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A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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by Johann Anton Kok
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Prof FJ Viljoen

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Summary

In the thesis I consider the potential effectiveness of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter "the Act") in reaching its stated goal of achieving societal transformation in South Africa.

I consider and analyse those socio-legal theories that have a bearing on the relationship between "law" and "society", and the extent to which state law may be used in a "top-down" or instrumental fashion to steer society in a desired direction. I identify several characteristics of effective laws and compare these to the Act. As the Act is the South African version of what may be termed "anti-discrimination legislation", I determine the usual shortcomings of this legislation in foreign jurisdictions, and identify the steps the South African legislature has taken to obviate these shortcomings.

This thesis analyses four requirements of effective laws in more detail: (i) that the enforcement mechanisms should consist of specialised bodies staffed by well-trained personnel; (ii) that the source of the new law must be authoritative and prestigious; (iii) that the purpose behind the legislation must at least to a degree be compatible with existing values; and (iv) that the required change must be communicated to the large majority of the population.

In order to assess the degree of expertise of equality court personnel, the first requirement above, I discuss and analyse the implementation of training programmes for court personnel tasked to preside in courts applying the Act. I illustrate that the current pool of equality court personnel was probably inadequately trained, *inter alia* because the individuals tasked to manage the training of equality court personnel did not follow good management practice.

As to the second and third requirements of effective legislation referred to above, I report on an empirical study relating to unfair discrimination undertaken in 2001 in "white Pretoria", Mamelodi and Atteridgeville. The results of this study suggest that the majority of South Africans do not experience explicit discrimination and where they do, they generally do not approach courts to

have their grievances aired. In turn, this finding suggests that the Act will be underutilised and will not play the role envisaged for it by Parliament in combating discrimination.

As to the last requirement highlighted above, I illustrate that the public awareness campaign relating to the Act was inadequate in its impact.

In conclusion, the study identifies a number of weaknesses in the Act and proposes a range of amendments that would facilitate the use of these courts by complainants. I also identify further avenues of socio-legal research that could be undertaken relating to the Act, specifically how the Act may be utilised to combat poverty in South Africa.

Opsomming

In die proefskrif ondersoek ek die potensiële doeltreffendheid van die *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 van 2000 (hierna "die Wet".) Ek ondersoek spesifiek die vraag of die Wet sy gestelde doelwit - die bereiking van sosiale transformasie in Suid-Afrika - sou kon bereik.

Ek oorweeg en ontleed daardie sosio-juridiese teorieë wat die verhouding bespreek tussen "reg" en "gemeenskap", en tot watter mate "owerheidsreg" gebruik kan word, in 'n instrumentele manier, om 'n gemeenskap in die verlangde rigting te stuur. Ek identifiseer verskeie eienskappe van doeltreffende wetgewing en vergelyk hierdie eienskappe met die Wet. Omdat die Wet die Suid-Afrikaanse weergawe is van wat gewoonlik as "anti-diskriminasie wetgewing" beskryf word, ondersoek ek ook die tradisionele tekortkominge van hierdie soort wetgewing in buitelandse jurisdiksies en identifiseer ek die stappe wat die Suid-Afrikaanse wetgewer geneem het om hierdie tekortkominge aan te spreek.

Die proefskrif bespreek vier eienskappe van doeltreffende wetgewing in meer besonderhede, naamlik (i) dat die afdwingingsmeganisme moet bestaan uit gespesialiseerde liggame en beman moet word deur goed opgeleide personeel; (ii) dat die bestaansbron van nuwe wetgewing gesag moet dra; (iii) dat die doel wat nuwe wetgewing onderlê minstens tot 'n mate versoenbaar moet wees met bestaande gemeenskapswaardes; en (iv) dat enige nuwe wetgewing behoorlik gepopulariseer moet word.

Ten einde die graad van deskundigheid van gelykheidshofpersoneel vas te stel, die eerste vereiste hierbo, bespreek en ontleed ek die implementering van opleidingsprogramme vir die hofpersoneel wat getaak is om hierdie Wet af te dwing. Ek dui aan dat hierdie opleidingsprogram grootliks nie in sy doel geslaag het nie, onder andere omdat die personeel wat getaak is om die opleidingsprojek uit te voer, nie behoorlike bestuurspraktyk toegepas het nie.

Wat die tweede en derde vereistes van doeltreffende wetgewing betref waarna ek hierbo verwys, doen ek verslag oor 'n empiriese ondersoek wat ek in 2001 onderneem het in wat genoem kan

word “wit Pretoria”, Mamelodi en Atteridgeville betreffende onbillike diskriminasie. Die resultate van hierdie studie toon aan dat die meerderheid Suid-Afrikaners nie eksplisiete diskriminasie ervaar nie, en waar hulle dit wel ervaar, nie van howe gebruik maak om die dispuut op te los nie. Hierdie afleiding impliseer weer dat die Wet onderbenut gaan word en nie die rol wat die Suid-Afrikaanse parlement voorsien het, gaan speel in die aanspreek van diskriminasie nie.

Wat die vierde vereiste hierbo na verwys betref, dui ek aan dat die populariseringsprojek veel te wense oorgelaat het.

Ter gevolgtrekking identifiseer ek ‘n aantal leemtes in die Wet en stel ek ‘n aantal wysigings voor wat klaers beter in staat sal stel om van howe gebruik te maak in die toepassing van die Wet. Ek identifiseer ook ‘n aantal moontlikhede vir verdere sosio-juridiese navorsing met betrekking tot die Wet, veral dan hoe hierdie Wet gebruik sou kon word om armoede in Suid-Afrika aan te spreek.

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Abbreviations and acronyms

ABA J	The American Bar Association Journal
AHRLJ	African Human Rights Law Journal
AJ	Acta Juridica
Am Soc R	American Sociological Review
Austr LJ	The Australian Law Journal
BCHRT	British Columbia Human Rights Tribunal
BCLR	Butterworths Constitutional Law Reports
Br J Law & Soc	British Journal of Law and Society
BYU L Rev	Brigham Young University Law Review
Cam LJ	Cambridge Law Journal
Can BR	The Canadian Bar Review
Can J ALP	Canadian Journal of Administrative Law and Practice
CJWL	Canadian Journal of Women and the Law
Comp Lab L & Pol'y J	Comparative Labour Law and Policy Journal
Conn L Rev	Connecticut Law Review
Cornell L Rev	Cornell Law Review
DJ	De Jure
DR	De Rebus
DSA	Development Southern Africa
ELDU	Equality Legislation Drafting Unit
ELETU	Equality Legislation Education and Training Unit
Geo LJ	Georgetown Law Journal
Harv CRCL LR	Harvard Civil Rights-Civil Liberties Law Review
Harv J on Legisl	Harvard Journal on Legislation
Harv L Rev	Harvard Law Review
Henn L	The Hennepin Lawyer
HRQ	Human Rights Quarterly
HSRC	Human Sciences Research Council
IB	Interights Bulletin

Int & Comp LQ	International and Comparative Law Quarterly
ILJ	Industrial Law Journal (South Africa)
ISLR	Irish Student Law Review
Int J Ethics	International Journal of Ethics
Int J Manp	International Journal of Manpower (sic)
Int J Soc & Soc P	International Journal of Sociology and Social Policy
Int J Soc Law	International Journal of the Sociology of Law
JAL	Journal of African Law
JISEC	Judicial Information Service for Equality Courts
J Law & Soc	Journal of Law and Society
Law & Soc Inq	Law and Social Inquiry
Law & Soc Rev	Law and Society Review
LDD	Law, Democracy & Development
LS	Legal Studies
Man LJ	Manitoba Law Journal
Melb U L Rev	Melbourne University Law Review
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
Mod L Rev	The Modern Law Review
NJCL	National Journal of Constitutional Law
Osgoode Hall LJ	Osgoode Hall Law Journal
Oxford J LS	Oxford Journal of Legal Studies
PL	Public Law
S Afr J Sociol	South African Journal of Sociology
SAHRY	South African Human Rights Yearbook
SAIRR	The South African Institute of Race Relations
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	SA Public Law
Stan L Rev	Stanford Law Review
Stat L Rev	Statute Law Review

Stell LR	Stellenbosch Law Review
Tex L Rev	Texas Law Review
THRHR	Journal of Contemporary Roman-Dutch Law (*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*)
TMB	(Equality Legislation) Training Management Board
TMT	(Equality Legislation) Training Management Team
TRW	Journal for Juridical Science (*Tydskrif vir die Regswetenskap*)
TSAR	Journal of South African Law (*Tydskrif vir Suid-Afrikaanse Reg*)
Tul L Rev	Tulane Law Review
Univ Chicago L Rev	The University of Chicago Law Review
UNB LJ	University of New Brunswick Law Journal
Univ Miami L Rev	University of Miami Law Review
U Pa L Rev	University of Pennsylvania Law Review
Yale LJ	The Yale Law Journal
W&M L Rev	William and Mary Law Review
W&A	Word and Action
Wis L Rev	Wisconsin Law Review

Chapter One: Introduction

1.1 Introduction

Since the first democratic elections in 1994, the South African government has attempted to counter a legacy of grossly unequal allocation of resources, wealth and power.[1] One of the latest in a string of legislative attempts to undo the effect of centuries of race-based oppression and marginalisation (including, obviously, Apartheid[2]) was the Promotion of Equality and Prevention of Unfair Discrimination Act.[3] The National Assembly passed the Act on 26 January 2000, the National Council of Provinces approved the Act on 28 January 2000, and the President signed the Act on 2 February 2000.[4] Sections 1,[5] 2,[6] 3,[7] 4(2),[8] 5,[9] 6,[10] 29 (with the exception of ss (2)),[11] 32,[12]

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[1] In the legislative sphere, the following Acts have been passed, among others: The Restitution of Land Rights Act 22 of 1994, the Land Administration Act 2 of 1995, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Housing Act 107 of 2997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, the National Water Act 36 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998. The social democratic Reconstruction and Development Programme (RDP) was replaced with the neo-liberal Growth, Employment and Redistribution programme (GEAR) in 1996 and has been heavily criticised from the left of the political spectrum. See Alexander (2002) 49, 57, 145 and Terreblanche (2002) 103, 108-121 among others. In 2005 the "Accelerated and Shared Growth Initiative of South Africa" (ASGISA) was introduced as an accompaniment to GEAR, with the aim of building a staircase between the first (formal) and second (informal) economy – Calland (2006) 53.

[2] Apartheid is sometimes referred to as an attempt at "social engineering" (eg Davis (1987) *AJ* 235; Fukuyama (1992) 20-21). Fukuyama argues that Apartheid was social engineering in that it attempted to reverse and prevent the urbanisation of black workers. Hughes in Clapham *et al* (eds) (2006) 160 refers to the "social artificiality" of Apartheid. This is not necessarily a correct description. Apartheid did not fall out of the sky in 1948 with the coming to power of the National Party and was not an attempt to force *new* patterns of behaviour onto South Africans. In 1948 South Africa was already a *de facto* segregated state (see eg Deane (2005) 11 *Fundamina* 2; Rayner and Stapley (2006) 392-393; Fukuyama (1992) 111); Picard (2005) 2; MacDonald (2006) 7; 65). From this perspective, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 may be described as (idealistic) social engineering in its attempt to *undo* centuries of racism and oppression.

[3] Act 4 of 2000; hereafter "the Act" or "the Equality Act".

[4] Gutto (2001) 123 n1.

[5] The definitions section.

[6] "Objects of the Act".

[7] "Interpretation of the Act".

[8] "Guiding principles". S 4(1), which did not come into effect onto 1 September 2000, deals with the adjudication of disputes in terms of the Act.

[9] "Application of the Act".

[10] S 6 contains the general prohibition against unfair discrimination: "Neither the State nor any person may unfairly discriminate against any person".

[11] "Illustrative list of unfair practices in certain sectors". S 29(2), which did not come into force on 1 September 2000, provides that "the State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in subsection (1)".

33,[13] and 34(1)[14] commenced on 1 September 2000.[15] As it stood then, the Act's prohibition of state and private discrimination could not be enforced – the Act envisaged the creation of informal, accessible "equality courts" in which discrimination complaints were to be heard, but these courts were not yet operationalised. In terms of the Act, equality court personnel had to be trained before the courts could be created.[16] Training commenced in April 2001. By June 2003, it was deemed that a sufficient number of trained judges, magistrates and clerks existed to allow the establishment of 60 courts.[17] The remainder of the Act, barring the provisions of the Act dealing with the promotion of equality, came into force on 16 June 2003.[18] At 31 October 2007, 220 equality courts at magistrates' court level had been established, with a remaining 146 equality courts to be

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[12] S 32 deals with the establishment of the Equality Review Committee (ERC). GN No R874, *Government Gazette* No 21517, 2000-09-01 established the ERC.

[13] S 33 deals with the powers, functions and terms of office of the ERC.

[14] "In view of the overwhelming evidence of the importance, impact on society and link to systemic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status— *(a)* special consideration must be given to the inclusion of these grounds in paragraph *(a)* of the definition of ''prohibited grounds'' by the Minister; *(b)* the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister".

[15] GN No R54, *Government Gazette* No 21517, 2000-09-01.

[16] The relevant parts of s 31(1) read as follows, before it was amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002: "(1) Despite section 16(1)*(a)* and *(b)*, and until the Minister determines by notice in the *Gazette*, no proceedings may be instituted in any court unless — *(a)* a presiding officer is available who has been designated, by reason of his or her training, experience, expertise and suitability in the field of equality and human rights; and *(b)* one or more trained clerks are available. (2) For purposes of giving full effect to this Act and making the Act as accessible as possible— *(a)* and in giving effect to subsection (1), the Minister may designate suitable magistrates, additional magistrates or judges, as the case may be, and clerks referred to in subsection (1) as presiding officers and clerks, respectively, for one or more equality courts ... (3) The Minister must take all reasonable steps within the available resources of the Department to designate at least one presiding officer and ensure that a trained clerk is available for each court in the Republic. (4) The Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— *(a)* establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and *(b)* building a dedicated and experienced pool of trained and specialised presiding officers and clerks". The amendment came into force on 15 January 2003 (The Presidency, No 95, *Government Gazette* No 24249, 2003-01-15). Since its amendment, the relevant parts of s 31 now read as follows: "(1) Despite section 16 (1) no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available ... (4) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing- (a) social context training for presiding officers; and (b) uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers. (5) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (4). (6) The Director-General of the Department must develop and implement a training course for clerks of equality courts with the view to building a dedicated and experienced pool of trained and specialised clerks, for purposes of performing their functions and duties as contemplated in this Act, by providing- (a) social context training for clerks; and (b) uniform norms, standards and procedures to be observed by clerks in the performance of their functions and duties".

[17] GN No 878, *Government Gazette* No 25091, 2003-06-13.

[18] GN No R49, *Government Gazette* No 25065, 2003-06-13.

established by the second quarter of the 2007/8 financial year.[19] At 31 October 2007, the sections of the Act relating to the promotion of equality have not come into effect.

As an example of "anti-discrimination legislation",[20] the Act is ambitious in scope. It outlaws unfair discrimination[21] in almost every sphere of society:[22] labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and professional bodies, provision of goods, services and facilities, and clubs, associations and sport.[23] The Act also aims at preventing and prohibiting harassment[24] and hate speech.[25]

The Act also calls on the state and all persons to promote substantive equality.[26] Section 24 of the Act provides that the state "and all persons" have a duty and responsibility to promote equality. Section 7(2) of the Constitution obliges the state to do this in any event. Section 9(4) of the Constitution states that no person may unfairly discriminate against any other person, which implies a passive approach – every person simply needs to make sure that his or her action (or inaction) does not lead to unfair discrimination. Section 24 of the Act goes further and directs all persons to actively pursue and promote equality. Sections 26 and 27 seem to limit this duty and responsibility to individuals who contract directly or indirectly with the state or exercise public power. It also appears that this duty only arises in relationships with other (public) bodies and when dealing with public activities. Section 27(2) of the Act states that the Minister of Justice must develop regulations that will require persons to prepare equality plans, abide by prescribed codes

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[19] Paras 3.1 and 3.2 of a "Progress Report on the Implementation of the Provisions of PEPUDA", drafted by the Department of Justice and Constitutional Development (hand delivered to me on 2007-07-12; report in my possession).
[20] Anti-discrimination legislation typically prohibits "private discrimination", ie discrimination committed by individuals or institutions such as clubs or restaurants, and usually consists of conduct. Currie and De Waal (2005) 267. The Act also prohibits state discrimination.
[21] S 6 read with ss 13 and 14 and the definitions of "discrimination" and "prohibited grounds".
[22] Lane (2005) 28 (internet version) seems to argue that the Act applies to "privately owned yet publicly used spaces" but not to private homes. The Act does not contain any explicit exclusions, but will probably not be utilised to combat instances of "intimate discrimination" – male friends' bridge club, for example.
[23] See the Schedule to the Act that contains an "Illustrative list of unfair practices in certain sectors". The Schedule to the Act "is intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed" (read with s 29(1)).
[24] S 11 read with the definition of "harassment" in s 1(xiii).
[25] S 10.
[26] S 24 read with the definition of "equality" in s 1(1)(ix).

of practice or report to a body on measures to promote equality. In this regard, regulations have been published for comment,[27] but have not been given legal effect yet.

1.2 Aim of the study

Broadly speaking, my aim is to ascertain the (potential) effectiveness of the Act. To do so, I consider to what extent the Act will reach its stated goals.

Anti-discrimination legislation could have a number of purposes:

(a) Parliament may wish to send a strong moral message that it views discrimination as an evil. Nothing more necessarily flows from the enactment of the law; the legislature may feel that its symbolic commitment to combating discrimination is sufficient.[28]

(b) The goal of an anti-discrimination Act could be to establish forums where discrimination complaints may be aired and resolved.[29] This goal need not move much beyond a symbolic commitment: Such tribunals may not be properly resourced, or little publicity may be given to its existence, or to favourable outcomes for plaintiffs.[30] At its most idealistic, the legislature may envisage that these forums will hear a large number of (individual) discrimination complaints and will resolve the complaints in favour of the plaintiffs.[31]

(c) The goal could be to achieve a thorough-going readjustment in income distribution and unemployment rates of various disadvantaged groups, identified by, for example, race,

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[27] GN No 563, *Government Gazette* No 26316, 2004-04-30.

[28] Lustgarten (1986) 49 *Mod L Rev* 84-85; Lacey (1987) 14 *J Law & Soc* 419-420; McCrudden in Loenen and Rodrigues (eds) (1999) 297. Also cf AIDS Law Project (ALP) Submission on the Act to the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and Joint Monitoring Committee on the Improvement of Quality of Life and the Status of Children, Youth and Persons with Disabilities, 22 September 2006, http://www.pmg.org.za/viewminute.php?id=8349 (accessed 2007-05-15), p 12 of the internet version: "Explicit protection [of HIV/AIDS status] ... would also carry *symbolic importance*. It would give *public and legislative recognition* to the fact that such discrimination is a social ill that affects a large – albeit vulnerable – section of our population". De Vos (1996) 11 *SAPL* 357 states that "some lesbian and gay men ... base their arguments [relating to the right to marry someone of the same sex] on the need for *public legitimation* of their relationships" (my emphasis). De Vos (1996) 12 *SAJHR* 290 argues that "especially for the historically disempowered, the 'conferring' of rights is symbolic of all the denied aspects of their humanity". At the same page he quotes a black drag queen at the 1994 gay pride march in Johannesburg: "Darling, it means sweet motherfuck-all. You can rape me, rob me – what am I going to do when you attack me? Wave the Constitution in your face? I'm just a nobody black queen ... But you know what? *Ever since I heard about the Constitution, I feel free inside*" (my emphasis).

[29] Cf Joachim (1999) 13 *Can J ALP* 52; Chemerinsky in Devins and Douglas (eds) (1998) 193.

[30] Bailey and Devereux in Kinley (ed) (1998) 303.

[31] Lustgarten in Hepple and Szyszczak (eds) (1992) 455-457 describes this goal as the "just treatment of individuals".

sex/gender, sexual orientation and HIV status, so that these figures become proportionately equivalent to the most privileged group (usually white, heterosexual males.[32])

(d) At its most ambitious and idealistic, the legislature may wish to reach into the hearts, minds and homes of its subjects, and affect fundamental changes in basic social relationships.[33]

I would argue that the Act aims to achieve all these goals,[34] but that the Act is primarily aimed at *transforming* South African society. I discuss my understanding of what "transformative law" entails immediately below, wherafter I return to the goals of anti-discrimination legislation and the stated goals of the Act.

As to what a *transformative law* entails, the literature is not clear.[35] Authors who offer definitions, do so in rather general or even vague terms. Friedman and Ladinsky defines "social change" (I take "social change" and "transformation" as synonyms, perhaps mistakenly) as "any nonrepetitive alteration in the established modes of behaviour in society".[36] If patterns of social relations and established social norms and social roles change, "social change" occurred.[37] Grossman and Grossman prefer a wider definition of "social change" and identify varying levels or orders of change.[38] They identify (a) an alteration in individual patterns of behaviour; (b) an alteration in group norms or relational patterns between individuals and groups and between groups; (c) an alteration in patterns of relationships between indivuals or groups to the political, economic or

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[32] Lustgarten in Hepple and Szyszczak (eds) (1992) 455-457.
[33] Gutto (2001) 7.
[34] Albertyn *et al* (eds) (2001) 3 seem to argue that the Act aims at providing a legal mechanism with which to address and remedy discrimination, and to address structural or systemic discrimination. These authors do not seem to read the fourth possible purpose of anti-discrimination legislation into the Act. Gutto (2001) 7 defines "social legislation" as "laws directed at (a) normalising the abnormalities of the past and/or (b) extending the boundaries of policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are redced to a minimum *and democratic values permeate all social relations*" (my emphasis). At 8 he refers to the Act as "one of the most important pieces of social legislation in the new democratic South Africa". Gutto clearly reads the fourth possible purpose of anti-discrimination legislation into the Act.
[35] Cotterrell (1992) 47 puts it thus: "It is clearly essential to try to pinpoint what is meant by social change in the relevant literature but this is not easy since the concept is often used in extremely loose fashion in discussions of law as though it were self-explanatory".
[36] Friedman and Ladinsky (1967) 50.
[37] Cotterrell (1992) 47.
[38] Grossman and Grossman (1971) 4.

social system; and (d) an alteration in a given society's "basic values".[39] Chemerinsky simply states that "social change connotes an overall noticeable effect on society".[40] Morison's definition is more explicit. He defines social change as "a fundamental alteration in the way an aspect of society is structured, in the way that people relate to one another or in the way that an issue is perceived and acted upon".[41]

More recent commentaries on what "transformation" entails, specifically in the South African context, are more helpful. In the context of transformative constitutionalism, Klare sees a highly egalitarian, caring, multicultural community,[42] while Albertyn and Goldblatt talks of a complete restructuring of the state and society, including a redistribution of power and resources along egalitarian lines, the eradication of systemic forms of domination and material disadvantage and the development of opportunities which allow people to realize their full human potential within positive social relationships.[43] Pieterse understands the concept as "mandating the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a 'culture of justification' for every exercise of public power".[44] At the risk of oversimplifying these authors' views, it seems as if "transformative" laws, specifically in the context of present day South Africa, may be seen as laws that attempt to do one or both of the following:

(a) Transformative laws aim to create a more egalitarian society where socio-economic disparities between different communities are eradication or at least softened. In the shorter term such laws would aim at the proportional representation across income, wealth and resource categories of the

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[39] Grossman and Grossman (1971) 6.
[40] Chemerinsky in Devins and Douglas (eds) (1998) 198. At the same page he states that clear criteria for assessing or measuring social change do not exist.
[41] Morison in Livingstone and Morison (eds) (1990) 7.
[42] Klare (1998) 14 *SAJHR* 150.
[43] Albertyn and Goldblatt (1998) 14 *SAJHR* 249.
[44] Pieterse (2005) 20 *SAPL* 155-156. He expands on what he has in mind at 159: "[T]he dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of the poor and otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity". At 160 he argues that substantive equality will only be achieved if the material consequences of social and economic vulnerability are addressed. The alleviation of concrete hardship, the socio-economic upliftment of the majority of South Africans and the achievement of social justice are therefore integral components of constitutional transformation in his view.

various social groupings, and in the longer term would aim at a society where all residents will lead dignified lives, free from hunger and want.[45]

(b) Such laws aim to change the "hearts and minds" of the broader South African community so that racism, sexism, homophobia, xenophobia and the like become anathema.[46]

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[45] Albertyn and Goldblatt (1998) 14 *SAJHR* 249 seem to use the concept "transformation" in this sense: "[A] complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines". Pieterse (2005) 20 *SAPL* 159 also seems to think of "transformation" in this sense: "[C]onstitutional transformation in South Africa includes the dismantling of the formal structures of apartheid, the explicit targeting and ultimate eradication of the (public and private) social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of the poor and otherwise historically marginalised sectors of society…" Also see Moseneke (2002) 18 *SAJHR* 316 ("Central to [that] transformation is the achievement of equality. An egalitarian society would not be possible unless there is a total reconstruction of the power relations in society…") and 318 ([T]ransformative adjudication must be put to the task of achieving… social redistributive justice. The primary purpose of the Constitution is to intervene in unjust, uneven and impermissible power and resource distributions…"); Lane (2005) 8 (internet version) (She describes the achievement of greater parity as one of the goals of the new constitutional order); Liebenberg (2000) 2 *ESR Review* 2 (internet version) (She argues that the Act is "committed to *ensuring equal outcomes* for disadvantaged groups) and Bohler-Muller and Tait (2000) 21 *Obiter* 407 ("The Preamble to the Equality Act makes it clear that the *eradication of systemic social and economic inequalities and unfair discrimination* underlies the establishment of a constitutional democracy ..."). The chairperson of the ad hoc committee who redrafted the Bill certainly had this sense of discrimination in mind when he spoke at the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 74 and further): "This Bill was about equality. This Bill was about transformation. This Bill was about changing the very fabric of our society so that we redress the disadvantages of a systemic nature that we have suffered as South Africans for so long…" Also cf the "Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill" that accompanied Bill B57B-99 (ISBN 0 621 29135 8): "This Bill is drafted to give effect to the letter and spirit of the Constitution, especially the founding values of *achieving equality* and human dignity. The Bill does this by *eradicating systemic forms of discrimination and disadvantage* ..." (my emphasis).

[46] Cf Brand (2000) *Woord & Daad* 13; Moseneke (2002) 18 *SAJHR* 319 ("[T]he overarching constitutional enterprise of transforming our society into a democratic, non-racial, non-discriminating, egalitarian, socially just and *caring* society (my emphasis); Hocking (1995) 15 *Proctor* 21 (who identifies the barriers to a truly non-discriminatory society as "personal attitudes, subtle perceptions and entrenched male focused value systems"); Dror (1958) 33 *Tul L Rev* 788 (who states that "social change" refers to changes in social structure or *culture*); Klare (1998) 14 *SAJHR* 150 (He talks of a multicultural, *caring* society); and Lane (2005) 29 (internet version) (who wants to see the equality court presiding officers providing remedies that challenge the *attitudes* of offenders.) This kind of transformation would for example include issues such as the eradication of "unjust joking" as referred to by Verwoerd and Verwoerd (1994) 23 *Agenda* 67. The (then) Deputy Minister of Justice and Constitutional Development seemed to have both "types" of discrimination in mind when she spoke during the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 71 and further.) The Deputy Minister said that the "express goal with this legislation is the creation of a society based on respect for the dignity and equal worth of all human beings. The underlying tenet of the Bill is the belief … that we can eliminate systemic forms of unfair discrimination inherited from a past fraught with prejudice and bigotry and … that we can prevent and prohibit any new forms of disadvantage that may arise". Also cf the "Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill" that accompanied Bill B57B-99 (ISBN 0 621 29135 8): "This Bill is drafted to give effect to the letter and spirit of the Constitution, especially the founding values of *achieving* equality and *human dignity*" (my emphasis). The Supreme Court of Appeal offers a similar (oblique) interpretation of the aim of the Act in *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA) at para 3: "The statute's objects are to give effect to the letter and spirit of the Constitution's equality promise …"

There is a clear overlap between the goals of transformative legislation, and some of the suggested goals of anti-discrimination legislation as referred to above.[47]

I would suggest that both these "types" of transformation may be identified from various provisions in the Act.

As to the achievement of a thorough-going readjustment in income distribution and unemployment rates, the Preamble of the Act speaks of the "eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy", as well as "systemic inequalities and unfair discrimination" that "remain deeply embedded in social structures [and] practices". This, in turn, "implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources". Section 2(g) contains as one of the objects of the Act, "to set out measures to advance persons disadvantaged by unfair discrimination". When applying the Act, it must be done in such a manner as to give effect to "the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or *advance persons disadvantaged by past and present unfair discrimination*".[48] Section 4(2) of the Act contains the following directive (my emphasis):

> In the application of this Act the following should be recognised and taken into account:
> *(a)* The *existence of systemic discrimination and inequalities*, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
> *(b)* the need to take measures at all levels *to eliminate such discrimination and inequalities*.

Sections 7, 8 and 9 of the Act contain examples of the kinds of discrimination the legislature had in mind when the Act was put in place. Some of these examples very clearly have a socio-economic transformation in mind, notably sections 7(d),[49] 7(e),[50] 8(c),[51] 8(e),[52] 8(g),[53] 8(h),[54] 8(i),[55] and 9(c).[56]

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[47] Also cf Gutto (2001) 7 where he refers to "social legislation".
[48] S 3(1)(a); my emphasis.
[49] "[T]he provision or continued provision of inferior services to any racial group, compared to those of another racial group".

