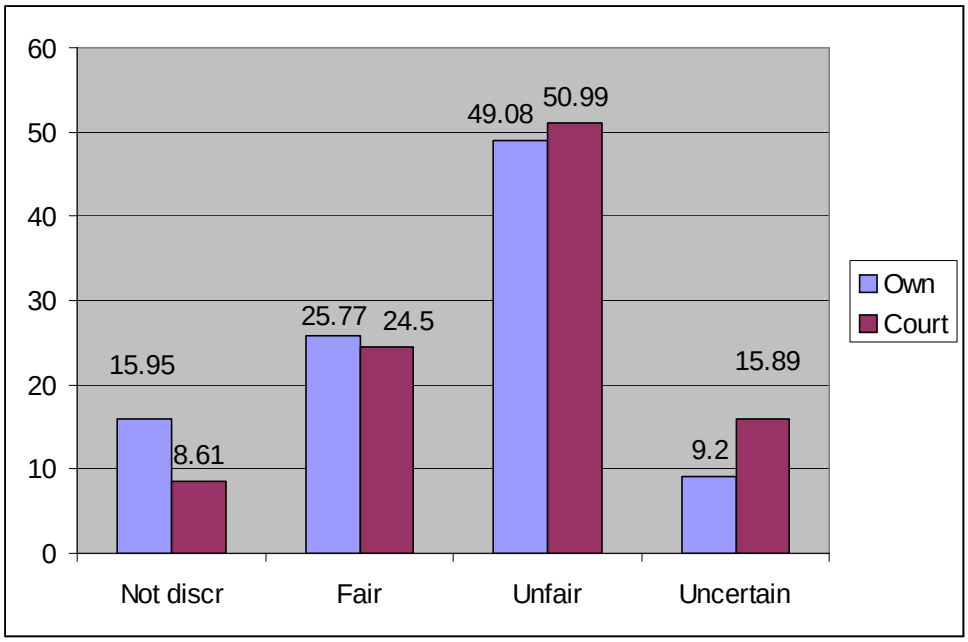
[44] "What do you think a South African court will decide on the following practices: gay couples are not allowed to adopt children; the Department of Justice invites job applications for prosecutors and makes it clear that no white males will be considered; Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen?"

[45] This trend could perhaps be explained by a sense of alienation experienced by many whites, as illustrated by their responses to other questions in the survey: 51% of whites said that they were "negative" or "very negative" about the general political situation in South Africa (versus 32% of blacks, coloureds and Asians), and 92% of whites thought that the term "racist" was misused in South African political discourse, as opposed to 48% of the black, coloured and Asian respondents.

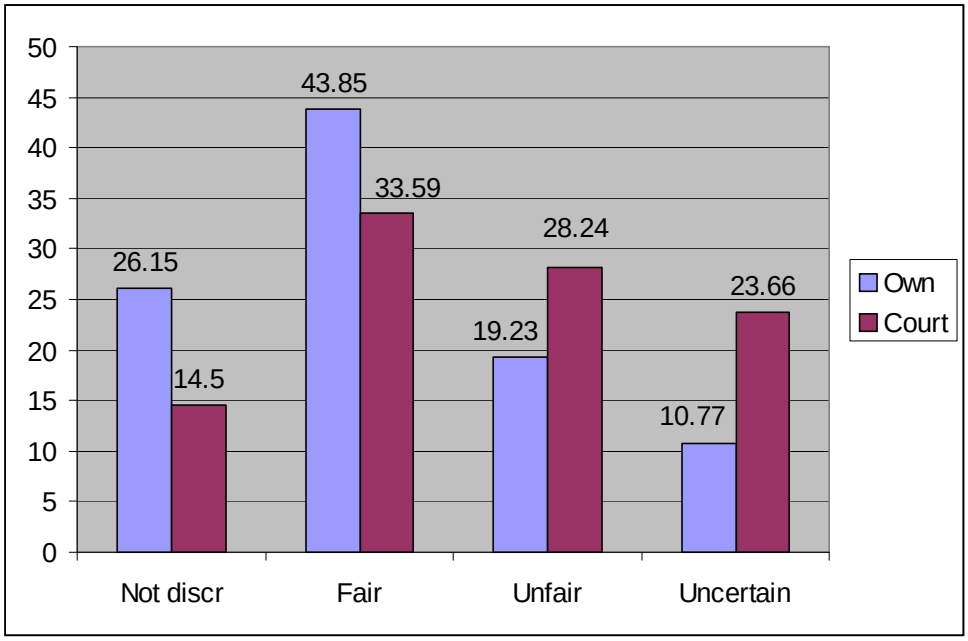
"Gay couples are not allowed to adopt children": The group taken as a whole



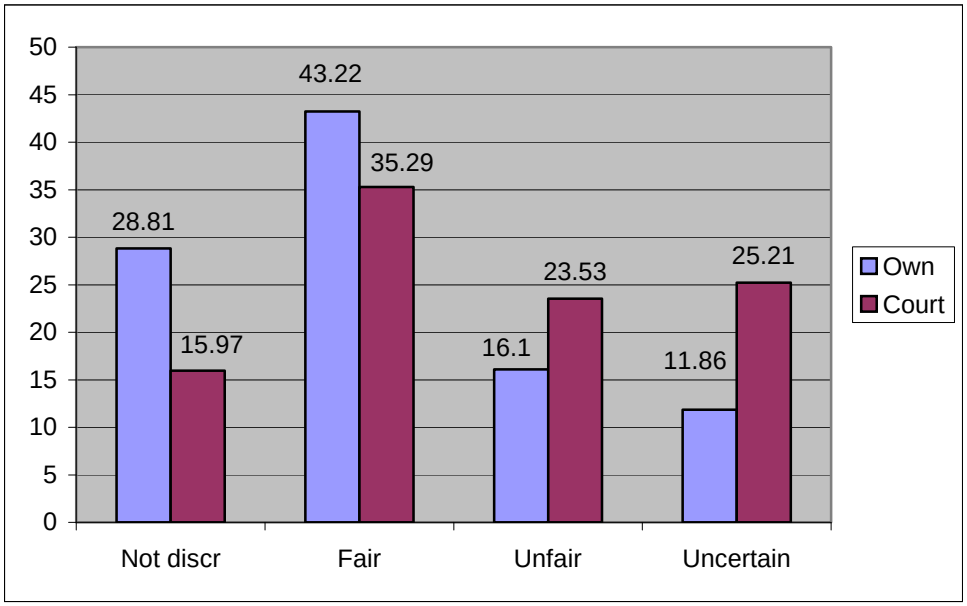
"Gay couples are not allowed to adopt children": The black community



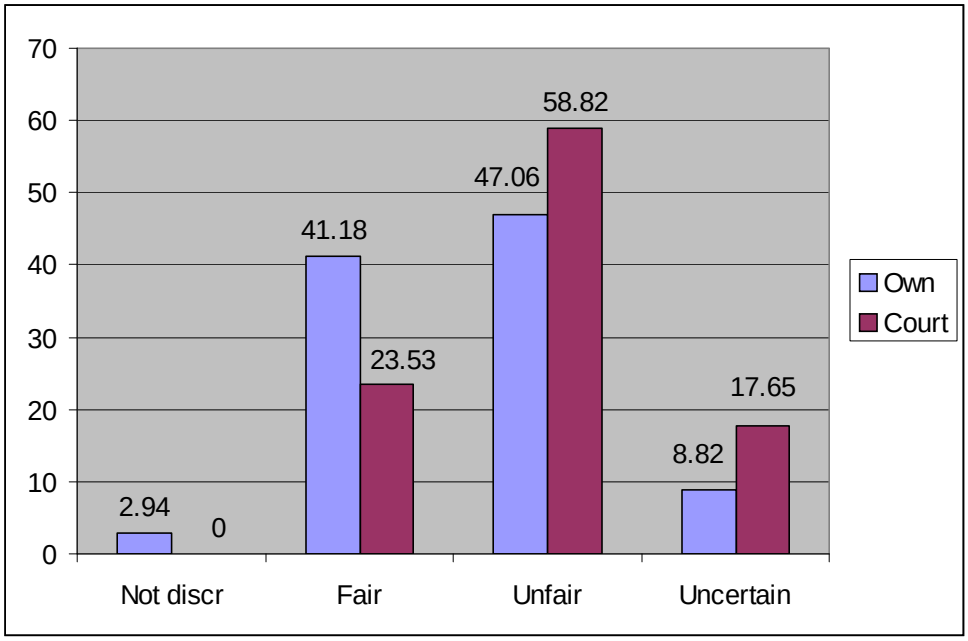
"Gay couples are not allowed to adopt children": The white community



