Chapter Six: Conclusion

In this final chapter, after briefly summarising the main arguments and conclusions flowing from each of the chapters, I consider how the Promotion of Equality and Prevention of Unfair Discrimination Act may be amended to function more effectively and how the implementation of the Act could be supplemented. I then also briefly consider further avenues of socio-legal research relating to the Act.

6.1 Summary of main arguments

I accept that the arguments presented below may have been presented in a more nuanced manner. I aso accept that some of these conclusions and arguments may well have to be revisited and finessed over time, for example after the promotional parts of the Act had been in operation for a while.

Chapter two dealt with the (potential) role of "law" in "society". Cotterrell's conceptualisation of law as "legal pluralism" (law as one normative order in a range of normative orders), "coercive order", "dispute processing" and "doctrine" is a helpful way of distinguishing between the various roles law may play in a given society. Critical scholars primarily focus on the "doctrinal" nature of law and probably *overestimate* its role in, or importance to, society.[1] Many socio-legal scholars focus in more depth on various (conflicting) systems of norms operating in a given society, and on the nature of law as coercive order, or as a system of dispute-processing. Many socio-legal scholars come to a different conclusion than critical scholars, namely that law's role in everyday life is *minimal and insignificant*.[2] The approach I followed in the thesis is an unashamedly instrumental one, premised on the notion that law is a practical discipline with real results that may be measured. Whether the values underpinning a particular Act is pervasive in society is an empirical question, not something to be decided beforehand by theorising about it.[3] As I suggest in chapter

[1] Sarat and Kearns in Sarat and Kearns (eds) (1995) 10; 21.
[2] Sarat and Kearns in Sarat and Kearns (eds) (1995) 1 n4.
[3] Cf Sarat and Kearns in Sarat and Kearns (eds) (1995) 43 as they interpret Macaulay (1963) 28 *Am Soc Rev* 55.

five, South Africans have not internalised the values underpinning substantive equality and the gap between the ideals expressed in the Act, and real, "living" values, is subsequently quite large.

Establishing whether a causal link exists between a given Act and societal change is not necessarily an easy task, and may well be impossible in some contexts. Yet, at the very least, court cases may be counted, a profile of litigants may be drawn up, the outcomes may be assessed, and the results may be used to reach particular conclusions, or to make particular suggestions about the improvement of the existing situation. This is an incremental, pragmatic approach to solving the "problems" that the law is asked to "solve". For example, in considering the potential use of the Act in South Africa, I identify below a range of amendments that could be considered to improve the Act. If, over time, these changes prove to be ineffective, others may suggest further changes. Gaps in areas relating to the effective implementation of the Act may also be identified by conducting appropriately tailored socio-legal research. Barriers that prevent ordinary South Africans from approaching equality courts may be identified; the nature of the interplay between equality court clerks and potential litigants may be probed to ascertain whether sensitisation courses should be organised, and so on. Over time, these studies may in turn be shown to have been incomplete or that the recommendations flowing from these studies were not far-reaching enough. Further studies will follow, hopefully broadening upon existing knowledge, and allowing supplementary recommendations to be made. This incremental, instrumental approach is therefore neither defeatist nor sterile; it is accepting law's limits and accepting law's limited role in eradicating social ills.

As I illustrated in chapter three, the drafters of the Act took the typical defects of a court-driven dispute resolution mechanism into account in the drafting process and as a result, the Act creates the potential for wide-ranging court-driven societal transformation. However, as explained in more detail in chapter two, some of the Act's underlying assumptions are unrealistic or incorrect. The Act arguably implicitly assumes that equality courts will effectively address a large number of incidents of discrimination, and overestimates the role law plays in ordinary South Africans' lives. As explained in chapter three, many socio-legal theories point to the same conclusion: the closer a particular society mirrors a closely knit, co-dependent, "happy (or unhappy) family", the smaller the

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role that (official state) law will play.[4] On the one extreme of the spectrum of possibilities, law may be able to influence neutral and instrumental areas of life,[5] but on the other extreme, law seldom manages to meaningfully intrude on "areas of emotion".[6] This does not bode well for an Act that was *inter alia* put in place to address the intimate spheres of life. Dror is probably correct: Law seems to be the quickest and cheapest way in changing a society and that is why governments too readily turn to the law when it wishes to dispose of a social ill. In this belief governments are probably usually mistaken.[7]

When considering whether "law" is able to change or steer a society, one should distinguish between court-driven and legislature-driven change. The anti-discrimination Acts that I considered in the thesis, have all created anti-discrimination *courts or tribunals* to address discrimination. In the first part of chapter three, I considered the limits of typical anti-discrimination legislation. The chief shortfall of anti-discrimination legislation is that it does not effectively address structural discrimination;[8] in other words, the *tribunals or courts* set up in terms of this legislation are not well-positioned to address structural discrimination. In the second part of chapter three, I compared the Act with the typical defects of anti-discrimination legislation and concluded that the Act is a laudable legislative attempt at addressing unfair discrimination. Again, the emphasis was on how the Act empowers *courts* to address discrimination. In the third part of chapter three, I considered the nature of discrimination complaints and specifically questioned the ability of law to effectively

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[4] Cf Galanter (1974) 9 *Law & Soc Rev* 130. Contra Lane (2005) 29 (internet version) that argues that it is "*highly likely* that equality courts will hear cases in which there will be a *continuing relationship* between colleagues, scholars, neighbours or members of religious groups" (my emphasis). She cites no authority for this proposition. Available sociological literature suggests that these kinds of cases are the *least* likely to reach official state courts.
[5] In Annexure D below, I set out reported decisions by the various Canadian anti-discrimination tribunals. Of the reported Canadian Human Rights Tribunal decisions (Annexure D1), 67% relate to employment. The respective percentages for Alberta, British Columbia and Ontario are 51%, 52% and 50%. One way of explaining this high percentage of employment-related complainants would be that the employment relationship is an instrumental area of human life and relatively easily "reachable" by courts, especially where the employment relationship has broken down.
[6] Morison in Livingstone and Morison (eds) (1990) 8; Luhmann (1985) 243; Cotterrell (1992) 24; Packer (2002) 150. I readily admit that this is a conservative conclusion: deeply held attitudes and well-established customs followed by a large majority of the population will not be changed by using laws; a critical mass of individuals need to change their stance and then laws that are passed to confirm the "new" custom may be successfully implemented. The prohibition of the Chinese custom of footbinding seems to bear out this conclusion. The custom of footbinding was first prohibited in 1622 but only by 1911 had public support for anti-footbinding campaigns reached such levels that the ban that followed was successful (Packer (2002) 161.) The Hindu custom of *sati* (widow burning) and the custom of female circumcision practised in some African countries seem to be still deeply held in some communities and official state prohibitions of these customs have *not* been successful (Packer (2002) 164 and further.)
[7] Dror (1958) 33 *Tul L Rev* 802.
[8] See pp 120-127 above.

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address discrimination. I measured the Act against the suggested requirements for effective legislation, and concluded that the Act will have a limited impact in addressing discrimination. I explicitly analysed the "choice" between Parliament or the courts in addressing discrimination in chapter 2.6 above, and I revisit this issue in chapter 6.2.1.3 below. In chapter 2.6 above I concluded that courts will not be able to address discrimination effectively. However, this does not mean that the legislature will fare much better. Discrimination occurs in a numbing variety of ways and no legislature will be able to imagine what forms discrimination will take. The pragmatic solution is to develop a general rule, as the South African Parliament did when it drafted sections 6 and 14 of the Act, and then leave it to courts to fit everyday occurences of discrimination into the general principles. The limits of this approach are set out in chapter 2.6. In chapter 6.2.1.3 below, I suggest how at least some of these limits may be softened, where I suggest that an inter-institutional dialogue should be initiated between the three branches of state authority and civil society.

In chapter four I mainly concerned myself with one of the requirements of effective legislation: "the enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise". I illustrated that the current pool of equality court personnel was probably inadequately trained, due to a particular incapacitated state institution. Specifically, the individuals tasked to manage the training of equality court personnel did not follow good management practice. The chapter contains a microscopic analysis of the initial training project undertaken by the Department of Justice to train equality court personnel. I provided a detailed topical overview of the planning and training process, mainly sourced from minutes to the meetings of the Training Management Team (TMT) or Training Management Board (TMB), a committee set up in terms of the business plan relating to the training process.[9] I analysed the training process and pointed out shortcomings in the planning and training stages.

I suggested that this microscopic study may have a secondary purpose, or added benefit. Kuye suggests that one aim of public administration research is to reform public organisations and

[9] I acted as minute secretary to most of the meetings.

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agencies and to reform their functioning.[10] Reform-minded "gap" studies in socio-legal research could have the same purpose in mind – once the "gap" between the suggested ideal in the law books and the factual reality have been identified, a further object of these kinds of studies could be to identify ways of narrowing the gap. In chapter four I *inter alia* analysed the *management* of a training implementation project run within the Department of Justice and Constitutional Development, as part of a broader enquiry into the need for adequately trained enforcement officials to ensure more *effective legislation*. In this respect then, chapter four illustrates an interplay between the disciplines of public administration and socio-legal studies. I painted a particularly detailed picture of the surrounding facts and circumstances of the initial training implementation project, as context is of much importance in public administration research.[11] If further socio-legal or public administration research is undertaken on the Act or future training programmes on the Act, it would be useful to have a contextualised and relatively complete picture of the first of these training initiatives, as a standard against which future results could be compared. In such an event, I would describe chapter four as an empirical study,[12] written from the perspective of a lawyer, to add to other studies of management, which could hopefully lead to better-refined management theories or better-refined critiques of management theories.[13]

I utilised a short list of abstract "best management practices" in evaluating the training programme for equality court personnel. However, barring the establishment of rather abstract and general management principles, a single "formula for success" for measuring good performance in the public sector does not exist.[14] However, the main aim of chapter four was not to "give advice" as

[10] Kuye in Kuye *et al* (2002) 2.
[11] See the discussion in chapter 4.2 immediately below.
[12] Roux in Kuye *et al* (2002) 84 distinguishes between "empirical", "evaluating", "normative" and "integrated" analysis. An "empirical" analysis is retrospective and descriptive and the primary focus is on the real facts involved.
[13] Cf Kuye in Kuye *et al* (2002) 2.
[14] Van der Waldt (2004) 5. See Pollitt (2003) 152: "context matters. Public management is not all one thing. Different functions, performed in different administrative cultures and circumstances, require different mixtures of norms and values. Therefore, it is inherently unlikely that a single set of prescriptions will work well in every – or even in most – situations". At 152-156 Pollitt points out that pragmatists, contingency theorists, social constructivists, post-modernists, those interested in the sociology of organisational knowledge, informatics theorists and decision theorists are all skeptical about the possibility of universal, scientifically-based generalisations about management. Roux in Kuye *et al* (2002) 91 is blunt: "The determination of the best policy options using policy analysis might prove favourable on paper or in principle, but is handicapped by the realities of life". Fukuyama (2005) 58: "Most good solutions to public administration problems ... will not be clear-cut 'best practices' because they will have to incorporate a great deal of context-specific information". Also see Fukuyama (2005) 113: "[P]ublic administration is idiosyncratic and not subject to broad generalization".