It is clear from an analysis of a number of provisions in the Act that the legislature also aimed to bring about changes in the "hearts and minds" of South Africans with the enactment of this Act. The Preamble implicitly expresses the wish that the Act will remove the "pain and suffering" brought "to the great majority of our people", as well as the "systemic inequalities and unfair discrimination" that "remain deeply embedded in social structures, practices and *attitudes*",[57] and that the Act will restore people's lost dignity. The Preamble explicitly notes that "this Act endeavours to facilitate the transition to a democratic society, united in its diversity, *marked by human relations that are caring and compassionate*".[58] A number of the examples listed in sections 7 and 8 at least implicitly addresses attitudinal discrimination.[59] The sections in the Act dealing with the promotion of equality also, at least implicitly, engage anticipated attitudinal changes.[60]

The Act also clearly has as one its goals the establishment of forums where discrimination disputes may be raised and resolved. A number of provisions in section 2 of the Act (which contains the objects of the Act) may be read to create this aim. Section 2(b)(i) states that the Act aims at giving effect to the letter and spirit of the Constitution, in particular "the equal enjoyment of all rights and freedoms *by every person*".[61] This subsection anticipates a procedure whereby individual claimants will be able to ensure the enjoyment of their human rights. Section 2(b)(iv) contains another object of the Act: "the prevention of unfair discrimination and protection of human dignity

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[50] "[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons".
[51] "[T]he system of preventing women from inheriting family property".
[52] "[A]ny policy or conduct that unfairly limits access of women to land rights, finance, and other resources".
[53] "[L]imiting women's access to social services or benefits, such as health, education and social security".
[54] "[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons".
[55] "[S]ystemic inequality of access to opportunities by women as a result of the sexual division of labour".
[56] "[F]ailing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons".
[57] My emphasis.
[58] My emphasis.
[59] Consider ss 7(a) ("the dissemination of any propaganda or idea, which propounds the *racial superiority or inferiority of any person*, including incitement to, or participation in, any form of racial violence"); 8(a) ("gender-based violence"); 8(b) ("female genital mutilation"); and 8(d) ("any practice, including traditional, customary or religious practice, *which impairs the dignity of women* and undermines equality between women and men, including the *undermining of the dignity* and well-being of the girl child" (my emphasis)).
[60] Ss 2(b)(ii); 2(e); 3(1)(a); and 24-28.
[61] My emphasis.

as contemplated in sections 9 and 10 of the Constitution". This subsection, read with sections 2(d),[62] 2(f),[63] 4(1)(b),[64] 16 and the regulations to the Act,[65] make it clear that the Act aims at the creation of of inexpensive, accessible, informal dispute resolution mechanisms (equality courts). In chapters 3.3.4; 4 and 5.5 I (implicitly) consider to what extent the Act achieved its goal of establishing accessible enforcement mechanisms for the resolution of discrimination complaints.

However, the main aim of the thesis is to take the drafters of the Act at their word and to assess the Act's potential to *transform* South African society, mainly in the first sense – socio-economic transformation.[66] I do not pay as much attention to the question whether the Act has the potential to change *attitudes*.[67] Nevertheless, socio-legal research that tracks the divergence or convergence over time between popular attitudes and Constitutional and other legal norms such as non-discrimination would be of value.[68] For example, it is arguable that a stable South African democracy would *inter alia* depend on "buy-in" by the majority of South Africans.[69] Therefore, popular attitudes in South Africa relating to issues such as racial tolerance; gender discrimination; homophobia, and so on, could be tracked over time as part of the broader societal transformation project.[70] However, many evaluative research projects face the problem of establishing the cause

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[62] "[T]o provide for procedures for the determination of circumstances under which discrimination is unfair".
[63] [T]o provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed".
[64] "In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply: *(b)* access to justice to all persons in relevant judicial and other dispute resolution forums".
[65] GN No R764, *Government Gazette* No 25065, 2003-06-13; and see pp 142-145 of the thesis.
[66] Chemerinsky's main point of criticism against sceptics is their *failure to clearly set out their criteria* for deciding whether court action was successful or not. His view is that a categorical statement that "courts (or the legislature) cannot effect social change" cannot be made and that a contextual analysis must take place – sometimes courts will have far-reaching effects and sometimes no effect whatsoever. (Chemerinsky in Devins and Douglas (eds) (1998) 192).
[67] In *Palmore v Sidoti* 466 US 429 (1984) 433 (as referred to by De Vos (1996) 59 *THRHR* 306 and De Vos (1994) 11 *SAJHR* 693) the American Supreme Court may well have decided that the law cannot steer popular attitudes: "*The [American] Constitution cannot control such prejudices* but neither can it tolerate them. *Private biases may be outside the reach of the law*, but the law cannot, directly or indirectly, give them effect" (my emphasis).
[68] Cf Pollitt (2003) 119, albeit in a somewhat different context. Pillay in Pillay *et al* (eds) (2006) 2 is more to the point: "knowledge about citizens' perceptions ... enables researchers and scholars to make continuous assessments of citizens' attitudes which constitutes one of the structural conditions for democratic sustainability". Also see Orkin and Jowell in the same source at 279: "[A] country's attitudinal profile is as much a part of its social reality as are its demographic make-up, its culture and its distinctive social patterns ... Regular data of this kind also helps a country to measure its progress towards the achievement of certain economic, social and political goals. And such analyses, especially social and political ones, are not complete unless they are based on the measurement of both 'objective' and 'subjective' realities ..."
[69] Cf Pillay in Pillay *et al* (eds) (2006) 1.
[70] Cf Pillay in Pillay *et al* (eds) (2006) 6 as to the value of longitudinal data.

if a "result" is found.[71] Many different actions by many different actors all operate independently or dependently on one another, co-causing or co-destroying the result; or it could be argued that a particular "project" consists of many programmes with many different subparts, and that it is impossible to calculate the relative contribution of each of the subparts to the whole.[72] Zammuto suggests that the process of evaluation can be reduced to three conditions necessary for an attribution of effectiveness:[73]

(1) an effect is desirable;
(2) that effect is observed or reliably predicted; and
(3) the desirable effect is perceived as having been produced by the activity being evaluated.

Zammuto states that an effect must be desirable, observed, or predicted, *and be perceived as being produced by the activity being evaluated* before it will be judged effective.[74] I would argue that it is not possible to establish the attitudinal outcome of a particular case in an equality court,[75] and an observation of attitudinal change over time cannot be empirically attributed to the Act.[76] On the other hand, I would suggest that concrete socio-economic outcomes of actual court cases may be measured and evaluated, at the very least in some cases.[77]

As stated above, the main aim of the thesis is to offer a prediction on the Act's effectiveness and to consider ways in which the Act could be made more effective in reaching its stated goal of achieving thorough-going socio-economic transformation of South African society.

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[71] Pollitt (2003) 119.
[72] Pollitt (2003) 119.
[73] Zammuto (1982) 29.
[74] Zammuto (1982) 29; my emphasis.
[75] Consider the approach of Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC). Sachs J argues that the common law of defamation should be developed so as to place greater emphasis on reconciliation between the parties. At para 121 he suggests that "more flexibility and innovation concerning the relation between apology and money awards" should be built into the law of defamation. The implication of his judgment is that he believes that the law of defamation may be used as a tool to bring the combating parties closer together; that the law may be used to change their attitudes towards one another. I would argue, and Sachs J admits as much at para 120 of his judgment, that there is simply no method of ascertaining whether the apology, if ordered by a court, was heartfelt and sincere, or a cynical attempt to reduce the amount of damages awarded in the judgment.
[76] See chapter 2.4 below for a more detailed discussion of this debate in the literature (ie, can laws change attitudes.)
[77] For example, a researcher could track housing delivery after *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), or treatment of HIV+ mothers in state hospitals after *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

Ancillary aims of the thesis include the following:

- an analysis of socio-legal theories on the relationship between law and society and the (in)ability of law to steer, change and transform society;[78]
- a thorough, critical and interdisciplinary evaluation of the training of magistrates and judges as required in terms of the Act, and how the inadequacies in this process may have compromised the effectiveness of the Act;[79]
- a comparative survey of the usual defects in anti-discrimination legislation and anti-discrimination enforcement mechanisms with the aim of identifying possible lessons for the amendment, implementation and application of the Act;[80] and
- an empirical survey to consider the suitability of court-driven societal transformation.[81]

1.3 Research assumptions

It is my contention that the South African Parliament's attempt to create an egalitarian society and to eradicate racist and other discriminatory behaviour is likely to be less effective than anticipated by the drafters *inter alia* due for the following reasons:

- The South African state as an institution is weak and is not capable of the degree of surveillance and social control necessary to create fundamental changes in society's power relations, views, attitudes and morals.
- In the South African state, law is largely absent or invisible.
- Many South Africans have internalised discrimination and do not perceive discriminatory incidents perpetrated against them as discrimination, but as "the way things are".
- The Act was written in typical lawyer's language, it is inaccessible and targeted at the judiciary instead of the most likely victims of unfair discrimination.
- The Act has been insufficiently "marketed" and there is a lack of awareness among South Africans of the Act and the equality courts.

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[78] See chapter 2.4 and 2.5 in particular.
[79] See chapter 4 of the thesis.
[80] See chapter 3.2 and Annexure D of the thesis.
[81] See chapter 5 of the thesis.

- The Act's enforcement mechanisms are not strong enough.
- Strong supporting mechanisms, for example sufficient legal aid for indigent claimants, do not exist.
- The majority of South Africans lack confidence in the courts and the justice system and have inadequate access to courts.

1.4 Importance of the topic

Whenever a social problem arises, a general tendency is to call upon Parliament to legislate to address the situation.[82] Relatively recent South African examples of such calls on Parliament include a "Bill of Morals",[83] safety at sport stadiums,[84] anti-smoking provisions,[85] transformation in sport,[86] trauma caused to animals due to fire works,[87] pirating of computer software,[88] road traffic deaths,[89] maintenance defaulters[90] and minimum wages for domestic workers.[91] At the same time a number of social commentators have noted an apparent lawlessness, non-application and the ineffectiveness of existing legislation in South Africa.[92] Newspapers have also reported a number of incidences in the recent past relating to vigilante justice.[93] Against a background of societal transformation in post-Apartheid South Africa, the thesis identifies some of the reasons behind this apparent paradox. The negotiators at the multi-party negotiation process preceding the 1994 elections and the drafters of the interim and final Constitution placed enormous faith in the ability of the legal system (including the courts, legislation, the judiciary and the legal profession) to underpin South Africa's transformation from an autocratic, racist, minority-ruled country into an egalitarian

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[82] This is not unique to South Africa. Allott (1980) vii notes that "obsession with law-making seems a twentieth-century phenomenon, product of the prolonged Age of Enlightenment which stretches down from the eighteenth century to the present day, fed by Bentham and Napoleon, watered by the Germans, and now spreading over all, everyone, and everywhere, like a great green mould".
[83] *The Star* (2005-05-21) 1; *Sunday Argus* (2005-05-22) 18; *Saturday Weekend Argus* (2005-05-21) 3.
[84] *Business Day* (2006-05-31) 8.
[85] *Star* (2007-03-08) 14; *Beeld* (2003-06-05) 4.
[86] *Beeld* (2003-04-09) 1.
[87] *Beeld* (2003-01-06) 5; *Citizen* (2003-01-04) 6.
[88] *Sunday Times Business Times* (2003-01-19) 7.
[89] *Beeld* (2003-01-31) 4.
[90] http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=10070 (accessed 2007-08-06).
[91] *Beeld* (2002-08-16) 1.
[92] Eg Du Plessis, Olivier and Pienaar (2002) 17 *SAPL* 440. Also cf Pound (1917) 3 *ABA J* 64: "Complaint of non-enforcement of law is nothing new. It is as old as the law and has been heard in this country from the beginning".
[93] *Beeld* (2002-08-29) 10; *Sunday Times* (2002-12-29) 6; *Beeld* (2003-05-20) 4; *Beeld* (2003-05-21) 10; *Beeld* (2003-06-27) 17; *Sunday Times* (2003-06-08) 16; *Financial Mail* (2002-02-01) 28; *Daily Dispatch* (2007-05-09) 1; *The Herald* (2007-04-25) 3; *Witness* (2007-05-10) 3; *Beeld* (2003-06-05) 16.

society.[94] Since 1994 the new government has passed a large number of Acts, many of which have been aimed specifically at redressing the imbalances of the past.[95]

In the thesis I question this approach and I point out, with specific reference to the Act, the limits of the law in transforming society. I attempt to ascertain if, when and how the Act and the equality courts can be used effectively to bring about social change, with a particular emphasis on the identification of possible pitfalls in the application of the Act in its attempt to eradicate the legacy of Apartheid. The relationship between law and society forms part of this analysis. If and when the limits of the law in effecting social change are better understood, then more effective ways of bringing about societal change in South Africa may be identified.[96]

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[94] Cameron (1997) 114 *SALJ* 504, Andrews and Ellmann in Andrews and Ellmann (eds) (2001) 8. De Klerk and Mandela, two crucial role players, were both lawyers by profession, as well as Roelf Meyer, a key NP negotiator. Mandela described the 1996 Constitution as "a charter for the transformation of our country" in the foreword to Andrews and Ellmann (eds) (2001) vii. Mutua (2002) 126 states that "never has the recreation of a state been so singularly the product of such focused and relentless advocacy of human rights norms" and "the construction of the post-apartheid state represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms". At 128 he continues: "The most important feature of the post-apartheid state is its virtually exclusive reliance on rights discourse as the engine of change". Also see Jagwanth in Campbell, Ewing and Tomkins (2001) 298: "In relation to content, the South African Constitution is manifestly transformative".

[95] See n1 for examples. Approximately 50 of the Acts passed by Parliament since 1994 (excluding amending Acts) could be described as Acts with a "transformative" purpose. *Contra* Seidman and Seidman (1997) 34 *Harv J on Legisl* 10 n33 that thinks South Africa has passed few transformatory laws. The article was written in 1996 however, at a time that the new Parliament was presumably still finding its feet. (On my count, approximately 17 transformative Acts were passed from 1994 to 1996, and a further 33 such Acts since then.) Seidman and Seidman highlight perhaps South Africa's biggest failure relating to legislating change: "New transformatory educational legislation seemed imminent but, in the interim, *most schools remain segregated* and curricula unchanged" (my emphasis). Also see O'Regan J's comments in *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06: "The absence of racial integration in our schools remains a problem for us all. It deprives young South Africans of the ability to meet, and to learn and play together" (para 124) and "sadly there are still too few schools in South Africa whose learner population is genuinely diverse" (para 185).

[96] Economically South Africa remains a deeply unequal society. Terreblanche (2002) 33 paints a bleak picture: "The inequality in the distribution of income has solidified over the past eight years into five clearly identifiable classes: a bourgeois elite consisting of 16,6 per cent of the population (of which +- 50 per cent is white and +- 50 per cent black), receiving 72,2 per cent of total income; a petit bourgeois class consisting of 16,6 per cent of the population (of which +- 15 per cent is white), receiving 17,2 per cent of total income; and a lower class consisting of +- 67 per cent of the total population of which 2 per cent is white), receiving only 10,6 per cent of the total income. However, the lower class has to be divided into three subclasses: an upper lower class, consisting of 16,6 per cent of the population and receiving 7,3 per cent of total income; a middle lower class, consisting of +- 25 per cent of the population and receiving 2 per cent of total income; and a lower lower class, consisting of +- 25 per cent of the population, and receiving only 1,3 per cent of total income… Sixty per cent of Africans are poor, compared to one per cent of whites." Christie in MacEwen (ed) (1997) 177-178 provides the following statistics: "White households earn more than six times black households … earnings of male-headed white households are more than seven times those of female headed African households. Black equity holdings are very low: black people have between 5% and 10% of total holdings … Only 3% of managers are African and women form little over 11% of managerial staff … At the same time there is even more dispiriting evidence of a widening disparity between rich and poor blacks. Large companies seem willing to pay black senior

1.5 Literature review

Relatively little material is available on the Act specifically – the Act has been in force for a relatively short time and very High Court equality court cases have been reported.[97]

As part of the training programme for equality court presiding officers, a bench book for judges and magistrates and a resource manual for clerks and registrars were drafted. These documents are not widely available. Gutto's[98] *Equality and non-discrimination in South Africa: The political economy of law and law making* touches on the drafting history of the Act and addresses some of the issues that I raise in the thesis, notably the role of the *ad hoc* Parliamentary committee mandated to draft the Act, the role of lobbyists, the training of equality court presiding officers, the role of the legal profession in a democratising South Africa, comparative practices in other jurisdictions and challenges relating to the implementation of the Act. I discuss the training of equality court clerks, magistrates and judges in much greater detail than set out in Gutto's book.

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managers up to 50% more than whites for the same position. Whereas a small, visible black elite, has been seen to benefit considerably from affirmation action programmes, sometimes implemented unilaterally by white management and occasionally negotiated with trade unions (particularly in large businesses) there is massive and persistent impoverishment". O'Regan in Loenen and Rodrigues (eds) (1999) 14: "[T]he wealthiest ten percent of households earn nearly 50 percent of all income earned, whereas the poorest 60 percent of households earn less than 20 percent of income. Liebenberg and O'Sullivan (2001) 2: "Nearly 95% of South Africa's poor are African, 5% are Coloured and less than 1% are Indian or White. The unemployment rate among Africans (42,5%) is ten times the unemployment rate of Whites (4,6%)". Calland (2006) xiii states that the "great majority of South Africans remain marginalized from real power and excluded from full participation in society due to chronic unemployment and poverty". Hughes in Clapham *et al* (eds) (2006) 159 states that South Africa has an ongoing shortage of 2.2 million low cost housing units, 5.3 million South African children are severely deprived and frequently hungry and 10.5 million children are poor and suffer from severe deprivation. Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 4-5 hold that during the first ten years of democracy income poverty had increased, income inequality had increased, inequality among African households had increased and unemployment had increased. At 6-8 they note that access to social services, however, had markedly improved during the same time period.

[97] Only three equality court (High Court) decisions have been reported: *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) (this judgment has been taken on appeal: *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA)); *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC); and *Pillay v MEC for Education, KwaZulu-Natal* 2006 (6) SA 363 (EqC). The respondents in *Pillay* appealed to the Constitutional Court and judgment was handed down on 5 October 2007 (*MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06). The Act has been referred to (but not applied) in *Hoffmann v SAA* 2001 (1) SA 1 (CC), *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T); *Botha v Mthiyane* 2002 (1) SA 289 (W); *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (CC); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) and *Minister of Education and another v Syfrets Trust Ltd NO and another* 2006 (4) SA 205 (C).

[98] (2001).

Albertyn, Goldblatt and Roederer (eds)[99] *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* aims to "unlock" the Act and is not primarily concerned with the Act's ability to realise its goal. Similarly, in three earlier articles I focus on the application of the Act and I do not specifically address the transformative potential of the Act.[100] Bohler-Muller has written a number of articles on the Act's transformative potential.[101]

Considerable material has been produced on anti-discrimination law more generally.[102] A number of impact studies on anti-discrimination legislation have been undertaken, of which most conclude that such attempts have largely been ineffective.[103] A large number of works concerning sociology of law focus on the (in)ability of laws to effect social change,[104] without specific reference to the Act or to South Africa.

1.6 Modus operandi *and research methodology*

1.6.1 Literature overview

I undertook an initial literature search of mainly sociological literature. Concepts that I explored included the role of law in society, the transformative potential of law and the requirements of effective laws. I focused on impact studies undertaken in other countries, specifically as they relate to anti-discrimination legislation. I consulted the major books and journal articles on the right to equality and non-discrimination as set out in the South African Constitution.

Professors Gutto, Albertyn and Liebenberg provided me with copies of their personal files relating to the drafting of the Act. The files contained various drafts of the Act, which I used in tracking the development of concepts used in the Act, specifically "discrimination", "equality", "fairness /

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[99] (2001).
[100] (2001) *TSAR* 294, (2002) 18 *SAJHR* 59, (2002) 4 *Judicial Officer* 211.
[101] (2000) 63 *THRHR* 288, (2000) 16 *SAJHR* 623, Bohler-Muller and Tait (2000) 21 *Obiter* 406.
[102] Among others McCrudden (ed) (1991), MacEwen (ed) (1997), Loenen and Rodrigues (eds) (1999).
[103] Among others Bennington and Wein (2000) 21 *Int J Manp* 21; Freeman (1978) 62 *Minn L Rev* 1049; Crenshaw (1988) 101 *Harv L Rev* 1331; Hocking (1995) 15 *Proctor* 19; Falardeau-Ramsay (1998) 47 *UNB LJ* 165; Lepofsky (1998) 16 *Windsor YB Access to Justice* 155; Hernandez (2002) 87 *Cornell LR* 1093; Astor (1990) 64 *Austr LJ* 113; Beermann (2002) 34 *Conn L Rev* 981; Dickens (1991) 18 *Melb Univ LR* 277; Delgado (2002) 37 *Harv CRCL LR* 369; Morgan (2002) 22 *LS* 259; Buntman (2001) 56 *Univ Miami L Rev* 1; McGoldrick (2001) 50 *Int & Comp LQ* 901; Zalesne (2001) 17 *SAJHR* 503.
[104] Among others Cotterrell (1992), Evan in Evan (ed) (1980), Reasons and Rich (1978), Kamenka and Tay (eds) (1980), Livingstone and Morison (eds) (1990), Kamenka *et al* (eds) (1978), Tamanaha (2001), Handler (1978). See chapter 2 for a detailed analysis of these studies.

unfairness / justification", as well the approach the drafters followed relating to remedies and enforcement. The files also included copies of the submissions made by the vast array of organisations that lobbied Parliament during the hearings into the Promotion of Equality and Prevention of Unfair Discrimination Bill during November 1999 and January 2000. I reviewed the content of these submissions in order to draw out the implications for equality court-based societal transformation,[105] as many of these organisations could be expected to be involved in equality court litigation, either as complainants or respondents.

I corresponded via email with the Department of Justice and Constitutional Development to obtain statistics on the number of equality cases lodged since 16 June 2003, and progress made with the training of equality court personnel. I corresponded via email with the relevant Justice College trainer to obtain information on the nature and extent of training provided to equality court personnel by Justice College. I made telephonic enquiries to and faxed two letters to Supreme Court of Appeal Judge Farlam relating to the training of judges on the Act. Ms Madonsela, the project manager of the Equality Legislation Training and Education Unit (ELETU), housed within the Department of Justice and Constitutional Development in 2001 and 2002 (and thereafter disbanded), graciously allowed me access to the ELETU offices. She also allowed me to make photocopies of any materials that I could locate in the offices that I deemed relevant to my doctoral research. The ELETU documents mainly related to the planning and implementation of training seminars, arranged during ELETU's lifespan, and the content of these seminars for equality court judges, magistrates and clerks.[106] I acted as minute secretary to the meetings of the Training Management Team (TMT), later called the Training Management Board (TMB), a committee set up in terms of the business plan relating to the training process. I collated the minutes to each of the 17 meetings. I reviewed the content of all of the abovementioned documents and communications when I wrote chapter 4 of the thesis.

The Internet provided a useful resource, specifically on Canadian equality tribunals' decisions. Hard copies of the tribunals' decisions are not readily available and I resorted to the web-based

[105] See Annexure G for a list of the submissions that I relied on in drafting the thesis.
[106] See Annexure G for a list of the documents obtained from the ELETU offices that I relied on in drafting the thesis.

versions.[107] Some of the tribunals' websites contain detailed analyses of decisions, which I studied. I reviewed the information obtained from a search relating to equality court cases as reported in the mass media. I performed a search on "SA Media" (SABINET) during August 2006, using the search key words "equality court", "equality courts", "gelykheidshof" and "gelykheidshowe" for the period 1 June 2003 to 31 July 2006.[108] I reviewed the information obtained from a survey that I undertook of the 60 pilot equality courts during the latter half of 2005. The information obtained from the 60 pilot courts mainly related to the number of complaints lodged with these courts, and a profile of the complainant and respondent in the lodged cases.[109] I also read the reported equality court (High Court) judgments.[110] I read these Canadian tribunals' decisions, newspaper reports, results of the equality court survey and reported South African equality court judgments in order to draw conclusions and identify patterns as to the identity of likely equality court complainants and respondents, and to consider the likelihood of the Act achieving its stated goals. I expected the cases brought to the South African equality courts and Canadian tribunals to be of a discrete, insular kind, with very limited, if any, broader societal restructuring disputes being brought to trial. This assumption was largely met.[111]

1.6.2 Field research

Fieldwork research consisted of qualitative and quantitative techniques:

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[107] The secretariats of the various Canadian anti-discrimination / equal opportunity commissions referred me to their websites when I approached them for copies of the tribunal decisions. I utilised the following websites: *Alberta Human Rights and Citizenship Commission* at http://www.albertahumanrights.ab.ca/legislation/panel_decisions.asp; *British Columbia Human Rights Tribunal* at http://www.bchrt.bc.ca/decisions/default.htm; *Canadian Human Rights Tribunal* at http://www.chrt-tcdp.gc.ca/tribunal/index_e.asp; Manitoba Human Rights Commission at http://www.gov.mb.ca/hrc/english/publicat.html; Nova Scotia Human Rights Commission at http://www.gov.ns.ca/humanrights/decisions/default.htm; Ontario Human Rights Commission at http://www.ohrc.on.ca/en/resources/cases; and Prince Edward Island Human Rights Commission at http://www.gov.pe.ca/humanrights/index.php3?number=72421&lang=E.

[108] See Annexure F.2.

[109] See Annexure F.1.

[110] Only three equality court (High Court) decisions have been reported: *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 (EqC) (this judgment has been taken on appeal: *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA)); *Du Preez v Minister of Justice and Constitutional Development* 2006 (5) SA 592 (EqC); and *Pillay v MEC for Education, KwaZulu-Natal* 2006 (6) SA 363 (EqC). The respondents in *Pillay* appealed to the Constitutional Court and judgment was handed down on 5 October 2007 (*MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06).

[111] I report on the outcome of this very limited survey in chapter 3.

- Qualitative research consisted of interviews with people involved in the drafting process of the Act. These interviews focused on their role in the drafting of the Act and their expectations of the Act. I interviewed judge Johann van der Westhuizen (then of the Pretoria High Court); Shadrack Gutto, Cathi Albertyn and Shereen Mills from the Centre of Applied Legal Studies, University of Witwatersrand; Deon Rudman, Laurence Basset and Ina Botha from the Department of Justice; Thuli Madonsela, then the project manager relating to training on the Act; Sandra Liebenberg, then from the Community Law Centre, University of the Western Cape; and Michelle O'Sullivan of the Women's Legal Centre, Cape Town.

- Quantitative research consisted of personal interviews in the form of questionnaires with residents of selected suburbs in parts of Tshwane[112] (completed by field workers) to ascertain South Africans' awareness of anti-discrimination legislation and what they conceive as "unfair discrimination". Some questions focused on the general public's perception of the courts and the legal profession.[113]

1.6.3 Multidisciplinary research

I borrow from the disciplines of sociology and public administration in the thesis.

I criticise the Act mainly from a (positivist) "socio-legal" perspective,[114] as opposed to employing a "legal" positivist method.[115] I mean by this to enquire into the likely effect of the Act on South African society.[116] To quote Pound, I do not "study the form of the rule and the abstract justice of its content".[117] My investigation will be different:

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[112] "White Pretoria" (excluding Centurion), Atteridgeville, Mamelodi, Laudium and Eersterust.

[113] See chapter 5 below.

[114] Kuye in Kuye *et al* (2002) 2 describes positivist social science theory as "the development of concepts and ideas, the formulation of hypotheses, the collection of data to confirm or falsify hypotheses, the accumulation of knowledge through exposing findings to critical scrutiny and attempts at integration". The largest part of the thesis follows this approach: the development of concepts in chapters 1 and 2, the formulation of hypotheses in chapters 1 and 2, the collection of data in chapters 4 and 5, and attempts at integration in chapters 2, 4, 5 and 6.

[115] In Friedman's words, I "will approach law with methods that come from outside the discipline itself". Friedman (1985) 38 *Stan L Rev* 763. Of course, empiricism, or the way I understand the term, is a positivist discipline: looking for facts to explain the world how it really is (Cf Trubek (1984) 36 *Stan L Rev* 581).

[116] Cf Griffiths in Loenen and Rodrigues (eds) (1999) 313: "In the field of sociology of law probably most attention has been paid to the effectiveness of legislation. However, such studies have usually been undertaken in a paradigm of instrumentalism, which ultimately proved quite sterile: The instrumentalist postulates that the policy-maker addresses a

> He must study how far cases under the rule are susceptible of proof. He must study how far by means of his rule he may set up a tangible legal duty capable of enforcement objectively by legal sanctions. He must consider how far infringements of his rule will take on a palpable shape with which the law may deal effectively. He must study how far the legal machinery of rule and remedy is adapted to effect what he desires. Last, and most of all, he must study how to insure that someone will have a motive for invoking the machinery of the law to enforce his rule in the face of opposing interests of others in infringing it.[118]

That said, the thesis cannot do for the sociology of law or sociological jurisprudence what Weber or Pound achieved. I will not provide grand answers to grand questions. This is not a *magnum opus.* I do not develop a general theory on the relationship between legislative action and societal change, nor is it my intention to build on the "long tradition in the sociology of law", in Cotterrell's words, of concerning myself with explaining "theoretically the nature of law as doctrine and behaviour in historical and social context".[119]

As to the discipline of public administration, in chapter 4 I describe the inability of the South African state to have devised and implemented an effective training programme for equality court personnel as obliged in terms of the Act. Chapter 4 focuses on the Department of Justice and Constitutional Development's planning and implementation of training programmes for judicial officers relating to the Act. I provide a detailed topical overview of the planning and training process, mainly sourced from minutes to the meetings of the TMT/TMB. I analyse the training process and point out shortcomings in the planning and training stages. I show that a well-trained cadre of equality court personnel had *not* been established. I argue that this microscopic study may have a secondary purpose, or added benefit. Kuye suggests that one aim of public administration research would be to reform public organisations and agencies and their work, such as service delivery initiatives.[120] 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

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command to those who are supposed to obey it, and if they do not, a sanction will be imposed. However, most instrumentalist literature comes to the depressing (and monotonous) conclusion that people sometimes (or generally) do not obey legislative commands and that sometimes (or usually) nothing happens to them". I hope to move slightly beyond this conclusion, by offering suggestions on how to improve the odds that the Act will be utilised.

[117] Pound (1917) 3 *ABA J* 70.

[118] Pound (1917) 3 *ABA J* 70.

[119] Cotterrell (1989) 208.

[120] Kuye in Kuye *et al* (2002) 2.

factual reality have been identified, a further object of these kinds of studies could be to identify ways of *narrowing* the gap. From a socio-legal perspective, I paint this detailed picture because an analysis of the provisions of the Act and reflection on the nature of the Act and the stated purpose of the Act is not sufficient – the social factors surrounding the Act should also be taken into account when assessing the full scope of "living discrimination law" in South Africa.[121]

1.6.4 Analytical research

Parts of the thesis, like many "law and society" studies,[122] proceed in a relatively a-theoretical manner.[123] Broadly speaking, however, I follow a pragmatic and instrumentalist approach to "law" in the thesis, that takes the view that we can do no more than "tinker at the edges" or "muddle through"[124] when considering the (better) use of law in society. I use "pragmatic" in the ordinary-meaning-of-the-word of being concerned about where law "works best".[125] Posner suggests that a legal pragmatist "lacks the political commitments of the realists and the crits"[126] and elsewhere suggests that "those pragmatists who attack the pieties of the Right while exhibiting a wholly uncritical devotion to the pieties of the Left ... are not genuine pragmatists; they are dogmatists in pragmatists' clothing".[127] In Posner's terms I am a "dogmatic instrumentalist" as I am sympathetic to the goals of social transformation as set out in the Constitution.[128] When I use the word "law" I

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[121] Cf Curzon (1995) 152-153 where he discusses Ehrlich's concept of the "living law". As Curzon explains it, the "living law" is an "amalgan of formalities, current social values and perceptions". Also see pp 36-38 below, where I discuss Ehrlich's concept of "living law".