"Gay couples are not allowed to adopt children": The Afrikaans community

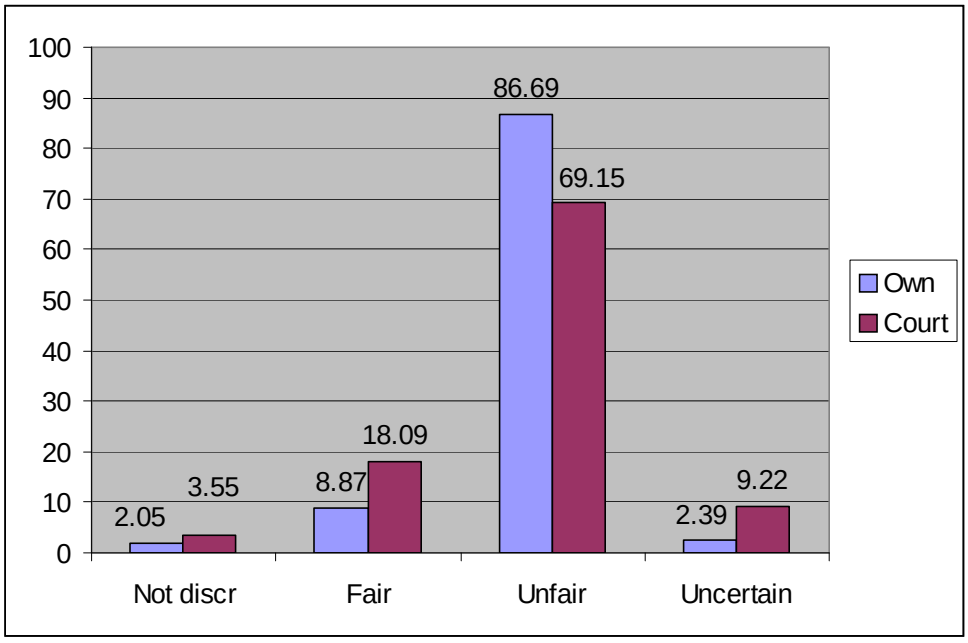


"Gay couples are not allowed to adopt children": The English community

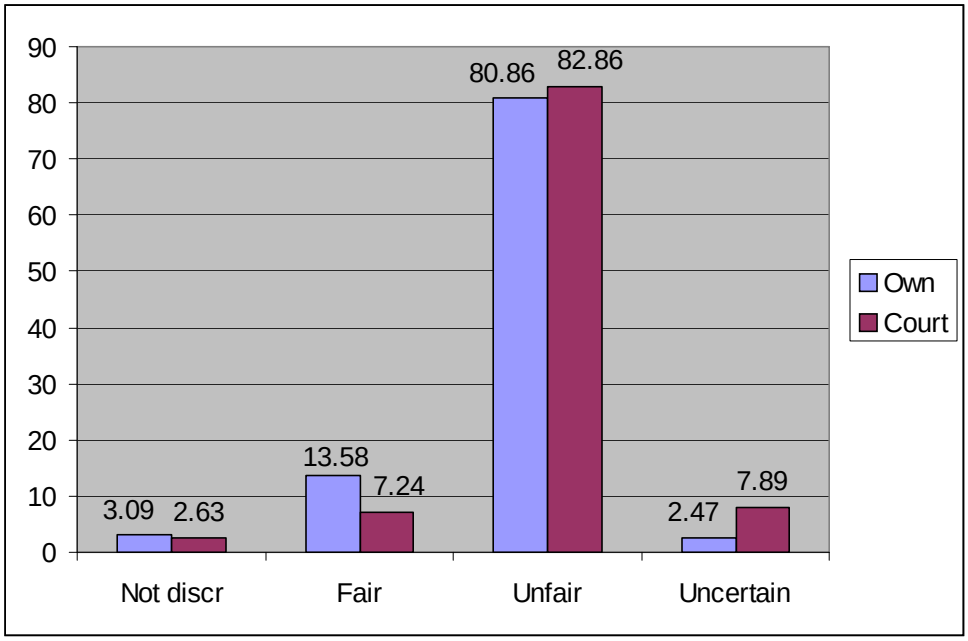


This "disconnect" in the white community is much more striking in the following two examples, that both deal with race discrimination:

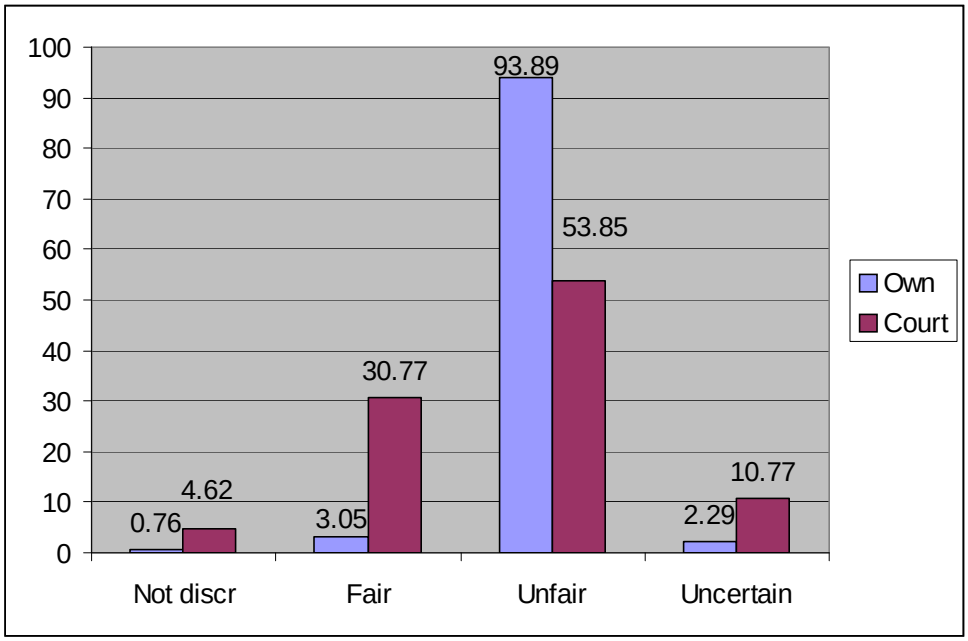
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The group taken as a whole



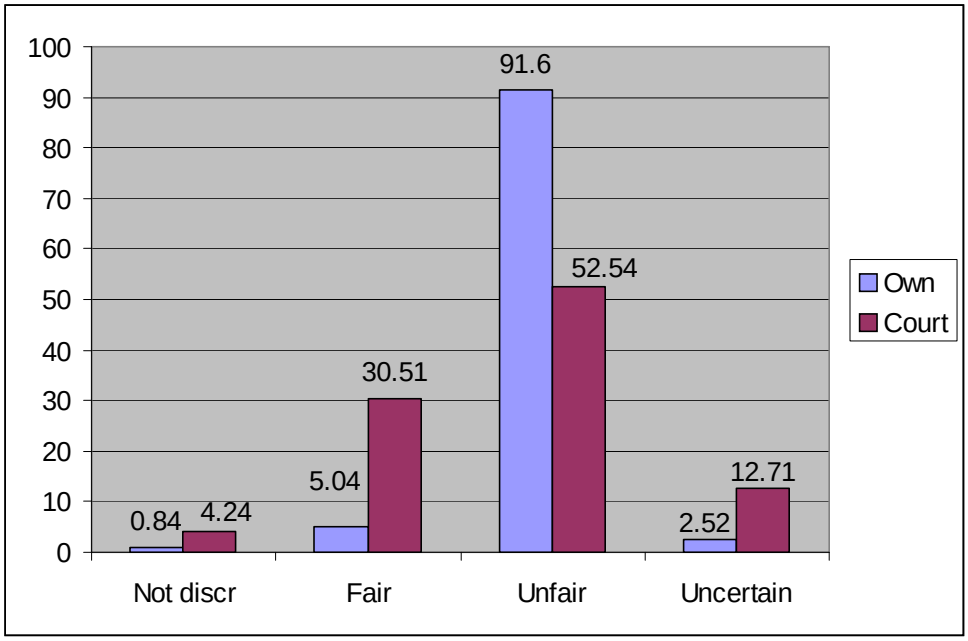
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The black community



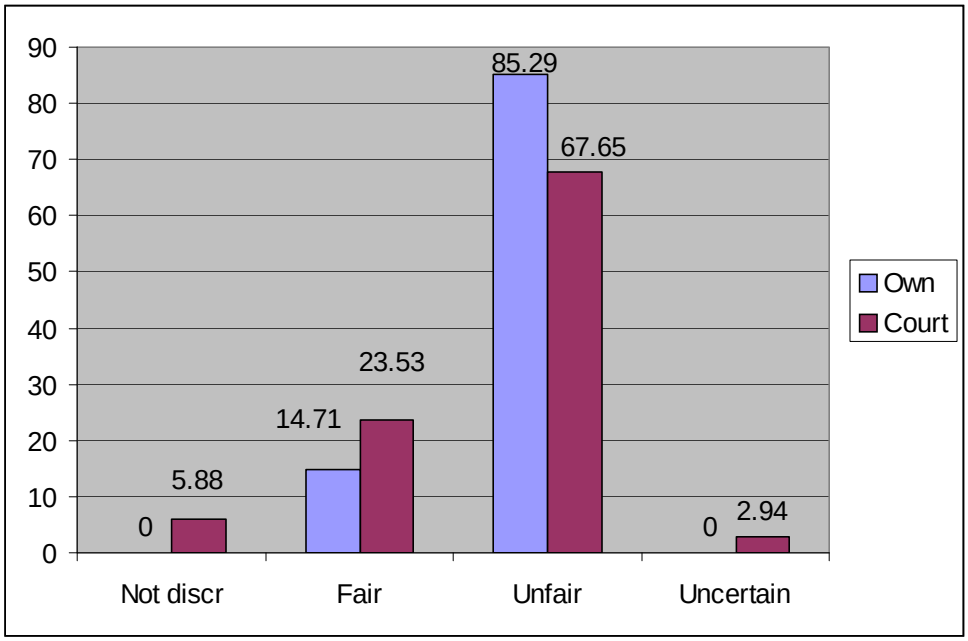
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The white community