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such to policy makers, or to empirically test the supposed beneficial impact of such a step-by-step approach to public sector management. Rather, the aim was to point out the *shortcomings* of the training programme and to point out the *gap* between the suggested ideal in the Act and the messy reality that eventually came to pass. To evaluate any programme, some criteria must be established upfront against which the programme will be *measured*, and that was the only role I envisaged for the "management principles" I set out in this chapter.[15] However, reform-minded researchers in public administration may well be able to distill certain "lessons" for public administration managers wishing to avoid the same pitfalls that the management personnel of the project under consideration could unfortunately not avoid.

In chapter five, I considered 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 described the inadequate public awareness campaigns that I were aware of that had been undertaken up to 31 October 2007, and I reported on an empirical survey that I conducted in 2001 in parts of Tshwane. The survey gauged Tshwane residents' experiences of discrimination and their understanding of concepts such as "fair" and "unfair" discrimination. The most surprising data 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. The other significant, but perhaps 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) disputes.[16] I concluded that a court-driven social transformation project would likewise remain underutilised.

To summarise the thesis in one sentence: the Act is unlikely to achieve its stated purpose of effecting large-scale societal change in South Africa. If the "official" legal system is seen through

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[15] Also cf Fukuyama (2005) 114: "The fact that organizational ambiguity exists does not mean that we throw up our hands and assert that 'anything goes' in public administration. While there may not be best practices, there are certainly worst practices, or at any rate bad practices to be avoided".

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

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Ehrlich's eyes as something to be turned to in order to deal with the "abnormalities of life",[17] this conclusion is not startling. Official state law plays a small and limited role in solving everyday disputes and will usually be of limited assistance in effecting social change. That is not to say that important victories are not sometimes won in utilising the law.[18] With this in mind, I turn to suggestions for legislative amendments to the Act.

6.2 Proposals for reform

Perhaps it is necessary to justify why this final chapter is mainly concerned with proposed amendments to the Act when it seems that I rather pessimistically conclude that law has little to offer when combating discrimination. In short – why do I turn to law, if law is likely to fail?

Law only "fails" if a particular question is asked. That question is: "Can law solve the problem of discrimination?" and the answer is "No". If one asks if law can provide effective redress for aggrieved individuals,[19] the answer may well be yes, at least for some individuals some of the time.[20] Where equality courts have been established, complainants may approach these courts and may without legal representation lodge a claim by completing a document at the court, whereafter the clerk of the court will have this document served on the respondent. At the trial, an unrepresented litigant may be assisted by a presiding officer, who is entitled to approach the matter in a quasi-inquisitorial fashion. If a complainant in a discrimination matter establishes a *prima facie* case of discrimination, it falls to the respondent to persuade the court that the discrimination was fair. However, as foreshadowed in chapters two and three, the Act contains a number of problematic provisions that may hamper a complainant's quest for effective relief. The bulk of the remainder of this chapter is therefore directed to pointing out how the Act may be improved to

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[17] See Ehrlich (1936) 21 and the discussion at pp 36-38 above.
[18] Also see the discussions at pp 107-109 and pp 123-127 above.
[19] Cf Lustgarten in Hepple and Szyszczak (eds) (1992) 467. Joachim (1999) 13 *Can J ALP* 57 argues that an anti-discrimination Act has four goals: "correcting persistent patterns of discrimination against protected groups, preventing discrimination before it occurs, acting as spokesperson on issues related to discrimination; and *when discrimination does occur, providing an effective, expeditious remedy through a fair process*" (my emphasis). The Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) at para 3 has the same purpose in mind for the Equality Act: "The statute's objects are to … *provide practical measures* to facilitate the eradication of unfair discrimination, hate speech and gender and other forms of harassment" (my emphasis). Macaulay (2005) *Wis L Rev* 392 more generally argues that "sometimes law is one tool for bringing about some measure of social change".
[20] The Durban equality court, for example, has come to the assistance of a not insignificant group of complainants who have been insulted based on the prohibited grounds. See Annexure F.1.9.

avoid litigants falling through the cracks, as it were.[21] This will be done by proposing six respects in which the Act should be amended, and by highlighting ways in which institutional capacity may be improved.

6.2.1 Proposed amendments to the Act

6.2.1.1 The definition of "discrimination"

Sensibly, the definition of discrimination in the Act makes it clear that courts must consider the *effect* of the impugned conduct or omission. To avoid any uncertainty, the words "whether intentionally or not" could have been added to the definition.[22] Protection against retaliation should expressly be added to the Act.[23] The definition of discrimination should make it clear that discrimination will be found to exist even if discrimination on a particular ground was not the sole or main reason for the discriminatory act or omission.[24] The definition of "discrimination" calls for a

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[21] Lacey in Hepple and Szyszczak (eds) (1992) 121 is forthright in her views: "[W]e simply cannot afford to abandon the legal process … because in the real world disadvantaged people do not always have a choice about whether or not to defend or advance their needs and interests by legal means. Sometimes they simply have to do so because legal action is initiated by other parties, and on other occasions they have to because no other avenue of redress is available or remains to be explored. *We must try to alter law so as to make it more receptive to the arguments of the powerless* …" (my emphasis). At 124 n42 she agrees with Crenshaw (1988) 101 *Harv L Rev* 1331 that "rights discourse is sometimes the only available point of entry for struggle or reform, and that we need to use liberal legal ideology pragmatically, with our eyes open to its dangers".

[22] Cf the definition of "discrimination" in a suggested alternate Bill presented by the Women's Legal Centre and the Social and Economic Rights Project, Community Law Centre, UWC to the *ad hoc* Parliamentary committee: "discrimination means any act or omission which, whether intentional or not, directly or indirectly imposes burdens, obligations or disadvantages upon; or withholds benefits, opportunities or advantages from any individual, group or category of persons on one or more of the prohibited grounds". S 20(4) of the Northern Territory Anti-Discrimination Act provides that "[T]he motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant".

[23] S 13(1) of the Yukon Human Rights Act contains a prohibition against retaliation relating to harassment. The Act could be amended to include the following section: "No person may retaliate or threaten to retaliate against an individual who objects to the discrimination". In IDASA's submission to the *ad hoc* Parliamentary committee, it noted that the Bill did not contain any provisions regarding reprisals and suggested that a provision be added to the Bill that would protect participants under the Act from negative consequences as a result of their participation. IDASA suggested the following wording: "All persons have the right to enforce their rights under this Act, to participate in proceedings under this Act, and to refuse to participate in unfair discrimination, without actual reprisal or the threat thereof".

[24] Bailey and Devereux in Kinley (ed) (1998) 315; Connolly (2006) 67-68.. S 20(3)(a) of the Northern Territory Anti-Discrimination Act provides that "[F]or discrimination to take place, it is not necessary that the attribute is the sole or dominant ground for the less favourable treatment". *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 43 may be read to disallow such an amendment to the Act: "Section 44(1) and (2) of the [Insurance] Act [27 of 1943] treats married women and married men differently. This difference in treatment disadvantages married women and not married men. The discrimination in s 44(1) and (2) is therefore based on two grounds: sex and marital status. Section 8(2) does not require that the discrimination be based on one ground only; it specifically states that it may be based on 'one or more' grounds. Nor is it a difficulty for the applicant that s 8(2) mentions only one of the grounds, sex. The list provided in s 8(2) is not exhaustive. The subsection states expressly that the list provided should not be used to derogate from the generality of the prohibition on discrimination. It is not necessary to consider whether the other ground of

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burden to have been imposed or a benefit to have been withheld (based) "on" a prohibited ground. The preposition "on" should be replaced with the phrase "related to", as "(based) on" carries a more limited meaning than "related to".[25] A provision should also be added to the Act to the effect that anyone who causes, encourages or requests another person to do or refrain from an act that amounts to discrimination in terms of the Act, should be held to have discriminated as if in their personal capacity.[26] A section expressly incorporating the principles relating to vicarious liability should further be added.[27]

The relevant definitions in the Act should be redrafted to clearly distinguish between "state discrimination" and "private discrimination", and between "discrimination" and "differentiation". I expand on this theme in some detail below.

The Act does not address "mere differentiation". For example, consider an insurance company that loads the premiums of owners of red vehicles as according to their statistics, red vehicles are involved in disproportionately more collisions that any other colour of vehicle. This does not amount to discrimination in terms of the Act because a prohibited ground is not involved – it is only when a benefit is withheld or a disadvantage imposed on a prohibited ground that discrimination is

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discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of s 8. It is sufficient that the disadvantageous treatment is *substantially based on one of the listed prohibited grounds*, namely sex" (my emphasis). It could be argued that the emphasised part is an *obiter* remark as it was not in issue between the parties whether the discrimination was substantially based on sex or not. The judgment was handed down in terms of the interim Constitution as well. The equality court in *Pillay v MEC for Education, KwaZulu-Natal and others* 2006 (6) SA 363 (EqC) para 21 held that disadvantageous or harmful or prejudicial treatment must *primarily* be based on one of the prohibited grounds.

[25] Connolly (2006) 104.

[26] Cf Bailey and Devereux in Kinley (ed) (1998) 301.

[27] S 133(1) of the Queensland Anti-Discrimination Act provides that "[I]f any of a person's workers or agents contravenes the Act in the course of work or while acting as agent, both the person and the worker or agent, as the case may be, are jointly and severally civilly liable for the contravention, and a proceeding under the Act may be taken against either or both". S 133(2) provides that it is defence to a claim under s 133(1) if the respondent can show that it took reasonable steps to prevent the worker or agent contravening the Act. S 10 of the Manito Human Rights Code provide that where an officer, employee, director or agent of a person contravenes the Code while acting in the course of employment or the scope of actual or apparent authority, that person is also responsible for the contravention unless the person did not consent to the contravention and took all reasonable steps to prevent it; and subsequently took all reasonable steps to mitigate or avoid the effect of the contravention. In the Black Sash's submission to the *ad hoc* Parliamentary committee, it noted that the Bill made no provision for vicarious liability. Black Sash argued that although courts would likely apply the principle of vicarious liability in appropriate circumstances, "the issue is complicated in the discrimination context by the question of the knowledge of the employer and the stage at which he or she should be held liable". Black Sash submitted that a section similar to s 60 in the Employment Equity Act be added to the Bill.