[122] Cotterrell (1989) 207.

[123] Cf Friedman (1985) 38 *Stan L Rev* 766: "[Law and society studies] do not, in general, build or grow; it travels in cycles and circles, round and round" and 779: "There is (it seems) no foundation; some work merely proves the obvious, some is poorly designed; there are no axioms, no 'laws' of legal behavior; nothing cumulates. The studies are at times interesting and are sporadically useful. But there is no 'science': Nothing adds up. Law and economics offers hard science; CLS offers high culture and the joy of trashing. The law and society movement seems to have nothing to sell but a kind of autumnal skepticism. The central message seems to be: It all depends. Grand theories do appear from time to time, but they have no survival power; they are nibbled to death by case studies. There is no central core".

[124] Cf Posner in Patterson (ed) (2003) 189.

[125] Cf the explanation given by Cameron JA *et* Brand JA in *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) at para 33 where he explains the application of the "but for" test in a delictual matter. It approximates my understanding of a "pragmatic" approach: "Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences". Harms JA in *Tsogo Sun Holdings (Pty) Ltd v Qing-He Shan* 2006 (6) SA 537 (SCA) at para 10 is to the point: "Courts have to be pragmatic and realistic…"

[126] Sullivan and Solove (2003) 113 *Yale LJ* 690.

[127] Posner in Patterson (ed) (2003) 183.

[128] I agree with what Woolman said at the launch of *Constitutional Law of South Africa* on 28 March 2006 at Constitutional Hill, Braamfontein: "South Africa remains … the last great modernist project. Our Final Constitution is certainly written as if it is such. It commits us to great ideals and the material transformation of the lives of those who cannot yet enter the public square without still experiencing shame … Part of our collective responsibility … is to put

primarily have in mind a potential tool for addressing social ills,[129] and I focus primarily on adjudication.[130]

The initial aim of the doctoral study was to undertake an *impact study* of the Act and to evaluate the effectiveness of the Act.[131] To achieve may aim I would have traveled through the country, visiting every operational equality court, and would have compiled statistics on the number of cases brought to each court, the profile of the complainants and defendants, the profile of complaints and the outcome of each case. I would also have hoped to interview complainants, defendants, presiding officers and legal representatives with a view to identifying barriers to the effective implementation of the Act. Because of the very long delay between the enactment of the Act and the eventual coming into force of the entire Act, I shifted my focus to a socio-legal *analysis* of the Act; turning what would have been a "making my hands dirty" research project into an office-bound or library-bound one.[132] The long-term aim to test the research question set out in the thesis with results obtained from a comprehensive compilation of data from the equality courts remains a goal.[133] In the last chapter I expand on further avenues of socio-legal research that could be undertaken relating to the Act.

Let me at this point also tone down expectations about the "critical" nature of the thesis. This is not a thesis written from the perspective of the "critical left".[134] "Critical" in the thesis corresponds to a

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our basic law on as solid a footing as possible, so that other members of the legal fraternity may do what they need to do to realize the great ends of this modernist project". (Woolman "Launch Talk" http://www.chr.up.ac.za/closa/Reflections.doc (accessed 2006-06-23) 2-3 of the internet version; copy of speech in my possession.) Of course, many modernist projects have failed – Scott (1998).

[129] Lane (2005) 9 (internet version) calls the Act a "pivotal *tool*" for facilitating South Africa's transition" and Liebenberg (2000) 2 *ESR Review* 2 (internet version) argues that the Act "has the potential to be a powerful *tool* to protect disadvantaged groups from unfair discrimination in accessing and enjoying socio-economic rights".

[130] As stated in chapter 1.2, this is one of the main reasons why I am interested in the Act's approach to combating discrimination: I want to question the drafters' implicit faith in the ability of courts (ie, adjudication) to facilitate societal transformation.

[131] I registered for my doctoral studies in 2001. Indications from the Department of Justice were that the Act would come into force in 2001.

[132] That is, barring the empirical study I undertook in 2001 in parts of greater Tshwane.

[133] Such a project would have to be funded from post-doctoral research funds.

[134] Cf Friedman (1985) 38 *Stan L Rev* 776: "The left tends to show great impatience with 'mere empiricism', and its program is to expose ideology, not to show how anything actually works". Trubek (1984) 36 *Stan L Rev* 577-578 explains that the critique of legal order is based on four principles: indeterminacy, antiformalism, contradiction, and marginality. The principle of marginality entails that there is no reason to believe that "the law" is often or even frequently a decisive factor in social behaviour. At 615 he argues that critical scholars have ignored the implications of

skeptical approach to the Act and to what it is supposed to achieve.[135] Disputes arise in any society at any given time and any society, consequently, has to put some kind of dispute resolution mechanism into place.[136] I am skeptical (or "critical") of the use of these dispute-resolution mechanisms to (fundamentally) change or transform society; I am skeptical about the value of "symbolic" victories;[137] and I am skeptical about the ability of courts and lawyers and academics to provide *tangible* rewards to the poor and vulnerable. On the other hand, I do not wish to "trash" the constitutional project or a rights-based approach. I hope not merely to criticise but to suggest other solutions.[138]

1.6.5 Comparative law research

If comparative law is the "comparison of the different legal *systems* of the world",[139] I do not undertake comparative law research in the thesis. Although a very large part of the annexures to the thesis consists of comparative material (court cases and legislation from Australia and Canada), the aim of the thesis is not to analyse these materials exhaustively or to compare these materials point by point to South African Acts or court cases. I do not hope to "resolve the accidental and divisive differences in the laws"[140] of South Africa and other jurisdictions who have grappled with the problem of how to combat discrimination via the law. Parts of the thesis[141] could perhaps be described as adopting an approach of microcomparison – concerning myself with "specific legal institutions or problems"[142] (ie, discrimination tribunals and how to address discrimination via the law) and with the "rules used to solve actual problems or particular conflicts

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the principle of marginality and have seem relatively indifferent to most "law and society" literature that tries to explore the impact or lack of impact of legal rules, legal doctrines and legal institutions.

[135] Macaulay (2005) *Wis L Rev* 391 suggests that Critical Legal Studies, Law and Economics and Law and Society scholars are all "skeptical about making life better by creating legal rights".

[136] Cf Watson (1982) 131 *U Pa L Rev* 1153: "Law ... is functional and practical. To some extent, it facilitates social and economic life. *At a minimum, it exists to institutionalize dispute situations* and to validate decisions given in the appropriate process which itself has the specific object of inhibiting unregulated conflict" (my emphasis).

[137] Slabbert (2006) 92, in a somewhat different context, makes the same kind of argument. He suggests that South Africa will measure its success not by eloquent speeches at political meetings, but by the ability of local governments to build a truly new South Africa by efficient service delivery.

[138] Cf Majury (1987) 3 *Wisconsin WLJ* 374-5: "But taking all of the criticism seriously leaves one without a theory of equality".

[139] Zweigert and Kötz (1987) 2; my emphasis. Also see Zweigert and Kotz at 4.

[140] Zweigert and Kötz (1987) 3. At 23 the authors even suggest that the "final function of comparative law … is its significant role in the preparation of projects for the international unification of law".

[141] See specifically pp 112-127 and chapter 6 of the thesis.

[142] Zweigert and Kötz (1987) 5.

of interests"[143] (ie, discrimination statutes). The comparative elements contained in the thesis aim to illustrate the limits of orthodox anti-discrimination legislation in selected (Western) countries,[144] and to identify proposed amendments to the Act to strengthen the Act's ability to achieve its stated goals.[145]

Annexures C, D and E relate to comparative law research. Annexure C contains overviews of each of the Canadian provinces' anti-discrimination Acts, so as to provide a context for the provisions in these Acts that I believe could be usefully appropriated for use in South African equality courts. Likewise, Annexure E contains overviews of each of the Australian states' anti-discrimination Acts, for the same purpose that I included Annexure C in the thesis. (In chapter 6, the conclusion, I draw on relevant provisions from Canadian and Australian anti-discrimination Acts to propose certain amendments to the South African Act.) Annexure D contains my brief summaries of decisions handed down by selected Canadian anti-discrimination tribunals for the period 1996 to 2003. As stated under chapter 1.6.1 above, the purpose of reviewing of these decisions was to to draw conclusions and identify patterns as to the identity of likely equality court complainants and respondents, and to consider the likelihood of the Act achieving its stated goals.

1.7 Limitations of this study

1.7.1 I am who I am

I am a 35-year-old male, white, Afrikaans-speaking[146] South African. I am a third generation South African: My grandfather on my father's side immigrated to South Africa from the Netherlands a few years before the second World War broke out. I lived on farms on the East Rand until I left school in 1989. I was four years old when the Soweto riots broke out in 1976 – I do not remember this event. I was in standard seven when the then State President PW Botha declared the first of a number of states of emergency. I was a matric pupil when PW Botha suffered a stroke and FW de Klerk became his successor. I was a first year BCom (Law) student at the University of Pretoria

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[143] Zweigert and Kötz (1987) 5.
[144] See pp 112-127 of the thesis. I accept that my choice of Australian and Canadian legislation and court cases may be criticised on the basis that South Africa is a racially divided society and much more polarised than these countries.
[145] See chapter 6 of the thesis.
[146] English, then, is my second language. Except for the first chapter, I did not have the thesis proofread or edited professionally. I may well have expressed myself somewhat inelegantly in some places in the thesis.

(then an almost all-white, almost all-Afrikaans tertiary institution) when de Klerk unbanned the ANC, PAC and SACP and released Nelson Mandela. I voted for the first time in 1992 in an all-white referendum on the future that South Africa should hope for.[147] I participated in the 1994 elections as an IEC official at a voting station north of Tshwane and assisted in vote counting at the (then) Pretoria show grounds. I voted for the then Democratic Party in the 1994 and 1999 elections, at that point a supposedly "liberal" political party, and for the Independent Party in the 2004 elections.

I do not have a single black friend.[148] I do not understand any African languages. Growing up on a farm, I did not regard it as unnatural that the black labourers lived in a location on the farm in small houses whereas my family lived in a much bigger house with a very large lawn. I did not regard it as unnatural that I attended an all-white primary and secondary school. I was about six years old when our domestic worker once accompanied us on our yearly holiday to the sea. We went to the circus one evening. She could not sit with us; she had to sit in the seats reserved for Blacks. I did not understand why, but I was not particularly perplexed by the incident. I became somewhat politically aware from about 16 years of age and would sometimes have blazing rows with my father, who, at that point, had rather conservative views. As a matric pupil I became despondent about the future of this country when De Klerk became State President, as I did not believe that he had the vision to do what had to be done. I was surprised by his February 1990 speech.

I did not engage in student politics at university and spent most of my time studying. I did not come into contact with many black people during my studies or during my articles with a large, corporate law firm in Johannesburg. I have not suffered from discrimination in any form.[149] I accept that

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[147] The question asked to the white voters was "Do you endorse the continuation of the reform process… which is aimed at a new constitution through negotiation?" Giliomee (2003) 633-634.

[148] Shadrack Mbonani, a former colleague, is the closest I came to forming a friendship with a black person. He committed suicide in 2002. I am convinced I could have done more to prevent it.

[149] Critical Race authors rightly state "those who have experienced racial discrimination all their life may have a perspective or insights on discrimination that those who are part of the majority would not have" (see Bix (1999) 216). I am not part of a "majority" in any sense in present day South Africa, but I am a member of an economically powerful group, and a member of a group that has not historically experienced discrimination. I am also part of a group that historically were the perpetrators of discrimination, consciously and unconsciously. Lacey in Hepple and Szyszczak (eds) (1992) 100 states that "there will be aspects of the issues which I am discussing to which my position as middle-class white woman will have made me insensitive". Macaulay (2005) *Wis L Rev* 366 states that the American Realists were white males and then proceeds to observe: "[W]e can wonder whether this affected what they looked for and what they saw".

Apartheid had and has ongoing consequences and that being born white almost automatically leads to a privileged life compared to the majority of South Africans. My own living standard has improved dramatically since 1994. I live a cocooned life,[150] far removed from the desperate conditions of life most South Africans have to face.

I should probably never have studied law. Although I may have achieved good marks, I disliked and was bored by a large number of my law courses. Although I completed my articles at a very good law firm and received excellent training, I disliked large parts of the training and exposure to legal practice. In a way, joining a law faculty at a university, teaching law and writing about law, has been an escape from what I would otherwise have had to do. Perhaps, paradoxically, what I miss about legal practice is the "practical results" – getting a judgment, having it enforced, reporting to a satisfied client. The pleasures and benefits of academic life are subtler.[151]

These and other personal facts necessarily impact on the conscious and subconscious choices made, patterns identified and conclusions drawn, during the course of writing the thesis.[152]

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[150] I am an academic; a senior lecturer in law at the University of Pretoria.

[151] Cf Van der Westhuizen (1989) April *DR* 242: "Dit hang saam met 'n spanning tussen 'n esoteriese en 'objektiewe' akademiese benadering en 'n hartstogtelike drang tot aksie en verandering".

[152] We probably "see and understand the world in a way typical of the sort of member of our community that we represent ourselves to be" – Dingwall (2000) 25 *Law & Soc Inq* 892. I also accept Lawrence's assertion as set out by Delgado (2001) 89 *Geo LJ* 2279: "The source of much racism lies in the unconscious mind. Individuals raised in a racist culture, without knowing it, absorb attitudes and stereotypes that reside deep in their psyches and influence behaviour in subtle, but pernicious ways". I agree with Jhappan in Dawson (ed) (1998) 67: "I do not think it really possible for even the most empathetic and imaginative white person to truly get what it is like to experience the racism that confronts people of colour who have been subjected to European colonization". I also agree with Albertyn and Goldblatt (1998) 14 *SAJHR* 262 that people (they refer to judges in their article) "tend to universalise their own experiences". Also see Van der Walt (2006) 12 *Fundamina* 38: "The observer's paradox is caused by our limited powers of scientific observation and the paradox of our position as scientific observers: we observe and analyse our culture and its products (like law), yet we are also enmeshed in that same culture" and 39: "[R]ealistic assessment of the limitations of human scientific observation does not imply that every scientific observation is uncertain, but rather indicates *the limits of certainty in observing events from a particular position*" (my emphasis). Empirical research tends to confirm these views. A Human Sciences Research Council (HSRC) survey on social attitudes was undertaken in 2003 and published in 2006 – Pillay *et al* (eds) (2006). In this source at 118-119 Roberts reports that it was asked of respondents if they perceived conflicts in South African society between rich and poor, employed and unemployed, managers and workers, young and old, and between different race groups. Roberts analysed the results and found that respondents who were better educated, white, married, or had higher personal incomes appeared to see less conflict than the other subgroups.

1.7.2 A narrow focus on the Act; South Africa; unfair discrimination

I readily admit that the scope of the thesis is partial and limited. Many recent Acts underpin South Africa's transformation,[153] and the Equality Act should be understood as one of the cogs in this legislative wheel, not the wheel itself. It would however have been an extremely daunting, if not impossible task, to consider each of these Acts in detail, as well as its interplay with the Equality Act in a single doctoral thesis. In the thesis I focus almost exclusively on the Equality Act: it has been described as the most important Act to have been passed by the South African Parliament, second only to the Constitution,[154] and it explicitly targets the effects of past discrimination, which arguably is the reason for the vast disparities in wealth, income and resources in South Africa. I do not analyse the Employment Equity Act, although this Act also outlaws unfair discrimination, specifically in the workplace.[155] The Employment Equity Act had a different drafting history, falls under a different government department (the Department of Labour), has been in operation for a much longer time and has different enforcement mechanisms. Critically, from a South African perspective where up to 40% of the population is estimated to be unemployed,[156] employment-related, court-driven structural adjustments would be completely meaningless for a large portion of inhabitants, whereas the Equality Act holds greater promise in this regard.

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[153] See the examples listed in n1.

[154] Eg cf the Minister of Justice's speech at the second reading debate of the Act, 26 January 2000, as reproduced in Gutto (2001) 25: "No doubt, this is yet another legislative milestone and in some circles, indeed, this Bill is regarded in importance as only second to the Constitution". Also see the speech by Dr EH Davies, delivered at the same occasion, reproduced in Gutto (2001) 39: "This afternoon we are debating a major piece of transformatory legislation. This Bill, when it is enacted, will stand second only to the Constitution as a mechanism for preventing discrimination and promoting equality". In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings the SAHRC noted that "the Act was hailed as the most important piece of legislation that was created after the constitution and expectations were created". During March 2007 an *ad hoc* committee of Parliament reviewed the so-called "Chapter Nine Institutions" – the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. I accessed the minutes to these proceedings at http://www.pmg.org.za/viewminute.php?id=8738 on 15 May 2007. At these hearings, the chairperson of the SAHRC referred to the Act as "the core of the whole Constitution". Also see Gutto (2001) 8.

[155] The Equality Act excludes all causes of action arising from the Employment Equity Act from the application of the Act (s 5(3)).

[156] Terreblanche (2002) 33; Christie in MacEwen (ed) (1997) 177-178; O'Regan in Loenen and Rodrigues (eds) (1999) 14; Liebenberg and O'Sullivan (2001) 2.

I take a practical, lawyer-like approach to what "law" entails and from that perspective what the legislature does with the Act interests me: the use of *courts* as the primary agents of societal reform, at least at this stage of the Act's enforcement.[157] By analysing the potential effectiveness of the Act, I begin to answer a broader question: To what extent may courts play a meaningful role in large-scale societal transformation?

The thesis focuses almost exclusively on the Act and its potential in transforming *South Africa*. Where I consider similar foreign legislative provisions and (quasi-) judicial pronouncements from other jurisdictions, the main aim is to cross-validate my conclusions as they relate to the potential effect of (South African) "law" on (South African) "society".

The Act deals with the prevention of unfair discrimination, harassment and hate speech, and with the promotion of equality by the state and non-state actors. In the thesis I focus on the prohibition of unfair discrimination. I do not discuss hate speech or harassment, and I only tangentially touch on the promotional aspects of the Act because there are no "teeth" to the enforcement of the promotional duties,[158] and because at the time of finalising the thesis the regulations relating to the promotion of equality had not been promulgated.[159]

1.7.3 Empirical research; not normative inquiry

In assessing the Act's potential to effect societal transformation, I focus on the potential use of the equality courts. In doing so, I *inter alia* rely on empirical research that indicates that ordinary South Africans in present day South Africa to a large degree do not trust the legal system and to a large degree do not experience explicit, blatant discrimination. The thesis is not primarily concerned with normative legal theory. The emphasis is on law as technique; on the practical and the

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[157] Cf Albertyn *et al* (eds) (2001) 3: "[T]he Act is intended to give substance to the constitutional commitment to equality, *by providing a legal mechanism* with which to confront, address and remedy past and present forms of incidental, as well as institutionalised or structural, unfair discrimination and inequality" (my emphasis). The regulations pertaining to the duty to *promote* equality (ie, obligations not primarily driven by courts) had not been promulgated by 31 October 2007, seven years after the Act's promulgation.

[158] In terms of s 21(1) of the Act, the equality courts only have jurisdiction to hear complaints based on unfair discrimination, harassment, hate speech, and the publication of material that unfairly discriminates. On this reading, it would not be possible to hold a state or non-state actor accountable for failing to promote equality in terms of the Act.

[159] Regulations pertaining to the promotion of equality by the state and by "all persons" were published for comment in GN No 563, *Government Gazette* No 26316, 2004-04-30. These regulations had not come into force by 31 October 2007. I accept the criticism that some of the conclusions I reach in the thesis may well have to be qualified or revisited over time, especially when the sections of the Act pertaining to promoting equality come into force.

pragmatic,[160] not the symbolic.[161] Put differently, I do not ask if laws and courts *should* transform a society; I ask if laws and courts *are able* to do this.

The critical left is usually intolerant of empiricism, asserting that what the researcher found would only be the product of the researcher's subjective position and that the results of the work of (reformist) empirical scholars only reinforce the *status quo*.[162]

On the other hand, if the (potential) effects of "the law" cannot be empirically measured, I find theorising about the topic somewhat ethereal. I cannot hope to improve on Macaulay's defence of empirical research and I quote rather extensively:[163]

> [W]e [ie empiricists] seek to understand the present and anticipate the future with greater probability of accuracy, understanding that our knowledge can only be tentative … [T]he goal must be to find the best evidence of what is going on in view of what is being studied. We cannot demand one 'Truth' with a capital 'T'. Sometimes we can test hypotheses with hard data analyzed by state of the art statistics. When we can, we should … Often, the best we can offer is a provisional and qualified picture of the world as out best guess of what others would find if they looked at what we examined. Yet, this is an advance over supporting one's normative position by anecdotes, urban legends, or statements based on no more than what we want to believe, because too many law professors are expert in finding an example or two of something, and asserting that it is a typical or important enough phenomenon to worry about. Social science teaches that we can and should do better … *[W]e need some defense against the undisciplined exercise of the imaginative faculty to produce hypotheses held true because of their inspirational origin.*

1.7.4 Time frames

A number of cut-off dates apply in the thesis:

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[160] I would for example agree with Kuye in Kuye *et al* (2002) 3 who argues that law is a "practice-oriented discipline", and I would agree with Marcus in Sarat and Kearns (eds) (1995) 238 who suggests that law is a "problem-solving discourse".

[161] In Habermas's terms, I focus on "facts", not "norms"; on "social reality", not "claims or reason". See Botha (1998) 36.

[162] Eg cf Macaulay (2005) *Wis L Rev* 393.

[163] Macaulay (2005) *Wis L Rev* 394; 396; my emphasis. And cf Friedman in Drobak (ed) (2006) 159-160: "Legal scholars, alas, are not very good at answering empirical questions. They are intoxicated by the heady liquor of what they consider big ideas. They tend too to look down on 'mere empiricism'; it is slow, time-consuming, and you might, God forbid, have to know something about statistics. Moreover, in the world of the law schools, the way to get ahead, to get a name for yourself, is to float some vast normative balloon. It is likely, then, that only social scientists can come to the rescue".

- I finalised the thesis in the first week of November 2007. I considered South African case law up to 31 October 2007.
- I conducted a limited impact study on the Act during August and September 2006. During this time, I telephoned the 60 pilot equality courts and enquired as to the number of cases lodged at each of these courts for the period 16 June 2003 to September 2006.[164]
- I conducted a media survey relating to equality court cases as reported in the mass media for the period 1 June 2003 to 31 July 2006.[165]
- The survey of decisions handed down by Canadian anti-discrimination tribunals covered the years 1996-2003.[166]

Therefore, where I refer to or analyse the outcome of the three surveys mentioned above, the time frames I adopted for each of the surveys must be kept in mind.

My initial LLD proposal was to conduct an impact study into the effectiveness of the Act. I registered for the LLD at the start of 2001 with the hope that the Act would come into force early in that year.[167] The Act eventually came into force on 16 June 2003, two and a half years after I registered for the degree. By that time, my focus had shifted to a socio-legal analysis of the Act. To conduct a proper impact study, a period of at least five years would probably have been needed. The author of any research study has to cry halt at some point. The results, conclusions and recommendations that follow from the limited telephonic impact study undertaken may have to be revisited when further surveys are undertaken. The thesis should be seen as part of an ongoing work in progress and as a first step in a broader assessment of the effectiveness of "law" in transforming South Africa.

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[164] 47 pilot courts are listed on the Department of Justice's website at http://www.doj.gov.za/2004dojsite/eqact/eqc_eqc%20structures.htm (accessed 2006-08-18). 60 pilot courts are listed in a booklet entitled "Equality for All" published under the auspices of the Department of Justice and Constitutional Development. I telephoned the 60 pilot courts as they appeared in the booklet. See Annexure F.1. The equality court for the Durban equality court (magistrate's court), by far the busiest of the equality courts, provided me with information for the period July 2004 up to and including March 2006. For the other courts the information is valid up to September 2005.

[165] I performed a search on "SA Media" (SABINET) during August 2006, using the search key words "equality court", "equality courts", "gelykheidshof" and "gelykheidshowe" for the period 1 June 2003 to 31 July 2006. The search turned up about 170 newspaper articles.

[166] See Annexure D.

[167] Indications from the Department of Justice were that the Act would come into force in 2001.

The empirical survey I conducted in parts of Tshwane during 2001 would need to be repeated at some point in the near future, but I would argue that the 2001 survey acts as an important signpost against which the results of future surveys can be measured, in order to track the progress or setbacks on the road to societal transformation.[168] Ideally, a follow-up empirical study would form part of the thesis, but empirical research of that nature is costly and time-consuming, and will have to wait for a better opportunity.

A portion of the thesis concentrates on an analysis of the drafting history of the Act, although this was not the initial aim of my research. For that reason, I did not keep contemporaneous notes of the progress in the drafting of the Act and interviews with individuals who played a role in the drafting of the Act were conducted years after. They had forgotten at least some of the detail; documents made available to me were usually in a chaotic and disordered state; and handwritten notes were sometimes illegible. Some information was provided to me "off the record". I did not conduct interviews with every individual that played a part in bringing the Act to fruition. (Gutto and his assistant researchers conducted interviews with a much larger group.[169]) In any event, an attempt to record a definitive, "final", drafting history is likely to fail.

1.7.5 Funding and sources

Ideally I wanted to observe anti-discrimination tribunals and other enforcement bodies in other jurisdictions in practice. I have not secured sufficient funding to undertake comprehensive research trips to either Canada or Australia and instead have relied on internet-based research. Most of the anti-discrimination tribunals in these countries make their (more recent) decisions and yearly reports available on the worldwide web. Reliance on these reports may present a skewed picture of the effectiveness of anti-discrimination legislation and enforcement mechanisms. My comparative research focuses mainly on the output of anti-discrimination *commissions* or *tribunals* as these enforcement bodies more closely resemble South African equality courts than higher courts in foreign jurisdictions. I therefore did not consider *constitutional* provisions and jurisprudence of foreign jurisdictions in detail.

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[168] Pillay in Pillay *et al* (eds) (2006) 2; Orkin and Jowell in the same source at 279.
[169] Gutto (2001) v – vi.

1.8 Overview of chapters

In Chapter 2 of the thesis I discuss various socio-legal models and theories on the relationship between law and society and how law may be used successfully to change and shape society. I identify different conceptions of "law" and "society" and how law may or may not influence a given society. I identify characteristics of effective transformative legislation from the available literature.[170] I consider whether the legislature or the courts are better placed to drive a societal transformation project, if it is accepted that law could (at least sometimes) play this role. I argue that "law", in the sense of formalised rules laid down by a legislature, is largely absent from the lives of the majority of South Africans and that it is not a particularly effective tool in effecting societal change.

In chapter 3, I examine the limits of orthodox anti-discrimination legislation and to what extent the Act attempts to address these limits. I compare the Act to the requirements for effective legislation in predicting the Act's (potential) effectiveness. I compare the profile of reported decisions of Canadian anti-discrimination tribunals and the early equality court judgments as part of assessing the potential ability of the Act to facilitate societal transformation. Where relevant, I refer to sections in the Act that could have been better drafted and to which sections of the Act that may result in controversy, conflicting decisions and possible constitutional challenges. Where relevant, I discuss the Act's drafting history and consider if a different process would have produced a different (and more effective) Act. The following barriers to a more effective implementation of the Act are also identified: The use of typical lawyers' language in an Act aimed at lay people and the effect of lobbying by the banking and insurance industries during the Parliamentary drafting process.

Arguably, a court-driven societal transformation project, as concretised in the Act, crucially depends on a cohort of presiding officers sensitive to the objectives of the Act. Chapter 4 describes and criticises the implementation of training programmes for clerks, magistrates and judges. The planning and implementation of training programmes were fraught with difficulties. I acted as minute secretary to most of the meetings of the TMT/TMB and attended all but one of the meetings. I participated in some training programmes for clerks and magistrates and I report on

[170] I explain what I mean when I use the terms "effective" and "transformative" legislation in chapter 2.5 below.

these sessions and the concerns raised by presiding officers during these training sessions. I argue that the initial business plan was overambitious and unrealistic in its assumptions; the overseeing body was ineffective; the development of training material took too long and should have been drafted much sooner; the training seminars were inadequate; the project was inadequately funded and not granted priority by the Department of Justice; and the project manager was inefficient.

Chapter 5 is concerned with three of the requirements of effective legislation: "the source of the new law must be authoritative and prestigious", "the purpose behind the legislation must at least to a degree be compatible with existing values", and "the required change must be communicated to the large majority of the population". I report on an empirical survey undertaken in parts of Tshwane ("white Pretoria", Eersterust, Laudium, Atteridgeville and Mamelodi) during May 2001. This survey confirmed a lingering legitimacy crisis in the South African legal system, and highlights ordinary South Africans' conception of substantive equality and unfair discrimination. Somewhat surprisingly, relatively few respondents indicated that they had suffered from serious incidents of discrimination and I consider possible reasons for this finding. I also refer to and discuss more recent independent surveys that, broadly speaking, confirm my most important findings. As set out in the Act, the equality courts are supposed to act as vehicles of societal transformation. However, if potential complainants are unaware of the Act and the courts, these courts will be underutilised. I therefore also focus on the inadequate public awareness programmes that were launched in terms of the initial Department of Justice project.

In chapter 6, I summarise my findings and recommendations and offer suggestions aimed at improving the effectiveness of the Act. I also briefly consider further avenues for socio-legal research relating to the Act.

Chapter Two: Law as tool of effective societal transformation?

"Law is some tricky shit".

Thelma & Louise (MGM-Pathe) 1991

2.1 Introduction

In this chapter I focus in general terms on the relationship between law and society and the (in)ability of law to effect changes in society. In the chapters that follow this one, I then apply the theoretical constructs and debates, which I explored in this chapter, to the Act and I focus specifically on the Act's ability to effect societal transformation in South Africa. In this chapter I firstly reflect on different conceptions of "law" and "society" as expressed by (among others) Ehrlich, Weber, Aubert and Cotterrell, and the limits of the law in effecting societal change. I then identify the conditions that should be present to enable "law" to be used (instrumentally) to steer or change a given society. Lastly, if one accepts that, under certain conditions, the law may be used successfully to steer society,[1] I ask the question whether the legislature or the courts are better suited to drive such a societal transformation project.

2.2 "Law"

A large number of authors have through the ages attempted to provide a lasting or universally applicable definition of "law". Some have defined "law" in relation to its societal context. Below I set out the views of some influential authors who may broadly be characterised as being interested in the sociological aspects of what "law" entails. Analysing the literature, Cotterrell helpfully identifies four ways of conceptualising law in this context:[2] law as one normative order in a range of normative orders (legal pluralism); law as coercive order; law as dispute processing, and law as doctrine. I elaborate on these concepts directly below, before clarifying the approach followed in the thesis.