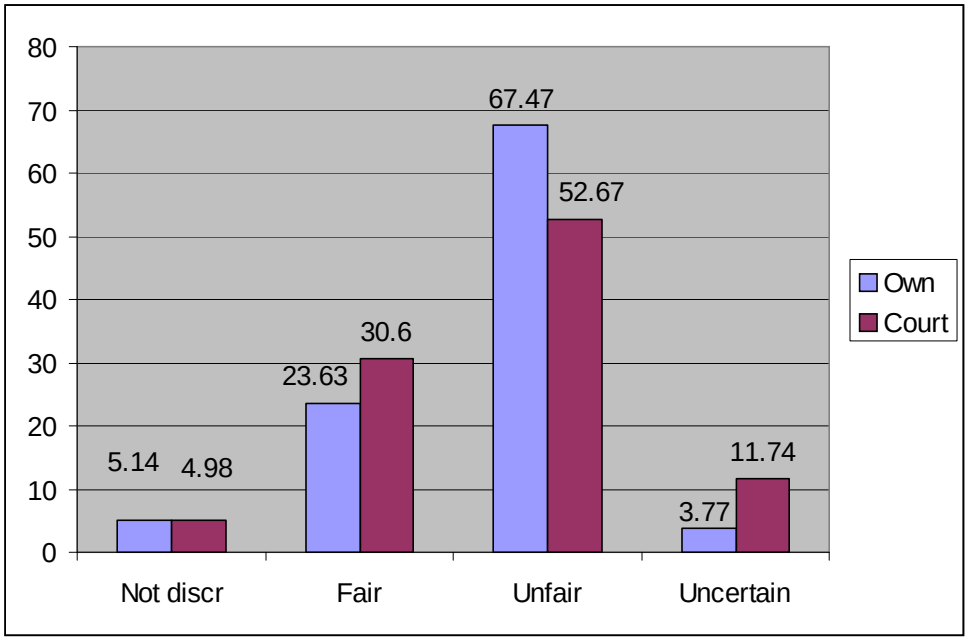
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The Afrikaans community



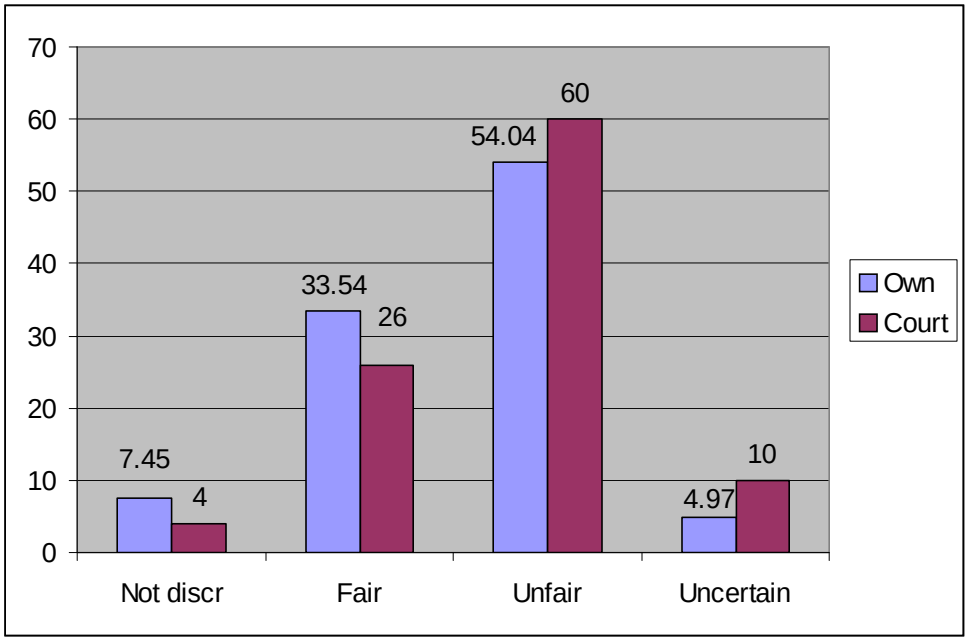
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The English community



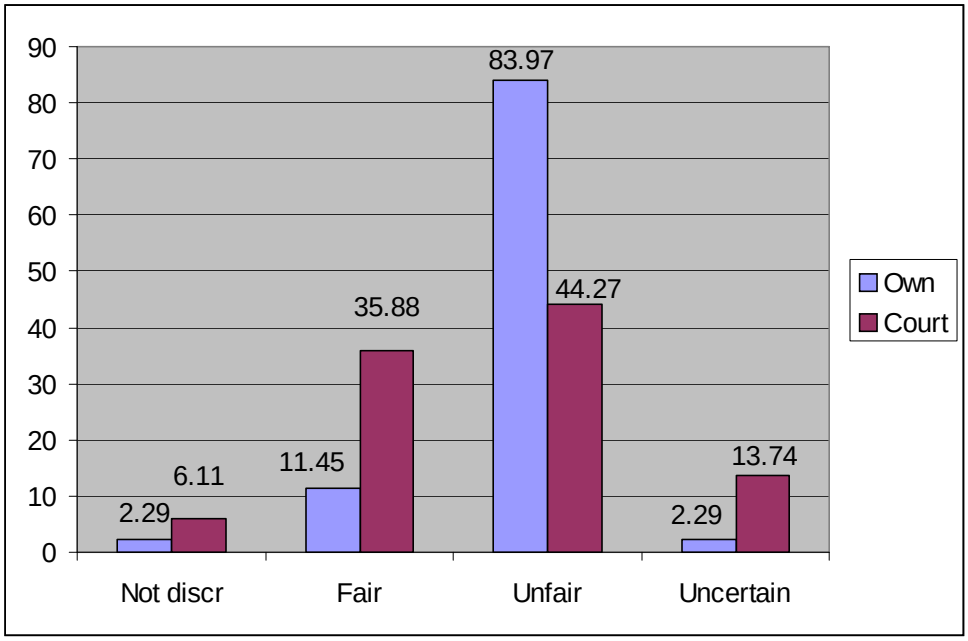
"Differentiated charges": The group taken as a whole



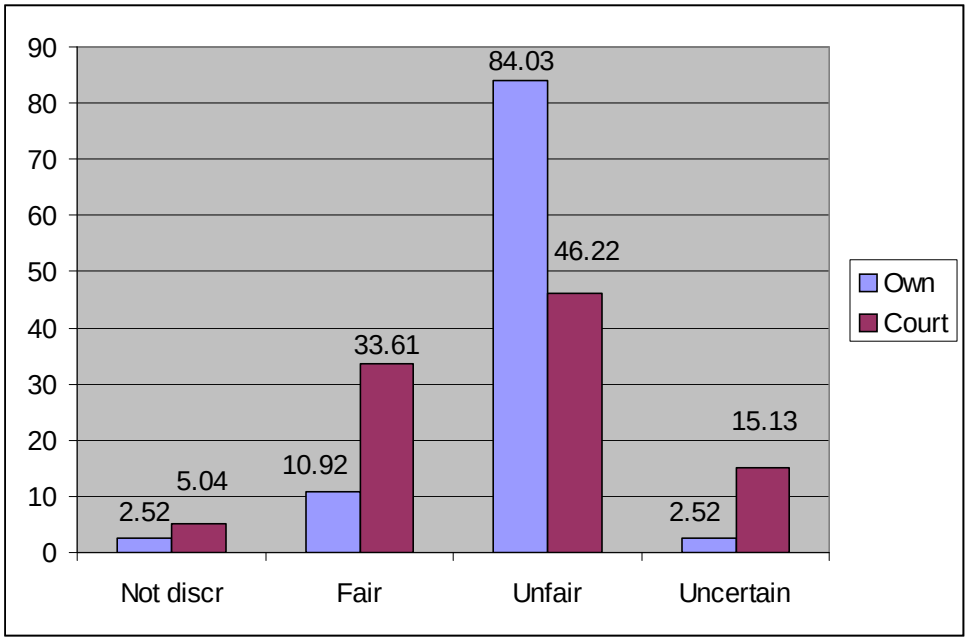
"Differentiated charges": The black community



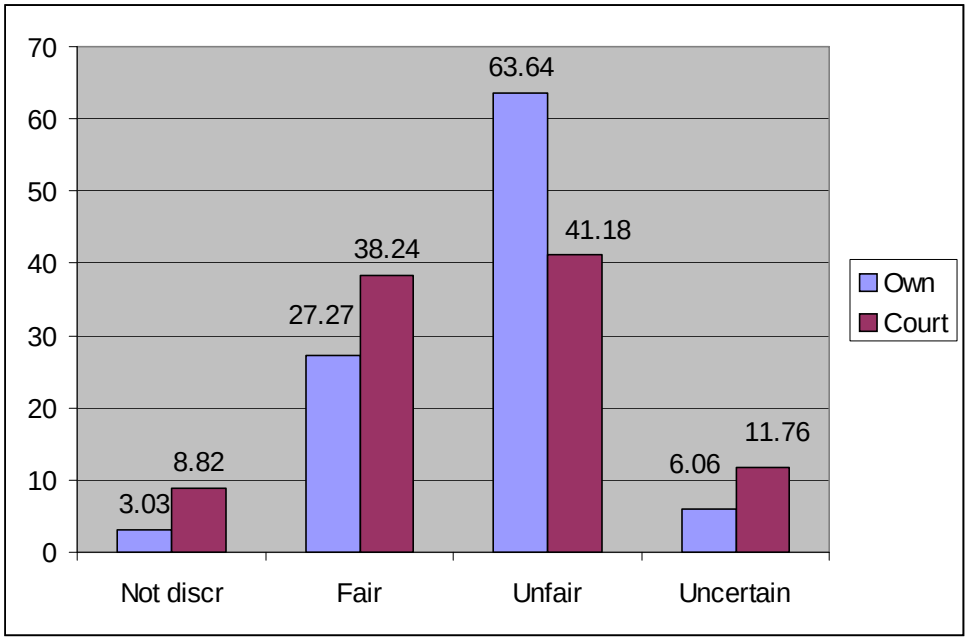
"Differentiated charges": The white community



"Differentiated charges": The Afrikaans community



"Differentiated charges": The English community



5.4.2 Little (overt) discrimination and an impoverished understanding of equality

With the exception of race discrimination, the vast majority of the respondents had experienced very little discrimination in the six months preceding the questionnaire. Two thirds of the respondents indicated that they had not experienced race/colour discrimination during this period. 70% of white respondents and 64% of black respondents had not experienced race discrimination during this period. The figures for male and female respondents were 58% and 76% respectively.