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present. "Vehicle colour" does not fit into either the listed or unlisted grounds. This conduct by the insurance company therefore entails "mere differentiation". According to the Constitutional Court, mere differentiation must be rationally connected to a legitimate governmental purpose in terms of s 9(1) of the Constitution.[28] It is not clear if s 9(1) applies to private actors.[29] Section 8(1) of the (interim) Constitution of the Republic of South Africa[30] read "every person shall have the right to equality before the law and to equal protection of the law" and section 9(1) of the 1996 Constitution states that "everyone is equal before the law and has the right to equal protection and benefit of the law". The Constitutional Court assumed in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[31] that its section 8 jurisprudence applies equally to section 9. The Constitutional Court interpreted section 8(1) of the interim Constitution (and presumably also section 9(1) of the 1996 Constitution) to test whether a rational connection exists between mere differentiation and a legitimate *governmental* purpose it is designed to promote or achieve.[32] It is difficult to conceive of a governmental purpose in cases of private discrimination. It is therefore possible that section 9 does not find application when a private person or institution differentiates and that such differentiation may occur on *any* basis, rational or irrational. *Harksen* referred specifically to executive conduct and legislation, however.

That leaves two options. On the one hand it may mean that section 9(1) still does not find application because a legislative provision or executive conduct is not attacked when differentiation by an insurance company is challenged. This means that a non-state respondent may irrationally or arbitrarily differentiate as long as the differentiation does not amount to unfair discrimination. On the other hand, none of the equality cases that have reached the Constitutional Court dealt with private discrimination. Obviously the qualifier "governmental" purpose would be used when analysing governmental differentiation. By analogy courts could adapt the *Harksen* test to fit private discrimination cases. The adapted test could read "whether a rational connection exists between the mere differentiation and a legitimate *private or institutional or business* purpose".

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[28] *Harksen v Lane* 1998 (1) SA 300 (CC) para 54.
[29] In *Cary v Cary* 1999 (3) SA 615 (C), s 9(1) was seemingly applied horizontally and interpreted to ensure equality of arms between litigating spouses in a divorce action. *Cary* did not refer to the *Harksen* test, however. A more satisfying approach might have been to reinterpret Rule 43 in terms of s 39(2) of the 1996 Constitution.
[30] Act 200 of 1993.
[31] 1999 (1) SA 6 (CC) para 15.
[32] *Harksen v Lane* 1998 (1) SA 300 (CC) para 43.

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Sprigman and Osborne find this possibility "disturbing".[33] They argue that should section 9(1) be held to reach private behaviour, every instance of private irrationality will offend the Constitution. They read more into section 9(1) than I do. If I choose to invite to my wedding only those co-workers who support the same rugby team that I do, and should a disgruntled colleague who was not invited decide to drag me to court, the presiding officer has to ask three questions: what is the purpose of this distinction, is it a legitimate distinction, and does a rational link exist between the purpose and the distinction. In highly personal, intimate situations the threshold will be very low and almost any answer will suffice: I want to enjoy my wedding, I will not enjoy it if guests that support other teams attend my wedding, I do not like people who support other teams. Sprigman and Osborne seem to place the threshold much higher. They describe the following examples as "irrational and capricious" decisions: to leave property to one relative and not to another, to bar Jehovah's witnesses from entering my house, to refuse to invite women to my bridge club.[34] In the context of highly personal or intimate relationships or spaces, why should these examples be described as irrational? I do not want to leave property to cousin A because I do not like cousin A. I do not want Jehovah's witnesses to enter my house because I think they are crazy, or because I do not allow religious conversations in my house, or because I happen to be in a foul mood. I do not want women at my bridge club because they talk too much or because they drink all my soda water – these are all rational and valid explanations in these particular circumstances. In any event their examples do not amount to mere differentiation: if I disinherit cousin A, it could be argued that I fairly discriminated against him based on birth; if I ban Jehovah's witnesses from my house I fairly discriminate against them based on religion; if I don't want women at my bridge club I fairly discriminate against them based on sex or gender. On their analysis, it seems as if they would characterise these examples as unfair discrimination ("irrational" and "capricious" decisions will on their analysis presumably also amount to "unfair" decisions) which is difficult to understand.

There is another reason why these examples will not fall foul of the Constitution: section 8(2) allows the leeway to courts to decline to apply section 9(1) in appropriate circumstances. Sprigman and Osborne seem to argue that courts have two choices: either apply section 9(1) in all

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33 Sprigman and Osborne (1999) 15 *SAJHR* 45.
34 Sprigman and Osborne (1999) 15 *SAJHR* 46.

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cases of private discrimination, or decline to apply section 9(1) in all cases of private discrimination. Section 8(2) is more subtle than that – in some circumstances it will manifestly be inappropriate to hold private actors to section 9(1), as in the examples provided above. In other cases, section 9(1) could very appropriately be applied to private actors, such as insurance companies.

As the Act currently stands, "mere differentiation" is not addressed at all, and South African discrimination law is unclear on whether private differentiation may occur on any basis, or whether it must (at least) be rational or non-arbitrary. The Constitutional principle that the State must act rationally when it chooses to differentiate between groups has also not been taken up into the Act. The Act should be amended to insist on rational differentiation. In most cases, as discussed above, the requirement of rationality will not impose a meaningful burden on respondents. As suggested above, truly intimate decisions, such as who to marry or who to invite to one's home, should be held to have been rational decisions under almost all circumstances. However, respondents who make it their business, and who derive profits from differentiating between different groups, such as insurance companies and banks, should be held to a higher standard of rationality.

6.2.1.2 The list of prohibited grounds

Section 14 – the test for unfairness – is the heart of the Act. It would then not be of particular moment to establish that "discrimination" had occurred, as the Act only prohibits "unfair" discrimination. The only function of the list of prohibited grounds in section 1(1)(xxii) is to distinguish between "differentiation" and "discrimination". For example, to pay a higher insurance premium for a red motor vehicle compared to a white vehicle (assuming that insurance companies' databases illustrate that red cars are proportionately involved in more collisions than any other colour of vehicle) amounts to mere differentiation, as "vehicle colour" is not listed as a prohibited ground. Paying a higher premium because the usual driver of the vehicle will be young, or male, would amount to discrimination as "age" and "sex" are listed as prohibited grounds. The list of grounds could then be seen as a gatekeeper of sorts, to distinguish between cases worthy of a full enquiry into the fairness or unfairness of distinguishing on particular grounds, and cases not worthy of such an enquiry. As long as the list of grounds performs this task, it would then seem to follow that the list may be broadened without losing the Act's focus. Expressly including additional grounds makes a complainant's work a little easier because one or more of the requirements listed

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in section 1(1)(xxi)(b) read with section 13(2)(b) then need not be established. To this end, the grounds listed in section 34 of the Act (HIV/AIDS status,[35] nationality, socio-economic status, family responsibility and family status) should be expressly added to the list of prohibited grounds.

In the context of an Act that was *inter alia* put in place to facilitate a large-scale redistributive programme,[36] it is particularly peculiar that "socio-economic status" was not added explicitly as a prohibited ground.[37] Where an Act has been put in place to effect societal transformation, one would have expected the legislature to follow through on its promise and to explicitly provide that a claim may be brought based on socio-economic status discrimination, or to put it more plainly, based on discrimination against the poor. Liebenberg and O'Sullivan are quite modest in their appraisal of what the inclusion of socio-economic status as prohibited ground may achieve:[38]

> Where poverty is a major barrier to women enjoying access to socio-economic rights such as decent health care, housing and education, socio-economic status as a prohibited ground can *facilitate* challenges to these structural exclusions. While it is recognised that legislation alone cannot eliminate the inequalities inherent in a market-based economy, it can at least seek to *combat the exclusion of the poor* from social goods, services and facilities arising from irrational prejudices and stereotyping.

The authors provide an example of what they have in mind: The inclusion of the ground could be used to combat the notion that all rural women or women living in informal settlements are bad credit risks and so should automatically be excluded from consideration for bank loans.[39] They

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[35] Somewhat contrivedly s 5(1)(p) of the Nova Scotia Human Rights Act outlaws discrimination based on "an irrational fear of contracting an illness or disease". 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 AIDS Law Project (ALP) again lobbied for the explicit inclusion of HIV/AIDS status in the definition of prohibited grounds. The ALP noted with concern that despite the directive in the Act that the Equality Review Committee had to within a year of its establishment make a recommendation to the Minister regarding the s 34 grounds, no such formal recommendation had yet been made.

[36] See the discussion in chapters 1 and 2 above.

[37] It appears that cabinet decided that the additional grounds, including HIV status and socio-economic status, should not be given explicit recognition in the Act. Albertyn *et al* (eds) (2001) 81.

[38] Liebenberg and O'Sullivan (2001) 32; my emphasis.

[39] Liebenberg and O'Sullivan (2001) 32. Reddy (2002) *TSAR* 674 argues in similar vein. At 686 he suggests that the use of the following loan criteria amounts to indirect race discrimination: geographical area; collateral; authenticated proof of income; operation of bank account; ability to produce banking details; amount requested above minimum set

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leave open their own more pertinent question: Can the inclusion of socio-economic status as prohibited ground facilitate *substantive challenges* to the material disparities existing within and between groups?[40] The authors suggest that the definition of socio-economic status in the Act hints at a more substantive content, but that all will depend on the development and application of the unfairness enquiry in relation to the ground of socio-economic status. At this stage too few equality court judgments have been reported to even attempt a guess at how progressive the equality courts will be in their interpretation of socio-economic discrimination cases. Consider an example Liebenberg provides: In the South African market economy a number of public services are in the process of being privatised. If market-related prices for "commodities", such as water, will be charged, poverty may well lead to a large number of people not being able to enjoy access to this crucial right.[41] Will courts characterise such instances as unfair discrimination? They may very well decide that market-generated inequalities are instances of reasonable discrimination, which would partly destroy the transformative potential of the inclusion of this ground.[42]

In addition to the section 34 grounds, the following grounds may also be considered for explicit inclusion in the list of prohibited grounds:

- Actual or presumed association with a person who has, or is believed or presumed to have, an attribute referred to in the list of prohibited grounds; [43]
- Breastfeeding;[44]

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by the lending institution. These criteria would also amount to direct discrimination based on socio-economic status and is an easier argument to make than indirect race discrimination.

[40] Liebenberg and O'Sullivan (2001) 32; my emphasis.

[41] Liebenberg (2000) 4 (internet version). Also see Liebenberg and O'Sullivan (2001) 7 for the same argument.

[42] Liebenberg and O'Sullivan (2001) 37. Parghi (2001) 13 *CJWL* 137 is extremely forthright. The author considers the suggestion that "social condition" be added as a prohibited ground to the Canadian Human Rights Act and concludes at 170 that "adding this new ground would not prevent the market from discriminating against poor people who are truly unable to pay for goods such as housing or food ... Social condition would therefore not effect the degree of social change that some of its proponents expect it to and that some of its opponents fear it will". In similar vein Freeman (1981) 90 *Yale LJ* 1894 cynically argues that the goal of anti-discrimination legislation "is to offer a credible measure of tangible progress without in any way disturbing class structure generally. The more specific version of what would be in the interest of the ruling classes would be to 'bourgeoisify' a sufficient number of minority people in order to transform those people into active, visible, legitimators of the underlying and basically unchanged social structure". If this is the case, "being hounded by a clothing store for owing R200, or having … water and lights cut off" (*Star* (2007-03-28)), will not be recognised as unfair discrimination based on socio-economic status by equality courts.