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[1] I do not concern myself with the (normative) question whether the law *should* be used to steer society.
[2] Cotterrell (1992) 39-43.

2.2.1 Law as one normative order in a range of normative orders (legal pluralism)

In explaining what he has in mind when he refers to "legal pluralism", Cotterrell refers to some of the pioneers of legal sociology such as Gurvitch, Petrazycki, Timasheff and Renner, and the American Realist Llewellyn.[3] Gurvitch, for example, sees law as the "expression of order or harmony of different forms of 'sociality' or collective life".[4] The character of law differs depending on the kind of sociality and the kinds of social groups it regulates. Thus, law may be organised or unorganised, fixed in advance or fixed in an *ad hoc* manner, or be purely intuitive and may or may not be accompanied by sanctions.[5]

This "range of normative orders", referred to in the heading, would for example include routine, habit, convention, the institution of marriage, colleagueship in an organisation or the practice of promising;[6] "the 'law' of the supermarket check-out line to the constitutional interpretation of the federal courts";[7] and the rules of "socialization, pressure, religion, popular culture, masculinity and femininity, everyday life".[8] Stout contends that many legal scholars have come to focus on the phenomenon of "social norms" – norms as rules of behaviour that people follow for a reason other than to be (possibly) sanctioned by a court.[9] Macaulay, who "pioneered the study of business practices",[10] empirically illustrates how businesspeople prefer settling their disputes outside of the formal prescripts of contract law and rather relies on norms such as "commitments are to be

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[3] Cotterrell (1992) 39-40.
[4] Cotterrell (1992) 39. Kamenka and Tay in Kamenka and Tay (eds) (1980) 14 refers to law "as maintaining fundamental rules of living together". Fuller (1981) 212 thought law should be construed broadly to include "law-like" systems such as labour unions, professional associations, clubs, churches and universities.
[5] Cotterrell (1992) 39.
[6] Sarat and Kearns in Sarat and Kearns (eds) (1995) 1; 22.
[7] Engel in Sarat and Kearns (eds) (1995) 125-126.
[8] MacKinnon in Sarat and Kearns (eds) (1995) 112. MacKinnon is concerned with the range of normative orders that all keep women subjugated. In discussing the role of the law in the construction of homosexual identity, De Vos (1996) 12 *SAJHR* 270 refers to a "*nexus of cultural prescriptions* of deviance, normality and illness which have together involved the production of the 'homosexual personage'. The discursive production of the homosexual person as a deviant man of law – a new subject to be observed, policed and examined – took place *in and across legal, medical and psychological discourses*" (my emphasis).
[9] Stout in Drobak (ed) (2006) 15 and 28 and the list of studies she refers to at 15 n4 and 28 n32. Also cf Gutto (1995) 11 *SAJHR* 313: "The reality of what could be regarded as 'living law' or 'law in practice', as opposed to 'inactive law' or 'law on paper or books', is that legal systems are complex and dynamic; they manifest co-existence or many layers of laws and social legal practices which are complementary, sometimes 'co-operatively' and at other times in contradiction or contestation with each other, that is conflictual".
[10] http://www.wisc.edu/faculty/biog.php?ID=350 (accessed 2007-08-16).

honored in almost all situations" and "one ought to produce a good product and stand behind it".[11] To these authors may be added Tamanaha, a pragmatist social scientist,[12] who refers to the "new legal pluralism" that have shown that state law is only one order that operates in society alongside custom-based norms, rule-making and rule-enforcing institutions such as companies and universities, and smaller social groups such as clubs and perhaps even the family.[13]

Ehrlich, "with and through Roscoe Pound … among the founders of modern American sociological jurisprudence",[14] could be seen as one of the first sociologists who identified this pluralist aspect of "law". Ehrlich talks of *lebendes recht* or "living law", by which he means the rules actually followed in social life.[15] The purpose of these rules is to avoid disputes. Should disputes arise, these rules aim at settling them without recourse to state courts.[16] Yet a lawyer's task is also to settle disputes. When would lawyers (and the courts) become involved? Ehrlich states that lawyers deal with the abnormalities of life, not the normalities.[17] He thinks that state law is often irrelevant in securing order and harmony. People generally voluntarily ("instinctively") perform the tasks arising from social relationships and "as a rule, the thought of compulsion by the courts does not even

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[11] Macaulay (1963) 28 *Am Soc Rev* 63.
[12] Morales (2000) 20 *Int J Soc & Soc P* 76.
[13] Tamanaha (2001) 117.
[14] Rheinstein (1938) 48 *Int J Ethics* 232.
[15] Ehrlich (1936) 21; Cotterrell (1992) 29. Macaulay (2005) *Wis L Rev* 368 describes Ehrlich's concept of the "living law" as follows: "The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law".
[16] Ehrlich (1936) 21; Cotterrell (1992) 29.
[17] Ehrlich (1936) 21; Cotterrell (1992) 29. Macaulay (1963) 28 *Am Soc Rev* 55 shows how the majority of "business deals" are struck without relying on the doctrines of contract law. Only when relationships break down, ie when an "abnormality" occurs, would one expect court cases to ensue, as Macaulay's study also indicates. Hartog in Sarat and Kearns (eds) (1995) 63-108 describes the journey of Abigail Bailey, a deeply submissive 18th century American wife, who discovers that her violent and abusive husband sexually abused one of their daughters, and eventually divorces him after 25 years of marriage. Hartog attempts to show that Abigail's "thoughts, prayers, and arguments are filled with law; legal facts, remedies, strategies, and institutions were constantly present". I read her story differently. Abigail's memoirs deal with her childhood in one paragraph, the first 21 years of marriage in 13 pages, and the next four years in 110 pages. She discovers the sexual assaults after 21 years of marriage. The next four years are understandably filled with the law – this is when her long relationship with her husband breaks down and she has to decide how to deal with the situation. Up to that point her religious faith convinced her to remain true and submissive to this violent man she loved. While the relationship with her husband held, the law played no role in her daily existence. When the "abnormality" intrudes, the law intrudes as well.

enter the minds of men".[18] People are creatures of habit or they do not want to be seen as deviant and therefore they conform to these extra-state rules.[19]

Ehrlich seems to suggest that scholars employing sociology of law should study "the whole of law in its social relations" and by "law" he means not only "state law", in other words court cases, legislation and the common law, but the entire "Social Order" made up of institutions such as marriage, family, possession, contract and succession and the rules governing such institutions.[20] (What I would term "state law" he defines as "Legal Provisions"; "instruction[s] framed in words addressed to courts as to how to decide legal cases or a similar instruction addressed to administrative officials as to how to deal with particular cases".[21]) Such an expansive study is an impossible task to perform in a single doctoral thesis.[22]

From the perspective of legal pluralism, state law plays a small role in the maintenance of the social order, and therefore also will have a marginal effect in changing or steering society.[23] For example, consider Ehrlich's rather strong view that "one might reasonably maintain that society would not go to pieces even if the state should exercise no coercion whatever".[24] Ehrlich probably

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[18] Ehrlich (1936) 21. In similar vein Kamenka and Tay in Kamenka and Tay (eds) (1980) 4 argue that violent self-help is not the only alternative to a state-sanctioned legal system and hold that societies have rules without having a sovereign, courts and police.

[19] Cotterrell (1992) 32 refers to a study by Macaulay of business practices in Wisconsin. Cotterrell describes it as follows: "[Macaulay] discovered that business agreements were frequently made without knowledge of the relevant rules of contract law and that, in many cases, they would be invalid according to those rules if challenged in courts. He also found that businessmen actively sought to avoid the use of law and lawyers in their affairs". See Macaulay (1963) 28 *Am Soc Rev* 55. Compare what a businessman said in testimony in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (SCA) par 38: "It is not our practice to finalise our deals in a court of law, that certainly doesn't appeal to us at all".

[20] Ehrlich (1922) 36 *Harv L Rev* 130-145.

[21] Ehrlich (1922) 36 *Harv L Rev* 132.

[22] Ehrlich (1922) 36 *Harv L Rev* 144 acknowledges this: "Such a task is far beyond the powers of the individual". Also see Engel in Sarat and Kearns (eds) (1995) 124: "Law academics generally prefer to pitch their tents in the shadow of the Supreme Court rather than on Main Street or in urban or suburban neighborhoods … The specialized discourse and rituals of lawyers and legislators invite study in a way that day-to-day reliance on common sense by ordinary people does not".

[23] Cf North in Drobak (ed) (2006) 55: "[T]hree factors determine the institutional framework of a society: formal rules, informal norms of behavior, conventions, and codes of conduct; and their enforcement characteristics. If all we can change are the formal rules, and not the other factors that also shape the performance characteristics, then we are going to get unforseen and undesirable results".

[24] Ehrlich (1936) 71. Sumner (1959) 3-4 is of the view that the primary method of control of/in a society is its "folkways". These folkways are not consciously created but are similar to products of natural forces that are unconsciously set in operation or instinctively developed out of experience. Lévy-Bruhl (1961) 50 as translated from the original French and interpreted by Cotterrell (1992) 29 is less optimistic about the strength of customs. He

overstates the position. The sociologist Aubert, a pioneer within Norwegian social science,[25] provides a plausible explanation for Ehrlich's view. Aubert theorises that Ehrlich lived in a state where the legislature was in distance far removed from local customs and norms and where the state's legitimacy was not secure.[26] Large geographical distances separated the commands of the legislature from local customs and suppressed national minorities resisted and resented central government policies.[27] A number of theories where law as phenomenon is located in the attitudes and behaviour of people had their origin in Tsarist Russia and the failing Austro-Hungarian Empire.[28]

2.2.2 Law as coercive order

A number of authors distinguish law from other methods of social control using the criterion of the sanctions that law utilises. In this context Cotterrell refers to Weber and Hoebel.[29] Weber states that "an order will be called law if it is externally guaranteed by the probability that coercion

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compares customary rules with "official" law and holds that customs in modern societies in powerful states are fragile and lacks the *solidité* (strength; firmness) of official law. Likewise Ferguson (1980) *Br J Law & Soc* 155 does not believe that dispute settlement mechanisms would be effective in the absence of an ultimate legal sanction. Sarat and Kearns in Sarat and Kearns (eds) (1995) 45-47 argue that most disputes are settled amicably, without recourse to courts, precisely because of the comforting thought that if things "got ugly" the formal legal system would be available, with clear limits to what each of the parties could gain or lose. The authors seem to imply, in other words, that if the *possibility* to approach a state court does not exist, society may well fall to pieces. Also see De Vos (2001) 12 *Stell LR* 343: "[Many conservative and progressive South African lawyers and judges] ... would probably also agree that the law is an important tool in preventing anarchy in a society. In times of radical change and upheaval – like the past ten years in South Africa – the law might well be the most important force for stability and predictability in a society".

[25] Minde (1992) 1.

[26] Aubert (1983) 23. At 28 Aubert maintains that a number of sources must be considered that does not form part of the positive law, such as bills that never become Acts, proposals by judges in chambers directed at achieving a settlement, police methods that have no basis in law, advice offered by attorneys to their clients, but he deems it neither necessary nor useful to present a sociological definition of law. Aubert then also follows a "legal pluralism" approach, but does not express the same degree of skepticism as Ehrlich relating to the power of state law to keep a given society intact.

[27] Aubert (1983) 23. In a context of investigating state dysfunctionality in Africa, Herbst and Mills in Clapham *et al* (eds) (2006) 2 argue that some big African states have "big hinterlands, which are hard to police and govern". Populations in these hinterlands would presumably also feel far removed from the central state's legal commands – see Herbst and Mills at 9 ("[S]cattered populations in a large state automatically present a physical challenge to the extension of state authority over a large percentage of the population"), 10 ("[M]any Africans in big states are not automatically oriented towards the capital"), and 11 ("In [big African states] the capital can be hundreds of kilometres from many of the people ... the administrative backbone may not be present in significant numbers in parts of large states, giving the impression to the populace that the state is uninterested in them".) In the same book Clapham at 298 reaches the same conclusion: "[T]hese states encompass different large population groups with distinct territories of their own, *which often have a very slight physical or emotional connection with a national centre* ..." (my emphasis).

[28] Aubert (1983) 23. Also see Cotterrell (1992) 26: "Ehrlich taught in a province of the Austro-Hungarian Empire which, after the First World War, became part of Romania. The central authority of the state in Vienna and Budapest must have seen highly remote from the lives of the numerous diverse ethnic groups of the area in which he lived".

[29] Cotterrell (1992) 40.

(physical or psychological[30]) to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specially ready for that purpose".[31] Hoebel thought that "a social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognised privilege of so acting".[32] Aubert also notes that a large number of conceptions of law include coercion or force as a central element.[33] Neumann believes that definitions of law that do not refer to its coercive character, fail.[34] He believes that for a norm to have juridical validity, the state must potentially be able to coerce.[35] To be sociologically valid the state's power must actually be carried out.[36] If a legal norm is not adhered to because the state's enforcement apparatus is too weak or because no one takes it seriously, then that norm is not sociologically valid.[37]

2.2.3 Law as dispute processing

Especially American authors have emphasised the use of courts as dispute-settlement institutions.[38] Cotterrell explains that many contemporary authors assume that dispute resolution is a major function of courts and that it is typical of Anglo-American common law thinking to have a court-centered approach.[39] Cotterrell criticises this approach. He argues that law is much more

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[30] Kidder (1983) 24 points out that by including psychological coercion, Weber expands law to include the activities of a number of groups in society. The threat of physical violence is not necessary to ensure compliance because societal life is full of incentives that may be used (Kidder uses the word "manipulated") to ensure compliance with these rules.
[31] As quoted by Cotterrell (1992) 40. In Weber (1968) 317 the definition of "legal order" reads a little differently: "A 'legal order' shall be said to exist wherever coercive means, of a physical or psychological kind, are available; i.e. wherever they are at the disposal of one or more persons who hold themselves ready to use them for this purpose in the case of certain events; in other words, wherever we find a consociation specifically dedicated to the purpose of 'legal coercion'".
[32] Hoebel (1967) 28.
[33] Aubert (1983) 8 quotes Marsilius of Padua: "In one way or the other, insofar as it only shows what is just or unjust, beneficial or harmful, and as such it is called the science or doctrine of right. In another way it may be considered according to whether observance to it is sanctioned by a command and is distributed in the present world; and considered in this way it most properly is called, and is, law". Aubert (1983) 9-10 also refers to John Austin who saw law as commands backed by force; and von Ihering and Jellinek who also defined law by referring to the force of the state. Jeffrey in Brantingham and Kress (eds) (1979) 31 criticises Austin's proposition. He considers the so-called command "thou shalt not kill" and the behaviour of people triggered by the discovery of a corpse: police, prosecutor, defence counsel, trial judge, appellate judges and states that these role players are not "obeying a command", they are "coping with a situation".
[34] Neumann (1986) 11.
[35] Neumann (1986) 12.
[36] Neumann (1986) 12.
[37] Neumann (1986) 12.
[38] Cf Kamenka and Tay in Kamenka and Tay (eds) (1980) 14 that see law playing three roles; one being setting out "principles for conflict resolution".
[39] Cotterrell (1992) 41.

than the processing of disputes and that a focus on dispute resolution as such cannot answer the question as to how central or marginal dispute resolution is as an aspect of contemporary Western law.[40]

2.2.4 Law as doctrine

This approach sees "law" as a system of rules, which implies the limitation of arbitrariness and a degree of control of official discretion.[41]

Cotterrell distinguishes between law as "a mechanism of regulation of social life through distinct institutions and practices" and as "a body of doctrine or ideas which can be logically or dogmatically interpreted and developed".[42] He highlights another aspect of its two-faced nature: Law consists of "ought propositions" or prescriptions that sets out how people are supposed to behave, but at the same time law is a social phenomenon, which can only be studied if these prescriptions have a measurable effect on the way people behave.[43] As I understand Cotterrell's typology, "law as doctrine" would then consist of "ought" propositions.

2.2.5 The approach adopted in the thesis

In the thesis I will limit myself mainly to a consideration of law in its "technical" sense;[44] that is, law as a "coercive order" (I would see this as legislation) or as a "dispute-resolution mechanism" (I

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[40] Cotterrell (1992) 41.
[41] Cotterrell (1992) 41.
[42] Cotterrell (1992) vii.
[43] Cotterrell (1992) 8. Aubert (1983) 1 also sees a "profound dualism" in law: It is a coercive force and a refuge from oppression and injustice; it is a technique that is guarded by a professional corps and it is the expression of human needs and interests. He notes that a person's conception of "law" will differ according to one's conception of being human: are we good or bad, egoistic and competitive or sociable and cooperative, aggressive or loving and charitable? (Hobbes saw "man" as wicked, sinful and aggressive, yet rational; Rousseau thought "man" capable of living together in harmony – Aubert (1983) 6; 17. Machiavelli (2003) 54 thought men to be "ungrateful, fickle, liars, and deceivers" and at 57 "wretched creatures". Ehrlich (1936) 23 thought that "the order of human society is based upon the fact that, in general, *legal duties are being performed*"; ie that humans generally live peacefully. Stout in Drobak (ed) (2006) 17-21 may be read to argue that humans act selfishly about half the time and act in an "other-regarding" manner about half the time. Stout refers to a number of social science experiments known as dilemma games, ultimatum games and dictator games. These experiments force subjects to choose between strategies that will maximise their own payoffs, and strategies that help or harm the other subjects. Generally speaking cooperation rates between subjects average at about 50%.)
[44] Black (1976) 2 conceives of law in a similar narrow sense when he defines it as "governmental social control". (Selznick as referred to by Kidder (1983) 25 says that this definition does not distinguish between legal and illegal acts. Selznick considers justice to be at the center of a satisfactory definition of "law".) Black has in mind legislation,

would see this as courts' decisions) and not as normative "doctrine".[45] (In chapter four I tangentially concern myself with law as "legal pluralism" when I consider the training of equality court personnel – I impliedly argue that (South African) "discrimination law" should be seen as also encompassing poorly trained personnel and poorly resourced enforcement mechanisms.)

The way in which I perceive the nature of my investigation forces me to adopt this rather narrow concept of law: Parliament has adopted a law to facilitate large-scale societal transformation and decided to utilise equality courts as the main vehicle to do so. I perceive this as an attempt by Parliament to treat the Act and the courts as a tool or instrument to achieve a particular purpose.[46] I will consider whether the Act in its present form can achieve this purpose. I am not primarily interested in asking the normative question whether the goal of societal transformation is a worthy one - I believe the goal to be a worthy one and I leave it to scholars skeptical of the state's transformation programmes to criticise the Act's stated goals. Had I believed the Act's goal to be misguided, it would have become overridingly important to adopt a normative stance as opposed to a technical stance towards the Act. To perhaps provide an unnecessary example: Had I adopted this narrow, instrumental approach towards Apartheid legislation, it would have been immoral.[47]

2.3 "Society"

Various authors describe different kinds and different aspects of "society". Depending on one's understanding of what "society" entails, the relationship with "law" will differ and the potential to change that society using (or abusing) law will differ as well. Broadly speaking, and at danger to oversimplify the viewpoints, two main approaches may be identified: firstly, a structural or

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litigation and adjudication. He explicitly excludes social control in everyday life but accepts that law is only one kind of social control. At 126 he argues that all societies, no matter how modern, have residues of "tribal life": Equality, intimacy, sameness and permanence, and in these settings "law" plays no role.

[45] Also see chapter 1.8.3.

[46] Kamenka and Tay in Kamenka and Tay (eds) (1980) 3 argue that a trend exists to "de-intellectualise" law; to compare "law in the books" with life. They state that law stands within society and does not make its own history. They believe that if law is seen as a neutral, flexible and characterless instrument simply needed to serve certain goals and needs, the trend has gone too far.

[47] Perhaps I stretch the analogy Kennedy uses in Sarat and Kearns (eds) (1995) 192 too far if I suggest that to an instrumentalist a critical scholar's approach seems like that of an activist whose "faith seems foolish"; and to a critical scholar the instrumentalist approach seems like that of a bureaucrat whose "complacency is immoral". I argue that I can afford to be "complacent" because I wrote the thesis when South Africa had become a constitutional democracy and because particular values, such as the achievement of substantive equality, had become constitutionally entrenched as part of our legal order.

consensus approach, and secondly, a conflict or critical or dissensus approach. I briefly sketch the two approaches below, whereafter I set out the approach adopted in the thesis.

2.3.1 A structural or consensus approach

A structural concept of society sees society as a machine with a large number of interdependent and interrelated parts. If one part does not achieve its goal, that part must be repaired or another part must step into the breach.[48]

Durkheim, the "great French sociologist [and one of] the major figures of sociology",[49] states that a society is viable only when mechanisms are put in place to ensure that people cooperate.[50] In ancient societies, people share living space and perform identical tasks – they hunt, fish, gather roots and berries.[51] By living and working together, by absorbing the ways of ordinary life, each member of this society gets to know the rules and customs, or "law", of that society.[52] Should a norm be breached, all the other members of the society would step in and avenge the breach.[53] Law was simple because the structure of society was simple.[54] Revenge is the primary purpose of primitive law and law is the "sacred" order of the group.[55] However population growth creates a crisis of solidarity; resources become scarce and people need to specialise to reduce strenuous competition and to produce goods and services more efficiently.[56]

Specialisation changes the structure of the society in which it operates.[57] Members of this society do not share the same experiences anymore.[58] A basket maker and a barber in the same society have vastly different daily life experiences which leads to different beliefs, values, interests and therefore norms.[59] Because norms differ, consensus disappears and norms are justified as being

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[48] Kidder (1983) 59.
[49] Freeman (2001) 666.
[50] Durkheim (1984) 219, 221; Kidder (1983) 59-61.
[51] Kidder (1983) 59.
[52] Kidder (1983) 60.
[53] Kidder (1983) 60.
[54] Kidder (1983) 60.
[55] Durkheim (1984) 36; Kidder (1983) 60.
[56] Durkheim (1984) 228; Kidder (1983) 60.
[57] Kidder (1983) 60.
[58] Kidder (1983) 60.
[59] Kidder (1983) 60-61.

"practical" rather than sacred or righteous.[60] Law's function changes: A need for coordination and management now exists.[61] As society's complexity increases, similarly complex legal institutions come into play to maintain efficient maintenance of organic hamony.[62]

Structuralists also use the concepts of simplex and multiplex relationships. A simplex relationship exists when people have contact with one another for a very specific, limited purpose: ordering a meal across a fast food counter; buying a movie ticket.[63] A multiplex relationship exists when people's lives connect in various spheres of their daily activities: A is B's friend. A is also B's financial advisor; partner in a business venture and the family doctor.[64] Structuralists hold that a decline in the frequency of multiplex relationships increases the necessity of using law for social control.[65] People involved in multiplex relationships are more likely to remind each other of the mutual benefits of their different relationships.[66] People involved in simplex relationships have nowhere to turn but the law should a dispute arise.[67] Where a society is dominated by simplex relationships, law would be expected to play a large role.[68] However, people do not necessarily turn to the law if they feel wronged. It may simply be too expensive or too costly in emotional terms to pursue a court action to finality; and therefore they literally walk away from the potential claim and the wrongdoer.[69] People involved in multiplex relationships cannot however afford to literally walk away and disputes are likely to be settled.[70] For example, Fukuyama explains that a distinct group of Jews emigrated from Baghdad to North Africa which came to be known as "Maghribi traders" by the 11th century.[71] These traders socialised each other into a particular cultural way of solving disputes in an area of the world where at that time no overall political authority existed to

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[60] Kidder (1983) 61.
[61] Kidder (1983) 61.
[62] Durkheim (1984) 83. Structuralists add a qualification: "If people can organize their collective activities in alternate ways, they may be able to avoid the disorganizing effects of population growth without resorting to law". Kidder (1983) 65.
[63] Kidder (1983) 70.
[64] Kidder (1983) 71.
[65] Kidder (1983) 71.
[66] Kidder (1983) 71.
[67] Kidder (1983) 72.
[68] Kidder (1983) 72.
[69] Kidder (1983) 72; Macaulay (2005) *Wis L Rev* 383.
[70] Cf Macaulay (1963) 28 *Am Soc Rev* 65 who shows that an ongoing business relationship between a supplier and merchandiser is likely to terminate if one of the parties sues the other.
[71] Fukuyama (2005) 45.

provide enforcement of what we would now call "contract law".[72] These traders relied on multilateral coalitions to enforce agreements and did not rely on any state courts to solve disputes.[73] Where simplex relationships dominate, people have a choice: resort to litigation, or walk away. Conciliation is not a "natural" option.[74]

To Ehrlich, *gesellschaftlichen Verbänden* (associations) is central to the reason why state-driven coercion is (almost) unnecessary.[75] He has in mind groupings such as trade unions, business corporations, partnerships, clubs, occupational groups, ethnic groups, political parties, religious affiliations and the family.[76] Humans do not want to be excluded from these groupings and therefore they conform as the sanction of non-compliance is exclusion.[77]

In 1887 Tönnies first coined the terms *Gemeinschaft* (usually translated as "community") and *Gesselschaft* (usually translated as "society") to distinguish between different models of human interaction.[78] The *Gemeinschaft* is a society that formed in a spontaneous and organic manner;[79] the *Gesellschaft* is external, public, mechanical and formal.[80] The *Gemeinschaft* lies in bonds such as a household, friendship, a neighbourhood.[81] The *Gesellschaft* lies in bonds such as commerce and contract, commercial exchange, the city, the factory, commodity production for exchange.[82] The *Gemeinschaft* is based on relationships; the *Gesellschaft* on rights.[83] These concepts are mental constructs; no actual society fits completely within either of these views of human associations.[84]

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[72] Fukuyama (2005) 45-46.
[73] Fukuyama (2005) 45.
[74] Kidder (1983) 72.
[75] Ehrlich (1936) 32, 34, 37; Cotterrell (1992) 30-31.
[76] Ehrlich (1936) 26-27.
[77] Cotterrell (1992) 30.
[78] Tönnies (2002); Kamenka and Tay in Kamenka and Tay (eds) (1980) 8-11.
[79] Tönnies (2002) 37-64.
[80] Tönnies (2002) 64-102.
[81] Kamenka and Tay in Kamenka and Tay (eds) (1980) 8.
[82] Kamenka and Tay in Kamenka and Tay (eds) (1980) 8.
[83] Kamenka and Tay in Kamenka and Tay (eds) (1980) 10.
[84] Kamenka and Tay in Kamenka and Tay (eds) (1980) 11. In addition to Tönnies's formulations, Kamenka and Tay 18-19 adds a third conception of society, that of the bureaucratic-administrative society. In this "society", humans are subject to regulations that determine their consequent rights and duties. This third dimension must be added, they say, because of the power of the state and its agencies in the twentieth century (and presumably beyond.)

2.3.2 A conflict, or critical, or dissensus approach

A critical or conflict or dissensus model of society presents a different picture.[85] This concept of society sees law as being actively used by powerful elites to dominate and maintain their dominance of weaker members.[86] This approach focuses on conflict and power as the most important features involved in the creation of law and focuses on inequalities developed or maintained by the law.[87] By way of explanation of this perspective, Kidder summarises a number of studies that follow the conflict paradigm. He sets out in some detail the historical application of the so-called "Black Acts" and vagrancy laws in England.[88]

2.3.2.1 Black Acts[89]

In the late 17th century a number of laws were passed in England that aimed at ensuring that only the owners of private land could hunt game on the land. Up to then, whoever could lay their hands on deer, squirrels, rabbits and wild fowl could keep it but after the passage of laws became "protected" animals – only the nobles were now allowed to hunt. Resistance to the laws developed. Groups known as "Blacks" formed, so called because they blackened their faces as part of their camouflage. The Blacks used various techniques of tracking and killing animals and were remarkably successful despite the best efforts of the noblemen. The Black Acts were passed, aimed at eradicating their activities. Poaching was made punishable by death; also being found with a blackened face. Courts set up to enforce the Black Acts had limited success. Blacks regarded hunting as a God-given right which they felt entitled to continue. The poaching struggle continued for decades. During this time the societal structure in Britain changed and a new middle class came to the fore. The middle class was landless and was also prohibited from hunting but by this time hunting had become associated with prestige and power and the new middle class wanted to share in the spoils. The nature of the hunting struggle changed. During the 19th century this new middle class succeeded in reforming the game laws. Everyone could now hunt game, but at the same time other laws introduced new restrictions – hunting licenses; permission from the landowner – that effectively excluded the rural poor from hunting. New farming methods had by

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[85] See in general Kidder (1983) 83-111.
[86] Kidder (1983) 83.
[87] Kidder (1983) 83.
[88] Kidder (1983) 84-87.
[89] This paragraph in the thesis is a summary of Kidder (1983) 84-86.

now eliminated regular jobs for the rural poor, leaving only seasonal work, and the new laws cut off a very important food source. Poaching followed a seasonal pattern – hunting was an ancient custom, and the rural poor had to supplement their meagre diet. The poaching laws and courts were ineffective, even when penalties were severely increased. This situation continued throughout the 19th century.

2.3.2.2 Vagrancy laws[90]

From a critical or conflict perspective the Black Acts is one example where law does *not* follow existing customs; for the rural poor it became customary to *breach* the law. Kidder refers to a study by Chambliss that illustrates that new laws need not necessarily be drafted to serve the elite's needs. Sometimes "the law" need not change at all, but be used for different purposes. Vagrancy laws can be traced to the aftermath of the Black Death when half of England's population died and a severe labour shortage developed. Vagrancy laws were put in place to secure labour for the aristocracy. The purpose behind the laws was to force labourers to accept low wage employment. The laws prohibited labourers from seeking higher paying jobs and prohibited people from giving alms to able-bodied beggars, presumably to force them to seek work. These laws did not have their intended effect. New social forces developed. The growing industrial sector needed free labour and their interests overrode the interests of the land-owning nobles. Vagrancy laws still punished people who did not have an "honest job" but the focus shifted from "job" to "honest" and full-time criminals were now targeted. Trade routes for safe commerce had to be protected and thieves, highwaymen and vagabonds threatened these routes. The rising merchant class used these laws to secure their newfound power. Likewise, these rules did not develop out of custom but was put in place to preserve the elite's power, whoever that elite may have been.[91]

2.3.3 The approach adopted in the thesis

In my view the conflict perspective sometimes seems akin to a conspiracy theory. From this critical perspective the "haves" consciously plot to keep the "haves-not" in their place by utilising the law. However, the question may be asked: From a conflict or dissensus theoretical viewpoint, how would one then explain the enactment of the Act? As expanded on in the next chapter, the Act

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[90] This paragraph in the thesis is a summary of Kidder (1983) 86-87.