The bulk of discriminatory incidents that respondents chose to describe in the survey are of such a nature that it is unlikely that an offended complainant would approach an equality court to resolve the issue: Almost 43% of the incidents were workplace-related, which in terms of section 5(3) of the Act would probably have to be resolved in fora other than the equality courts. A large number of the workplace-related incidents (27 out of the described 52 incidents;[46] 52 %) related to "affirmative action" complaints, which, if it were appropriately applied in the circumstances, would not found a complaint in terms of relevant legislation. Of the 38 incidents that related to "social interaction" the

[46] Of the 27 incidents, 17 related to white respondents alleging that less-deserving black applicants were offered the position or promotion; one related to a coloured female who stated that she was "not black enough" for the position, and nine related to black respondents alleging that less-deserving white applicants were offered the position or promotion.

majority (22 out of 38 incidents; 58%) would probably be termed "frivolous" by orthodox presiding officers. The most serious incidents related to physical assaults (two) and the use of words such as "kaffir" (three) and "coolie" (one) while other deserving cases related to the use of Afrikaans or other languages that not everybody in the particular group understood (three). The majority of the incidents in the other categories would probably also be termed "frivolous" (in some cases, incomprehensible) or "lacking a cause of action".

Not a single incident described by any of the respondents linked in any way to indirect discrimination.[47] Not any of the incidents related to a substantive notion of equality either. Not any of the large number of respondents, black and white, who complained about "affirmative action" in the workplace indicated in any way that they understood or believed in the principles underlying corrective measures. All the complaints could be resolved by applying a formal notion of equality – all the (serious) complaints, at least impliedly, suggests that but for being black, or white, or old, or young, the discrimination would not have occurred and that the discrimination lay in being treated differently than the (unstated) comparator. It is rather obvious that if potential complainants do not "see" discrimination when it occurs in indirect or subtle forms, the equality courts will be underutilised.

The survey also suggests that the respondents did not properly understand the use of the term "unfair discrimination" (or "fair discrimination") and that most respondents implicitly held on to a formal concept of equality as opposed to a substantive notion of equality.[48] As to the term "discrimination", to my mind 19 of the 20 hypotheticals listed in question 10.1 amount to

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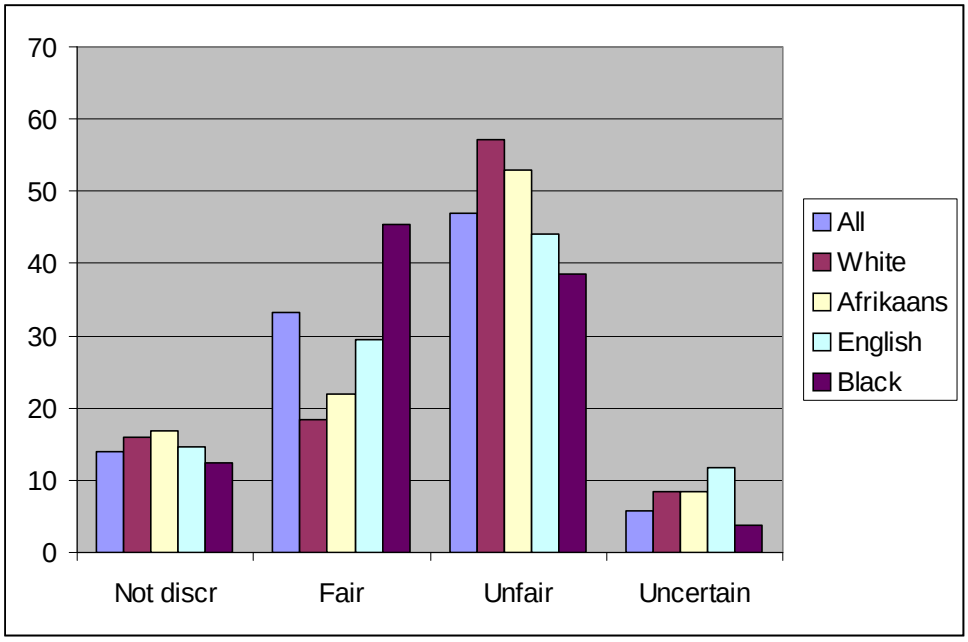
[47] In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice 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 SAHRC reported that the majority of discrimination complaints that reached their offices related to race and disability discrimination. The Commission reported that "most cases appear to be direct discrimination cases. We are yet to see cases of indirect discrimination being brought in the equality court. The racial discrimination cases also appear to be direct and blatant discrimination cases".

[48] During the Parliamentary hearings referred to in the previous footnote, the House Chairperson commented that some of the problems relating to the application of the Act could be related to the language used in the Act. She thought that various concepts in the Act were difficult to understand and referred specifically to "fair discrimination" and "unfair discrimination", which were "even tricky to understand for those involved in drafting the legislation. This made it difficult for enforcement agencies such as the police service to recognise an equality case".

"discrimination" according to the test set out in *Harksen v Lane* and the Act. Only the first example – "Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy" – does not amount to "discrimination" because no burden is imposed or advantage withheld and no differentiation takes place; all applicants have to take the test. Yet for all of the 20 hypotheticals some respondents chose to label the examples as "not discrimination", in one case as high as 51% of the respondents.[49]

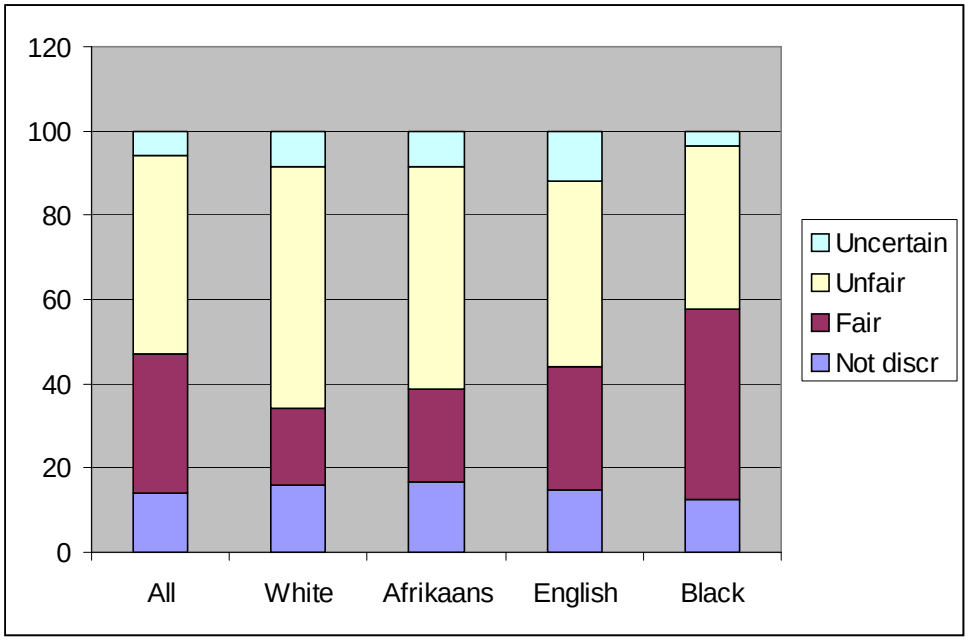
Two of the hypotheticals related to substantive equality in the sense of (a) allowing for corrective measures to be taken, and (b) treating two groups differently, by taking relevant differences into account, while at first glance they appear to be similarly situated. The respondents labeled these examples as follows:

"SARFU declares that in future all Springbok rugby teams must include at least two black players"