[43] S 19(1)(r) Northern Territory Anti-Discrimination Act; s 6(l) Yukon Human Rights Act; s 5(1)(v) Nova Scotia Human Rights Act; s 6(m) Victoria Equal Opportunity Act; s 7(1)(m) Queensland Anti-Discrimination Act. Also see Zimmer (1999) 21 *Comp Lab L & Pol'y J* 254.

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- Criminal record; [45]
- Irrelevant criminal record; [46]
- Irrelevant medical record;[47]
- Parenthood;[48]
- Physical appearance;[49]
- Political belief, opinion, association, affiliation or activity;[50]
- Same-sex partnership status;[51]
- Source of income or status as recipient of social welfare payments;[52] and
- Trade union or employer association activity.[53]

The definition of "prohibited grounds" should also be amended to make it clear that presumed membership of these grounds will also constitute a cause of action. The definition of "harassment" in section 1(1)(xiii) refers to "a person's membership or *presumed membership* of a group identified by one or more of the prohibited grounds *or a characteristic associated with such group*".[54] Unfortunately this wording was not carried over to the definition of the prohibited grounds where it relates to discrimination. A number of foreign anti-discrimination Acts contain similar provisions.[55]

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[44] S 19(1)(h) Northern Territory Anti-Discrimination Act; s 6(ab) Victoria Equal Opportunity Act; s 7(1)(e) Queensland Anti-Discrimination Act. S 1(1)(xix) defines pregnancy as including "any condition related to pregnancy" which could be read to include breastfeeding, but on a strict literal interpretation would *not* fit this definition as breastfeeding occurs *after* the pregnancy has run its course.
[45] S 6(i) Yukon Human Rights Act.
[46] S 19(1)(q) Northern Territory Anti-Discrimination Act.
[47] S 19(1)(p) Northern Territory Anti-Discrimination Act.
[48] S 19(1)(g) Northern Territory Anti-Discrimination Act; s 6(ea) Victoria Equal Opportunity Act. The Act defines "family responsibility" in s 1(1)(xi) as "responsibility in relation to a complainant's spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support", which could be read to include parenthood.
[49] S 6(f) Victoria Equal Opportunities Act; Pieterse (2000) 16 *SAJHR* 121.
[50] S 19(1)(n) Northern Territory Anti-Discrimination Act; s 6(j) Yukon Human Rights Act; s 1(d) Prince Edward Islands Human Rights Act; s 5(1)(u) Nova Scotia Human Rights Act; s 6(g) Victoria Equal Opportunity Act; s 7(1)(j) Queensland Anti-Discrimination Act.
[51] Ss 1, 2 and 3 Ontario Human Rights Code.
[52] S 1(d) Prince Edward Islands Human Rights Act; ss 2 and 3 Ontario Human Rights Code; s 5(1)(t) Nova Scotia Human Rights Act; s 4(b) Alberta Human Rights, Citizenship and Multiculturalism Act.
[53] S 19(1)(k) Northern Territory Anti-Discrimination Act; s 6(c) Victoria Equal Opportunity Act; s 7(1)(k) Queensland Anti-Discrimination Act.
[54] My emphasis.
[55] Eg s 8 of the Queensland Anti-Discrimination Act: "Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of (a) a characteristic that a person with any of the attributes generally has; or (b) a characteristic that is often imputed to a person with any of the attributes; or (c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or (d) an attribute that a person had, even if the

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6.2.1.3 Systemic discrimination

The discussion under this heading is linked to the analysis relating to the prohibited ground of socio-economic status in 6.2.1.2 above, and the lament in chapter three above as to the general inability of anti-discrimination laws to effectively address structural discrimination.

The Act does not contain a clear, explicit recognition of systemic discrimination as a separate, self-standing cause of action. I have in mind the explicit, upfront legislative recognition of particular, named, structural barriers in society and particular, named respondents,[56] put on notice to address these barriers. Delgado argues that a single plaintiff – single defendant court case "reinforces a perpetrator perspective that sees racism as a series of isolated actions and not an integrated system that elevates one group at the expense of another".[57] Day argues in similar vein that an anti-discrimination system that is modeled on a dispute resolution system assumes that if the particular form of inequality is serious enough the victim will complain.[58] Such a system also assumes that, broadly speaking, society *is* equal and only the lapses from equality will be complained of and remedied by law.[59] Delgado asks that a search should begin for "broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfill our unkept promises of democracy, equality, and a decent life".[60] He seems to implicitly argue that the way to attain a system of "economic democracy", as he terms it, would be to take the battle to "the streets".[61] If one still has some faith in the legal process, as I do,

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person did not have it at the time of the discrimination". S 9(1)(a) of the Manitoba Human Rights Code defines "discrimination" as "differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit".

[56] Fredman (2002) 174 argues that discrimination law that seeks to transform a society should adhere to a model of "structural reform". While in the orthodox dispute resolution model the defendant would be the wrongdoer and the provider of the remedy, in the structural reform model the defendant would be the body best able to achieve the required reform.

[57] Delgado (2001) 89 *Geo LJ* 2295.

[58] Day in Martin and Mahoney (eds) (1987) 403.

[59] Day in Martin and Mahoney (eds) (1987) 403. At 402 n1 Day argues that "discrimination because of race, sex, and disability is now understood by all serious scholars in the field not as isolated acts of individuals but as deeply etched patterns in [North American] society, rooted in history, and embedded in the ordinary practices of all our institutions".

[60] Delgado (2001) 89 *Geo LJ* 2296.

[61] At 2296 Delgado approvingly refers to protests held at WTO meetings. In similar vein Delgado Harv *CRCL LR* 386 argues that "as the country and the world continue to diversify and the gap between the wealthy and the rest widens, *the threat of disruption may come to haunt the consciousness of ruling elites sufficiently* that change may come once again, however slowly and haltingly" (my emphasis). (This is not a novel idea. Rousseau (1968) 96 said much the same centuries ago: "Do you want coherence in a state? Then bring the two extremes as close together as possible; have neither very rich men nor beggars ...").

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another option would be to stretch the legal options as far as they can go. One such "stretch" would be the explicit recognition of a legislative prohibition of systemic discrimination. MacDonald argues that liberal democracies draw political disputes into institutions where these disputes are *contained*: "Disputes are localized, particularized, insulated: particular grievances do not metastasize into general indictments of the whole social order".[62] A generous, wholehearted application of the principle of "substantive equality" and the subsequent recognition of a claim based on systemic discrimination may well lead to an "indictment of the whole social order".

A "claim" based on structural discrimination will not in the first place be a court-driven transformative process. As argued in chapter three above, courts are not particularly well-suited to adjudicating structural discrimination disputes.[63] If the law is to be utilised in combating structural discrimination, and if courts are not up to the task, the only other institution to turn to is the legislature. As argued in chapter 2.6 above,[64] the drafters of the 1996 Constitution anticipated that *Parliament* would be tasked to achieve societal transformation, as may be seen in the command to Parliament to address discrimination, as contained in section 9(4) of the Constitution. Parliament then saw to the drafting of the Act. Is it possible to read (certain provisions of) the Act as a command to the South African state and South African society to address structural discrimination?

The following provisions in the Act may be identified as possibly hinting at the existence of a legislative command to address systemic discrimination – that is, not a court-based claim based on the private law model of a single plaintiff versus a single defendant, litigating about a singular, discrete wrong; but rather a command from Parliament to a specific, named respondent, to address group-experienced, structural harm:

- The definition of "equality" in section 1(1)(ix), which speaks of "*de facto* equality" and "equality of outcomes".

62 MacDonald (2006) 170.
63 See pp 120-127 in particular.
64 See p 99 in particular.

- The "test" for the recognition of further prohibited grounds not listed in the Act, which includes the requirement that such a ground must "cause or perpetuate systemic disadvantage".[65]
- The definition of "socio-economic status", which refers to structural barriers faced by the poor in South Africa.[66]
- The objects of the Act, which include to give effect to the equal enjoyment of all rights and freedoms by every person,[67] and to give effect to the promotion of equality.[68]
- When equality courts adjudicate disputes arising from the Act, the principle of the use of corrective or restorative measures in conjunction with deterrent measures should be applied.[69]
- When the Act is applied, the existence of systemic discrimination and inequalities,[70] and the need to take measures at all levels to eliminate such discrimination and inequalities,[71] should be recognised and taken into account.
- Section 7(d), which refers to the "provision or continued provision of inferior services to any racial group, compared to those of another racial group".
- Section 8, which contains a number of examples of systemic or structural discrimination based on sex or gender: gender-based violence;[72] female genital mutilation;[73] the system of preventing women from inheriting family property;[74] any policy or conduct that limits women's access to land rights, finance and other resources;[75] conduct that limits women's access to social services and benefits;[76] and the systemic inequality of access to opportunities by women as a result of the sexual division of labour.[77]

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[65] S 1(1)(xxii)(b)(i).
[66] S 1(1)(xxvi): "a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications".
[67] S 2(b)(i).
[68] S 2(b)(ii).
[69] S 4(1)(d).
[70] S 4(2)(a).
[71] S 4(2)(b).
[72] S 8(a).
[73] S 8(b).
[74] S 8(c).
[75] S 8(e).
[76] S 8(g).
[77] S 8(i).

- Section 9, which contains one example of systemic discrimination based on disability: the failure to eliminate obstacles that limit or restrict disabled people from enjoying equal opportunities or the failure to take steps to reasonably accommodate the needs of disabled people.[78]
- Section 14(3)(e), which requires an equality court to consider if the impugned discrimination was systemic in nature or not.
- The Act allows the institution of representative claims,[79] class actions,[80] and public interest actions.[81]
- A number of the remedies listed in the Act require a respondent to over time make structural adjustments in order to remove structural barriers.[82]
- The Schedule to the Act contains a number of examples that could be termed as systemic or structural discrimination.[83]

What would be the content of these commands to address structural discrimination, and who would be the respondents? Sections 7, 8 and 9 and the Schedule to the Act contain a list of discriminatory situations that must be addressed. Sections 7, 8 and 9 do not address specific respondents but the Schedule to the Act clearly identifies who is to be tasked to combat structural discrimination in a given sector. For example, clause 1(c) of the Schedule may be read to command *employers* to ensure equal pay for equal work; clause 2(c) may be read as a command *schools* to accommodate diversity; clause 4(b) may be read as a command to *banks* to desist from the practice of "red-lining"; and clause 10(c) may be read as a command to *sporting bodies* to ensure that all national teams are truly representative of the nation these teams represent. The Department of Justice and Constitutional Development, as the drafters of the Act, would then have

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[78] S 9(c).
[79] S 20(1)(b).
[80] S 20(1)(c).
[81] S 20(1)(d).
[82] S 21(2)(g) (order to make specific opportunities and privileges available); s 21(2)(h) (order for the implementation of special measures); s 21(2)(i) (order to reasonably accommodate a group or class of persons); s 21(2)(k) (order to undergo audit of policies and practices); s 21(2)(m) (order to make regular progress reports to an equality court or relevant constitutional institution.)
[83] Clause 4(b) ("red-lining" based on race or social status); 4(c) (discrimination in the provision of housing bonds, loans and financial assistance based on race or gender); 8(a) (imposing conditions that limit or deny entry into a particular profession of persons from historically disadvantaged groups); 9(b) (imposing terms or conditions or practices that perpetuate the consequences of past unfair discrimination or exclusion regarding access to financial resources.)