[91] Structuralists would argue that these laws protected commerce and therefore protected society by preserving the balance. Kidder (1983) 87.

outlaws unfair discrimination on a wide-ranging number of grounds, including (probably) socio-economic status. All decisions made by the elite that impact negatively on the masses in terms of the prohibited grounds would in principle amount to socio-economic "discrimination" in terms of the Act and it would be up to the elite to justify their decisions to a court. A complainant may approach an equality court without the assistance of an (expensive) lawyer. Any NGO or other public-minded institution may approach an equality court on behalf of a (presumably) poorly-informed and poorly-resourced complainant. Certainly the Act could have been drafted in clearer language, certainly the Act could have come into force much sooner than it did, certainly the training of presiding officers could have commenced sooner and could have been planned and executed much better, but should these delays be attributed to conscious debilitating actions by elite forces opposed to the Act? I believe the delays to have rather been caused by administrative bungling and a poorly-capacitated state, as set out in more detail below in chapter 4, where I discuss the planning and execution of the initial training programmes.

If my argument relating to socio-economic status is not persuasive,[92] consider some of the other grounds protected in the Act. The new Parliamentary elite could not have regarded itself as insulated from discrimination claims based on for example sex, gender, disability and sexual orientation; yet went ahead to put into place a far-reaching piece of legislation, targeting these instances of discrimination.[93] Therefore, not being convinced of the merits of the conflict paradigm *in the context of this Act*, I will, where appropriate, adopt a structural approach to the composition of "society" and its relationship to "law".

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[92] It could be argued, for instance, that the adoption of the Act also coincided with a "changing of the guard" as it were; one set of (Parliamentary or political) elites moving out and making place for a new elite. This new political elite would not necessarily view themselves as the target of the Act's prohibition of socio-economic discrimination, as the economic elite had not changed membership. If anything, the economic elite did what it could to soften the Act's blows by vigorously lobbying Parliament during the drafting process.

[93] Also cf Freeman (2001) 677: "A difficulty with the conflict model is how to explain laws which appear to limit the activities of powerful groups … Morals legislation also causes problems for it is normally instigated by economically weak, middle-class crusaders".

2.4 The relationship between "law" and "society" – The (in)ability of law to affect behaviour and attitudes and to steer society

I discuss below the relationship, or absence of a relationship, between a "society" and the (official state) "law" applicable to that society, with a view to ascertaining to what extent law may be used to steer or change a society in a particular way. I do not have in mind what Dror calls the "indirect" use of law in social change,[94] but will rather focus on the *direct* use of law in transforming society.

Dror quite rightly points out that large-scale bureaucratic societies almost always indirectly rely on laws to bring about changes.[95] For example, a public body may be set up with one of its functions being the bringing about of certain social changes. A law would be passed, setting up that body and establishing its powers. Similarly, education may be used to steer a society in a particular direction, but a law would first have to be passed that sets up educational institutions and creates a duty to attend these institutions.[96] In the context of the thesis, if one would want to utilise the law in combating poverty, creating a legal obligation to attend primary and secondary schools would also amount to the indirect use of "the law" to achieve the desired result, because it is the benefits accruing to a better education that leads to a better chance of being employed.[97] The legal command to attend a school merely facilitates the implementation of state policy in increasing school attendance. To put it differently, the "effective cause" of societal change in this case would have been "education for more people", not the Act of Parliament obligating school attendance.

(Sustained) court action would usually amount to the *direct* use of the law to bring about a concrete result. Handler lists these (positive) *indirect* effects of litigation: It provides publicity, legitimises values and goals, and may be used as part of broader campaign.[98] He argues that litigation may be used as leverage and that litigation may be used to bring a halt to a particular action and so

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[94] Dror (1958) 33 *Tul L Rev* 798.
[95] Dror (1958) 33 *Tul L Rev* 798.
[96] Dror (1958) 33 *Tul L Rev* 798. To Dror's examples may be added the following "Grand Schemes" as described by Scott (1998) that could or would have been established "via" law: compulsory *ujamaa* villages in Tanzania, collectivization in Russia, Le Corbusier's urban planning theory realised in Brasília, the Great Leap Forward in China and agricultural "modernisation" in the tropics.
[97] Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 8.
[98] Handler (1978) 209-210.

increase the party's bargaining power.[99] Seen from this perspective, the eventual court order is not the end but part of the strategy. Handler states that litigation may generate harmful publicity that may force the discriminator into settlement, which would be some consolation to a claimant that is not able to proceed with the court case to finality because of the duration or costs involved.[100] He seems to argue that litigation may be used as "consciousness raising" and that litigation can contribute to a change in public opinion.[101] I would argue that some of these benefits are easier to assert than to empirically prove,[102] that many of these benefits would only accrue in very specific cases, and that in some instances it would be impossible to clearly link the benefits to the litigation.[103] I therefore do not intend to theorise about the potential or imagined benefits of the indirect use of the law, but will primarily be interested in how the actual outcome of the *direct* use of law may bring about societal change.

When speaking of the direct use of law, Dror has in mind "a revolutionary or intellectual *minority*" that "obtains legislative power and uses it in its efforts to bring about extensive changes in social structure and culture",[104] but the same question could be asked of a previously disenfranchised, marginalised and powerless *majority* that suddenly obtains legislative power: To what degree could "the law" be used effectively in steering society in the desired direction?

Broadly speaking, one group of scholars believes that law has a meaningful role to play in changing (aspects of) society, while others are more skeptical, or critical, or pessimistic. I discuss and analyse the viewpoints of "pessimists" immediately below and I discuss and analyse the "optimists" under the next heading.[105]

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[99] Handler (1978) 212.
[100] Handler (1978) 214.
[101] Handler (1978) 218-219.
[102] How would one measure whether "consciousness raising" occurred? Sen in Drobak (ed) (2006) 254 seems to argue in a similar vein. He suggests that many human rights can serve as important constituents of social norms, and have their influence and effectiveness through "personal reflection" and "public discussion", without their being necessarily diagnosed as pregnant with potential legislation. My argument would again be that this "influence and effectiveness" seem to be theorised or imagined and not susceptible to empirical proof.
[103] Eg, a change in public opinion.
[104] Dror (1958) 33 *Tul L Rev* 799. Dror has in mind "Japan and Turkey, where whole parts of Western law were received with the intention thus to further the Westernization of these countries, and this was also the case in Soviet Russia. To some extent the efforts of the various colonial powers, especially France, to introduce their law into various territories under their rule was also motivated by the desire to shape the social realities of those places", and the enactment of Prohibition in the United States.
[105] That is, chapter 2.5 ("Characteristics of effective law".)

I identified nine overlapping themes in current literature where authors question the (potential) ability of law to change or steer society:[106]

1. It is a complex task to use the law as an agent of change.[107] Compare Morison's view:[108]

> We do not have very much by way of a theory *and the sheer number and complexity of the many forces to be understood and deployed* ensures that the theory of the art of statecraft is likely to remain beyond the reach of any modern Machiavelli hoping to educate his Prince.

Chemerinsky argues that change (if it occurs) will probably take place over the long term and the more far-reaching the intended change the longer it will take and the more variables will probably play into the process.[109] Tamanaha notes that the relationship between law and society is too complex to address in a single formula and that one has to drastically simplify the relationship to begin an analysis.[110] An obvious question is why one should bother to study such a "drastic simplification" – Such a simplified model would not be accurate because it is not true to reality. Kamenka and Tay note that only revolutions have simple programmes and that only simple programmes have a high probability of being successful – the more complex the operation the more things can go wrong.[111] They put it bluntly – quick, pervasive or fundamental changes will not be achieved via the law.[112]

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[106] Some authors describe law as a "blunt" or "limited" tool but do not provide particular reasons. Cf Gardner in Hepple and Szyszczak (eds) (1992) 168-169; Loenen (1997) 13 *SAJHR* 427 (she doubts whether any other legal concept could reach the more fundamental levels of gender and race relations and views law, by its nature, as a limited instrument in changing social reality); Burns in Reasons and Rich (1978) 361 (he believes that law is a valuable tool but should not be seen as the only tool; law is only "a component in a much larger change process".)

[107] Morison in Livingstone and Morison (eds) (1990) 11: "Law is better seen as a Heath Robinson contraption, a ramshackle device where creaking pulleys operate to overbalance buckets of water that trigger off other forces which in turn activate other processes with the final result that (possibly) an egg is boiled or a banana skinned. Change through law is difficult to plan, complex to execute and often uncertain in its consequences"; Livingstone in Livingstone and Morison (eds) (1990) 64: "Using law to alter a society is a complex and difficult task"; Gardner in Hepple and Szyszczak (eds) (1992) 168-169 thinks that law is a blunt tool "which destroys more readily than it creates" and that no quick fixes exist. Also cf Koopmans (2003) 252 and Marcus in Sarat and Kearns (eds) (1995) 255 ("[R]eality is complex, almost unbearably complex ...").

[108] Morison in Morison and Livingstone (1990) 13; my emphasis.

[109] Chemerinsky in Devins and Douglas (eds) (1998) 192-193.

[110] Tamanaha (2001) 1.

[111] Kamenka and Tay in Kamenka and Tay (eds) (1980) 115.

[112] Kamenka and Tay in Kamenka and Tay (eds) (1980) 115.

2. Linked to the first theme, changes in law in one field may have unforseen (and perhaps unwanted) consequences in other fields.[113] Authors offer the following examples: Scott tells how a door-and-window tax was established in France under the Directory.[114] The idea behind the policy was that the number of doors and windows in a dwelling would be proportional to its size; the more doors and windows the higher the tax then. A tax collector would then not have to measure the house but merely count the doors and windows. However, peasants then developed their dwellings so as to have as few openings as possible and the health of the rural population in France suffered from more than a century.[115] Kidder explains how income ceilings, intended by the legislature to act as an incentive to *leave* public housing and move into private housing, actually provided a strong incentive to *remain* in public housing and to turn down better-paying employment – "if a moderate increase in family income forced a family out of public housing, their net gain might turn into a net loss because of the pricing effects of a private-housing shortage".[116]

3. More specifically, changes in the law may have unintended consequences because any given society consists of various individuals faced with various choices and the impact of law on these individuals will be varied and almost impossible to control or predict.[117]

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[113] Cf Livingstone in Livingstone and Morison (eds) (1990) 64: "[C]hanges in one area, such as constitutional reform, may be undermined by problems in the application of law elsewhere, such as the security field … However careful planning of a legal strategy and the likely resistances it will meet will not avoid every problem and legal changes will often have unexpected effects". Schäffer (2001) 22 *Statute LR* 141 admits defeat in the following terms: "Certainly, any enactment is a 'shot in the dark', because we know very little about the way law operates and the *interconnection* of the effects of legislation" (my emphasis).

[114] Scott (1998) 47.

[115] Scott (1998) 48.

[116] Kidder (1983) 137-138.

[117] Engel in Sarat and Kearns (eds) (1995) 136; Friedman (1975) 86; 119. Aubert (1983) 172 simply states: "Individual choices aggregate in unforseen patterns". Jeffrey in Brantingham and Kress (eds) (1979) 33 refers to William James's description of life as a "big buzzing blooming confusion". Luhmann (1985) 249 is to the point: If the theory behind changing society is based simply on the concepts of "expectation and fulfilment" and "command and obedience", it will fail to explain practice. The interdependencies in society are probably too high; everything depends on everything; and it is therefore not possible "to cause specific effects by specific interventions". Cf Rousseau (1968) 89: "Peoples differ; one is amenable to discipline from the beginning; another is not, even after ten centuries" and Machiavelli (2003) 80: "It can be observed that men use various methods in pursuing their own personal objectives ... One man proceeds with circumspection, another impetuously; one uses violence, another strategem; one man goes about things patiently, another does the opposite; and yet everyone, for all this diversity of method, can reach his objective. It can also be observed that with two circumspect men, one will achieve his end, the other not; and likewise two men succeed equally well with different methods, one of them being circumspect and the other impetuous. This results from nothing else except the extent to which their methods are or are not suited to the nature of the times". Fukuyama (1992) 47 argues that "the more one knows about a particular country, the more one is aware of the 'maelstrom of external contingency' that differentiated that country from its neighbors, and the seemingly fortuitous circumstances that led to a democratic

Kidder argues that complex decision-making networks of law enforcers exist and that laws are filtered through these networks.[118] He points out that people are not isolated individuals that make isolated decisions but that they function within a complicated network of family life and employment and that it is not easy to predict law's effects on these individual decisions.[119] He presents an example illustrating the varying effect of a change in the law: In 1948 the United States Supreme Court ruled that religious teaching could not take place in public schools.[120] How did public schools react to this ruling? In all kinds of ways: Some immediately stopped religious teaching; others camouflaged the fact that they were carrying on as they have always did; others carried on without making any adjustments.[121]

Kamenka and Tay state that the relationship between law and "society" is further complicated by the fact that within "society" various "societies" co-exist.[122] These different societies are held together or strain to get apart from one another; sometimes they would agree with each other and sometimes they would display bitter or violent conflict or both.[123] Even within one individual within a given society, different motives and feelings compete or agree, only to agree or compete on another issue the very next moment. These complex inter-relationships between individuals and different societies cannot be reduced to a "fixed and finite pattern".[124] Luhmann uses somewhat obtuse language to reach the same conclusion.[125] He argues that the "enforcement of the legislative will" is filtered through various variables: the socio-economic system, "deviant" legal subcultures (each with its own normative attitudes), and personality structures.[126] These different variables lead to one legal text obtaining very different meanings; or various legal texts pointing to the same

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outcome" (he then refers to Portugal, Spain, Russia and Eastern Europe.) Similarly, Hughes in Clapham *et al* (eds) (2006) 162 argues that "unique and conjunctional forces, including the global failure of state socialism and the stroke suffered by PW Botha in January 1989" created the space for "pragmatic and prescient leaders on both sides" to start negotiations, thus leading to a democratic South Africa.

[118] Kidder (1983) 127.
[119] Kidder (1983) 137.
[120] Kidder (1983) 117.
[121] Kidder (1983) 117.
[122] Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.
[123] Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.
[124] Kamenka and Tay in Kamenka and Tay (eds) (1980) 106.
[125] Luhmann (1985) 235-239.
[126] Luhmann (1985) 236.

situation.[127] All of these systems operate separately yet interdependently and all together forms "social reality".[128] Every change in the law causes immeasurable effects; some positive, some negative, some short-term, some long-term – but each of these consequences are uncertain in the different systems and in relation to different functions.[129] Unifunctionality is an illusion only used as an analytical tool.[130] Luhmann presents the relationship between law and social structure as "cause and effect simultaneously"; sometimes societal changes take place while the law remains unchanged (although what happens with the legal rules may change), and sometimes new laws appear that do not change society.[131] The more complex a society becomes, the scope of this "relative invariance" will probably increase.[132]

Tamanaha refers to the work of what he calls "new legal pluralism" that have shown that state law is only one order that operates in society alongside custom-based norms, rule-making and rule-enforcing institutions such as companies and universities, and smaller social groups such as clubs and perhaps even the family. [133] From this perspective, and I am echoing Ehrlich here,[134] state law plays a very small role in the maintenance of social order, and therefore also will have a marginal effect in changing or steering society.

4. Problem-solvers considering the use of law to solve a particular problem may not adequately grasp the problem. Most authors who take this line argue that some (or most) social ills cannot be adequately addressed via the law and at least implicitly argue that overambitious legislatures have contributed to the phenomenon of unenforced law.[135]

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[127] Luhmann (1985) 236.
[128] Luhmann (1985) 236.
[129] Luhmann (1985) 238.
[130] Luhmann (1985) 239.
[131] Luhmann (1985) 227.
[132] Luhmann (1985) 227.
[133] Tamanaha (2001) 117.
[134] See pp 36-38 of the thesis where I discuss Ehrlich's views on this point.
[135] Livingstone in Livingstone and Morison (eds) (1990) 64: "[P]roblems have arisen through a failure on the part of those designing and applying the law to properly analyse the nature of the problem they are dealing with or to carry through the implications of their actions. However careful planning of a legal strategy and the likely resistances it will meet will not avoid every problem and legal changes will often have unexpected effects". Ehrlich (1936) 375 simply states "we shall have to get used to the thought that certain things simply cannot be done by means of a statute". Allott (1980) 287 lists an overambitious legislature, inadequate preliminary surveys, and inadequate enforcement mechanisms as the reasons for the inability of law to effect social change. Gardner in Hepple and Szyszczak (eds)

5. Law must be grounded in existing customs. Put differently, changes in law must or should follow changes in society, or it will not be effective. This argument also implies that laws that stray too far from existing customs will not be followed, in other words, will not be effective.[136]

Morison points out that earlier writing on the relationship between law and society saw law as mirroring the population's views and that legislation would only succeed if it more or less conformed to what society wanted.[137] On this view, law has almost no role to play in effecting social change; society changes and then law adapts to those changes. Morison quotes Sumner's "stateways cannot change folkways"[138] as a prime example of this approach to law and societal change.[139] Morison states that towards the 1960s and 1970s this view changed somewhat in that writers now attempted to identify the circumstances under which laws could be used to steer society, and when not, and that writers in the field of sociology and law moved away from "grand theories".[140]

Probably the best known example of a disastrous attempt at changing people's attitudes is American Prohibition.[141] Despite a relatively high number of convictions and draconian penalties, alcohol consumption did not decrease significantly.[142] Cotterrell lists a number of factors why this experiment failed: half-hearted enforcement by police, enforcement agencies lacked coordination and proper resources to prevail over organised crime, neither

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(1992) 168-169 thinks that law is a blunt tool "which destroys more readily than it creates". He states that no quick fixes exist; social forms develop delicately over time; law may be able to nudge direction-insensitive relationships and that may in turn cause a gradual adjustment, but that rapid transformations will not take place. Fuller (1981) 233 believes that it is primarily in the field of criminal law and specifically so-called victimless crimes (for example, laws that prohibit the use of cannabis, gambling or homosexual practices) where law has failed most spectacularly.

[136] An often-quoted source in this regard is Sumner (1959) 55. He is of the view that legislation must be grounded in existing customs and to be viable must be consistent with these folkways. Folkways only change as life's conditions change. Aubert (1983) 23 sees Sumner as a defender of the *status quo*, in contrast to Marxist scholars who would have been sceptical about using legislation to change society and would instead choose revolution to do so. Also see point 2 below ("the values (implicitly) underpinning a given new law should not run too far ahead of society's contemporaneous *mores*") at pp 77-81 of the thesis.

[137] Morison in Livingstone and Morison (eds) (1990) 5.

[138] Sumner (1959).

[139] Morison in Livingstone and Morison (eds) (1990) 6.

[140] Morison in Livingstone and Morison (eds) (1990) 6-7.

[141] Cotterrell (1992) 55.

[142] Cotterrell (1992) 55.

the federal government nor the states set up proper enforcement machinery.[143] The most important factor, however, was the "social forces" set up against the attempt to outlaw alcohol.[144] Perhaps providing evidence of a contrary conclusion, anecdotal evidence tends to suggest that South Africa's smoking legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful, and do not smoke,[145] whether a law prohibits smoking in public or not.

Heyns sees the law as at best an instrument that expresses and summarises a society's deeper held values.[146] Civil society and a culture of volunteerism hold a society together and steers it. Education about human rights values is more important that courts enforcing these values.[147] Internalised values steer society; values that are coerced at best creates a temporary distortion.[148]

Tyler notes that laws are set up to restrain self-interested individuals from actions that are destructive to society and to coordinate individual behaviour (traffic laws are a good example.[149]) Laws can only be effective if they are obeyed and authorities must therefore be able to secure compliance. Tyler believes that a democracy depends on voluntary compliance of laws because the legal system has a limited ability to coerce or compel people into obeying laws. He refers to studies relating to drug use and drunken driving in the United States.[150] Increased penalties for drug use and large numbers of drug-related

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[143] Cotterrell (1992) 55-56. Richards in Swain (ed) (2006) 109 quotes Einstein as having said of the American experience relating to prohibition: "nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced".
[144] Cotterrell (1992) 56. Koopmans (2003) 256 argues that Prohibition failed because the population was unwilling or indifferent to the enforcement of the prohibition of "intoxicating liquors".
[145] Griffiths in Loenen and Rodrigues (eds) (1999) 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the "social civility" norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. Desmond and Boyce in Pillay *et al* (eds) (2006) 203 report that a 2003 HSRC survey on social attitudes indicated that 76% of South Africans never smokes.
[146] Heyns (1998) 26 *Aambeeld* 17.
[147] Heyns (1998) 26 *Aambeeld* 17.
[148] Heyns (1998) 26 *Aambeeld* 17.
[149] This paragraph is a summary of Tyler (2000) 25 *Law & Soc Inq* 983-985; 988 and 1000.
[150] He cites MacCoun RJ "Drugs and the Law: A Psychological Analysis of Drug Prohibition" (1993) 113 *Psychological Bulletin* 497; Nagin DS and Paternoster R "The Preventive Effects of the Perceived Risk of Arrest: Testing an

prisoners have not lessened drug use while the level of police enforcement needed to increase the risk of being caught to such a level to ensure compliance is prohibitively high. Tyler highlights morality and legitimacy as two factors that will likely lead to voluntary obeyance. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisified with court decions and will be likely to obey them.

6. Law is autonomous and self-referential.[151] This implies that (official, state) law is separate from society and relatively "immune" to society's impulses.[152]

Autopoiesis theory regards law as a self-referential system of communication. Legal communication understands the world in terms of a binary output: legal/illegal or right/wrong or yes/no.[153] Luhmann, one of the exponents of this view of law, regards law as cognitively open but normatively closed.[154] Cotterrell interprets this statement as meaning that law is able to respond to economic, scientific and political events but it interprets these events in its own terms (legal/illegal; yes/no; right/wrong) and uses its own normative criteria that is not dependent on the surrounding environment in which it operates.[155] Autopoiesis theory then seems to suggest that law cannot be used to steer society at all.[156]

Cotterrell comments on law's *isolation* in Western societies and its *separateness* from other aspects of life.[157] He mentions a number of examples: ordinary people do their best

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Expanded Conception of Deterrence" (1991) 29 *Criminology* 561; Paternoster R "Decisions to Participate in and Desist from Four Types of Common Delinquency" (1989) 23 *Law and Society Review* 7; Tyler TR *Why People Obey the Law* (1990) Yale University Press New Haven; and Ross HL *Deterring the Drinking Driver: Legal Policy and Social Control* (1982) DC Heath Lexington.

[151] Eg Hepple in Hepple and Szyszczak (eds) (1992) 29.

[152] Cf Engel in Sarat and Kearns (eds) (1995) 168: Although the impetus for new law may come from local-level movements and organizations, the norms, procedures and sanctions of law are generally *extrinsic* to particular social domains" (my emphasis).

[153] Cotterrell (1992) 67.

[154] Luhmann (1985) 283; Luhmann in Teubner (ed) (1986) 113-114; Cotterrell (1992) 65-70.

[155] Cotterrell (1992) 67.

[156] Luhmann (1985) 283; Luhmann in Teubner (ed) (1986) 113-114; Cotterrell (1992) 65-70.

[157] Cotterrell (1992) 16. However, Neumann (1986) 17 is also correct: "a legal order for its own sake is unthinkable".

to avoid courts or litigation; it is mainly lawyers that concern themselves with legal texts such as reported court decisions;[158] lawyers are professionally autonomous which means that lawyers' typical conceptions of law are very resistant to contrary views of the nature and function of the law and law is intellectually isolated in that it can be analysed without reference to the actual conditions in which it is supposed to operate.[159] Elsewhere he comments that many Acts are not understood by most individuals, or are not even aware of most Acts.[160]

Bestbier notes the alienation of individuals from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.[161] She advocates utilising the primary and secondary school system as a "nationally inclusive socialising agent".[162]

Watson presents a compelling argument.[163] In his view law is largely autonomous and not shaped by societal needs.[164] He uses two propositions to justify his view: (a) legal development has largely been constituted by legal transplantation;[165] and (b) the legal culture itself determines and controls legal development.[166] Lawmakers across societies share the same legal culture: lawyers are creatures of habit, they see laws as ends in themselves, they see law as a specialised field and this leads to an inclination to borrow from one another.[167] He states:[168]

> [T]o a large extent law possesses a life and vitality of its own; that is, no extremely close, natural or inevitable relationship exists between law, legal structures, institutions and rules on the one hand and the needs and

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[158] Cotterrell refers to a study by McBarnet that noted that "case law, originating in the everyday business of the courts, has 'a surprisingly low profile in public affairs' owing, no doubt, to its complexity and detail and the 'convoluted and archaic style in which it is presented'." Cotterrell (1992) 175.
[159] An example from a lecture hall would be my own experience in Property Law during my second year as a law student (1991): Not a word was said about the Land Act of 1913 or the racially skewed land distribution in South Africa.
[160] Cotterrell (1992) 45.
[161] Bestbier (1994) 15 *Obiter* 107.
[162] Bestbier (1994) 15 *Obiter* 108.
[163] Watson (1978) 37 *Cam LJ* 313; Watson (1982) 131 *U Pa L Rev* 1121; Watson (1987) *BYU L Rev* 353; Tamanaha (2001) 107-109.
[164] Watson (1982) 131 *U Pa L Rev* 1135; 1136.
[165] Watson (1982) 131 *U Pa L Rev* 1125; 1146. Also see Barak-Erez in Bauman and Kahana (eds) (2006) 532: "Learning from other legal systems has always been a *significant technique* for developing law" (my emphasis).
[166] Watson (1982) 131 *U Pa L Rev* 1125; 1136.
[167] Watson (1982) 131 *U Pa L Rev* 1157.
[168] Watson (1978) 37 *Cam LJ* 314-315.

desires and political economy of the ruling elite or of the members of the particular society on the other hand. If there was such a close relationship, legal rules, institutions and structures would transplant only with great difficulty, and their power would be severely limited.

It is therefore possible that no relationship will exist between "law" and "society". Watson does however admit that society may influence law. The legal elite's culture may be influenced by social values and the impetus behind new laws may have their origin in social, economic and political factors.[169] Surrounding circumstances will probably influence transplanted laws.[170] However, there is no direct relationship; "the input of the society often bears little relation to the output of the legal elite".[171]

Several characteristics of the Act bear out Watson's hypothesis. If a close association exists between a particular society and its laws, one would have expected a strongly "South African" anti-discrimination Act.[172] Although the Act contains several improvements

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[169] Watson (1982) 131 *U Pa L Rev* 1135.
[170] Tamanaha (2001) 109.
[171] Watson (1985) 17 as paraphrased by Tamanaha (2001) 109. (Watson (1989) 42 puts it somewhat differently: "Lawmakers have defects of imagination and restrictions of knowledge. They are part of society and share in the general culture and interests of society. But they develop a specialized attitude to law, arising out of the tradition in which they work. There is a lawyer's way to approach a problem. *This mode of thinking innoculates them from too much concern with the demands of society*. Lawmaking becomes an art form that can be understood only by its practitioners" – my emphasis). Perhaps the South African experience bears this out. When the final Constitution was drafted, the public was invited to send their submissions to Parliament. To my mind the legal elite to a large degree ignored these submissions. Cf Murray in Andrews and Ellmann (eds) (2001) 110-112: "If the first problem with the statistics is that they do not do justice to the public participation programme, the second is that they conceal the fact that its goals were not always clear and *leave the concrete results of the programme obscure*. In fact, some commentators were openly sceptical, describing the entire programme as an elaborate hoax, *designed to hide the fact that even the final Constitution was to be a negotiated document* and not the democratically-determined one that the ANC claimed it would be. In support of this argument, people pointed to the huge volume of submissions and asked if any politicians could be expected to review all of them. Moreover, these critics may have added, if the politicians had reviewed the submissions they would have found vague wish lists, more often concerned with poverty and the standard of living than with matters more appropriately dealt with in a constitution. The criticism of the process is not entirely unwarranted. Even those who read through the submissions found repetition rather than inspiration and in many painful requests based on deep poverty, they found the legacy of apartheid rather than a design for the future. *But the public participation programme was not intended to provide a list of matters that should be included in the Constitution. Advertising which suggested this … might be criticised for being misleading …*" (my emphasis). *Contra* Ramaphosa in Skjelten (2006) 11: "The [Constitution of South Africa] is remarkable not only for its content, but also for the extent to which the views and interests of ordinary South Africans are reflected in its provisions". Ramaphosa does not indicate which of the provisions in the Constitution he is referring to.
[172] Cf Dr SE Pheko (MP, PAC), speech at the second reading debate of the Act, reproduced in Gutto (2001) 51: "Some elements of the Bill reflect eurocentric arrogance" (in the context of "outlawing" traditional African customs) and "This Bill has aspects which are turning this country into a dustbin of the decaying values of the West…"

on typical or "orthodox" anti-discrimination legislation,[173] the heart of the Act has been borrowed from elsewhere – that is, the definition of "discrimination" and the "fairness/unfairness" enquiry. The definition of "discrimination" in section 1(1)(viii) of the Act[174] bears a strong resemblance to the definition of discrimination as set out in *Andrews v Law Society (British Columbia)*,[175] *Law v Canada*,[176] section 9(1) of the Queensland Anti-Discrimination Act,[177] section 8(1)(b) of the Australian Capital Territories Discrimination Act[178] and section 4 of the Nova Scotia Human Rights Act.[179] Some of the factors listed in section 14 of the Act (the unfairness enquiry) also appear in section 11(2) of the Queensland Anti-Discrimination Act,[180] section 9(2) of the Victoria Equal Opportunity Act,[181] section 8(3) of the Australian Capital Territories Discrimination Act,[182] section 49C of the New South Wales Anti-Discrimination Act[183] and section 58(2) of the Northern Territory Anti-Discrimination Act.[184]

7. It is very hard if not impossible to ascertain the existence or absence of a causal link between changes in law and changes in society. In the natural sciences laboratory conditions may be created to isolate and measure the impact of certain factors,[185] but this cannot be done in a functioning society in the social sciences. Chemerinsky asks how one