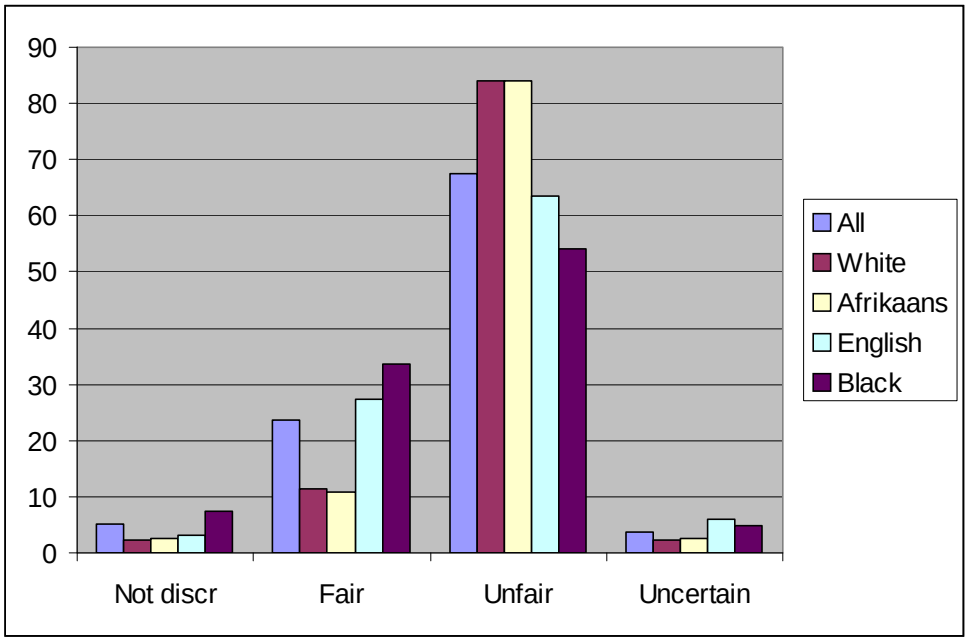


[49] "A pleasure park does not allow children under a certain age to go onto their rides". This is of course age discrimination; yet 51.15% of white respondents labeled it as "not discrimination". 32.53% of the group as a whole labeled this example as "not discrimination". 29.32% of white respondents and 33.05% of Afrikaans respondents labeled "insurance companies refuse to issue a life insurance policy to a HIV+ person" as "not discrimination". 30.53% of white respondents and 31.93% of Afrikaans respondents labeled "Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies" as "not discrimination".

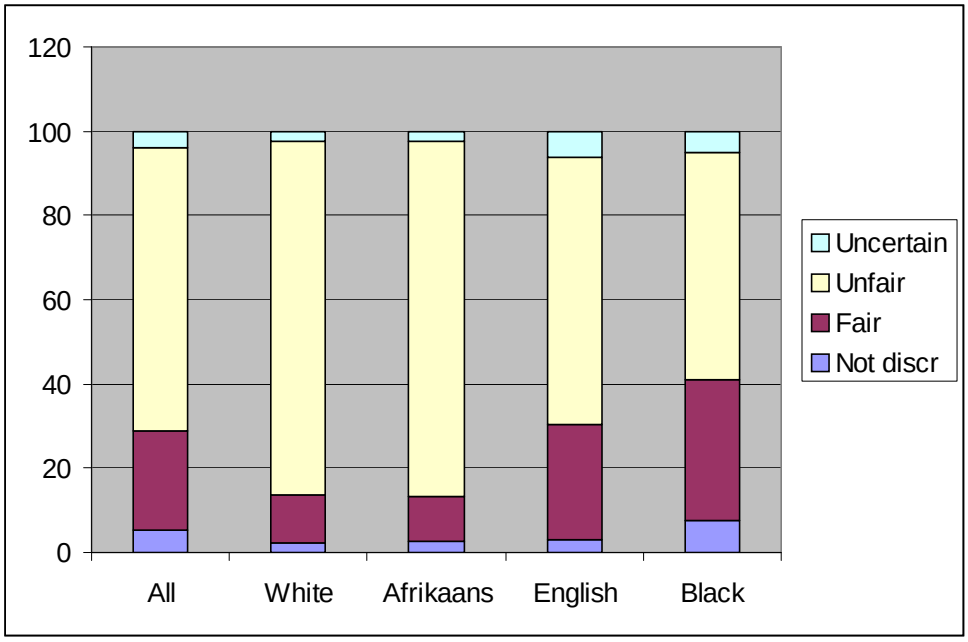
"SARFU declares that in future all Springbok rugby teams must include at least two black players"



"Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen"



"Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen"



As to the rugby hypothetical, the highest proportion of the group as a whole labeled it "unfair" discrimination (46.92%) while 57.25% of the white respondents, 52.94% of the Afrikaans, 44.12% of the English and 38.51% of the black respondents labeled it "unfair" discrimination. 45.34% of black respondents labeled it "fair" discrimination.

54.04% of black respondents labeled the differentiated charges for water and electricity as "unfair" discrimination, while the corresponding percentages for the group as a whole, white, Afrikaans and English respondents were 67.47%, 83.97%, 84.03% and 63.64%.

The majority of black respondents, I contend rightly, felt that the rugby hypothetical constituted fair discrimination. Interestingly, the majority of black respondents felt that differentiated charges for water and electricity constituted unfair discrimination, although the same principle is at play. It would have been interesting to know *why* respondents labeled these hypotheticals as "fair" or "unfair" and in hindsight I should have added this question to the survey.

The majority of white respondents in both cases, incorrectly I believe, labeled the hypotheticals as "unfair" discrimination.

What these two hypotheticals seem to indicate is that a number of discrimination complaints may wrongly be brought to the equality courts by aggrieved complainants on the wrong assumption that the respondent's "special" treatment is necessarily unfair discrimination.

When I drafted the 20 hypotheticals, I had the following "correct answers" in mind:

1. Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	Not discrimination[50]
2. Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	Fair discrimination[51]
3. A restaurant refuses to serve black people	Unfair discrimination[52]
4. Someone with a garden flat refuses to rent that flat to Muslims	Fair discrimination[53]
5. Banks refuse to grant loans to people wanting to buy property in certain areas	Unfair discrimination[54]
6. The municipality requires a matriculation certificate for its garbage removal employees	Unfair discrimination[55]
7. Insurance companies refuse to issue a life insurance policy to a HIV+ person of a person who has AIDS	Unfair discrimination[56]
8. A nightclub only allows people of Asian origin	Unfair discrimination[57]
9. The SAA refuses to employ cabin stewards who are HIV+ or who has	Unfair discrimination[58]

[50] No benefit is withheld or burden imposed and all applicants are subjected to the test without distinction.
[51] Kok (2002) 18 *SAJHR* 59.
[52] I cannot think of any plausible arguments why a restaurant would refuse to serve customers solely on the basis of their race or colour.
[53] The right to freedom of association and the right to privacy will probably allow a respondent to decide who to accept as tenant in his or her own backyard. S 26 of the Australian Capital Territories *Discrimination Act* (see Annexure C.1) and s 40(3) of the South Australia *Equal Opportunity Act* (see Annexure C.5) explicitly provide that this kind of accommodation discrimination is "not unlawful" (in South African parlance, "fair".)
[54] 4(b) of the Schedule to the Act.
[55] Direct discrimination on the unlisted ground of "scholastic achievement" or indirect discrimination on the basis of race – as a proportion of the population, more blacks than whites would probably not have passed matric. I label the discrimination unfair because it is not an inherent requirement of the job. (cf s 6(2) of the Employment Equity Act 55 of 1998.)
[56] 5(c) of the Schedule to the Act and s 14(3)(a), (b), (c), (h) and (i) of the Act.
[57] I cannot think of any plausible arguments why a nightclub would refuse to allow customers solely on the basis of their race or colour.

AIDS	
10. The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	Unfair discrimination[59]
11. Gay couples are not allowed to adopt children	Unfair discrimination[60]
12. A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	Unfair discrimination[61]
13. The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	Unfair discrimination[62]
14. A pleasure park does not allow children under a certain age to go onto their rides	Fair discrimination[63]
15. A husband states in his will "My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church"	Unfair discrimination[64]
16. Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	Fair discrimination[65]
17. SARFU declares that in future all Springbok rugby test teams must include at least two black players	Fair discrimination[66]
18. A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	Unfair discrimination[67]
19. Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	Fair discrimination[68]
20. A company fails to appoint a woman to the position of Marketing	Unfair discrimination[69]

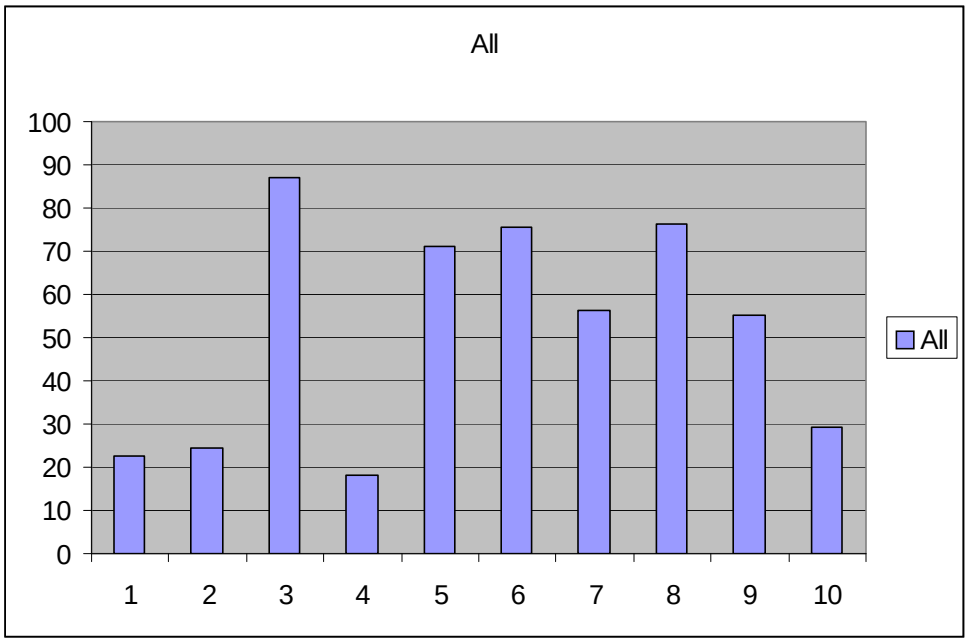
[58] *Hoffmann v SAA* 2001 (1) SA 1 (CC).
[59] S 14(3)(a), (b), (c), (h) and (i) of the Act. To my mind the risk of contracting HIV/AIDS from a dentist is extremely small.
[60] *Du Toit v The Minister for Welfare and Population Development* 2003 (2) SA 198 (CC).
[61] The guide dog would be a "supporting or enabling facility" in terms of s 9(a) of the Act.
[62] *Public Servants' Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T).
[63] This refusal amounts to age discrimination but it is probably fair, *inter alia* because of safety reasons, and the vulnerability of young children.
[64] Du Toit (2000) 11 *Stell LR* 358; *Ex parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust* 1993 (2) SA 697 (C); *Minister of Education and another v Syfrets Trust Ltd NO and another* 2006 (4) SA 205 (C). However, see s 48 of the Victoria Equal Opportunity Act 42 of 1995, Annexure E.6, below.
[65] Based on the rights to freedom of association and privacy.
[66] 10(c) to the Schedule to the Act.
[67] Direct discrimination based on socio-economic status. 9(b), 10(a) to the Schedule to the Act and s 7(b) of the Act. Whether all reasonable readers would necessarily understand the reference to "undesirable elements" to indicate black applicants is debatable.
[68] *City Councill of Pretoria v Walker* 1998 (2) SA 363 (CC).