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to monitor compliance with the (implied) commands contained in the Act, and should a named respondent then be found not to have undertaken its legislative duty, contempt of court proceedings should follow.[84]

Alas, on closer reading, these sections read together do not amount to the recognition of a cause of action of systemic or structural discrimination. (I analyse the bulleted points above *seriatim*.) The mere fact that the word "equality" as used in the Act is given a broad meaning does not create a right and only defines the ambit of the word. Similarly, section 1(1)(xxii)(b)(i) does not create a cause of action and merely defines the range of prohibited grounds contemplated by the Act's drafters. The fact that socio-economic status is given a broad meaning still begs the question whether this ground will be recognised by equality courts. Furthermore, a claim based on socio-economic status need not be a systemic discrimination case.[85] Sections 7, 8 and 9 list examples and is explicitly made subject to the general prohibition against discrimination in section 6.[86] Section 6 does not explicitly refer to systemic discrimination. Section 14(3)(e) seems to indicate that systemic discrimination would more likely be unfair, but would not automatically lead to the conclusion that all cases of systemic discrimination are by it very nature unfair, let alone lead to the recognition of a general claim of systemic discrimination. Representative claims, class actions and public interest actions based on discrimination will not necessarily be systemic discrimination cases. The list of practices in the Schedule of the Act, some of which amount to systemic discrimination, is in terms of section 29 of the Act a list of possible examples in terms of which a claim may be brought and may not be unfair in a particular case.[87] A claim based on the examples in sections 7 to 9 or the Schedule would still have to be brought in terms of the general prohibition against discrimination in section 6 of the Act, read with the test for unfairness as set out in section 14 of the Act. If "unfair" discrimination is the target of a given legislative command, some agency

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[84] The remedies contained in s 21 of the Act seem to anticipate an equality court hearing into unfair discrimination, harassment, or hate speech. What I have in mind is the upfront legislative recognition of a particular situation or condition that calls for immediate rectification by a named respondent, *without* first having to recognise the claim in a court. Section 21 therefore does not seem to be available in the situation I have in mind.

[85] An indigent single parent may approach an equality court because his or her child may have been turned away from school for failure to pay her school fees. The fact that many such cases may exist does not turn that specific equality court case into a systemic discrimination matter, it would still be a single plaintiff versus a single defendant with a potentially positive outcome for a single litigant.

[86] Albertyn *et al* (eds) (2001) 56. Elsewhere I have argued that the conditions listed in ss 7-9 amount to *prima facie* cases of discrimination, but this does not necessarily take the point any further. Kok (2001) *TSAR* 305.

[87] S 29 reads that the Schedule contains practices "which are *or may be* unfair" (my emphasis). If a practice "may be" unfair, it may also be fair in a given case.

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will by necessity have to be selected or created who will decide when a particular situation amounts to "unfair" discrimination. The Act then creates equality courts to decide if a given situation amounts to "unfair" discrimination. All of the examples in section 7-9 are made subject to the general injunction in section 6 against "unfair" discrimination, and the vast majority of examples listed in the Schedule to the Act contain the qualifier "unfairly" or "unreasonably".[88]

It appears then that the drafters opted for the "soft" enforcement of cases of systemic discrimination, primarily by requiring mainly public bodies to *promote* equality (and not to be taken to court for failing to do so.[89])

The Act should be amended to include appropriate, well-targeted commands to specified respondents to address systemic discrimination. How should this happen? I suggest that the most practical method would be to initiate an inter-institutional dialogue between the executive branch (concretised as the Department of Justice and Constitutional Development), the legislative branch, the judicial branch (concretised as the equality courts) and civil society. In the short term, the best one could hope for would be that suitable claims will be lodged with equality courts. "Suitable claims" would be claims that could potentially open Parliament's eyes to the existence of systemic discrimination in a given sector, in other words claims that could potentially act as the platform for further legislative action. It would be civil society's task to open Parliament's eyes by lodging appropriate claims in equality courts on behalf of victims of systemic discrimination. The Department of Justice and Constitutional Development, in turn, is obliged to collect data from the equality courts as to the profile of complainants, the profile of respondents, and the nature of cases lodged and cases finalised.[90] Over time, based on an analysis of lodged cases, it may become

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[88] 22 of the 30 examples listed in the Schedule to the Act contain the qualifier "unfairly" or "unreasonably".

[89] Although the Act contains a number of provisions that seem to create promotional obligations, the section of the Act dealing with enforcement (s 21) seems only to be concerned about unfair discrimination, hate speech and harassment, which are the causes of action that may be brought to an equality court. An equality court seems *not* to have the power to for example declare that the state or a particular body has failed in its duty to promote equality, or to hold the relevant official in contempt for failing to promote equality in the prescribed manner.

[90] Regulation 23(1) of the Regulations published in GN No R764, *Government Gazette* No 25065, 2003-06-13, as amended by GN No 563, *Government Gazette* No 26316, 2004-04-30, and read with s 25(3)(c) of the Act, obliges the Departement of Justice to collect the following data from operational equality courts: the number of cases lodged; the number of cases finalised; the ground of discrimination; the category of discrimination involved; the area from which the complainant originates (rural or metropolitan); the age, gender, race and, where applicable, the disability of the complainant; the gender and race od the person against whom the allegations are made; and the finding and order of each finalised complaint. Also see Annexure B of the same regulations.

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clear that a response from Parliament is called for. The Department of Justice should then draft an appropriate discrimination bill, and the bill should be debated and refined in Parliament, where civil society would hopefully contribute to the debate. Such an institutional dialogue would be the mirror image of Réaume's criticism of Canadian anti-discrimination legislation. She argues as follows:[91]

> It is hard to avoid the conclusion that, in respect of both these aspects of the problem of discrimination, the legislature has adopted the bottom-up method of case-by-case rule-making by waiting for fact situations not yet covered by the rules to present themselves and then deciding how they should be handled. Given our legal system's lack of experience with equality as a norm, perhaps a case-by-case method was the best way to start. It is not to be expected that the legislature would be able to articulate at the outset a comprehensive theory in such uncharted territory. But it is not clear that the legislature has taken the next step – moving towards an articulation of the deeper principles that explain the concrete cases.

What I have in mind is the reverse. The South African legislature put in place a general norm. The Act states that "unfair discrimination" is prohibited, and then defines "discrimination" and sets out a test with which to determine "fairness" or "unfairness". These general norms must now be concretised on a case-by-case basis. Over time it may well become clear that equality courts always find that a particular situation amount to unfair discrimination. (It is, for example, difficult to imagine that admission to a restaurant or holiday resort may ever be based on race or colour.) Parliament may in such an event then safely legislate that, for example, restaurants or holiday resorts may never point away patrons based on race or colour. This example does not relate to systemic discrimination, but the same principle will apply to cases of systemic discrimination. Take the example listed in footnote 85 in this chapter above – An indigent single parent may wish to approach an equality court because his or her child may have been turned away from a public school for failure to pay her school fees. The fact that many such cases may exist does not turn that specific equality court case into a systemic discrimination matter, it would still be a single plaintiff versus a single defendant with a potentially positive outcome for a single litigant. However, once such a claim has been lodged and decided in favour of the complainant, Parliament may wish to intrude and prohibit public schools from turning away learners for failure to pay school fees.

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[91] Réaume (2002) 40 *Osgoode Hall LJ* 127-128.

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Particularly strenuous challenges will be posed to civil society and rights groups to effectively illustrate the existence of systemic discrimination and to identify claims that could act as an impetus for legislative action in particular sectors.[92] In particular cases it may be difficult to identify the breach of the equality right; it may lie in "inadequate budgetary allocations, capacity deficits (particularly at provincial and local government level), unduly complex regulations, a lack of knowledge by disadvantaged groups of their rights, and inadequate infrastructure".[93] The identification and addressing of such barriers to full equality would require "careful empirical research combined with a detailed understanding of the context of service delivery".[94]

When considering legislative action, the requirements for effective legislation set out in chapter 2.5 above must be firmly kept in mind. My call for an inter-institutional dialogue should not be misconstrued as a call for an avalanche of new laws. Discrimination is a particularly difficult problem to attempt to solve utilising the law, whether it is courts or Parliament that is called to action. Some forms of systemic discrimination, such as occurs in highly intimate spheres of life, may be almost impossible to address via the law. Where a small number of possible respondents exist, there may be more hope. (There are, for example, only four major banks operating in South Africa. An Act of Parliament obliging all banks operating in South Africa to waive bank fees for account holders earning less than (say) R2000 per month may well be effective. An Act of Parliament obliging public schools to admit learners who cannot pay their school fees may often be violated, because of the difficulties involved in monitoring such violations.[95])

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[92] The submission by the Equality Alliance to the *ad hoc* Parliamentary committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill noted that the Bill adopted a sectoral approach to the prohibition of discrimination. The Equality Alliance criticised this approach and said that "the initial purpose of adopting a sectoral approach was to take account of the differences and nuances in the way discrimination occurs within particular sectors. However, the way in which the sectors are currently drafted do not take account of these differences and nuances. Prevalent forms of discrimination in particular sectors are not referred to, e.g. language barriers within the health sector". The implied corollary of this submission is either that insufficient research had been done into prevalent barriers to substantive equality in various sectors, or that the available research had not been adequately taken into account when the Bill was drafted. I would argue that the "differences and nuances" referred to in the submission may be identified by appropriate research.

[93] Liebenberg and O'Sullivan (2001) 8.

[94] Liebenberg and O'Sullivan (2001) 8. Also see Parghi (2001) 13 *CJWL* 147: "[C]omplex empirical evidence is often necessary to demonstrate that equality-hindering attitudes and norms have actually resulted in unequal conditions ... A second difficulty ... is that expert evidence may be required to analyze the quantitative evidence, explain the assumptions underlying it, assist the tribunal in drawing inferences from it, and scrutinize competing quantitative evidence".

[95] See the requirements for effective legislation in chapter 2.5 above, in particular the following requirements: "Rules will be enforced that are highly visible, cost little and do not affect competition", "the state driving social change must be

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It must also be kept in mind that sanctions would have to be created for non-compliance with an Act prohibiting certain kinds of systemic discrimination. Criminalisation of conduct that is widespread leads to its own difficulties, as the experience of Prohibition in the United States proved.[96] Monitoring agencies would have to be created to identify violations. It should also be noted that courts would ultimately also have to be called on to decide on the guilt or innocence of an accused in a systemic discrimination dispute, which introduces all the difficulties of a court-based approach to solving social ills.[97]

It lies outside the scope of the thesis to consider other legislative initiatives to address systemic disadvantage, such as land redistribution and skills development, and its interplay with the Act.[98]

6.2.1.4 Remedies

This discussion is linked with 6.2.1.3 above, as the type of remedies associated with systemic discrimination would usually differ from "once off" cases of discrimination.