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[173] See the discussion in chapter 3.3 below.
[174] "'Discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly— *(a)* imposes burdens, obligations or disadvantage on; or *(b)* withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".
[175] [1989] 1 SCR 143, 56 DLR (4th) 1 at 18: "Discrimination is a distinction based on grounds relating to personal characteristics of an individual or group that has the effect of imposing burdens, or limiting access to opportunities".
[176] (1999) 1 SCR 497, (1999) 60 CRR (2d) 1 at 36: "Does the differential treatment differentiate, by imposing a burden upon or withholding a benefit from the claimant…"
[177] See Annexure E.4 below.
[178] See Annexure E.1 below.
[179] See Annexure C.8 below.
[180] See Annexure E.4 below.
[181] See Annexure E.6 below.
[182] See Annexure E.1 below.
[183] See Annexure E.2 below.
[184] See Annexure E.3 below.
[185] For example, Diamond (2005) hypothesises on the causes of the decline of (mighty) empires and societies. He identifies environmental damage, climate change, hostile neighbours, friendly trade partners and that society's response to its environmental problems. At 79-119 he considers the lost civilization of the Easter Islands, *inter alia* because of its remoteness: the nearest lands are Chile, 2300 miles to the east and the Pitcairn Islands 1300 miles to the west. By doing so, he can at least exclude the factor "hostile neighbours". At 329-357 he considers the Dominican Republic and Haiti, two countries on one island, and by doing so he can focus specifically on "that society's response to environmental problems". In the social sciences, these kinds of real-world laboratories do not exist. Cf Herbst and Mills in Clapham *et al* (eds) (2006) 9: "[W]e cannot run controlled experiments with countries …"

measures causality and argues that in modern society a clear causal link between changes in the law and changes in society will be very difficult to prove: Change will probably take place over the long term and the more far-reaching the intended change the longer it will take and the more variables will probably play into the process.[186] If the intended changes do occur, how does one ascertain if courts (or the legislature) or other social factors caused the change?[187] Handler argues along the same line: When the law changes and effects take place, what is the cause?[188] He sees law as a moral persuader or educator or a ratifier of changes that have already taken place.[189] Factors such as public opinion, timing, social and economic conditions influence the possible effect of law, and law sometimes have completely unintended consequences.[190]

8. Authors disagree on the ability of law to control or steer attitudes and beliefs as opposed to observable behaviour.

Optimists include Berger, Kidder and Chemerinsky. These authors believe that laws may be used to influence attitudes. Berger is of the view that in an urban and secular society a high number of social relations exist that fall within law's ability to influence it, and by steering these "external acts", have an influence on the attitudes behind the external acts.[191] Kidder cites studies that showed an improvement in racial attitudes after the United States school desegregation decision.[192] He notes that one way of explaining this improvement is what psychologists call cognitive dissonance - people cannot persistently act in contravention of their conscience, beliefs and values.[193] If law prevents a person from acting in a particular way, people develop new values to fit the actions of what they

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[186] Chemerinsky in Devins and Douglas (eds) (1998) 192-193.
[187] Chemerinsky in Devins and Douglas (eds) (1998) 192-193.
[188] Handler (1978) 37.
[189] Handler (1978) 37.
[190] Handler (1978) 37.
[191] Berger (1952) 172; Cotterrell (1992) 54.
[192] Elsewhere Kidder (1983) 124 points out that the same people's attitudes were not ascertained over time; the studies related to random population selections at three set points in time. He notes that many things happen over time besides people's exposure to legal decisions. A change in attitude does not necessarily translate into a change in behaviour and perhaps the people questioned gave what they thought to be "respectable" answers to the survey questions.
[193] Kidder (1983) 119.

find themselves doing.[194] Chemerinsky argues that if a court changes the law and the change in law affects society, it is irrelevant if attitudes change.[195] He refers to court decisions invalidating Jim Crow statutes:

> Ultimately the 'whites only' signs were taken off restrooms and water fountains and parks and beaches. If this occurred without a change in attitude, it still was valuable and important. Perhaps, too, it caused a change in attitudes over time. Either way, there was an effect, and few would deny that it was positive.[196]

Then Chemerinsky retreats: Public opinion is affected by numerous factors and to try to ascertain courts' role in the mix is probably impossible.[197] To charge an undemocratic, insular body (that must interpret an antimajoritarian document) with affecting public opinion is too much to ask.[198]

Cotterrell, Pound, Wilson, Allott, Friedman and Rosenberg are less enthusiastic about law's ability to effect changes in beliefs.[199]

Pound was of the view that law could not be used to control attitudes and beliefs but could only attempt to control observable behaviour.[200] By interpreting works by Pound and Ehrlich, Cotterrell argues that law cannot be used to control attitudes and beliefs but can only attempt to control observable behaviour.[201] Laws must be able to be enforced to influence behaviour.[202] If laws are to be enforced by state agencies, a high degree of

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[194] Kidder (1983) 119.
[195] Chemerinsky in Devins and Douglas (eds) (1998) 195.
[196] Chemerinsky in Devins and Douglas (eds) (1998) 195.
[197] Chemerinsky in Devins and Douglas (eds) (1998) 195.
[198] Chemerinsky in Devins and Douglas (eds) (1998) 195. Kollapen in *Sunday Times* (2005-04-03) 18 vacillates on the issue. He relates his own tale of being denied admission to a hair salon ostensibly because the staff couldn't cut "coloured people's hair". He decided to lodge a claim with the nearest equality court, which awarded R10 000 in damages, to be paid to a charity. At the start of the article he argues that "we succeeded ... in changing the attitudes of a small group of people". However, his conclusion is much more tentative: "I will soon visit [the salon] again. *I certainly hope* that when they welcome me as a client *they will do so not because of the compulsion of a court order* but because the experience they endured has taught them to accept and respect me as a fellow South African ..." (my emphasis).
[199] Sen in Drobak (ed) (2006) 254 may also be added to this list. He states that on matters of attitudinal change, legislation would be difficult and most likely quite ineffective.
[200] Pound (1917) 3 *ABA J* 55; Cotterrell (1992) 51.
[201] Cotterrell (1992) 51.
[202] Cotterrell (1992) 51.

clarity must be sought.[203] He notes that state-enforced sanctions appear to be useless in many areas of social life and tend to disrupt rather than harmonise social relations.[204]

Wilson believes that law has a limited role in causing societal changes. He argues that public opinion changes because dramatic events take place, such as a war or a depression, because of extraordinary leadership or a repeated circulation of ideas in the media.[205] In other words, public opinion does not change because a law prescribes that it should change.

Allot states that people obey laws because they see it as to their advantage to do so, or because they have formed the habit to do so, of because the appropriate authority has put in place an effective compliance-ensuring mechanism.[206] He does not seem to pay much heed to the moral pressure that laws possibly exercise. He refers to the notion of superficial conformism: people who sense that their opinions are in conflict with the official line, will keep their opinions to themselves and outwardly conform to what seems to be the approved version.[207]

Friedman departs from the premise that people are selective; they choose which laws they approve of and choose specific laws to strengthen already-held beliefs about right and wrong. [208]

Rosenberg is very pessimistic about a court's ability to change popular beliefs.[209] He refers to the American Supreme Court *Dred Scott* decision which upheld the constitutionality of slavery on the eve of the outbreak of what would come to be known as

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[203] Cotterrell (1992) 51.
[204] Cotterrell (1992) 52.
[205] As discussed by Handler (1978) 39. Handler (1978) 220 puts it somewhat differently: "Wilson… argue[s] that social change only really comes about by dramatic events, political entrepreneurs, or the gradual change of public opinion". From this perspective, one could argue that it was not the enactment of the interim Constitution that led to greater tolerance between the polarised racial groups in South Africa, but incidents such as President Mandela's appearance in a Springbok jersey at the 1995 Rugby World Cup.
[206] Allott (1980) 40.
[207] Allott (1980) 231-232.
[208] Friedman (1975) 111-124; Handler (1978) 218.
[209] Rosenberg in Devins and Douglas (eds) (1998) 173.

the American Civil War.[210] The court's ostensible purpose was to avoid that war but instead it only "fanned the flames".[211] Rosenberg writes "when emotions run high, as they do over issues of equality, one might think it unlikely that the Court's decisions would change opinions".[212] He makes the common sense assumption that to be able to influence opinions, people must know what courts do.[213] However, most Americans are largely ignorant and care very little about courts, including the Supreme Court. He refers to a few studies: In 1966, 40% of the American public could not identify Earl Warren and in 1989, less than ten percent could name the chief justice.[214] In 1966, 46% of the survey population could not recall anything that the Supreme Court had done in the recent past.[215] The Court also receives very limited press coverage.[216] Studies of newspaper coverage of issues relating to African Americans after *Brown* do not indicate an increase in coverage relating to racial equality; coverage only improved with the massive demonstrations of the 1960s.[217] Surveys in the American South following *Brown* contain no indication that the decision facilitated a change of heart and Rosenberg concludes that people supportive of integration were probably supportive of it before *Brown*.[218] African Americans also did not show enthusiastic support for *Brown*.[219] Rosenberg refers to similar studies relating to abortion,[220] affirmative action,[221] women's rights[222] and sexual orientation[223] and concludes: "The findings are consistent: there is no evidence supporting the power of the Court to increase support for racial or gender equality".[224] He argues that the reason for courts' inability to influence attitudes is as follows:[225]

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[210] Rosenberg in Devins and Douglas (eds) (1998) 173.
[211] Rosenberg in Devins and Douglas (eds) (1998) 173.
[212] Rosenberg in Devins and Douglas (eds) (1998) 173.
[213] Rosenberg in Devins and Douglas (eds) (1998) 174.
[214] Rosenberg in Devins and Douglas (eds) (1998) 174.
[215] Rosenberg in Devins and Douglas (eds) (1998) 174.
[216] Rosenberg in Devins and Douglas (eds) (1998) 174-175.
[217] Rosenberg in Devins and Douglas (eds) (1998) 175.
[218] Rosenberg in Devins and Douglas (eds) (1998) 177.
[219] Rosenberg in Devins and Douglas (eds) (1998) 179.
[220] Rosenberg in Devins and Douglas (eds) (1998) 183-184. Rule and Mncwango in Pillay *et al* (eds) (2006) 270 report that American attitudes relating to abortion had not varied significantly in the last decade.
[221] Rosenberg in Devins and Douglas (eds) (1998) 180-181.
[222] Rosenberg in Devins and Douglas (eds) (1998) 185-186.
[223] Rosenberg in Devins and Douglas (eds) (1998) 186-187.
[224] Rosenberg in Devins and Douglas (eds) (1998) 187.
[225] Rosenberg in Devins and Douglas (eds) (1998) 187.

As anyone who has ever debated issues of racial or gender equality can attest, opinions on such issues are often deeply held. It is naïve to expect an institution seen as distant and unfamiliar, shrouded in mystery, and using arcane language and procedures to change people's views.

South African empirical research tends to disprove Davis's view that "the judiciary shapes public opinion".[226] The Human Sciences Research Council conducted a "South African Social Attitudes Survey" in 2003, the results of which was published in 2006.[227] This study indicated that the South African public's attitude relating to issues such as the death penalty, sexual orientation and abortion are "out of sync with government policies".[228] The authors of the study conclude that "South Africans still come across as ... racist, homophobic, sexist, xenophobic and hypocritical", [229] and that "ten years of democracy seem to have done little to moderate what can be described as hard-line, authoritarian attitudes on such politico-social issues as capital punishment and gay sex".[230] A number of Constitutional Court judgments have been handed down where the values of compassion and tolerance have been preached.[231] These judgments have clearly not found their way into the hearts of South Africans.

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[226] Davis (1999) 11.
[227] Pillay *et al* (eds) (2006).
[228] Pillay in Pillay *et al* (eds) (2006) 10. Rule and Mncwango in the same source at 272 argue that "[South Africa's] new Constitution and legal regime are thus at odds with the core beliefs of a large proportion of its electorate" while Orkin and Jowell at 297 note that "despite South Africa's extremely progressive Constitution, the majority of South Africans are still very traditionalist on all these moral issues".
[229] Pillay in Pillay *et al* (eds) (2006) 10; Roger *et al* in the same source at 20.
[230] Daniel *et al* in Pillay *et al* (eds) (2006) 20. At 36 the authors state that, based on the survey, despite the Constitutional Court judgment outlawing the death penalty (*S v Makwanyane* 1995 (2) SACR 1 (CC)), 75% South Africans favour, and 50% strongly favour, the reintroduction of the death penalty for murder. Despite s 12(2)(a) and (b) of the Constitution and *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T), 74% of respondents regard abortion to be wrong in some respect with 56% of respondents disapproving of abortion even where there is a strong chance of the baby suffering a serious defect. Despite a ruling such as *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 78% of respondents thought gay sex was always wrong. (A 1995 HSRC survey of public opinion showed that 54% of respondents were strongly opposed and 10% of respondents somewhat opposed to equal rights for heterosexual and homosexual marriages – Rule and Mncwango in the same source at 255. An empirical study conducted in 2004 showed that more than 50% of the black gay respondents interviewed felt that the broader South African society's attitudes towards homosexuals had not improved since the coming into effect of the new constitutional order – *Beeld* (2007-01-17) 9.) Dawes *et al* in Pillay *et al* (eds) (2006) 239 report that 75% of women in three provinces thought that it was sometimes acceptable for adults to hit each other and more than 50% of girls between 10 and 19 years of age thought that forcing sex on someone you knew was not sexual violence, despite s 12(1)(c) and (e) in the Constitution and cases such as *S v Baloyi (Minister of Justice intervening)* 2000 (2) SA 425 (CC) and more to the point, *S v Njikelana* 2003 (2) SACR 166 (C).
[231] *Prince v President of the Law Society of the Cape of Good Hope* 2002 (1) SACR 431 (CC) paras 57, 79, 147; *S v Lawrence; S v Negal; S v Solberg* 1997 (2) SACR 540 (CC) para 147; *S v Makwanyane* 1995 (2) SACR 1 (CC) paras

9. A ninth approach is to argue (sometimes implicitly) that legal classifications are artificial. People do not function according to legal precepts; legal principles are mental constructs to find a solution "after the fact". When the incident that forms the background to the ensuing court case occurred, the legal principles were absent. The implication is clear – law plays (virtually) no role in influencing human behaviour; legal rules come into play after the event to "solve" a "problem". Permit me a longish detour to expand on this strand of thought.

Jeffrey seems to believe that in the majority of cases it is completely wrong to think of legal rules having "governed" behaviour.[232] He points out that in most civil and criminal cases, the so-called "rules" that are supposed to govern human behaviour, only come into play *after* the incident.[233] He uses an example from contract law to explain his view: Suppose two businesspeople draft a shipping contract but for whatever reason fail to include a provision on what should happen if the cargo does not arrive safely or is delayed. Assuming the cargo does not arrive and assuming the parties fail to reach a settlement, the matter proceeds to court where lawyers use whatever methods are available to "cope with the situation"; to talk of the rules of contract law "governing" the parties' behaviour is fallacious.[234] Similarly, the rules of law of delict cannot be said to have regulated drivers' behaviour involved in a motor accident (unless they were both attorneys, perhaps.[235])

Boshoff states that

> [E]veryday life, and the slices of everyday life that appear before the courts, do not readily fit into the classifications that the law forces upon them. There are, however, always and only situated contexts of

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249, 308, 369, 391; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 102.

[232] Jeffrey in Brantingham and Kress (eds) (1979) 27-40.

[233] Jeffrey in Brantingham and Kress (eds) (1979) 34.

[234] Jeffrey in Brantingham and Kress (eds) (1979) 34-35. Compare what a South African businessman said in testimony in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 491 (SCA) para 38: "It is not our practice to finalise our deals in a court of law, that certainly doesn't appeal to us at all".

[235] Jeffrey in Brantingham and Kress (eds) (1979) 35.

action, with real people in real situations, imbued with all the particularities of history, culture and preconceived value.[236]

In the South African context, a study by Joubert provides a striking example of Jeffrey's hypothesis.[237] The legislature and presumably courts as well, assume that people will take cognisance of the law when "planning" their behaviour - why else shall we bother drafting and applying laws in the first place? However, Joubert's study would suggest that law plays virtually no role in people's daily decisions:

In November 1982, more than a decade before the advent of a democratic South Africa, a coloured school principal had to write an Afrikaans-Dutch examination together with three white students in a small town in the Cape countryside. They were all students at a non-residential university. A minister of the local Reformed Dutch church acted as invigilator and thought it prudent to let the school principal write his examination separate from the three white candidates. The white candidates wrote their examination in the vestry while the principal wrote his examination in the kitchen. The principal approached the media after the incident and for a number of weeks especially *Die Burger*, a mainstream-Afrikaans Cape-based daily newspaper, covered stories, statements and letters from readers on the incident. Joubert analysed the reasons given by various parties either condemning or defending the minister's decision. He divided the various reactions into 12 categories:

The so-called "immediate reactions" all condemned the minister and included judgments such as insulting (*vernederend*), disgusting, irresponsible, unfortunate, cold rage, insensitive (*onsensitief*), shocking (*ontstellend* and *skokkend*), without tact (*taktloos*), sad (*hartseer*) and "a match that should never have been struck" (*'n vuurhoutjie wat nooit getrek moes gewees het nie*). The second-highest number of reactions (84) related to the minister personally. 41 of these reactions condemned him; 43 defended him.[238] Of the

[236] Boshoff (2002) *TSAR* 758-759.
[237] Joubert (1991) 22 *S Afr J Sociol* 59.
[238] Joubert *inter alia* lists the following examples of statements justifying his behaviour: "minister was scared that he would be setting a precedent" (*hy was bang hy stel 'n presedent*); "it was the first time that he had invigilated at an

reactions condemning him, only one used a legalistic term: "the minister regards *discrimination* as a right" *(hy beskou diskriminasie as reg*).[239] 19 reactions commented on the room allocated to the principal.[240] Only four reactions mentioned local conditions: "Parishioners would have felt aggrieved had he allowed the principal to write together with the white students" (*gemeentelede sou andersinds beswaard voel*); "the public did not have regard to the minister's action in his particular circumstances" (*publiek sien nie dominee se optrede teen agtergrond van omstandighede nie*); "the townsfolk's profile includes very conservative and very liberal/progressive people" (*die dorp wissel van uiters konserwatief tot uiters liberaal*); "minister's task is difficult in a *Boland* town" (*taak nie so maklik op so 'n Bolandse dorp nie*). 12 reactions related to organisational regulations.[241] Six reactions related to the minister's position and role expectation.[242] The highest number of reactions (85) had church and religion as its focus. 78 reactions condemned the

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examination" (*dit was sy eerste eksamentoesig*); "he will and had resolved the matter with the principal" (*hy sal en het die saak met die onderwyser uitgepraat*); " he prayed" (*hy het 'n gebed gedoen*); "it was a judgment error and who does not make mistakes" (*dis 'n oordeelsfout en wie maak nie foute nie*).

[239] Reactions condemning the minister included the following: "minister's blaming of the school principal was pathetic and laughable" (*dominee se blamering van die onderwyser is pateties en belaglik*); "he hides behind the church council" (*hy skuil agter die kerkraad*); "how would he have reacted if he had to write the examination in the kitchen" (*hoe sou die dominee reageer as hy in 'n kombuis moes eksamen skryf*); "he destroys all the good in one moment" (*hy vernietig in een oomblik al die goeie*); "he lives in one way on Monday and in another way on Sunday" (*hy leef Maandae anders as Sondae*); "how did he invigilate in different rooms" (*hoe het hy toesig gehou in verskillende vertrekke*); "he plays into the hands of the enemy" (*hy speel in kaarte van die vyand*).

[240] Reactions defending the minister included: "the kitchen was in the minister's opinion the best place to write in the circumstances" (*die kombuis was na die dominee se oordeel die beste skryfplek onder omstandighede*); "the principal was satisfied with the room" (*die onderwyser was tevrede met die skryfplek*); "what more is needed than a table, chair, light and air" (*wat meer as tafel, stoel, lig en lug is nodig*); "the kitchen is the quietest area in the church complex (*dis die stilste vertrek in die kerkkompleks*); "it is to be regretted that the word 'kitchen' was used" (*dis jammer dat die woord kombuis gebruik is*). Reactions condemning the minister included: "it is not the place but the separation of the candidates that is the issue" (*dis nie die plek nie maar die skeiding wat saak maak*); "the church complex was built with money given to God in gratitude" (*die kerkkompleks is gebou met dankoffergeld wat God toekom*); "only God's will is relevant when considering the use of church buildings" (*net die wil van die Koning geld vir die gebruik van kerkgeboue*).

[241] These reactions *inter alia* included the following: "the church council decides on matters relating to church buildings" (*die kerkraad besluit oor sy geboue*); "if the minister acted differently he would have had to answer to the church council" (*ander optrede sou die dominee by die kerkraad in die moeilikheid bring*); "the minister's actions corresponded with church council decisions that the minister had to adhere to" (*die optrede is is ooreenstemming met kerkraadsbesluite wat die predikant moes gehoorsaam*); "must a minister be more faithful to a church council? (*moet 'n predikant 'n kerkraad meer gehoorsaam wees?*)

[242] These reactions were: "is this 'n man that called himself a Dutch Reformed minister? (*'n man wat homself 'n NG predikant noem*); "cannot believe a minister could do such a thing"; "the conduct is unbecoming of a minister" (*die optrede is 'n leraar onwaardig*); "that a leader could act in this way to a neighbour" (*dat 'n leier só teenoor 'n naaste kan optree*); "spiritual leaders must set an example" (*geestelike leiers moet 'n voorbeeld stel*); "one should remember that a minister said and acted in this way" (*mens moet onthou dit is 'n predikant wat só sê en doen*).

incident; seven defended it.[243] The category "politics and state policy" included 17 reactions.[244] "Folkways" accommodated 73 reactions; 15 defending the minister and 58 condemning him. Three of these reactions explicitly referred to "discrimination": "this is a kind of race discrimination, possibly even racism" (*hierdie is 'n soort rassediskriminasie, moontlik selfs rassisme*); all of us discriminate indirectly" (*ons almal wat onregstreeks diskrimineer*) and "it is almost impossible to negotiate a better future when such daily instances of discrimination occur" (*dis byna bomenslik om 'n beter bedeling te beding met sulke daaglikse diskriminasie*).[245] 32 reactions related to the media's role in the controversy.[246] Joubert allocated 13 reactions to the category "values". All of these

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[243] Reactions defending the minister included: "inconsistent Synod decisions exist that confuse ministers" (*daar bestaan teenstrydige Sinodebesluite wat leraars verwar*); "the Synod's attitude displays arrogance" (*die houding van die Sinode openbaar heelwat arrogansie*); "we are aware of other parishes with open doors" (*ons is bewus van ander gemeentes wie se deure oop is*); "we must forgive and must pray for harmony" (*ons moet vergewe en bid vir harmonie*). Comdemnatory reactions included the following: "writing in the kitchen implies that the Coloured is not welcome in a white church" (*kombuisskrywery impliseer dat die Bruinman ook nie in die blanke kerk welkom is nie*); "this indicates that the Dutch Reformed Church is not honest when it talks about openness" (*dis 'n aanduiding dat die NGK nie opreg is met oopheid nie*); "culmination of a church's approval of apartheid" (*kulminering van kerk se sanksionering van apartheid*; "confirms criticism against DRC in Ottawa"; "Synod decision passes the buck"; "an embarrassment to church"; "Synod allowed incident by leaving decision to church councils"; "cannot be justified on biblical grounds"; "Synod declared racism sin – kitchen examination is also racism" (*Sinode het rassisme sonde verklaar – kombuiseksamen is ook rassisme*); "woe to us, that closed white tempels testify against us" (*wee ons, dat geslote wit tempels teen ons getuig*).

[244] These reactions included the following: "it appears to be a crime to have a white skin" (*dit lyk asof dit 'n misdaad is om 'n wit vel te hê*); "until recently this particular university let its students write separately" (*tot onlangs toe het die betrokke universiteit sy studente apart laat skryf*); "when apartheid becomes a pseudo religion, it is a mistake" (*'n optrede waar apartheid 'n pseudo-godsdiens word, is 'n dwaling*); "apartheid is the sin of the century" (*apartheid is die sonde van die eeu*; "apartheid infringes the dignity of mere mortals" (*apartheid raak die eer van die nietige mens*); "this is apartheid in its naked, ugly form that our country cannot afford anymore" (*dis apartheid in sy naakte, lelike vorm wat ons land nie meer kan bekostig nie*; "the government can forget about its initiatives if this happens so often" (*regering kan vergeet van inisiatiewe as dit so dikwels gebeur*); "if the government had an explicit policy in place relating to the application of or dismantlin of apartheid this would not have happened" (*indien die regering 'n duidelik uitgespelde beleid ten opsigte van die toepassing of afskaffing van apartheid gevolg het, sou die insident nie plaasgevind het nie*); "PW Botha [the then prime minister] must continue – the entire South Africa will follow (*PW Botha moet voortgaan – hele Suid-Afrika sal volg*).

[245] Other reactions included: "incident did not promote good relations between races"; "we should avoid behaviour which is belittling and degrading"; "good race relations were impaired" (*goeie rasseverhoudings is afgebreek*); "whites actinf as the minister did are a minority" (*blankes wat soos die dominee optree in die minderheid*); "coloured citizens must be treated with dignity" (*kleurlingburgers moet menswaardig behandel word*); "this is not an unusual incident – an entire generation had to cope with it" (*dis mos nie 'n uitsonderlike geval nie – 'n hele geslag moes hiermee verlief neem*); "this kind of thing has a 300 year history"; "these kind of incidents are unavoidable and will contunue for a long time" (*hierdie insidente is onvermydelik en sal nog lank aanhou*); "are we consistent – why are out children still in segregated schools" (*is ons konsekwent – hoekom is ons kinders dan nog in aparte skole*).

[246] These reactions included the following: "it is important that the media continues to act as a watchdog" (*dat die koerante nie skroom om hul waghondfunksie te vervul nie, stem tot dankbaarheid*); "one should be glad that an uproar followed" (*'n mens moet seker bly wees oor die ontsteltenis*); "reporters wish to tear parish and community apart" (*verslaggewers wil die gemeente en die gemeenskap uitmekaar skeur*); "incident caused no danger to the country – but the momentum created via the media is abused for political gain" (*insident hou geen gevaar vir land in nie – maar*

reactions condemned the incident as "unChristian". And finally, 14 reactions focused on image.[247]

One could differ about the categories that Joubert chose as it is not always clear why a particular reaction was not classified under another heading and some reactions could plausibly be put under more than one heading. It should also be pointed out that the incident occurred in 1982, some eight years before FW de Klerk's Rubicon speech and more than a decade prior to the first democratic elections. Perhaps more crucially, in 1983 the ruling National Party introduced a new constitution, whereby so-called "coloureds" and Indians received limited representation in Parliament. The incident was mainly covered in the Afrikaans press (very few of the reactions were recorded in English) and it is at least arguable that *Die Burger*, one of the National Party's mouthpieces at the time, wished to use the incident to illustrate that the majority of Afrikaners deplored bad treatment of "coloureds". Had the principal been African, I doubt whether the same proportion of reactions condemning the minister's behaviour would have been recorded.

That being said, it is still of value to consider to what extent correspondents utilised the law or legal concepts to justify or condemn the minister's behaviour. Joubert listed more than 370 "reasons" why the minister should or should not have acted in the way that he did. Very few of the offered reasons invoked the law and those that did, only did so very indirectly – only five correspondents used the phrase "discrimination" and only a further 17 respondents referred to Apartheid as state policy directly or implicitly. Had the matter proceeded to court, trained lawyers would not have used any of the offered arguments as they would have been regarded as "irrelevant". Had the matter proceeded to court in 1982, perhaps some obscure part of Apartheid legislation would have been used to justify

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die momentum wat deur die kommunikasiemedia daaraan verleen word, is dikwels vir politieke gewin); "these days there are many newspaper reports relating to non-whites (sic) that were mistreated" (*daar is deesdae altyd berigte oor nie-blankes wat te ná gekom is*); "media reports sets up brother against brother" (*persberigte sweep blankes teen mekaar op*).

[247] These reactions included the following: "the church council regrets the incident and the publicity" (*die kerkraad is jammer oor die voorval en publisiteit*); "the incident created a bad example" (*die voorval stel 'n slegte voorbeeld*); "the parish and South Africa cannot afforf the example" (*die gemeente en Suid-Afrika kan die voorbeeld nie bekostig nie*); "damage to South Africa's image abroad" (*skade aan Suid-Afrika se beeld in buiteland*); "international embarrasment for country and university" (*internasionale verleentheid vir land en vir universiteit*); "our enemies rejoice about this incident" (*ons vyande is bly*).

the minister's conduct. Had a similar event occurred in post-1994 South Africa, the Constitution or the Act would have been in play and lawyers would have argued about the absence or presence of "discrimination", as defined in the Act, and whether the discrimination, if proven, was "fair" or "unfair".[248] In other words, had any of these correspondents been faced with the minister's situation, and assuming that they would have acted in accordance with their "reasons",[249] "the law" would not have featured large in deciding what to do.[250]

2.5 Characteristics of effective law

The authors referred to above all share a pessimistic, or at least critical, outlook (at least implicitly) on the ability of law to drive a societal transformation project. More optimistic authors have attempted to identify characteristics of effective laws, which I deal with below.

To consider whether a particular Act has been or will be effective in accomplishing its purpose, that Act's goals or objectives first have to be established.[251] It is not necessarily an easy task to

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[248] Tushnet as set out by Crenshaw (1988) 101 *Harv L Rev* 1353 says that the language of rights "undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse". The author provides the following example at 1353 n85: "When I march to oppose United States intervention in Central America, I am 'exercising a right' to be sure, but I am also, and more importantly, being together with friends, affiliating myself with strangers, with some of whom I disagree profoundly, getting cold, feeling alone in a crowd, and so on. It is a form of alienation or reification to characterize this as an instance of 'exercising my rights'. The experiences become desiccated when described in that way". However, who describes a march as "exercising our rights", barring a few pretentious lawyers? Ordinary people will describe their outing in precisely the same terms that Tushnet does: being with friends, getting to know people, getting cold. Law does not intrude. Law does not alienate. Law is simply mostly absent. Should the extraordinary occur and a court case ensues, ordinary people will describe the outing in ordinary words to their lawyers and the court, and the lawyers will use "rights-talk" to argue the case in court. The experience in court may be alienating to a layperson, but this is not unique to law and the legal profession. I complain to my doctor in "ordinary" words and he responds in medical jargon. He scribbles a prescription in illegible handwriting, leaving me bewildered. When my brother, a mechanical engineer, talks about his latest project, I am lost.

[249] It could be argued that verbalisation and internalisation are two separate matters; that the mere fact that "the law" as such is not articulated, is not necessarily indicative of the fact that the law plays no part in the life worlds of individuals.

[250] I acknowledge that there are limits to this argument. The selection of "arguments" is not representative as only views expressed in newspapers were taken into account. I also assume that every commentator would have acted in the way that they expressed themselves; ie if someone had reacted negatively to the minister's behaviour, that they would have let all the candidates write in the same venue. If one collects data on human behaviour; if one wants to know why people acted in a particular way, you either have to *imagine* it, but this is a socially conditioned process, or you have to *ask* them but then one gets "in order to" and "because of" motives; "the response to [the] question is filtered through the same social process: whatever the motivation might have been before the act, what we get is a statement of motivation that makes sense of the act after it has happened". Dingwall (2000) 25 *Law & Soc Inq* 891.