Director after she falls pregnant	

Some of my "correct answers" may be highly contentious. Of course adjudicating real cases is not this easy – if it were, anybody could be an equality court presiding officer. I also accept the criticism that for some hypotheticals I provided very little information or justification for the decision to differentiate and in some cases I expected respondents to make a number of assumptions.

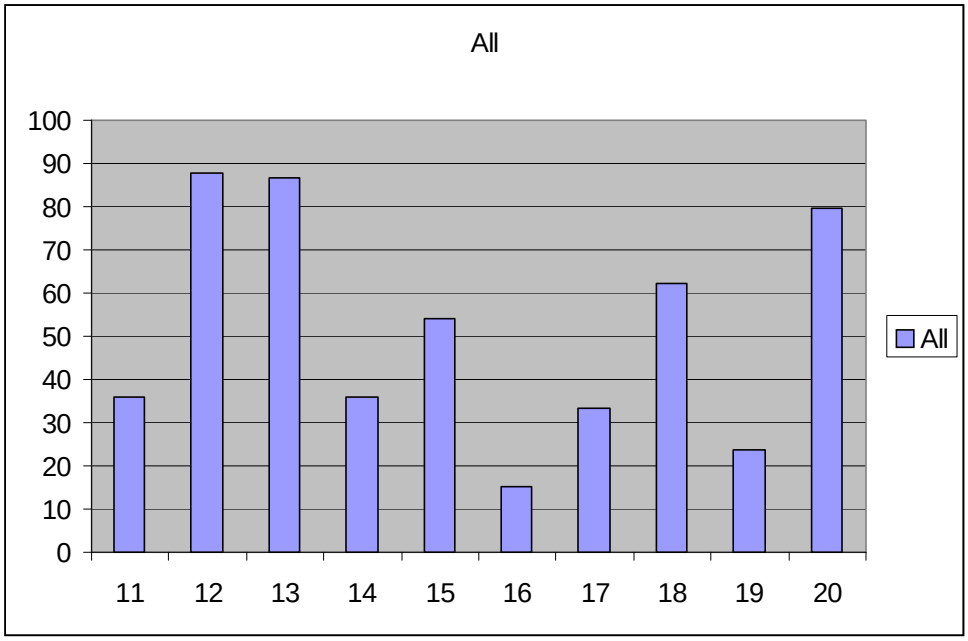
How did the respondents fare in picking the "correct" answer? Below I set out the respective percentages of the group members as a whole and the members of the white and black communities who, to my mind, picked the correct label for each of the 20 hypotheticals:

The group as a whole: Hypothetical 1-10

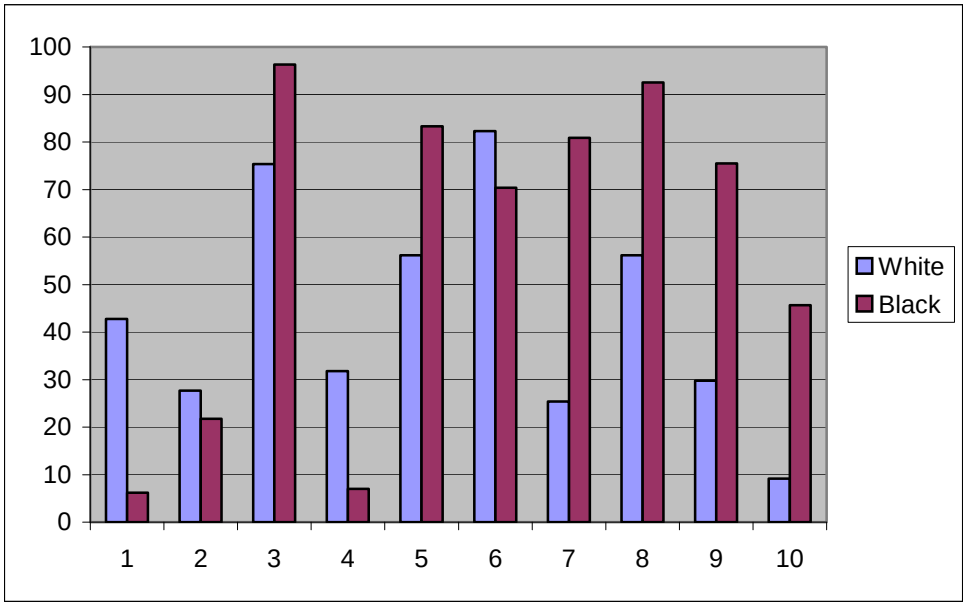


[69] *Whitehead v Woolworths (Pty) Ltd* (1999) 20 *ILJ* 2133 (LC).

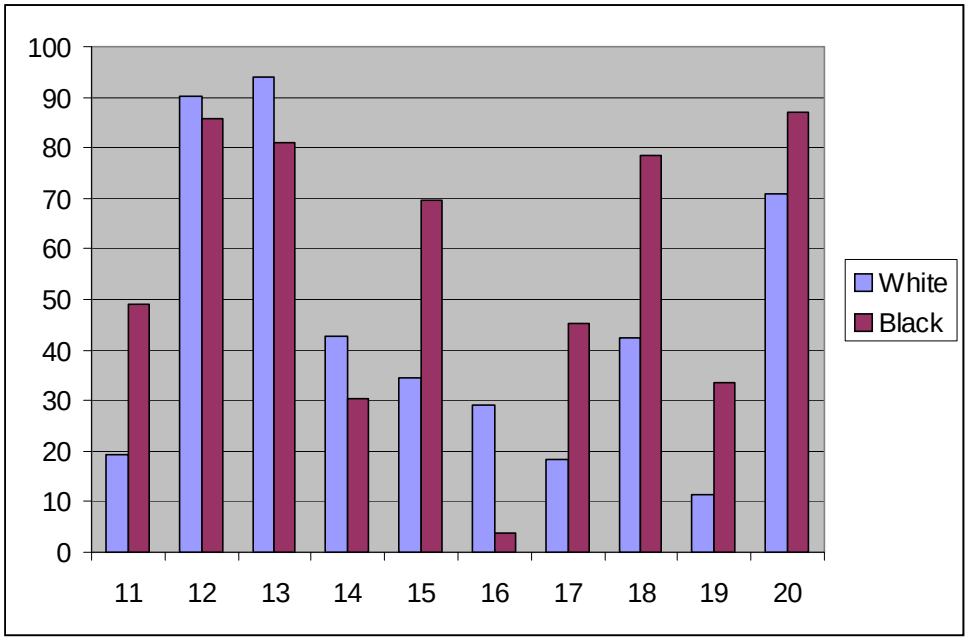
The group as a whole: Hypothetical 11-20



Black and white communities: Hypothetical 1-10



Black and white communities: Hypothetical 11-20



The group of respondents as a whole answered "correctly" 11 times out of 20 if 50% is taken as the "pass mark" (in a court consisting of three or more judges, 50% plus one would be sufficient for a verdict of "fair" or "unfair" to become binding law.) The white respondents answered "correctly" 7 times out of 20 and the black respondents answered "correctly" 11 (almost 12) times out of 20. Perhaps one couldn't hope for a better result, given the fact that lay people were asked for their views on unfamiliar matter, without any explanation as to what the terms were supposed to mean. It does seem to indicate, however, that public awareness material on the Act should incorporate some explanation of the concepts "differentiation", "discrimination", "fair discrimination" and "unfair discrimination".

5.5 Inadequate public awareness campaigns

In this paragraph, I aim to illustrate that the Department of Justice mismanaged one of the suggested requirements of effective legislation, in that the main norms taken up in the Act have *not* been popularised.