Lacey argues in favour of the recognition of what she terms "remedial rights".[99] These rights would emphasise socio-economic disadvantage and the distribution of basic goods and would primarily apply to groups who are currently exposed to disadvantage based on present or past effects of discrimination.[100] The remedy associated with the enforcement of such rights would be to order that positive and effective steps be taken to combat and overcome the effects of the discrimination within a reasonable time.[101] Properly resourced public agencies would enforce the rights and would also monitor the effectiveness of the remedies over time.[102] Possible remedies would then include urban development programmes, educational reforms, and the award of money to set up various community projects.[103] She envisages that courts would be involved in the enforcement of

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relatively powerful, and must have significant technological surveillance facilities available", and "laws put in place to assist or protect the economically weak will have limited impact".
[96] Also see pp 54 and 74, and fn 104 (p 49) and fn 144 (p 55) above.
[97] See chapter 2.6 above, in particular pp 88-97.
[98] See chapter 1.7.2.
[99] Lacey in Hepple and Szyszczak (eds) (1992) 113.
[100] Lacey in Hepple and Szyszczak (eds) (1992) 113.
[101] Lacey in Hepple and Szyszczak (eds) (1992) 113.
[102] Lacey in Hepple and Szyszczak (eds) (1992) 114.
[103] Lacey in Hepple and Szyszczak (eds) 1992) 114.

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these rights and that it would not be left to the political process to give effect to these rights.[104] Some of Lacey's suggestions are too vague – it is unclear what the content of these programmes and reforms would be. Her argument also suffers from a middle class perspective as it is unclear which remedies would be granted if the disadvantaged group approaching a court would be skill-less, homeless and jobless. It is difficult to imagine what a legal system could offer to such groups, though – courts would probably baulk at the suggestion that they should, for example, order the state to devise and implement court-monitored house-building or job-creation programmes.

The Act contains a number of provisions that seem to foreshadow what Lacey has in mind: sections 7(d),[105] 8(e),[106] 8(g),[107] and 8(i).[108] If these sections are read with section 21, equality courts seem to be empowered to order that, for example, the quality of provision of services must be equalised between different racial groups; that women be given equal access to resources such as land rights, finance, health and social security; and, unrealistically, to order that the sexual division of labour must be terminated.

As suggested in chapter 6.2.1.3 above, the most likely scenario is that discrete complaints will be brought to equality courts, of which some disputes will be illustrative of particular kinds of systemic discrimination in South African society. As part of the inter-institutional dialogue referred to above, civil society would have to undertake appropriately tailored research to identify structural barriers in different contexts. Civil society should then subsequently explicitly draw the courts' attention to the potential for broader societal restructuring locked up in particular complaints. Identifying the most appropriate remedy will be crucial to the success of court-ordered social restructuring. Once unfair discrimination has been shown to exist in a particular situation, the available remedies listed in section 21 of the Act are wide enough to grant far-reaching relief.[109] However, much imagination

[104] Lacey in Hepple and Szyszczak (eds) (1992) 114.
[105] "The provision or continued provision of inferior services to any racial group, compared to those of another racial group".
[106] "Any policy or conduct that unfairly limits access of women to land rights, finance, and other resources".
[107] "Limiting women's access to social services or benefits, such as health, education and social security".
[108] "Systemic inequality of access to opportunities by women as a result of the sexual division of labour".
[109] See esp ss 21(2)(g) ("an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question"); 21(2)(h) ("an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question"); 21(2)(i) ("an order directing the reasonable accommodation of a group or class of persons by the respondent"); 21(2)(k) ("an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court"); and 21(2)(m) (:a directive requiring the

may be required from equality court presiding officers to concretise the general and abstract terms contained in the list of remedies. Over time, as part of the inter-institutional dialogue, concrete examples of what each of the remedies could entail, should be added to the Act in footnotes to each of the listed remedies to assist other equality courts in ensuring appropriate, far-reaching relief.

6.2.1.5 The respondent's defences

As it currently reads, section 14 of the Act contains a workable scheme of deciding whether the discrimination complained of was legitimate or not.[110] As the list of factors in section 14 is not closed, it is in any event open to an equality court to consider any relevant argument in favour of the complainant or respondent. I would, however, suggest that the following amendments be made to this section:

Section 20(3)(a) of the Northern Territories Anti-Discrimination Act provides that discrimination is still present even if the prohibited ground was not the sole or dominant ground for the discrimination.[111] A similar provision should be added to the Act.[112]

Serious consideration should be given to deleting section 14(2)(c) from the Act.[113] This section was added to the Act after intense lobbying from the banking and insurance sectors during the Parliamentary hearings. These industries wanted to have a clause added to the Act that would in effect have operated as a complete defence for so-called "commercial differentiation".[114]

During the Parliamentary hearings the following pro-business groups suggested the following defences:[115]

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respondent to make regular progress reports to the court or to the relevant constitutional institution regarding the implementation of the court's order".)

[110] See the discussion in chapter 3 above.

[111] See Annexure E.3.

[112] However see the *caveat* in fn 24, p 306 above.

[113] "Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned".

[114] O'Regan J in *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06 (para 137 and para 168; fn 151 of her judgment) is somewhat critical of s 14(3)(c).

[115] Proffs Albertyn, Gutto and Liebenberg graciously allowed me to make copies of their personal files relating to the drafting of the Act. A large portion of these files consisted of copies of the various bodies and institutions' submissions made to the *ad hoc* Parliamentary committee who held public hearings on the Act during from November 1999 to

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The Banking Council submitted that "the Bill as currently formulated would preclude banks from using appropriate systems and mechanisms to arrive at sound judgements on the provision of banking services and products to appropriate customers, markets and segments, based on objective commercial principles and criteria". The Banking Council argued that a defence be built into the Act for "credit criteria, products and services that are based and applied solely on commercial principles and criteria". It suggested the following wording for such a defence:

> The application of objective commercial principles and criteria in selling or providing goods, services and facilities in a free market economy.

Business South Africa (BSA) submitted that regarding the insurance, health, banking and other services sectors, a defence be built into the Act to the following effect: "BSA submits that differentiation based on objective actuarially and commercially based evidence should not be regarded as unfair discrimination, as is the case in other countries".[116]

The Financial Services Board (FSB) noted that it is widely accepted in foreign jurisdictions that "differentiation on sound underwriting principles and actuarial grounds" does not constitute unreasonable discrimination.

The Institute of Retirement Funds of Southern Africa argued that "sound financial operation of a retirement fund depends (generally) on differentiations based on actuarial grounds. If funds are constrained from applying these traditional risk management techniques, the result will be a general erosion of the level of member benefits and the hastened demise of defined benefit funds in particular". It argued that "reasonable and *bona fide* differentiation based on actuarial or statistical data should be excluded from categorisation as 'unfair discrimination'". As an alternative,

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January 2000. I relied on the contents of these copied files in preparing the summaries of these submissions that follow below. Copies of these files are in my possession.

[116] BSA adopted the following alarmist approach: "The Bill effectively compels the providers of insurance, banking and health services to ensure that all persons are provided with services and does not allow differentiation on reasonable and objective actuarial and commercial grounds". BSA did not appreciate that differentiation on grounds not listed in the Bill, ie "commercial" grounds, was not dealt with in the Bill.

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it submitted that the sector dealing with retirement funds be deleted from the Act and dealt with in the Pension Funds Act.

The Life Offices' Association's (LOA) submission was in similar vein. Their submission contained the following alarmist sentence:[117]

> Regard being had to the operation of insurance, any legislation which directly (or indirectly) prohibits non-arbitrary differentiation founded on proper risk assessment *constitutes a threat to the very existence of the Insurance Industry and millions of policyholders*, as it is only through proper risk assessment that an insurer can ensure its solvency and ability to continue to indemnify its policyholders for losses suffered.

LOA further argued that the Bill negated the basic principles of risk insurance. It proposed the following defence:

> 25. No insurer may unfairly discriminate against any person in the provision of insurance services on any of the prohibited grounds.
>
> 26. It shall not constitute unfair discrimination if an insurer differentiates between persons, and that differentiation
>   (a) is based on actuarial data or statistical data or medical or actuarial opinion upon which it is reasonable to rely;
>   (b) is reasonable having regard to the data or advice or opinion.

On 25 January 2000 the LOA sent a letter to the Minister of Justice and proposed that a new clause 14(2) be inserted into the Act:

> It is not unfair discrimination to differentiate between persons or groups of persons according to reasonable and justifiable criteria which are objectively determinable and intrinsic to the activity concerned.

The South African Insurance Association (SAIA) proposed the following scheme:

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[117] My emphasis.

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> Every person has a right not to be unfairly discriminated against in respect of insurance services on the grounds of race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> Every person having legal capacity has a right to contract on equal terms without unfair discrimination because of race, gender, sex, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> An insurer may discriminate against any person in the provision of insurance on the grounds of gender, sex, pregnancy, marital status, sexual orientation, age or disability if
> The discrimination is based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely; and
> The discrimination is reasonable having regard to the data.

It was apparently the intention of the pro-business groups to have a provision added to the Act that would have allowed banks and insurers to "discriminate" on particular grounds but their submissions only refer to "differentiation".[118] In terms of Constitutional Court jurisprudence, "differentiation" occurs if a distinction is made on a ground *not* protected by the equality clause.[119] A provision in the Act that would have merely provided that discrimination is not unfair if it amounts to differentiation would therefore have been rather pointless. Yet this is what the drafters of the Act at one stage wished to add to the Act. Clause 8(b) of a draft bill marked "E5" and dated 14 January 2000 read as follows:

> 8. It is not unfair discrimination to –
> (b) differentiate between persons according to reasonable, justifiable and objectively determinable criteria that are intrinsic and inherent to economic or other legitimate activity".

The wording changed slightly in "Draft E6" dated 17 January 2000:

> 8. It is not unfair discrimination to –

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[118] Only SAIA's submission clearly stated that "discrimination" by an insurer should in particular circumstances be excused.
[119] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 35.

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(b) differentiate between individuals ~~persons~~ or groups of persons according to reasonable and justifiable ~~and objectively determinable~~ criteria that are intrinsic and inherent to ~~economic or other legitimate activity~~ a normal commercial or other legitimate activity".

Section 14(2)(c) in the Act, as passed by Parliament, then makes it clear that what is in issue is "discrimination" – that is, differentiation on a prohibited ground. Yet, instead of a complete defence for commercial discrimination, the Act now contains an additional factor to be considered in the overall assessment of whether the discrimination was fair or unfair. It would appear that the section intends to convey the meaning that if the discrimination reasonably and justifiably differentiates on the basis of objectively determinable criteria and intrinsic to the activity concerned, such discrimination would more likely be fair. Albertyn *et al* interprets section 14(2)(c) so as to give extra weight to "properly construed commercial considerations within the overall context of the section as a whole".[120] Liebenberg[121] and Liebenberg and O'Sullivan[122] are concerned that this section could undermine substantive socio-economic equality, as this section invites courts to find that market-related service fees and costs are reasonable and justifiable differentiation. If Parliament is serious about sending a message to the equality courts that this Act is primarily a driver for socio-economic transformation, section 14(2)(c) should be deleted to remove any doubt as to where the emphasis should lay when considering the factors listed in section 14.