[251] Pollitt (2003) 9; Zammuto (1982) 17; 28-29. Macfarlane in Swain (ed) (2006) 101 considers the "effectiveness" of laws more broadly. He suggests that the following indices of effectiveness exist: whether "rule of law" exists, the degree to which people abide by legal decisions, the degree to which citizens or subjects feel protected by their laws

establish these goals. Allott uses the following example:[252] Suppose the conviction rates of burglaries and murder dramatically increase, are the laws prohibiting burglaries and murder effective or ineffective? (If the aim of these laws is to punish transgressors, they may be seen as effective. The more likely aim is however to prevent burglaries and murders from occurring in the first place, and then high conviction rates may be seen as a symptom of the failure of these laws.) Kidder points out that it must always be considered *why* a particular law was put in place and refers to a stop sign in an absurd position – such a traffic sign was probably put in place to generate income for the local authority and has little, if anything, to do with traffic safety.[253] Similarly, an anti-discrimination law may be put in place merely for its symbolic value and it is feasible that the drafters of such an Act never intended it to have any measurable effect, despite what they may have said in public when the Act was promulgated.

An assessment of a specific Act's effectiveness is also further contingent upon the framing of the goal of that specific Act. For example, Chemerinsky refers to Rabkin who argued that anti-discrimination legislation has not succeeded in the United States because income disparities based on race has continued.[254] Chemerinsky asks why it must be assumed that income is the only measure of success.[255] He argues that anti-discrimination legislation would have succeeded if it resulted in less discrimination and more jobs being available for blacks, even if the black-white wealth gap remains.[256] It is clear that Rabkin and Chemerinsky have radically different goals in mind for anti-discrimination legislation and as a result have different views on the (in)effectiveness of such laws. Once a particular Act's goals have been established, it is possible to consider the Act's weaknesses and its potential in effecting change. Assuming that it is possible to reach agreement on a particular Act's aims, I will use the phrase "effective legislation" in the sense of legislation that broadly speaking seems able to, or have met, its stated goal(s).

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and legal processes, the degree to which the public trusts the law, and whether people feel the law runs with their interests and not against them. I would categorise most of his indices as part of a question into the *legitimacy* of a particular legal order and not primarily as indices of *effectiveness*. Of course it may be argued that to be effective, any legal order also has to be (at least to a degree) legitimate in the eyes of the subjects. See chapter 5 below for the results of an empirical survey in greater Tshwane, 2001, that suggests that South African law is not legitimate in the eyes of the majority of subjects.

[252] Allot (1980) 30.

[253] Kidder (1983) 193.

[254] Chemerinsky in Devins and Douglas (eds) (1998) 193.

[255] Chemerinsky in Devins and Douglas (eds) (1998) 193.

[256] Chemerinsky in Devins and Douglas (eds) (1998) 193.

It is possible to extract the following characteristics of effective legislation from the available literature. It would seem that roughly 18 criteria may be identified according to which a particular Act may be measured to gauge its effectiveness. There may well be some overlap between these criteria.

1. To put it bluntly, the legislature must be realistic.

1.1 The goal of the lawmaker must be realisable through law.[257] This seems to be a somewhat circular requirement because one will only know if the goal is realisable by measuring it against criteria for effective legislation, and if the criterion is simply "the goal must be realisable", it leaves the legislature stranded. Pound suggests a way out. He argues that the following goals will not be realisable:[258]

> Another set of limitations grows out of the intangibleness of duties which are morally of great moment but legally defy enforcement ... A third set of limitations grows out of the subtlety of modes of seriously infringing important interests which the law would be glad to secure effectively if it might. Thus grave infringements of individual interests in the domestic relations by talebearing or intrigue are often too intangible to be reached by legal machinery ... A fourth set of limitations grows out of the inapplicability of legal machinery of rule and remedy to many phases of human conduct, to many important human relations and to some serious wrongs. One example may be seen in the duty of husband and wife to live together and the claim of each to the society and affection of the other.

1.2 The required change must be able to be implemented and to be strongly enforced.[259]

1.2.1 Rules will be enforced that are highly visible, cost little and do not affect competition.[260] Handler suggests that, based on this criterion, a law obliging warning labels on cigarette

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[257] Morison in Livingstone and Morris (1990) 9.
[258] Pound (1917) 3 *ABA J* 66-67.
[259] Morison in Livingstone and Morris (1990) 9; Ehrlich (1922) 36 *Harv L Rev* 138; Coussey in Hepple and Szyszczak (eds) (1992) 46-47. This is one of the reasons why Apartheid ultimately failed – in the face of increasing and ultimately unpoliceable disobedience, influx control, and with that the notion of separate development, collapsed. Cf MacDonald (2006) 69. Also see Hirsch (2005) 208: "Perhaps the most important reason for the apartheid government's turnaround on the economic rights of Africans was its recognition that it had lost the war against the urbanisation of Africans".
[260] Handler (1978) 16-17.

packages would be enforceable.[261] Meat inspection however is of low visibility because consumers cannot easily detect violations and profits are to be made if substandard meat is sold and therefore requires a major effort to ensure compliance.[262] Handler provides additional reasons why enforcing meat inspection laws are difficult: "a large number of inspectors making hundreds of decisions each day … throughout the country; it is extremely difficult to monitor their actions, let alone change their behaviour".[263] For the same reason laws targeting the police, welfare agencies, hospitals, mental institutions or prisons would also face serious implementation challenges.[264] Friedman argues that enforcement depends on "ease of detection and enforcement".[265] He argues that for some laws there are many potential violators who can violate that law in many places, such as a law against "jaywalking".[266]

A South African example bears this out. Legislation protecting farm workers is not easily enforceable as many farmowners are potential violators of these laws, and it is not in farm owners' interests to adhere to the formal and drawnout evictions proceedings. In an empirical study completed in 2005 it was shown that from 1994-2004, approximately 930 275 farm labourers and their dependents were illegally evicted from farms.[267] It is not surprising that the study concluded that only about 1% of evictions that occurred after 1997 were performed in terms of the relevant legislation.[268] In six out of seven cases the farm workers had no legal representation when their eviction case was heard in court.[269] On the other hand, coal mine safety laws can only be violated by (a few) coal mines and such laws are more likely to be effective.[270]

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[261] Handler (1978) 16-17.
[262] Handler (1978) 19.
[263] Handler (1978) 19.
[264] Handler (1978) 19.
[265] Friedman (1975) 86-87.
[266] Friedman (1975) 86-87.
[267] *Sake24 (Beeld)* (2007-03-19) 12.
[268] *Sake24 (Beeld)* (2007-03-19) 12.
[269] *Sake24 (Beeld)* (2007-03-19) 12.
[270] Friedman (1975) 86-87.

1.2.2 Enforcement agents must be committed to the behaviour required by the law, even if not to the values implicit in it.[271] Members of the police, judiciary and health services are often tasked with the eradication of a targeted practice, and if these officials are not committed to achieve the required change, adequate public support will likely not follow.[272] Evan refers to the Prohibition Amendment in the United States – he argues that one of the major reasons why Prohibition failed was that local police forces were mainly tasked with enforcing the ban on alcohol consumption, and these local police officials were often disrespectful of the ban.[273]

1.2.3 If laws are to be enforced by state agencies, "a high degree of clarity is important",[274] and objectively measurable results should be put in place.[275] A law that does not establish a clear standard or that is ambiguous or too flexible will facilitate avoidance.[276]

1.2.4 The source of the new law must be "authoritative and prestigeful".[277] Evan utilises this criterion to argue that legislation is the most effective way of effecting change, when for example compared to court decisions.[278]

1.3 The change-inducing law must provide for effective remedies.[279] In Chemerinsky's opinion, for example, school desegregation efforts failed largely because courts failed to formulate effective remedies for segregated schools.[280] American cities are largely

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[271] Evan in Evan (ed) (1980) 559; Packer (2002) 169.
[272] Packer (2002) 169.
[273] Evan in Evan (ed) (1980) 559.
[274] Cotterrell (1992) 51.
[275] Coussey in Hepple and Szyszczak (eds) (1992) 46-47. In the United States a presumption of unfair discrimination exists when a 20% or more difference in impact on different groups occur - Hepple (1997) 18 *ILJ* 607.
[276] Friedman (1975) 59; Hepple (1997) 18 *ILJ* 606-607.
[277] Evan in Evan (ed) (1980) 557. Also cf Coussey in Hepple and Szyszczak (eds) (1992) 46-47.
[278] Evan in Evan (ed) (1980) 557-558. In a somewhat different context, Stout in Drobak (ed) (2006) 32 argues that "other-regarding norms" are likely to be followed if the targeted population believes that these norms are supported by a respected authority. She states that courts and legislatures can play this role, even without the actual impositioning of sanctions.
[279] Evan in Evan (ed) (1980) 560; Chemerinksy in Devins and Douglas (eds) (1998) 199. Hepple (1997) 18 *ILJ* 606-607 states that a vigorous enforcement mechanism must be put in place; people who disregard a particular Act's standards must face serious economic consequences and those who comply must earn rewards. Allott (1980) 287 lists an overambitious legislature, inadequate preliminary surveys, and *inadequate enforcement mechanisms* as the reasons for the inability of law to effect social change.
[280] Chemerinsky in Devins and Douglas (eds) (1998) 199.

segregated: Blacks live in the inner cities; whites live in the suburbs. To effectively desegregate schools, courts would have had to include suburban white schools in the desegregation interdicts that they issued.[281] However, in *Milliken v Bradley*,[282] the Burger Supreme Court held that an interdistrict interdict would only be granted in the exceptional cases where proof existed of interdistrict constitutional violations.[283] In effect, *Milliken* prevented the desegregation of black inner city schools and white suburban schools.[284] Chemerinsky also refers to *Keyes v Denver*.[285] In this decision the Supreme Court held that proof of school segregation was not sufficient to establish a constitutional violation; proof had to exist that segregation occurred because of intentionally discriminatory policies.[286] Chemerinsky argues that school segregation usually has many interlocking reasons and that by requiring discriminatory intent instead of discriminatory impact, the Supreme Court radically limited courts' ability to order desegregation of *de facto* segregated northern schools.[287]

Also in the context of school desegregation, Evan argues that it is *not* an effective remedy to allow parents of a black child who was prohibited from admission to a white school to appear before a board of education; these parents should have the support of a government-funded agency or an NGO.[288] Heyns and Brand illustrate how the Constitutional Court in the *Grootboom* and *TAC* decisions failed to retain supervisory jurisdiction over the implementation of its orders and how, as a result of this omission, the practical impact of these decisions remain uncertain.[289]

1.4 As resistance to a new law increases, positive sanctions are probably as important as negative sanctions.[290] Evan argues that Anglo-American legal systems generally do not award positive sanctions and that the likely instrument for compliance to be utilised by

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[281] Chemerinsky in Devins and Douglas (eds) (1998) 200.
[282] 484 F 2d 215, 245 (6th Cir 1973) rev'd 418 US 717 (1974).
[283] Chemerinsky in Devins and Douglas (eds) (1998) 199-200.
[284] Chemerinsky in Devins and Douglas (eds) (1998) 200.
[285] 413 US 189 (1973).
[286] Chemerinsky in Devins and Douglas (eds) (1998) 200.
[287] Chemerinsky in Devins and Douglas (eds) (1998) 200.
[288] Evan in Evan (ed) (1980) 560.
[289] Brand and Heyns in Manganyi (ed) (2004) 36.
[290] Evan in Evan (ed) (1980) 559; Gutto (2001) 221.

courts are fines or imprisonment ("negative sanctions").[291] However, more severe fines do not necessarily lead to higher compliance.[292] If anything, Evan argues, very severe fines provide violators the chance to neutralise their feelings of guilt with what they feel are justified resentment against the excessive punishment.[293] Evan therefore argues that to assist in the learning of new behaviour and attitude, positive reinforcement is required. In the context of school desegregation, Evan suggests that subsidies for teachers' salaries and classroom construction and rebates on income tax ("positive sanctions") could have been provided to desegregated schools, in accordance with the length of time that a particular school had complied with desegregation directives.[294] In similar vein, Hepple argues that respondents (potential violators) must be better off if they voluntarily comply with the particular legislation, by for example offering government contracts, if they formulate plans and undertake positive monitoring and systematic reviews of their practices.[295]

1.5 To have any hope of effective enforcement, the state driving social change must be relatively powerful,[296] and must have significant technological surveillance facilities available.[297]

1.6 The enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise.[298] Mahomed sets out the following reasons why training of judicial officers in general had

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[291] Evan in Evan (ed) (1980) 559.
[292] Evan in Evan (ed) (1980) 559. This was of course one of the reasons why the death penalty was found unconstitutional in *S v Makwanyane* 1995 (3) SA 391 (CC); the state could not provide sufficient proof that the death penalty was a deterrent factor.
[293] Evan in Evan (ed) (1980) 559.
[294] Evan in Evan (ed) (1980) 559.
[295] Hepple (1997) 18 *ILJ* 606-607. Also see Coussey in Hepple and Szyszczak (eds) (1992) 46-47 and Lustgarten in Hepple and Szyszczak (eds) (1992) 468.
[296] Cotterrell (1992) 44. Ehrlich (1936) 372-373: "The effectiveness of the law of the state is in direct ratio to the force which the state provides for its enforcement, and in inverse ratio to the resistance which the state must overcome".
[297] Bennington and Wein (2000) 21 *Int J Manp* 21; Cotterrell (1992) 44.
[298] Cf Bawa (1999) September *Consultus* 30; Hepple (1997) 18 *ILJ* 606-607; Gutto (2001) 192. S 180 of the Constitution states that national legislation may provide for training programmes for judicial officers. Regulation 3 of the Regulations for Judicial Officers in the Lower Courts 1993 (GR 361 11 March 1994) published in terms of s 16 of the Magistrates Act 90 of 1993 states that no person may be appointed as magistrate unless he/she has successfully completed a requisite course at Justice College.

become necessary: The immense quantitative and qualitative changes in the law; litigation has become more complex; conflicts have become more complex that may be linked to industrial, social and economic development; the potential areas of jurisdiction of judges have expanded; a proper judicial insight in the lives of the disadvantaged had to be inculcated and a potentially massive expansion in the power of the judiciary had taken place.[299] He points out that training for judges had become commonplace in the United States, Canada, Australia, New Zealand, Malaysia, Pakistan and Sri Lanka, among other countries.[300]

2. The values (implicitly) underpinning a given new law should not run too far ahead of society's contemporaneous *mores*.

2.1 The purpose behind the legislation must at least to a degree be compatible with existing values.[301] Evan states that "the rationale of the new law must clarify its continuity and compatibility with existing institutionalised values".[302] Jeffrey argues that changes in legal rules will only lead to social change to the extent that people believe in, agree with or accept the legal changes and then decide to model their behaviour in accordance with the new rules.[303] Lundstedt states that penalties prescribed by law must "appeal to the moral consciousness of the public" or else it will not be effective, or could undermine public confidence in the legal system.[304] Savigny's concept of *volksgeist* is in a similar vein. He states that law is an expression of the "spirit of the people" and that law "reflects and expresses a whole cultural outlook".[305] Savigny would of course have frowned upon the idea of "changing" society via legislation; a law would only come into existence if it reflected the *volksgeist*. Anecdotal evidence tends to suggest that South Africa's smoking

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[299] Mahomed (1998) 115 *SALJ* 108-109.
[300] Mahomed (1998) 115 *SALJ* 107.
[301] Macfarlane in Swain (ed) (2006) 105; Morison in Livingstone and Morris (1990) 9. In a somewhat different context Fukuyama (1992) 15-16 argues that a (strong) state breaks down if a failure of legitimacy occurs in at least the elites tied to the state itself: the ruling party, the armed forces, the police. At 20-21 he argues that Apartheid's loss of legitimacy among white elites ultimately led to its demise.
[302] Evan in Evan (ed) (1980) 557-560.
[303] Jeffrey in Brantingham and Kress (eds) (1979) 38.
[304] Lundstedt as translated and interpreted by Aubert (1983) 13 (from the original Swedish).
[305] Cotterrell (1992) 21.

legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful.[306]

2.2 Laws set up in opposition to powerful economic values and interests may also (eventually) fail.[307] MacDonald illustrates how the interests of the (white) business class in South Africa were no longer served by Apartheid by the 1980s.[308] Because of a falling birth rate, whites could no longer fill all the middle and upper rungs of employment and businesses had to start looking at the black population to fill previously "white" jobs, bringing their interests in conflict with those of the Apartheid state.[309] Business's interests ultimately prevailed with the advent of the post-1994 democratic South Africa and the adoption over time of pro-business economic policies.[310]

2.3 Laws that facilitate action that people want to take or that encourage voluntary change is likely to be more effective than compulsory change.[311] Allott distinguishes between "model laws" and "programmatic laws".[312] A model law sets up a model that the population may adopt if they so choose. The legislature encourages the use of the model but it remains voluntarily. Should the model be adopted by society it will radically alter the content of legal relationships. It is a slow, cautious and less assertive way of achieving transformation but in Allott's view more likely to succeed than programmatic laws.[313] An example of a "model law" would be where the legislature wishes to discourage polygamous

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[306] Griffiths in Loenen and Rodrigues (eds) (1999) 322 notes that anti-smoking legislation is characterised by an almost complete absence of formal law enforcement, yet the legislation is obeyed. Griffiths states that the "social civility" norms have already changed to incorporate a strong anti-smoking sentiment and that highly effective non-official enforcement is taking place. Desmond and Boyce in Pillay *et al* (eds) (2006) 203 report that a 2003 HSRC survey on social attitudes indicated that 76% of South Africans never smokes.

[307] Cf Przeworski (1991) 37: "A stable democracy requires that governments be strong enough to govern effectively but weak enough not to be able to govern against important interests".

[308] MacDonald (2006) 73.

[309] MacDonald (2006) 73.

[310] MacDonald (2006) 88; 128; 143; 169; 173; 178. *Contra* Saul (2005) 5 who states, without analysis, that Apartheid would not have disappeared of its own accord and that it was the liberation forces' armed struggle that brought the Apartheid state to its knees. At 177 he states, again without analysis, that "mass action ... was the key factor forcing the apartheid government onto the path of 'reform'".

[311] Allott (1980) xii. Griffiths in Loenen and Rodrigues (eds) (1999) 318 believes that rules are best known and obeyed that require the least departure from existing behavioural expectations. In similar vein Hepple (1997) 18 *ILJ* 604 states that laws are more effective when they facilitate action that people want to take, than laws designed to protect socially vulnerable groups.

[312] Allott (1980) xii; 168-236.

[313] See Allott (1980) 168-174 for a detailed discussion of "model laws".

marriages but instead of an outright ban on such marriages, introduces the option of a monogamous marriage, with the hope that over time there would be a move to the more "progressive" option.[314] In Allott's terms a "programmatic law" imposes a programme of compulsory change.[315] An example would be (mandatory) anti-discrimination laws, in Allott's words laws aimed at overriding "the way people live; the social arrangements which they have in their homes; the attitudes and practices of employers at work; the prejudices of the people".[316]

2.4 Models or reference groups must be used for compliance.[317] Evan provides the following examples of what he has in mind: The United States could have motivated its school desegregation efforts by referring to countries with which the United States identified with politically where desegregation had been in place for years without any negative effects.[318] It could also have referred to successful desegregation in the United States army.[319] What must be aimed at is providing admirable models to overcome resistance by potential recalcitrants.[320]

2.5 Laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity.[321] Morison puts it as follows:[322]

> Change through law works best where behaviour is economically rational, as in business activity, and less well in more customary or emotional aspects of life, such as family relationships. Here the law works only very slowly if at all.

Likewise, Luhmann refers to legal-sociological theories which postulate that "areas of life based on emotion" is more difficult to direct via legislation than "emotionally neutralised" areas such as the economy and communications.[323]

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[314] Allott (1980) 171.
[315] See Allott (1980) 174-236 for a detailed discussion of "programmatic laws".
[316] Allott (1980) 194.
[317] Evan in Evan (ed) (1980) 557-560.
[318] Evan in Evan (ed) (1980) 558.
[319] Evan in Evan (ed) (1980) 558.
[320] Evan in Evan (ed) (1980) 559.
[321] Dror (1958) 33 *Tul L Rev* 800 and 801; Packer (2002) 170.
[322] Morison in Livingstone and Morison (eds) (1990) 8.

Cotterrell refers to research on the transplantation of laws from one country to another.[324] These studies seem to indicate that such "transplants" may be successful where the new laws concern instrumental matters and where a strong incentive to accept change may exist, such as in the commercial arena.[325] Family relations, however, are extremely resistant to change.[326] It is then, for example, not surprising that a legislative attempt in Tanzania to outlaw female genital mutilation, has not been particularly effective. In 1998 the practice was criminalised and made punishable by imprisonment of up to 15 years. However, no one has been found guilty of violating this law yet. Those prosecuted under this law are usually acquitted because the daughters involved have been unwilling to testify against their parents.[327]

2.6 Law must make conscious use of the element of time in introducing a new pattern of behaviour.[328] Evan argues that the shorter the transition time between the "old" and the "new" or "expected" pattern of behaviour, the easier the adaptation to the change, because it lessens the chance for the establishment of organised or unorganised resistance to the enacted change.[329] Evan then argues that this will only be true if enforcement agencies are committed to the behaviour required by the new law, and if positive sanctions are introduced when resistance starts to increase.[330] (I have dealt with these last-mentioned requirements above.) Allott takes an opposite view. He argues that transformation using law(s) is possible if the social transformer is willing to be *patient*, is willing to use

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[323] Luhmann (1985) 243. Also cf Rousseau (1968) 88-89: "Once customs are established and prejudices rooted, reform is a dangerous and fruitless enterprise; a people cannot bear to see its evils touched, even if only to be eradicated; it is like a stupid, pusillanimous invalid who trembles at the sight of a physician".
[324] Cotterrell (1992) 24.
[325] Cotterrell (1992) 24.
[326] Cotterrell (1992) 24. Cf Prof LBG Ndabandaba (MP, IFP), speech at the second reading debate of the Act, reproduced in Gutto (2001) 33 and further: "The IFP is of the view that it is not correct for the patriarchal system to be listed on the same level as apartheid as a mother of all forms of discrimination. Patriarchy, in our view, is a cultural phenomenon, the purpose of which is to maintain order and social control in society … The definition of harassment is also a little problematic. It is somehow too broad and could effectively apply to any lack of good manners, humour or proper human considerations … There is no denying that the proper business of legislation is the prohibition of unfair discrimination and the promotion of equality. This noble exercise, however, must not be so overrated (sic) that it affects cultural and religious beliefs".
[327] http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=72766 (accessed 2006-08-23).
[328] Evan in Evan (ed) (1980) 559.
[329] Evan in Evan (ed) (1980) 559.
[330] Evan in Evan (ed) (1980) 559.

persuasion, is responsive to people's feelings and desires and is prepared to accommodate different views.[331] Allott seems to suggest that change-inducing laws are more likely to be effective over the longer term and seems to imply that change should be phased in over time, instead of suddenly confronting the population with a new required way of doing things, as Evan seems to argue.[332]

3. Different groups of people will be influenced in different ways by a new law.

3.1 Large organisations with specialised personnel that is well-equipped to interpret rules will probably be committed to implementing new laws, but small businesses, individual home-owners, small landlords and individuals will probably not have sufficient knowledge and implementation on this level will be very difficult to achieve.[333] Griffiths argues that law only has a measurable effect if people use the law.[334] This means that the specific legal rule must be known and people must understand what it means; they must be aware of the relevant facts; they must have a sufficient motive for using the rule and must consider doing so feasible and appropriate; and they must not have an overriding motive for not using it.[335] Crucially, he believes that people's interpretation of what happened to them depends on their social surroundings, not the law.[336] Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations.[337] Each of these institutions has limited knowledge and resources.[338] Therefore (well-resourced) large organisations with specialised personnel are more likely to be committed to implementing new laws.[339]

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[331] Allott (1980) 196.
[332] However at 207 he seems to take no position. He argues that "impatience tends to be self-defeating – it is difficult to sustain the original momentum in the years ahead. Gradualism, on the other hand, runs the risk of being so gradual as to be imperceptible".
[333] Griffiths in Loenen and Rodrigues (eds) (1999) 318.
[334] Griffiths in Loenen and Rodrigues (eds) (1999) 315.
[335] Griffiths in Loenen and Rodrigues (eds) (1999) 315.
[336] Griffiths in Loenen and Rodrigues (eds) (1999) 317.
[337] Griffiths in Loenen and Rodrigues (eds) (1999) 317.
[338] Griffiths in Loenen and Rodrigues (eds) (1999) 318-319.
[339] Griffiths in Loenen and Rodrigues (eds) (1999) 315; 317; 318. A recent South African example bears this out. It has been reported that the South African banking industry will be spending approximately R1.5 billion in implementing the National Credit Act 34 of 2005. http://www.businessday.co.za/PrintFriendly.aspx?ID=BD4A467927 (accessed 2007-05-22).

3.2 Laws put in place to assist or protect the economically weak will have limited impact. Laws such as these should be complemented by active and effective non-governmental support.[340] A provision allowing class actions will give private human rights groups the opportunity to initiate and monitor change.[341] Hepple is of the view that laws will likely succeed where the aim is to steer action that people want to take and less effective where rights are created to assist weaker parties; that is people who lack social and economic power.[342] Lustgarten states that the traditional model of single claimants under an Act designed to assist the socially and economically vulnerable will have limited impact and that if much is expected from this model, disappointment will follow.[343] The author argues that it is important to provide a system that people may use when they have been aggrieved, but the entire project should not be discarded simply because we do not trust law, or as Lustgarten puts it, "we don't deny victims of accidents adequate compensation because we may have different theories about the economic impact of tort law".[344]

4. To have any hope of legislating effective laws, Parliament should see to it that its laws are popularised.

4.1 The use of law will increase if the educational system is used in a well-directed way as a "nationally inclusive socialising agent".[345] Bestbier accepts that the repeal of discriminatory laws do not automatically lead to similar norm changes in society.[346] She believes that these norm changes must also be accomplished via the law.[347] She notes the alienation of

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[340] Coussey in Hepple and Szyszczak (eds) (1992) 46-47; Gutto (2001) 299.
[341] Hepple (1997) 18 *ILJ* 606-607.
[342] Hepple in Hepple and Szyszczak (eds) (1992) 20. Some of the reasons Hepple advances for this argument are similar to my discussion of the limits of the law in addressing structural discrimination at pp 120-127 of the thesis.
[343] Lustgarten in Hepple and Szyszczak (eds) (1992) 466-467.
[344] Lustgarten in Hepple and Szyszczak (eds) (1992) 466-467.
[345] Bestbier (1994) 15 *Obiter* 108. Cf Prof LBG Ndabandaba (MP for IFP), speech at the second reading debate of the Act, reproduced in Gutto (2001) 35: "[O]ne must be engaged in a process of deprogramming and reprogramming according to new values and laws. That is why, in order to be effective, the Bill must be accompanied by a massive educational programme". Also cf K Moonsamy (MP for ANC), speech at the second reading debate of the Act, reproduced in Gutto (2001) 47: "Concerted efforts will have to be made to educate citizens to change their attitudes and practices regarding the roles of women and men, the disabled, the aged and so forth".
[346] Bestbier (1994) 15 *Obiter* 107.
[347] Bestbier (1994) 15 *Obiter* 107.

individuals from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.[348] She advocates utilising the primary and secondary school system as a "nationally inclusive socialising agent".[349] Dror argues that law could be used to change social institutions which in turn will influence social change, for example the national education system.[350] Griffiths is less optimistic. He argues that people's interpretation of what happened to them depends on their social surroundings, not the law.[351] Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations and each of these institutions has limited knowledge and resources.[352]

4.2 The required change must be communicated to the large majority of the population.[353] Public awareness must be maintained over the long term.[354] The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change.[355] Packer argues that the mass media, forming part of popular culture, is capable of competing with traditional beliefs.[356] Evan sees this criterion as part of providing effective remedies; potential beneficiaries of a change-inducing law will only be able to utilise such a law if they are aware of its existence.[357]

4.3 Laws that include incentives to encourage lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective.[358]

4.4 The state driving social change must be able to rely on vast mass media communication.[359]

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[348] Bestbier (1994) 15 *Obiter* 107.
[349] Bestbier (1994) 15 *Obiter* 108.
[350] Dror (1959) 33 *Tul L Rev* 797.
[351] Griffiths in Loenen and Rodrigues (eds) (1999) 316.
[352] Griffiths in Loenen and Rodrigues (eds) (1999) 316.
[353] Morison in Livingstone and Morison (eds) (1990) 9; Ehrlich (1922) 36 *Harv L Rev* 138.
[354] Packer (2002) 173.
[355] Packer (2002) 189.
[356] Packer (2002) 189.
[357] Evan in Evan (ed) (1980) 560.
[358] Macaulay (1979) 14 *Law & Soc Rev* 161, 163, 164; Cotterrell (1992) 33.
[359] Cotterrell (1992) 44.

I return to these criteria in chapter 3.4 below, where I compare them to the Act and assess the Act's (potential) effectiveness as a tool with which to transform South African society.