The public awareness programmes that occurred as part of the initial two-year implementation process were inadequate, and to my knowledge mainly consisted of two newspaper advertisements and a number of radio interviews.[70]

The item "public awareness" often appeared on the agenda of TMT meetings but was not often discussed. ELETU did not undertake any large-scale public awareness campaigns and the Department has not since the demise of ELETU planned or implemented public awareness campaigns relating to the Act.[71]

Paragraph 9.1 of the initial business plan correctly notes that the "Act cannot be implemented without preceding such implementation with training and public education ..." Paragraph 9.2 notes that R500 000 had been allocated to the public education component that would be "based on a communications strategy which uses existing resources and cost free communication avenues as much as possible". Somewhat ludicrously, the plan estimates that "40 million will be reached through various media in the public awareness programme". Paragraph 12.3 indicates that the public awareness campaign would target "every person in society" and would include rural and

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[70] A document entitled "Equality Legislation Education and Training Unit (ELETU) Categorised Financial Report as from November 2002 to Mid January 2002 & the Schedule of Activities, Expenditure, Existing & Original Budgets" that I obtained from the ELETU offices reflects that for that financial year R500 000 was budgeted for public awareness activities, of which only R315 575.58 was spent (the bulk of this amount was spent on two newspaper advertisements at R173 410.93 and R114 000 respectively.) In a memorandum drafted by Ms Madonsela to the Director-General dated 20 September 2001 she stated that public awareness activities had been ongoing, "particularly on the radio". Details of these radio appearances were not provided. In the same memorandum (para 2.5.2) she notes that "also agreed to is a *more extensive* TV and radio campaign", which tends to suggest that the activities that had been undertaken were of a modest nature.

[71] A document entitled "Project Plan Implementation Report" dated April 2004 and emailed to me by Mr Skosana, Department of Justice, seems to imply that no public awareness activities were planned for the 2003/2004 financial year. The document notes the severe budgetary constraints under which the project operates (pp 2; 43). The plan lists as one of its objectives to "embark on a vigorous and sustained public awareness campaign that will ensure that the South African public knows about the established Equality Courts and Constitutional Institutions where they can seek redress for any violation of their Rights to Equality and/or Impairment of Human Dignity" (pp 30-31). The public awareness budget as set out in the plan for 2003/2004 amounts to R3.5 to R4 million but of the R10 million that was awarded to the project, no amount was allocated to public awareness. (On p 42 the R10 million allocated to the project is divided into R3.5 million "administrative", R1 million "inventories", R5 million "equipment" and R500 000 "professional and specialised services". Elsewhere in the document it is stated that the R10 million is needed to appoint temporary clerks for two years for the purpose of proper record keeping.) The R3.5 million suggested budget for public awareness consisted of the production of 45 000 posters at R100 000; the production of banners at R25 000; the purchasing of equipment at R300 000; the production and distribution of 1 million leaflets at R1.1 million; two imbizos and community outreach per province at R200 000; 50 000 caps and 50 000 T-shirts at R1.3 million; radio advertisements (30 seconds long; 3 time per day; awaiting estimate) and newspaper supplements at R500 000. The value of posters, banners, caps and T-shirts is extremely questionable. I would suggest that a sustained radio campaign would be the most effective way of publicising the Act and the equality courts.

illiterate people. Radio, television and community visits would be used and NGOs would be drawn in to assist with the campaign. The plan envisaged that the Department of Justice would in partnership with the SAHRC and CGE implement the campaign and that "resources within these Commissions" would "also be harnessed for training purposes". The initial budget drawn up indicated that public awareness would have started by June 2000 and that the budgeted R500 000 would mainly have been used for the printing costs for posters and pamphlets, printed advertisements and paid air time on television.

A document entitled "Chief Directorate Transformation and Equity: Second Status Report on Implementation of the Equality Legislation", dated 31 January 2001,[72] notes as one of the "key challenges" of the project "a visible and sustained public education campaign that literally and repeatedly reaches every person in this country and a campaign that is conducted economically and responsively using all resources or agencies that are available".[73] Elsewhere in the same document a list of activities are listed that were to have occurred from September 2000 to 21 March 2001 (at that stage the anticipated implementation date of the Act), inter alia "intensive public education involving repetitive information on the Act for every person or category of person is to take place".[74] The document notes that "the success of the Act both in terms of behaviour modification and access to justice, depends heavily on legal literacy for all with regard to the Act. The public must understand the rights involved, prohibitions, processes and institutional support".

The minutes to the second TMT meeting notes that the team agreed that the Department would enlist the support of journalists to assist in the implementation of section 2(e) of the Act as it related to public education on the Act. This did not happen to any meaningful extent. During the same meeting it was agreed that the Minister could use his powers to issue directives to universities to recommend that universities and technicons must incorporate training on the Act into their graduate and postgraduate courses. This has not happened.

The minutes to the 11th meeting merely states that the public awareness programme had been stalled because of uncertainty as to the date on which the Act would come into force. At the same

[72] See fn 87 (p 186) and p 231 above.
[73] Para 6, pp 5-6 of the document.
[74] Pp 12-13.

meeting the "proposed annual work plan" for the period February 2001 to January 2002 was distributed. This document reflects that ELETU's capacity building programme had been broken down into six implementation programmes, one of which was a "public education and awareness programme". The same document then mentions that "public awareness is conducted with the help of the Equality Ambassadors in the Department of Justice and Constitutional Development, a group which has been trained by ELETU. The [C]ommunications and Community Service Divisions in the Department, the CGE and SAHRC are playing a major role with regard to public awareness and education".

The project manager report that was distributed at the 12th meeting indicated that the Communications Directorate had been asked to issue a newspaper spread in the Independent group of newspapers. Members of the TMB and provincial coordinators were to be interviewed for the spread and the article was to appear in November 2001. At the 13th meeting "public awareness" was discussed in some detail. Ms Madonsela reported that an "Equality Act newspaper insert" was published in November 2001 in the Independent group of newspapers and in the Sowetan and that another insert was planned for 14 December 2001. She had arranged for an interview with judge Zulman as the journalist could not reach other TMB members or provincial coordinators. Ms Madonsela had to substantively edit the article, as the journalist did not properly understand the concepts underpinning the Act. Judge Zulman reported that he had appeared on Radio 702 regarding the Act. Most of the questions from the public related to a white employer who had dragged his black employee behind his bakkie. Judge Zulman thought that public awareness programmes should not start too early as expectations would be raised by publicity. Prof Albertyn mentioned that Prof De Vos (UWC) had been interviewed on radio relating to the Act as well. Ms Madonsela thought that public awareness could commence as long as it was clearly stated that the Act was not in force yet. Mr Raulinga thought that soccer matches would be an ideal venue to publicise the Act. The project manager report distributed at the same meeting reflects that discussions with the appropriate government functionaries regarding the establishment of a webpage had commenced. At the 14th meeting Ms Van Riet said that a "citizens' pamphlet" should be published on the Act. Ms Madonsela said that the Department of Justice had produced a poster and a draft pamphlet but that the release was delayed pending the amendment of the Act. Ms Madonsela reported that about 50 equality ambassadors, an advocacy group, had been trained

to publicise the Act and that the group was to be expanded. These ambassadors were apparently involved in presentations on radio in all of the official languages.

The project manager report distributed at the 14th meeting reflects that newspaper articles on the Act were placed in all of the Independent newspapers in the second week of December 2001. Somewhat ludicrously the report also mentions folders that had been produced for ELETU as part of the public awareness on the Act. The report also mentions that public education had been pursued through presentations by the project manager and various TMB members at events organised by NGOS and human rights agencies. Details of these events were not provided in the report. Apparently the equality ambassadors in the Department of Justice had also been engaging in "various public awareness activities". Details of these activities were not provided.

At the same meeting, a document entitled "Schedule of Activities and Budget February 2002 – January 2003" was distributed. This document envisaged that a national stakeholder roundtable conference would be hosted by the end of February 2002 relating to the "responsive implementation" of the Act. A summary of the Act would be printed and distributed to the public in pocket and poster sizes by May 2002. The Act would be printed in full text in pocket size and distributed to the public in at least three official languages, an audio version and Braille by December 2002. Fact sheets on key aspects of the Bill would be printed and distributed and T-shirts, caps and headbands with equality and nondiscrimination messages would be produced and distributed from February 2002. At least one more newspaper spread would appear by March 2002 and one comprehensive radio and television advertisement would appear. The advertisement was also to appear on buses, taxis, cinemas and sport arenas. Celebrities were to be enlisted as equality ambassadors. As far as I could establish, none of these activities were undertaken with the exception of the printing and distribution of a document entitled "Equality for All".[75] The document was not drafted in plain legal language, does not emphasise that legal

[75] In a memorandum drafted by Ms Madonsela to the then Director-General dated 13 December 2001, in which she requested the Director-General to approve a business plan for phase II of the capacity building project, she requests funding of R20 million for public awareness raising activities during the first year of funding phase II, and R31 million for public awareness activities in the second year of funding phase II. These amounts would have been allocated to summary copies of the Act in various languages, "millions" of information brochures, posters and "public awareness interventions". It is presumed that nothing near this amount was allocated to the project as these activities were not undertaken.

representation is not necessary to lodge a claim, does not contain easy-to-follow examples of the kind of cases the equality courts are entitled to hear and does not explain in easy-to-follow language what "discrimination", "unfair" discrimination, "fair" discrimination, "hate speech" and "harassment" entail.