If one takes a rigorous approach to what "fairness/unfairness" and "reasonableness/justifiability" entails, the scheme set out in section 14 does not adhere to constitutional jurisprudence on the approach to be followed when deciding whether discrimination was fair or unfair. When dealing with a law of general application that unfairly discriminates, a court must further consider whether that unfair discrimination is nevertheless reasonable and justifiable. When the unfair discrimination does not occur in the form of a law of general application, an enquiry into reasonableness and justifiability is not made.[123] The Act does not make this distinction and subjects all enquiries to an assessment of fairness/unfairness,[124] and reasonableness and justifiability.[125] Strictly speaking,

[120] Albertyn *et al* (eds) (2001) 47.
[121] Liebenberg (2000) 5 (internet version).
[122] Liebenberg and O'Sullivan (2001) 36-37.
[123] See the discussion in chapter 3.
[124] Ss 14(2)(a), 14(3)(a), 14(3)(b), 14(3)(c), 14(3)(d) and 14(3)(e).
[125] Ss 14(2)(c), 14(3)(f), 14(3)(g), 14(3)(h) and 14(3)(i).

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the Act should also have followed this three stage approach: (a) did discrimination occur? (b) if so, was the discrimination unfair? (c) if so, was the discrimination reasonable and justifiable?[126]

During the Parliamentary hearings in November/December 1999, the Gender Research Project, Centre for Applied Legal Studies, University of the Witwatersrand (GRP) advocated the use of such a three-stage approach. GRP criticised the two stage approach followed in the Bill in that a presiding officer would need to establish whether unfair discrimination was present, and, if so, whether it was justified. GRP argued that a three-stage approach would make the procedure more user-friendly and would follow the Constitutional Court's judgments on equality and discrimination. A complainant having to prove "discrimination" instead of "unfair discrimination" would also face fewer hurdles in pursuing a claim. It suggested the following scheme:

(1) In determining whether the state or any person has unfairly discriminated against any person or groups of persons, a court shall enquire into
  (a) whether there has been discrimination on a prohibited ground; and
  (b) if so, whether this discrimination is unfair.

(2) In determining whether the discrimination is unfair, a court shall consider the impact of the discrimination on the complainant and his or her group, including:
  (a) The historic and socio-economic context in which the discrimination occurred or occurs;
  (b) The position of the complainant in society andf whether he or she is a member of a group that has suffered in the past from patterns of disadvantage;
  (c) The disadvantage suffered by the complainant, including the extent to which the discrimination has affected his or her rights and interests;
  (d) The relationship between, and the effects of, discrimination on more than one prohibited ground;
  (e) Additional criteria set out in sections …. below [Here one would have to list all the sector specific sections that add criteria to the unfair enquiry – note also that the sectoral criteria would have to refer back to this section.]

(1) It is a defence to a claim of unfair discrimination that the act or omission is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

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[126] The Constitutional Court in *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06 subtly hints that a challenge may be brought against section 14 based on its non-compliance with the scheme set out in the Constitution. The Court notes that "the fairness test under the Equality Act as it stands may involve a wider range of factors than are relevant to the test of fairness in terms of section 9 of the Constitution. *Whether that approach is consistent with the Constitution is not before us*, and we address the question on the legislation as it stands" (para 70; my emphasis).

(2) The factors to be taken into account in deciding whether the act or omission is reasonable and justifiable in the circumstances include –

(a) the purpose of the unfair discrimination;

(b) the nature and extent of the unfair discrimination, including the nature and extent of the resultant disadvantage;

(c) the relationship between the unfair discrimination, including the resultant disadvantage, and its purpose; and

(d) whether there are less restrictive and disadvantageous means to achieve the purpose.

(3) For the purposes of (1) and (2), there shall be no finding that the act or omission was reasonable and justifiable in the circumstances, unless it is established that the person or group affected by the unfair discrimination cannot be accommodated to the point of undue hardship.

(4) In determining whether there has been undue hardship all relevant circumstances must be taken into account, including –

(a) the nature of the benefit accruing to, or disadvantage suffered by any person;

(b) the effect of the disadvantage suffered by the person unfairly discriminated against;

(c) the financial circumstances of the person who has a duty not to discriminate unfairly in the particular circumstances;

(d) the estimated costs involved in addressing the unfair discrimination;

(e) any positive measures.

This approach would however have made section 14 even more complex to interpret and to apply to concrete factual situations.[127] As argued in chapter three, it is unlikely that equality court presiding officers would have wanted to get bogged down in semantics. Ultimately, an equality court must decide if the discrimination complained of was legitimate or not; whether one calls it "fair" or "reasonable" discrimination is not necessarily of any moment.[128]

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[127] During the Parliamentary hearings the Women's Legal Centre and the Socio-Economic Rights Project, Community Law Centre (WLC/CLC) argued that the use of reasonableness and justifiability as the general defence should be re-examined. WLC/CLC argued that this defence in effect introduced a three-stage burden of proof requirement; once the applicant makes out a *prima facie* case of unfair discrimination, the respondent must prove (a) that the discrimination is not based on one or more of the prohibited grounds; (b) if it is, that the discrimination is unfair; and (c) if it is unfair, that the discrimination is reasonable and justifiable. However, WLC/CLC believed that the Bill in its then form omitted (b) from its burden of proof provision in that unfairness did not play a part as a possible defence. WLC/CLC thought that a true three-stage process would "potentially make issues of proof and interpretation in a discrimination case very complicated".

[128] Cf De Vos (1996) 11 *SAPL* 381.

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6.2.1.6 The equality courts

Section 21(2)(o) of the Act currently provides that an equality court may grant an appropriate order of costs against any party to the proceedings. This open-ended, unguided discretion should be curtailed. The Act should contain explicit directions as to how this discretion is to be exercised. The general rule should be that each party should bear her own costs, particularly when the complainant is unrepresented, barring frivolous cases and when it is manifestly clear that the court process is being abused.[129]

Section 21(2)(p) provides that an equality court may grant an order that any provision of the Act must be complied with, but does not expressly grant an equality court the power to *mero metu* initiate contempt of court proceedings against a recalcitrant litigant.[130] In terms of the usual principles relating to contempt of court, if a respondent disobeys a court order, the complainant would have to approach the court that granted the original order,[131] and then show on notice of motion that an order was granted against the respondent, that the respondent was either served with the order or informed of its contents, and that he either disobeyed it or neglected to comply with it.[132] In terms of the procedure allowed in the equality courts, this cumbersome process would be anomalous. Equality courts are expressly allowed to retain jurisdiction over a matter even after judgment had been obtained. Equality courts are for example empowered to order a respondent to implement special measures to address unfair discrimination,[133] and to order a respondent to make regular progress reports to the court regarding the implementation of the court's order.[134] If a respondent does not obey a court order that expects continuing observance and where an equality court has retained jurisdiction, it should be open to that court to initiate contempt of court proceedings of its own accord.[135]

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[129] Also see Henderson (1999) February *DR* 25.
[130] The Centre for Public Law and the Judge Institute of Management Studies, University of Cambridge prepared a report in which these institutions proposed a fourth generation anti-discrimination law for the United Kingdom. One of its recommendations was that the equality tribunal should have the power to certify a failure to comply with a tribunal order to the High Court for contempt of court proceedings, *or to itself award a monetary penalty* (my emphasis). Zimmer (1999) 21 *Comp Lab L & Pol'y J* 259.
[131] *James v Lunden* 1918 WLD 88; *SA Druggists Ltd v Deneys* 1962 (3) SA 608 (E).
[132] *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C); *Höltz v Douglas & Associates (OFS) CC* 1991 (2) SA 797 (O).
[133] S 21(2)(h).
[134] S 21(2)(m).
[135] *S v Mamabolo* 2001 (3) SA 409 (CC) paras 51-59 probably stands in the way of such an amendment to the Act, but see Burchell (2005) 957-958.

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6.2.2 Institutional capacity

6.2.2.1 Public awareness

Ordinary South Africans would be inhibited from approaching equality courts if they perceive these courts as inaccessible institutions that may only be utilised if one can afford an (expensive) lawyer. Most humans cope with their situation with the tools at their disposal. If a particular tool is too expensive or too cumbersome or if its advantages are difficult to identify, it will simply not be utilised.[136] An unrelenting barrage of publicity relating to the Act's possibilities should be launched;[137] particularly emphasising the fact that the equality courts may be approached without the need to employ an expensive lawyer. Specific, explicit examples of what may amount to unfair discrimination, in simple language, should form part of publicity material.[138] Bohler-Muller and Tait suggest that the media should become involved in a partnership with the equality courts to make the applicable principles and processed more accessible to the general public.[139] Lane is more pessimistic about the (potential) role of the media, but suggests that newspaper reporting could play a role in popularising equality court findings and educating the public.[140] The Department of Justice and Constitutional Development has acknowledged that public awareness of the equality courts have to be increased.[141] Linked to increased awareness of the Act would be the drafting of a radically simplified version of the Act to assist ordinary South Africans in understanding the scope of application of the Act.[142]

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136 Cf Cotterrell (1992) 44 and Griffiths in Loenen and Rodrigues (eds) (1999) 315 and further.

137 Cf Allott (1980) 37 that even suggests the use of show trials of people breaching a new law "to get the message across".

138 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). A "Draft Equality Review Report" was prepared pursuant to the October 2006 hearings and tabled at a meeting of the Justice and Constitutional Development Portfolio Committee on 27 March 2007. http://www.pmg.org.za/viewminute.php?id=8875 (accessed 2007-05-15). *Star* (2007-03-28) 6 reported that the committee chairperson said that it was "suggested that particularly vulnerable sections of the public be made aware of practices that unfairly discriminated against the poor and vulnerable".

139 Bohler-Muller and Tait (2000) 21 *Obiter* 414.

140 Lane (2005) 24 (internet version).

141 Lane (2005) 29 (internet version).

142 During the Parliamentary hearings in November 1999, COSATU submitted to the *ad hoc* Parliamentary committee that the Bill was not written in plain language, that longwinded wording was used and that the Bill was subsequently difficult to follow. COSATU recommended that the Bill be redrafted in plain language. When interviewed, Gutto, one of the drafters of the Act, told me that the drafters would have preferred to be able to give sufficient attention to the use of plain language in the final Act, but that extremely pressing time constraints made this impossible. In October 2006 a

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Any amendments to the Act would not be particularly useful if victims of unfair discrimination do not approach equality courts. It is at least arguable that more complainants would approach the equality courts if they were aware of the Act and its enforcement mechanisms. The empirical study I undertook in 2001 suggested that very few people were aware of the existence of the Act. Admittedly that study was undertaken when the Act was not yet in force and it would be useful and interesting to undertake a similar study in 2008, five year after the coming into effect of the Act. If it is shown that the Act is still not well-known, a much more concerted effort should be made to publicise the Act. When the Constitution was drafted, the Constitutional Assembly launched a media campaign to create public awareness and to educate the South African population.[143] Similar initiatives should be undertaken to publicise the Act: billboards; television; radio; national, regional and local newspapers; posters and pamphlets should be utilised on a sustained basis.[144] Clear and simple language should be used in these awareness raising efforts and all the official languages should be used.[145] Taxi ranks and other mass meeting places could be used as distribution points of these materials.[146]

6.2.2.2 Legal aid

As discussed in chapter three, although it is an ostensible advantage to be able to approach the equality courts without having to employ a legal representative, it is likely that represented parties may fare better at court than unrepresented parties.[147] The establishment of a *pro bono* "clearing house" could be considered,[148] or Parliament could in some way or another force the legal

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Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). At these hearings the House Chairperson reported that one of the challenges relating to the implementation of the Act related to the difficulty in understanding the legal language used in the Act. To this end, she reported that promotional leaflets and a leaflet had been prepared and that these would be translated into all the official languages shortly.

[143] Skjelten (2006) 142.

[144] See Skjelten (2006) 145 regarding the Constitutional Assembly's media campaign.

[145] S 31(2)(b) in any event obliges the Minister to have made available the Act in all official languages within two years after the coming into force of the Act. This deadline has since passed.

[146] Cf Skjelten (2006) 150-151.

[147] Arguably a party to a suit that has legal representation will fare better than a non-represented litigant - Galanter (1974) 9 *Law & Soc Rev* 114; Koopmans (2003) 236.

[148] De Klerk (2003) January / February *DR* 26.

profession to provide legal services to the poor.[149] Such initiatives obviously need not be limited to the equality courts.

6.3 *Avenues for further socio-legal research relating to the Act*

Finally, I briefly consider further avenues for socio-legal research relating to the Act.

As hinted at in paragraph 6.2.1.3 above (relating to the difficulties of adjudicating cases of systemic discrimination), civil society and rights groups will have to become specialist data gatherers and monitors to properly assist equality courts in adjudicating (structural) discrimination cases. Academics may be well-suited to collaborate with civil society in gathering the necessary information.[150] What would also have to be gauged is the *empirically established* needs and experiences of vulnerable groups in South African society,[151] so that the Act may be further amended, should it prove not to respond to these needs and experiences. The experiences of litigants who have utilised the equality courts must be profiled to identify barriers to litigation. The effect of the remedies awarded to successful litigants must be monitored over time to evaluate the effectiveness of the courts in addressing discrimination. The equality courts themselves should be monitored to observe the relationship between court clerks and potential claimants with a view to identifying further barriers to more claims being brought. Qualitative interviews should be held with presiding officers, court translators, clerks and litigants to identify loopholes in the application of the Act. The outcomes of as many equality court cases as possible should be recorded and publicised in academic journals and more accessible sources, and distributed among all equality court presiding officers.

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[149] Sarkin (2002) 18 *SAJHR* 630.

[150] In a somewhat unrelated matter, Kidder (1983) 129 explains how appropriate data gathering may unearth the true reasons behind a particular phenomenon. Researchers found drastic differences in the rates of statutory rape in two American cities. The orthodox explanation would be to argue that females in one city was more sexually active than in the other city or that the police in one city more enthusiastically pursued statutory rapists than in the other city. The "true" reason was somewhat different. In the city with the higher rate of convictions, welfare agencies as a matter of policy refused medical services or pregnancy advice to underage pregnant females unless they told law enforcers who had impregnated (raped) them. The young females were often unwilling to name the offenders as they did not think of the sexual encounter as rape but the welfare agency – law enforcement link "forced" the young females to disclose the identity of their partners. In the other city, no such link between welfare agencies and the police existed.

[151] Cf Atkins in Hepple and Szyszczak (eds) (1992) 443.

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More specifically, if academics from law faculties in South Africa are to play any meaningful role in the transformation of South Africa, I would suggest that (much more) research be undertaken in how to utilise the law in combating poverty. The thesis suggests that the law has a *limited* role to play in this regard, but that does not mean that law has *no* role to play.

Smith identifies 16 poverty traps: family child labour traps, illiteracy traps, working capital traps, uninsurable-risk traps, debt bondage traps, information traps, undernutrition and illness traps, low-skill traps, high fertility traps, subsistence traps, farm erosion traps, common property mismanagement traps, collective action traps, criminality traps, mental health traps and powerlessness traps.[152] He identifies eight keys to escape from extreme poverty: health, education, credit, bottom-up market development, entitlement to new technologies, sustaining the environment, *social inclusion and human rights for the poor and voiceless*, and community empowerment.[153] One of the eight keys explicitly refers to human rights (or the law, then.) Two of his examples under this heading are puzzling as "the law" does not seem to feature: teaching Egyptian girls to read and write, draw and play musical instruments;[154] and setting up an emergency telephone number in India for children in need.[155] His other examples refer to NGOs in Cambodia,[156] rural Bangladesh,[157] and Mexico,[158] which promotes, monitors, and educates the poor about human rights and provides victims of human rights abuses with legal aid and medical care. He then rather blandly states, without analysis, that "through legal empowerment, the poor can take important steps away from social exclusion and toward social acceptance and economic opportunity, ultimately to economic and social development of their own communities on their own terms".[159] It remains a challenge to legal scholars to found a basis for Smith's optimism.

In a book published by the World Bank, the editors compiled 11 case studies of poverty-reducing strategies.[160] Only one of these explicitly refers to the law or the legal process: The appropriation

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[152] Smith (2005) 12-17.
[153] Smith (2005); my emphasis.
[154] Smith (2005) 127-130.
[155] Smith (2005) 130-131.
[156] LICADHO: The Cambodian League for the Promotion and Defense of Human Rights. Smith (2005) 131-132.
[157] BRAC: Bangladesh Rural Advancement Committee. Smith (2005) 132-134.
[158] HRC: Fray Bartolomé de Las Casas Human Rights Center. Smith (2005) 134-136.
[159] Smith (2005) 136.
[160] Fox and Liebenthal (eds) (2006).

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of the *Gacaca*[161] in Rwanda to try people suspected of involvement in the 1994 genocide, when the ordinary courts could not cope with the immense number of people suspected of crimes committed during the genocide.[162] Described by Burgoyne and Maguire as a "bold, innovative socio-judicial experiment", these courts at best played only an indirect role in combating poverty by ensuring a more stable environment, conducive to economic development.[163]

I would approach the fight against poverty somewhat differently. I would argue that some conditions that attach to poverty amount to structural or systemic discrimination based on socio-economic status.[164] If poverty is not only seen as lack of adequate income but as the failure of basic human capabilities to reach minimally acceptable levels of nutrition, health, clothing and housing,[165] then some role may be identified for law in the fight against this kind of severe deprivation. For example, if it is true that access to education and health care services would alleviate poverty,[166] in appropriate circumstances strategic litigation could be embarked upon to facilitate greater access to these socio-economic rights, read with the Act's prohibition of unfair discrimination on socio-economic status. The challenge to socio-legal researchers would however be immense. To found a claim based on socio-economic discrimination, it would have to be shown that it is the complainants' poverty that caused them to be deprived of particular socio-economic services such as health care and education. What would more likely be the case is that poor complainants would have access to services, but that these services would be of a poor

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[161] Burgoyne and Maguire in Fox and Liebenthal (eds) (2006) 82 describes *Gacaca* as "a traditional, community-based means of conflict resolution".
[162] Burgoyne and Maguire in Fox and Liebenthal (eds) (2006) 71-93.
[163] Burgoyne and Maguire in Fox and Liebenthal (eds) (2006) 71-93.
[164] Eg Hirsch (2005) 237 who maintains that poverty remains an *inescapable* reality for about one third of the population (my emphasis).
[165] Kapindu (2006) 6 *AHRLJ* 495; Sen in Drobak (ed) (2006) 249. Smith (2005) 2-3 refers to poverty as hunger, pervasive poor health and early death, the loss of childhood, the denial of the right to a basic education, vulnerability and powerlessness. Roberts in Pillay *et al* (eds) (2006) 103 reports on the outcome of the South African government's first national qualitative poverty study, commissioned in 1997. This study showed that the poor saw their poverty as alienation from kinship and the community; food insecurity; overcrowded living conditions and poorly-maintained houses; the use of basic forms of energy and the burden on women of collecting firewood; the lack of adequately paid, secure jobs; and fragmentation of the family due to absent fathers and children living away from their parents. Also cf Leibbrandt *et al* in Bhorat and Kanbur (eds) (2006) 114 who maintain that an analysis of "well-being" must stretch beyond income measures to include other indicators of living standards such as access to services like clean water, electricity, sanitation, telephones and adequate shelters. The Programme of Action published after the Copenhagen World Summit on Social Development in 1995 states that "absolute poverty" is "a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. In depends not only on income but also on access to social services" – Meth in Bhorat and Kanbur (eds) (2006) 369.
[166] Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 8; Van der Berg in Bhorat and Kanbur (eds) (2006) 222.

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standard.[167] Does the delivery of poor services amount to "discrimination"? Would it be "discrimination" if better-qualified teachers tend to migrate towards the cities, leaving rural schools with poorer-qualified teachers?[168] Is it "discrimination" if the Department of Health omits to put in place a subsidy scheme to allow greater access to private health care facilities?[169] Is it "discrimination" if the largest part of an increased education budget is spent on teachers' salaries instead of improving school buildings or building more schools?[170] These questions cannot and should not be answered in the abstract without having the benefit of carefully tailored socio-legal research, illustrating how the lives of the poverty stricken may be alleviated by an equality court-based approach.[171]

[167] Van der Berg in Bhorat and Kanbur (eds) (2006) 227.
[168] Van der Berg in Bhorat and Kanbur (eds) (2006) 225.
[169] Van der Berg in Bhorat and Kanbur (eds) (2006) 222.
[170] Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 8.
[171] Some legal scholars have started to explore how the law may be used to combat poverty, but they do so by focusing on the socio-economic rights entrenched in the Constitution – eg Liebenberg (2006) 17 *Stell LR* 5; Liebenberg (2002) 6 *LDD* 159; Kapindu (2006) 6 *AHRLJ* 493; Steinberg (2006) 123 *SALJ* 264; Mubangizi (2005) 21 *SAJHR* 32; Mubangizi and Mubangizi (2005) 22 *DSA* 277; Williams (2005) 21 *SAJHR* 436. Only De Vos "Equality Conference" (2001) explicitly links combating poverty with the Equality Act. (De Vos (2001) 17 *SAJHR* 258 deals more broadly with the interplay between socio-economic rights and substantive equality.) Liebenberg S and O'Sullivan M "Equality Conference" (2001) discuss utilising the Act in fighting poverty within the context of women's inequality in South African society.