The situation has not significantly improved since. I have been able to source only ten newspaper reports that publicised the existence of the equality courts and how to approach these courts.[76] In six of these reports were it emphasised that legal representation was not necessary to lodge a claim.[77] A road show to make the community more aware of the courts was held in Orlando West, Soweto during April 2005,[78] and an imbizo relating to equality courts were held in Khayelitsha on 21 June 2005.[79] In a recent "progress report" relating to the implementation of the Act, the Department of Justice reports that during the 2006/7 financial year "educational materials and equality court booklets" to the value of R500 000 had been printed and distributed; that community radio stations and the print media have been used to publicise the Act and the equality courts; and that a "step by step" poster on how to lodge a complaint had been commissioned.[80] Details of these publicity drives were not provided. The Department of Justice has admitted that insufficient funds have been made available to popularise the Act.[81]

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[76] *Star* (2005-03-18) 19; *Sowetan* (2005-03-17) 9; *Star* (2005-03-17) 22; *Burger* (2004-02-26) 19; *Cape Argus* (2004-03-10) 12; *Cape Times* (2003-11-28) 5; *Mail & Guardian* (2003-11-27) 42; *Sunday Tribune* (2003-07-20) 11; *Beeld* (2005-03-22) 10; *Sunday Times* (2005-03-20) 15.

[77] *Sowetan* (2005-03-17) 9; *Burger* (2004-02-26) 19; *Cape Argus* (2004-03-10) 12; *Cape Times* (2003-11-28) 5; *Mail & Guardian* (2006-11-16) 3; *Sunday Times* (2005-03-20) 15. 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 chairperson of the SAHRC reported that victims of discrimination who approached the SAHRC were generally unaware that legal representation was not needed in equality court proceedings.

[78] *Sowetan* (2005-03-18) 18.

[79] *Burger* (2005-06-22) 4. It is of course possible that other community awareness initiatives have been undertaken, but if so, it has not to my knowledge been reported on in the media.

[80] Para 3.9 of a "progress report on the implementation of PEPUDA" (hand delivered to me on 2007-07-07), drafted by the Department of Justice and Constitutional Development.

[81] A document emailed to me by Mr Skosana, Department of Justice, entitled "Project Plan Implementation Report" dated April 2004 reflects on p 5 that "budgetary constraints remains an obstacle". P 36 of the document notes that "there is generally lack of information about the equality legislation". P 43 states that "In order to meet our marketing objectives an additional amount of R4 million is required to ensure that even people in rural areas can receive and understand the intended information as contemplated in the Act. The Department of Justice must promote the Act… by assisting and providing relevant information to the public. However at this stage *due to lack of funds we encounter*

At the "Equality Indaba Two Workshop" held at their premises on 23 November 2006, the SAHRC reported on a monitoring project of the 24 operational Gauteng equality courts (magistrates' courts) that it undertook during September 2005.[82] It performed this task in terms of section 184(c) of the Constitution and section 25(2) of the Act.[83] The survey was carried out from 8 to 30 June 2005 and focused on accessibility for people with disabilities to the courts; advertising material at the courts; whether people at the reception areas at the courts were aware of the existence of the equality court in the same building; the number of complaints lodged and adjudicated since their inception; infrastructure; whether the court officials had received sufficient training; the structure of the courts; and which challenges were faced by equality court clerks in facilitating the operation of these courts.[84] The study showed that most of the courts did not have promotional material available and no signage in the building directing people to the equality courts; most of the courts lacked resources such as computers and stationary; and most of the officials at reception were not aware of the equality court situated in the same building.[85]

5.6 Conclusion

The most surprising data in this survey relates to the relatively low incidence of discriminatory events reported by the respondents, and the relatively non-serious nature of a large number of these incidents. A number of reasons for this result come to mind:

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difficulties in carrying out our mandate" (my emphasis). Despite repeated requests, I have not been provided with a more recent "project plan implementation report". 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). On my interpretation of the documentation made available on the PMG website, for the 2006/2007 financial year no funds were set aside for promotional activities relating to the Act. The Department of Justice reported that R12 million had been allocated to the equality court project for the 2006/2007 financial year, of which R6 million had been allocated for the appointment of permanent clerks and R6 million for "goods and services", which seems to have been earmarked for furniture for the equality courts.

[82] Mere (2005).

[83] Mere (2005) 2.

[84] Mere (2005) 2-3.

[85] Mere (2005) 3-4.

(a) A possible optimistic reason: By 2001, South Africa had become, by and large, a society that is free from (at the very least overt, explicit) discrimination.[86]

(b) The more pessimistic corollary to the suggested reason in (a) above: Discrimination has become much more subtle and indirect and is difficult to detect, even by the victims of these subtle forms of discrimination.

(c) Potential claimants do not have the necessary knowledge of discrimination law to realise that what had happened to them is "discrimination" in terms of the law.[87] (The obvious answer is to provide sufficient funding to implement a thorough public awareness campaign.)

(d) Potential claimants have become so accustomed to "the way things are" that they do not experience discriminatory events as discrimination; it is simply "life".[88]

The other significant, but not surprising aspect of the survey is the relatively low regard in which lawyers are held and the relatively low use of the formal court system to resolve discrimination and other disputes.[89] The survey was conducted in 2001, well before the equality courts were

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[86] Griffiths in Loenen and Rodrigues (eds) (1999) 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the "social civility" norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. Perhaps the same has happened to overt discrimination in South Africa – South Africans, by and large, have internalised the value of not overtly discriminating against others, and by and large refrains from doing so.

[87] Cf Bestbier (1994) 15 *Obiter* 105. Bestbier suggests using the school system to create legal literacy, but the educators would then have to be re-educated as well: Mthethwa-Sommers (1999) 41 *Agenda* 46 relates a tale of a young schoolgirl who was pressurised into taking Home Economics, where they were taught how to cook, bake, and look beautiful. During a typical school day she would also have to sweep the classroom and clean the toilets. This occurred in 1997, three years after the first democratic elections, supposedly bringing sweeping changes with it. Mthethwa-Sommers (at 47) argues that if education is going to be such a tool, teachers must become "transformative intellectuals": self-conscious, self-aware and critical of their pedagogy.

[88] Delgado (2001) 89 *Geo LJ* 2295; Handler (1978) 223; Lacey in Hepple and Szyszczak (eds) (1992) 102-103; Verwoerd and Verwoerd (1994) 3 *Agenda* 70. 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 Director: Promotion of the Rights of Vulnerable Groups argued that the low reporting of equality court complaints "could be explained by the mere fact that people regard discrimination as part of their lives and were thus unaware that institutions such as the equality courts existed to challenge such discrimination".

[89] The low use of lawyers is not unique to South Africa. Clermont and Eisenberg (2002) 88 *Cornell L Rev* 136 refers to a survey of 5000+ American households. During the three years preceding the survey over a third of these households

operationalised, but the picture that emerged from telephonic enquiries to the first 60 pilot equality courts is similarly depressing:[90] from June 2003, when the first 60 courts became operational, to September 2005, only about 220 complaints had been lodged in a country with 40 million inhabitants,[91] of which only 33 cases related to discrimination.[92]

As set out in the introduction to this chapter, I concerned myself with three of the requirements of effective legislation: "the source of the new law must be authoritative and prestigious", "the purpose behind the legislation must at least to a degree be compatible with existing values", and "the required change must be communicated to the large majority of the population". I briefly consider these three requirements below.

As referred to in chapters 2 and 3 as well,[93] 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 follows logically that if South Africans do not trust the judicial system, the equality courts will be underutilised. The low utilisation of the equality courts tends to suggest that the legal system is still held in low regard by the South African population, but would have to be confirmed by further empirical surveys.[94]

The results of the survey could be read to indicate that many, if not 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 followed by the majority of South Africans. However, many South Africans would probably not consider indirect and subtle discrimination based on race as

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indicated that one or more grievances occurred that could have been taken to court. Only 11.2% of these grievances resulted in a claim being brought.

[90] See Annexure F.1 for a summary of this survey.

[91] Approximately 150 of these cased had been brought in one equality court – Durban.

[92] See Annexure F.1 below.

[93] See pp 74 and 163-164 above.

[94] Daniel *et al* in Pillay *et al* (eds) (2006) 20 and 35 note that South Africans still display relatively high levels of distrust of the court system and police. Only 41% of the respondents indicated that they trusted the police while 47% of respondents indicated that they trusted the courts. These two institutions recorded the lowest levels of trust in the provided list (national government, provincial government, local government, Parliament, business, police, SABC, churches, SANDF, the courts, IEC.)

problematic, as set out above.[95] Sexism, homophobia and HIV-phobia are still deep-rooted pathologies in South African society and quick changes should not be expected.

As to the third criterion, public awareness campaigns on the Act 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 discussed above, the public awareness campaigns relating to the Act have been inadequate, if not almost entirely absent. 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.[96] The Department of Justice has certainly not utilised the mass media in a sustained, vigorous manner. The equality court statistics referred to above also tend to suggest that South Africans are insufficiently aware of the existence of the equality courts and that the public awareness campaigns that have been undertaken,[97] have been ineffective.

The data obtained in this survey and the analysis of the public awareness campaigns, taken as a whole, indicate that the equality courts will not be overburdened with complaints: Courts are not trusted to solve (discrimination) complaints, ordinary South Africans do not have an adequate grasp of the kinds of discrimination prohibited by the Act, and not enough has been done to popularise the Act.

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[95] See pp 281-285 above.
[96] I have been able to source only ten newspaper reports relating to publicising the existence of the equality courts and how to approach the equality courts. See fn 75 and 76 (p 294) above for more detail.
[97] See para 5.5 above.