2.6 A court-driven or legislature-driven social transformation?

If one accepts that "law" may or should be used to effect societal transformation, even if it is a limited instrument, which legal institution should be co-opted to facilitate such a project: Parliament or the courts? Below I set out a debate between authors who tend to favour either legislation-driven or court-driven programmes. I then argue that pragmatically one has to accept that, for the time being at least, a court-facilitated programme of societal change will not achieve the results one would hope for. (Depressingly, this does not necessarily mean that a programme of societal change driven or facilitated by the legislature would succeed either.[360])

Klare takes for granted that judicial adjudication is a site of law-making: Judges are never completely constrained by the legal texts and it is unlikely that a system of total constraint (consistent with a democracy) will ever be developed. [361] He refers to the tendency of common law academics to overemphasise court decisions at the expense of legislation, executive action, administration, police procedure and extra-legal dispute resolution.[362] He argues that for ordinary South Africans these other processes matter more, but still believes that court decisions are important to study: South Africa has a justiciable bill of rights which supposedly introduced a culture of justification.[363] Compared to other law-making, adjudication is "the most reflective and self-conscious, the most grounded in reasoned argument and justification, and the most constrained

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[360] Eg cf Chemerinsky in Devins and Douglas (eds) (1998) 192: "The failure to improve economic circumstances for African Americans obviously reflects inadequacies not just of courts but also, and perhaps even more significantly, of legislatures". Komesar (2001) argues that courts are most needed when alternative decision-making bodies such as the political process work least well. Courts, political processes, markets and informal communities all function well when the number of people affected are small and the decision to be made is not complex. However, when numbers and complexity increases, all these institutions' abilities decrease. Also see Koopmans (2003) 262: "If many citizens want society changed … the judiciary can help them as little as the political institutions, possibly less so".
[361] Klare (1998) 14 *SAJHR* 146-147.
[362] Klare (1998) 14 *SAJHR* 147.
[363] Klare (1998) 14 *SAJHR* 147.

and structured by text, rule and principle".[364] Adjudication is therefore ideally suited to illustrating what a culture of justification entails.[365]

Klare then attempts to identify a way in which courts can develop a politically and morally engaged method of adjudication without turning it into "illicit judicial legislation".[366] He terms this possibility "transformative constitutionalism" by which he means "a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction"; an "enterprise of inducing large-scale social change through nonviolent political processes grounded in law".[367]

He makes an argument that South Africa has a post-liberal Constitution committed to large-scale, egalitarian social transformation; that judges and advocates can be committed to social transformation and be faithful to their professional role; that constitutional adjudication must acknowledge its political role more frankly; and that South Africa's legal culture and legal education must be transformed as he identifies a disconnect between the constitution's possibilities and South Africa's conservative legal culture.[368]

He argues that one can read the Constitution as a post-liberal document because it is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious about its historical setting, role and mission.[369] As to lawyers' role in giving life to this promise, Klare accepts that national constitutions and "foundational legislation" enacted under a constitution (the Act could qualify as an example of foundational legislation) may uncontroversially have a transformational purpose because it is "the act of the people through their elected

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[364] Klare (1998) 14 *SAJHR* 147.
[365] Davis (2000) 117 *SALJ* 704 argues in a similar vein: "[T]here is a modest but significant role for law in promoting a culture of justification" and at 708: "[A]s much as judges should be compelled to enhance a culture of justification by insisting that law complies with the twin principles of participation and accountability, so are judges beholden to justifying their own decisions and being accountable therefor. In this way the citizenry can examine the justification for law, participate in the debate surrounding such law and thereby become not only the addressee but also the author of such law".
[366] Klare (1998) 14 *SAJHR* 150.
[367] Klare (1998) 14 *SAJHR* 150.
[368] Klare (1998) 14 *SAJHR* 151.
[369] Klare (1998) 14 *SAJHR* 153-156.

representatives".[370] However, the idea of transformative adjudication *is* controversial, as this seems to be an invitation to judges to work towards the achievement of political projects whereas judges are supposed to be appointed in a neutral fashion to enforce laws made by others, not to become involved in politics.[371] How is this "dilemma" to be resolved? Klare believes that legal texts must be interpreted; they do not self-generate their meaning.[372] Texts have gaps, conflict with other texts and are ambiguous.[373] A judge has to work with a medium that *is* constraining but that is also "far more plastic than is commonly acknowledged (although not infinitely plastic)".[374] Lawyers should be more honest with themselves and with the larger community and should accept responsibility for constructing a social order through adjudication.[375]

Van der Walt (André) is skeptical about the "orthodox" common law method of reasoning to achieve transformation. His view is that the common law tradition is an institutionally sanctified and entrenched version of what is regarded as "normal" and this tradition resists change because courts fail to recognise opportunities for transformation.[376] In similar vein, van der Walt (Johan) states:[377]

> I believe a significant part of the failure of the judicial development of the law to address the ills of modern society can be traced to conservative political attitudes bent on the preservation of an existing *status quo* and vested interests. Such political attitudes are bound to turn open-ended legal principles such as reasonableness, good faith and the *boni mores* of society into rule-like maxims that entrench rather than challenge existing power relations.

The implication seems to be that social transformation in present-day South Africa will have to be mainly legislation-driven and that open-ended principles (such as the test for "fairness"/"unfairness"

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[370] Klare (1998) 14 *SAJHR* 157.
[371] Klare (1998) 14 *SAJHR* 157.
[372] Klare (1998) 14 *SAJHR* 157.
[373] Klare (1998) 14 *SAJHR* 157.
[374] Klare (1998) 14 *SAJHR* 160.
[375] Klare (1998) 14 *SAJHR* 164.
[376] Van der Walt (2002) 17 *SAPL* 259.
[377] Van der Walt (2001) 17 *SAJHR* 361.

set out in section 14 of the Act[378]) should be avoided, lest a (conservative) judiciary grab the opportunity to scuttle the transformative project.[379]

From another perspective, Watson explains why legislation is a better "instrument" in developing the law than the judiciary:[380]

> When law develops from precedent, the law must always wait upon events, and, at that, on litigated events; it will always be retrospective. The scope for development of legal principles – especially in the short term – is very restricted, and there can be no organised systematic development ... Legislation operates very differently. It can and generally does provide primarily for the future. It can be very systematic, general in its purposes, and removed from individual particular cases. It can make drastic speedy reforms. Development by legislation can have a very satisfactory explicit or implicit theoretical base and can thus point the way to further reform.

I would (pragmatically) argue that courts in present day South Africa are quite limited in what they can achieve. Although some authors view a court-driven process positively,[381] in a South African context it is clear that courts will not achieve much:[382]

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[378] See the discussion relating to the application of this open-ended test in chapter 3 (3.3.5) below.

[379] Courts can play an obstructionist role, consciously or subconsciously. Beermann (2002) 34 *Conn L Rev* 984-5 notes how the American Supreme Court's creation of the "state action" principle in interpreting the Fourteenth Amendment made it very difficult for Congress to act to attack private discrimination. (In terms of this doctrine, the American Constitution applies only to "state action". *Civil Rights Cases* 109 US 3, 3 SCt 18 (1883). State action consists of (a) statutes or regulations enacted by national, state and local bodies and (b) the official actions of all government officers. State action also includes the actions of private individuals or groups if the private actor is performing a government and if the private actor is sufficiently involved with or encouraged by the state. See Woolman "Application" in Chaskalson *et al* (1999) 10-23). Congress passed civil rights legislation in 1866, 1870, 1871 and 1875. The Supreme Court either read these statutes very narrowly or invalidated them on the basis of unconstitutionality. At 986 Beermann notes that the "state action" doctrine still constitutes a fundamental limitation on the Fourteenth Amendment. He analyses the Supreme Court's decisions on civil rights and at 1034 concludes that "[T]he degree of anti-civil rights judicial activism at the Supreme Court is still much too high. By and large, the Court has obstructed Congress and stood against efforts to legislatively redistribute power from the advantaged to the disadvantaged".

[380] Watson (1978) 37 *Cam LJ* 323 and 324.

[381] Tay in Kamenka *et al* (eds) (1978) 7 holds that the common law system allows for the detailed consideration of particular people in particular circumstances; that previous cases are seen as historical events that arose in a specific and actual social, psychological and historical setting. Only in common law reports do the parties "come alive"; do they have names and histories and personal quirks. Cotterrell (1992) 17 points out that common law countries still regard judicial decisions as the "heart of the legal system". Handler (1978) 209-210 lists the positive indirect effects of litigation: it provides publicity; legitimises values and goals, and may be used as part of broader campaign. At 212 he argues that litigation may be used as leverage and that litigation may be used to bring a halt to a particular action and so increase the party's bargaining power; seen from this perspective the eventual court order is not the end but part of the strategy. At 214 he argues that litigation may generate harmful publicity that may force the discriminator into settlement, that would be some consolation to a claimant that is not able to proceed with the court case to finality because of the duration or costs involved. At 218-9 he seems to argue that litigation may be used as "consciousness

1. Based on the results of empirical surveys,[383] it is not at all clear that South African courts are seen as legitimate in the eyes of the majority. It is perhaps trite that courts need to be held in esteem within the psyche and soul of the nation, or to be reduced to "paper tigers with a ferocious capacity to roar and snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship".[384] It is at least arguable that Parliament enjoys more legitimacy than the courts and that Parliament should therefore be the main force behind transformation.

2. Any court system is complaints-driven.

2.1 Courts work best when a single plaintiff sues a single defendant and if the dispute between the parties may be reduced to a single issue.[385] The more complicated the dispute, the more strain the system suffers. Social reform groupings use the courts because they are weak politically but they generally bring claims that are complex and that are not easily "solved" in a court;[386] courts are unlikely to produce direct, tangible results.[387]

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raising" and that litigation can contribute to a change in public opinion. McKenna (1992) 21 *Man LJ* 327 believes that a potential advantage of judicial activism is that it may permit legal development in a field where there is typically little political urgency or pressure for legislative action but admits that *ad hoc* judicial law-making introduces a number of dangers. Krishnan (2003) 25 *HRQ* 818 argues that in a country where the legislature or the political system is viewed as illegitimate (he uses the words "corrupt and inaccessible") courts could provide an avenue as a forum where a cause may be advocated. He optimistically asserts that when litigation is "done in a coordinated, structured and repeated fashion", it "has the potential for creating a culture of rights-consciousness within a society".

[382] Many of the reasons set out below would apply to any court-driven process, whether South African or elsewhere. Reasons that apply specifically to South Africa are set out in points 1, 4 and 6.

[383] See the results of these surveys in chapter 5 below.

[384] Mahomed (1998) 115 *SALJ* 112. Tyler (2000) 25 *Law & Soc Inq* 983-985; 988; 1000 highlights morality and legitimacy as two factors that will likely lead to voluntary obeyance. He refers to studies that have shown that people voluntarily defer to authorities who make decisions that they regard as fair. If judges are perceived as neutral, honest, concerned about citizens and respectful of citizens and their rights, most people will feel satisfied with court decisions and will be likely to obey them.

[385] Cf *S v Williams* 1995 (3) SA 632 (CC) para 8: "[Courts' role in promoting a human rights culture] … demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of *individuals* who *appear before them*" (my emphasis). Allott (1980) 65 is scathing – he believes that a system of self-help still exists and that "might is still right" because a plaintiff must still initiate the complaint. Pound (1917) 3 *ABA J* 68-69 argues that courts generally depend on interested parties *not* professionally involved with the legal system to set it processes in motion. He argues that claimants need incentives to use this system. Hepple in Hepple and Szyszczak (eds) (1992) 20-21 states that law needs specificity, has to be clear and needs an "identifiable culprit". Also see Chemerinsky in Devins and Douglas (eds) (1988) 193.

[386] The housing crisis in the Western Cape, for example, was not solved when the Constitutional Court ruled in favour of the respondent in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

In the context of anti-discrimination legislation, a number of authors comment on the inherent weaknesses of a complaints-driven process. Handler[388] notes that the school desegregation cases "simply required too many individual lawsuits in too many places". Freedman argues that the legislature is better positioned to eradicate disadvantage via a redistribution of resources than courts, as courts "are best suited to deal with *particular wrongs*, rather than with patterns of systemic disadvantage".[389] Delgado argues that a complaints-driven process assumes that the "perpetrator" is a malevolently motivated individual and assumes that racism is the exception; not an integrated system that elevates one group at the expense of another.[390] Such a complaints-driven mechanism serves as a "valuable, if unstated, homeostatic mechanism for maintaining and replicating social relations";[391] "if racism is seen as a disease its cure would be medical, educational, psychological treatment – so intrusive that liberals and conservatives might be expected to object".[392] On a more practical level and in the context of disability discrimination, Astor[393] notes that

> [I]f intending litigants must wait over an hour for an adapted taxi to arrive, pay for it out of their pension, and arrive at the lawyer's office to find that they cannot get in the door, they need to be exceptionally determined not to give up the idea of pursuing their complaint entirely.

2.2 A complaints-driven process will produce very few results where the oppressed or underrepresented do not "feel" the wrongs committed against them;[394] they may

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[387] Handler (1978) 209.
[388] Handler (1978) 117.
[389] Freedman (2000) 63 *THRHR* 320; my emphasis.
[390] Delgado (2001) 89 *Geo LJ* 2295.
[391] Delgado (2001) 89 *Geo LJ* 2295.
[392] Delgado (2001) 89 *Geo LJ* 2295. At 2296 he argues that racism must be looked for in "broad structures that submerge people of color, workers, and immigrants, *and replace these structures with ones that can fulfil our unkept promises of democracy, equality, and a decent life*" (my emphasis). He does not suggest how this is supposed to be done; if at all via the law.
[393] Astor (1990) 64 *Austr LJ* 114.
[394] Cf *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 14: [South Africa is] a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons".

experience these wrongs as "life" and the thought of approaching a court may not even enter their minds.[395] A potential claimant perhaps does not realise that a claim exists:[396]

> Like other people who have lived under injustice for a long time, may women tend to see themselves through the eyes of their oppressors, having internalised patriarchal views of women's 'proper' roles which justify and legitimate their situation. They often see their situation as the product of 'natural' forces which cannot and even should not be changed.

2.3 In a complaints-driven system, the "wrong" claimants may approach the courts. For example, Lahey sets out an empirical survey of American Supreme Court jurisprudence on the Fourteenth Amendment.[397] From 1868 to 1911, the court heard 604 such claims of which only 28 cases concerned black interests and of which blacks lost 22 of these cases.[398] From 1920 to 1937, the Court declared 132 laws unconstitutional but only a few related to black people and more than 67% were linked with property or economic claims.[399] In Canada, equality disputes are mainly brought (and won) by male complainants.[400] Almost all the American Supreme Court sex discrimination cases have been brought by men.[401] The equality jurisprudence produced by the South African Constitutional Court largely had to be developed with the "wrong" kind of claimants and the "wrong" kind of facts:[402] privileged females,[403] white males,[404] a (rich) German fugitive from

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[395] Handler (1978) 223. Cf *Moise v Transitional Local Council of Greater Germiston* 2001 (8) BCLR 765 (CC) para 14: "[M]any potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. *Many are not even aware of their rights* and it takes time for them to obtain legal advice. Some come by such advice only fortuitously" (my emphasis).
[396] Verwoerd and Verwoerd (1994) 23 *Agenda* 70.
[397] Lahey in Martin and Mahoney (eds) (1987) 74.
[398] Lahey in Martin and Mahoney (eds) (1987) 74.
[399] Lahey in Martin and Mahoney (eds) (1987) 74.
[400] Lahey in Martin and Mahoney (eds) (1987) 82.
[401] MacKinnon in Dawson (ed) (1998) 366.
[402] McKenna (1992) 21 *Man LJ* 327 argues that tribunals are constrained by the facts of particular cases and are usually "unable to shape the law with the same measure of reflection, cogency and universality practised by legislatures". He sees a danger in politicians becoming too comfortable in their own passivity with the result that tribunals may then act as a conservative force, "sufficient to prevent a build up of pressure for political change, but insufficient to keep the law in reasonable harmony with social values and power relations". To the Constitutional Court's credit, it has somehow managed to develop a relatively cogent equality jurisprudence despite the "wrong" sets of facts. To my mind, the cases referred to in the footnotes immediately below were brought by privileged of powerful members of society. The equality clause in the Constitution was not primarily drafted to cater for the complaints in these cases. Cf Carpenter (2002) 65 *THRHR* 184: "Among the ironies are the fact that the only allegation of discrimination based on race to have engaged the attention of the Constitutional Court was brought by whites; that so may cases were on unspecified grounds of discrimination; that most of the women who alleged discrimination based on

justice,[405] forestry legislation,[406] while the first "affirmative action" decision to be decided by the Constitutional Court was brought by (privileged) "old order" Parliamentarians.[407] A thorough-going empirical investigation of equality court discrimination complaints would have to be undertaken to establish whether this pattern is also evident for these courts.

2.4 It is also possible that the "right" claimants will bring "wrong" claims. In its first year of operation the Canadian Human Rights Commission had to turn away a number of complaints that could not be related to a discriminatory practice.[408] In its 1978 report the Commission provided the following examples:[409]

> A mother with three children to support claimed that she could not find a job that would provide her with an adequate income. She was in tears. A discreet exploration of her situation did not indicate any discrimination had occurred. An elderly man wrote that his oil bills were rising faster than his pension indexing. He may well have to sell his house … A woman whose unemployment benefits were cut off had not found out that she could appeal such a decision until after it was too late. She was not disentitled on the basis of a prohibited ground of discrimination.

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sex and gender were in fact persons from privileged sectors of society; and that two of the most important cases dealing with gender issues were brought by males. Thus the Constitutional Court has not had many opportunities to deal directly with factual situations of the kind that were a characteristic of pre-1994 South Africa". Also see Albertyn and Kentridge (1994) 10 *SAJHR* 168; Albertyn and Goldblatt (1998) 14 *SAJHR* 273. A number of more "deserving" cases have since been reported, where the complainants could be described as (historically) vulnerable members of South African society. These complainants were not necessarily successful, however. These cases include *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (the gay and lesbian community); *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (the gay and lesbian community); *Moseneke v The Master* 2001 (2) SA 18 (CC) (administration of deceased black estates); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) (person living with HIV); *S v Jordan* 2002 (6) SA 642 (CC) (female sex workers); and *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) (permanent residents).

[403] *Brink v Kitshoff* 1996 (4) SA 197 (CC) related to a constitutional challenge to the Insurance Act.

[404] The *President of the Republic of South Africa v Hugo* 1997 (1) SA 1 (CC) case related to a complaint by a male prisoner that (then) President Mandela's proclamation to only grant clemency to certain female prisoners were discriminatory. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) related to a claim that Pretoria City Council unfairly discriminated by imposing a flat rate on Mamelodi whereas 'white Pretoria' was charged according to actual consumption. *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) related to s 18(4)(d) of the Child Care Act 74 of 1983 that only requires the mother of an illegitimate child to consent to the child's adoption.

[405] *Harksen v Lane* 1998 (1) SA 300 (CC) related to the alleged unconstitutionality of ss 21, 64 and 65 of the Insolvency Act 24 of 1936.

[406] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) related to s 84 of the Forest Act 122 of 1984. The complaint was that the Act unfairly put the onus on the defendant in civil disputes.

[407] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

[408] Falardeau-Ramsay (1998) 47 *UNB LJ* 168.

[409] Falardeau-Ramsay (1998) 47 *UNB LJ* 168.

2.5 A number of authors refer to the "one shotter" versus the "repeat player" that is characteristic of a complaint-driven dispute resolution mechanism.[410] In a system where a "wronged" plaintiff sues a "malevolent" defendant, the defendant is more likely to be a well-resourced repeat player while the plaintiff is more likely to be an under-resourced one-shotter. The tactical advantage lies with the defendant – their lawyers are specialists, they can afford long-term litigation based on complex facts, they can afford experts, they can afford to take a long-term view, they can budget for litigations costs and they are familiar with legal jargon and the nature and risks of court proceedings.[411]

3. The institutional nature of courts causes other disadvantages as well. Courts sometimes attempt to "simplify" what could be an immensely complex problem.[412] Most courts have to reach a decision based on partial facts.[413] A decision cannot be indefinitely deferred until all the information is available; the search for "truth" has to be pragmatically balanced against the need to reach a (relatively) speedy decision.[414] Judgments are handed down with

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[410] The most-cited article in this regard is Galanter (1974) 9 *Law & Soc Rev* 95.

[411] Aubert (1983) 142. Neumann (1986) 195 refers to Weber's "advantage of small numbers" – a large number of potential plaintiffs will likely sue a small number of, for example banks or insurance companies, who may meet and keep deliberations secret and will probably demonstrate greater solidarity. Law cannot overcome this. Also see Ehrlich (1922) 36 *Harv L Rev* 141; Griffiths in Loenen and Rodrigues (eds) (1999) 325, Kidder (1983) 75-76, 136; Handler (1978) 31 and Hunt (2002) 71 *Henn L* 19. Haynie (2005) 21 *SAJHR* 476 fn 22 quotes a large number of empirical studies that have found that those litigants with more resources are more likely to succeed. In the same article at 483 Haynie quotes a Constitutional Court judge who bluntly told her "the one-shotters (ie inexperienced and less expensive counsel presumably hired by a resource-constrained litigant) aren't very helpful". Another Constitutional Court judge said that the quality of the oral argument reflected the inexperience of one-shotters as they do not address the broader issues. Most judges interviewed by Haynie thought that a bad oral argument was more likely to lose a case for a client that a good oral argument would win a case for a client. Arguably inexperienced counsel are more likely to produce bad arguments. At 489 Haynie argues that Galanter's hypothesis may not necessarily apply in South Africa as white, experienced advocates who appear before transforming courts and "ideologically divergent" judges may not necessarily be "sufficiently conversant with new constitutional principles and precedents or new judicial personalities". The counter-argument is more persuasive: "Conversely, one may find that more experienced may be particularly advantaged before courts whose judges lack the experience of previous appointees. Newly appointed judges who were denied years to develop expertise in a particular area may be compelled to rely on the expertise of veteran advocates".

[412] Hannett (2003) 23 *Oxford J LS* 76: "Rather than acknowledging the complex ways in which discrimination operates between and within groups in society, the court retreats into easily compartementalised, discrete, essentialist understandings of discrimination". Haynie (2005) 21 *SAJHR* 480 quotes an advocate that suggested that the advocate must "give the judge a hamburger rather than a five-course meal – he wants fast food – simplify, simplify, simplify".

[413] Cf *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons* 2001 (1) SA 1017 (LCC) para 16. Also see *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) para 37: "[S]ingle instances of litigation cannot possibly provide the opportunity for the breadth and depth of investigation, analysis and determination that is necessary to produce [an effective structure to deal with strict liability for manufacturers]".

[414] Levy-Bruhl as translated and interpreted by Cotterrell (1992) 51; *Pharmaceutical Society of South Africa v Tshabalala-Msimang* 2005 (3) SA 238 (SCA) para 33.

incomplete knowledge of background social circumstances and the likely effect of new rules or principles cannot be readily ascertained.[415] This means that courts do not necessarily solve the "real" problem – suppose, for example, that a poor tenant's water supply is discontinued. The "problem" that the legal system may perhaps be able to solve is to have the water supply returned; but the underlying, structural disadvantage remains. The tenant has scarce resources and will likely decide not to waste money on a system that cannot effectively address his or her situation.[416] It is therefore not surprising that poor people do not readily access the justice system; the justice system (lawyers; courts) cannot offer them anything meaningful.

Lawyers serve the propertied classes – they, for example, draft contracts and wills and assist in the conveyancing of property. Poor people do not need these services.[417] Law "works" for employed people; for people with resources and who have something to lose. If a potential claimant has already lost everything, or have never had anything, law can do very little. If the economy does not grow and insufficient jobs are available, legal "solutions" such as affirmative action won't do a thing to resolve the poverty.[418]

On another level, courts do not solve problems as well. Cotterrell argues that the legal system depends on ignorance to be supported and he notes that the more people know about courts the more dissatisfied they are with it; for example the shock of realising that what the client regarded as important was treated as "irrelevant" by the court.[419] In a divorce case, the wronged wife may simply want her day in court, to verbalise her anger and disappointment at her philandering husband; forcing him to listen to her, perhaps for the first time in their lives. However, judges are loath to hear contested divorce cases and the case may be stood down, day after day, in an attempt to force the parties to settle. The wife's real

[415] Cotterrell (1992) 91. Allott (1980) 69-70 refers to "poor feedback systems".
[416] Cf Kidder (1983) 90-91.
[417] Kidder (1983) 74-76.
[418] Nyman (1994) 23 *Agenda* 82.
[419] Cotterrell (1992) 173.

"problem" is not solved.[420] The legal system forces a dispute into an "admit/deny" pattern while the "real" conflict may be about interests.[421]

It is not necessarily true that courts should be preferred to the legislature because the legislature is more open to persuasion when lobbied by powerful players than the courts. During the drafting of the Act the insurance industry persistently lobbied for a complete defence to so-called "mere economic differentiation" and eventually got something from the portfolio committee.[422] Had the lobbying not taken place, section 14(2)(c) would not have formed part of the Act and the fairness/unfairness enquiry would have been more coherent.[423] That is not to say, however, that over time courts could not have crafted an insurance-friendly defence out of the factors listed in the Act, even in the absence of section 14(2)(c). Galanter argues that repeat players in litigation can afford to take a long term view and may play for a change in the rules.[424] The repeat players are likely to be powerful players as well.

4. Representivity is a major concern in the South African context.[425] If the legal profession, the magistracy and judiciary are dominated by a particular gender or race, or if they hold

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[420] This example is based on a similar incident that occurred while I was an articled clerk in Johannesburg. The particular divorce case stood down for four days but the plaintiff wife was adamant that she wished to proceed with the case. When a judge was finally allocated to the case during the late afternoon of the fourth day, the wife was called as the first witness. After she testified the case was postponed to the next day. The case settled that evening – all she wanted to do was to tell her husband that she was angry and hurt – she nursed him back to health after he contracted cancer and he repaid her by having a number of affairs.

[421] Aubert (1983) 63. From another perspective courts as an institution are also likely to have limited power to change things. Ferejohn and Kramer in Drobak (ed) (2006) 161 reminds readers that courts are the least dangerous branch of government, having neither the purse nor the sword to enforce its own judgments. The authors argue because of this political weakness, courts will generally attempt to hand down judgments in such a way as to minimise the risk of a "showdown" with the other branches of government, and so ensure that its judgments are usually enforced. Edwards in Drobak (ed) (2006) 230 agrees: judges' self-restraint builds up constitutional legitimacy over time, which in turn allows the other branches of government to develop the habit of obedience to judgments and as this practice becomes entrenched, courts achieve real independence. However, to ensure the continued existence of that independence, courts must continue to exercise self-restraint.

[422] See fn 497 (p 106) and pp 324-328 of the thesis below.

[423] See Albertyn *et al* (eds) (2001) 41; 46.

[424] Galanter (1974) 9 *Law & Soc Rev* 100.

[425] Zulman (2002) 76 *Austr LJ* 42 points out that the South African judiciary is not particularly representative. By June 2001 of the 192 permanent judges, 52 or 27% were people of colour: Six of the provincial divisions and the Land Claims Court were headed by people of colour. Millar and Phillips (1983) 11 *Int J Soc Law* 422 note that the legal profession is to a large degree male-dominated. The same is probably true of the South African legal profession. Based on the profile of the 2007 intake of first year law students at the university where I teach, in future the profession may become dominated by women.

stereotypical views about race and gender equality, will they identify possible causes of action and will they grant effective remedies?

Handler points out that the outcome of a dispute depends to a large degree on the lawyer-client relationship.[426] A strong client may dominate his or her attorney; any attorney is likely to dominate a poor, unknowledgeable client. It is not necessarily in lawyers' interests to utilise a particular Act, for example consumer protection laws.[427] Lawyers may for example not wish to utilise the Act to pursue a case of loan discrimination against a bank, as that particular lawyer may wish to receive more work from that particular bank. Clients from a different socio-economic or ethnic background than their lawyers may not be accurately "heard" by their lawyer and may be represented at court in a way that they would not necessarily have hoped for.

5. The remedies that courts are generally inclined to grant cannot always satisfactorily address the disadvantage suffered:[428]

Sometimes courts are explicit about their refusal to grant far-reaching remedies. Buntman considers *Washington v Davis*[429] and *McCleskey v Kemp*[430] and points out that in both cases the black litigants were portrayed as challengers to the "American way" and the "correct" *status quo*.[431] In both cases the Supreme Court rejected the litigants' claim *inter alia* based on the consideration that to have found for them would have been too disruptive to the economic, social and political order.[432] *Davis* related to a complaint by black applicants to the Washington DC police force that the civil service exam was discriminatory as black applicants failed at a grossly disproportionate rate compared to white applicants.[433] The Supreme Court rejected the argument and found that if it had to consider the disproportionate impact, widespread and wholesale economic redistribution and social re-

[426] Handler (1978) 25.
[427] Cf Kidder (1983) 129-131.
[428] Chemerinsky in Devins and Douglas (eds) (1998) 199.
[429] 426 US 229 (1976).
[430] 481 US 279 (1986).
[431] Buntman (2001) 56 *Univ Miami L Rev* 21.
[432] Buntman (2001) 56 *Univ Miami L Rev* 21.
[433] Buntman (2001) 56 *Univ Miami L Rev* 22.

engineering would perhaps have to take place and would raise questions or even invalidate a whole range of tax, welfare, public service, regulatory and licensing statutes, on the basis that the statutes are more burdensome to the poor than the more affluent white.[434]

Kagan provides striking examples of the limits of traditional legal remedies: Courts can issue orders against overt discrimination, but they cannot increase the tax base of central cities, eliminate economic disparities between the poor and the suburban middle class, create governmental programmes, guarantee jobs, build subsidized houses, or operate halfway houses for the mentally ill.[435]

In the same vein Loenen argues that it is primarily the legislature that must see to it that substantive equality is achieved.[436] She provides the following example to illustrate that the remedy that a court would grant is not ideally suited to achieving the "best" result: The Dutch legislature considered an amendment to its Unemployment Act to make the factor "work history" decisive in ascertaining the period for which a person could claim unemployment benefits – the longer a person had worked, the longer that person would be entitled to benefits. A question was raised in Parliament as to possible indirect sex discrimination: more women than men would have given up their employment to take care of young children and more women would therefore have a shorter "work history". The legislature's solution was to allow people taking care of young children to count these years as part of their "work history". The proviso was couched in sex-neutral terms, therefore also allowing stay-at-home fathers to be included.[437] Had the Act been promulgated in its original form and had a court to decide on the appropriate remedy, it would have faced a dilemma: striking down the "work history" factor would have had much more serious economic consequences than Parliament would have intended when it enacted the Act.[438] Loenen argues that a court would not have been able to introduce the solution the Dutch legislature opted for.[439]

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[434] Buntman (2001) 56 *Univ Miami L Rev* 22.
[435] Kagan (2001) 180.
[436] Loenen (1997) 13 *SAJHR* 428.
[437] Loenen (1997) 13 *SAJHR* 428.
[438] Loenen (1997) 13 *SAJHR* 428.
[439] Loenen (1997) 13 *SAJHR* 428.

Handler argues that courts consider themselves overburdened and would rather get rid of problems.[440] Enforcement of court orders is problematic and courts will generally not set up elaborate structures to enforce judgments.[441] This puts pressure on the plaintiff and requires staying power.[442] Money payments are generally not difficult to monitor, except when small amounts need to be paid out to a large group of people.[443] Courts or court-like structures are probably better equipped to provide short-term or immediate remedies and are loath to order long-term restructuring.[444] For example, Chisholm and Napo refers to two commissions of enquiry that were set up to investigate gender violence at two Soweto schools, one a primary school and the other a high school.[445] The primary school enquiry was set up under the chairpersonship of a woman, the Director of Personnel, Human Resources Development and Organisational Development, educated at a liberal South African university and acutely aware of gender inequality.[446] The high school enquiry was placed under the control of a male advocate and an outsider to the particular community.[447] Both enquiry reports examined the grievances on a case-by-case basis and recommended the transfer of particular students and/or teachers.[448] In the authors' words, such an approach "dissolve but do not resolve" the issues.[449] The long-term effect is to silence and trivialise grievances.[450]

6. It is perhaps trite to mention that the costs of legal proceedings in South Africa are prohibitively high for the vast majority of South Africans.[451] Sarkin states that legal aid in civil matters is almost entirely unavailable to the majority of South Africans.[452] He lists the most important ways in which access to justice is provided in South Africa: Private attorneys and advocates (compensated by the Legal Aid Board (LAB)); LAB-funded candidate attorneys in

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[440] Handler (1978) 24.
[441] Handler (1978) 24.
[442] Handler (1978) 24.
[443] Handler (1978) 22-25.
[444] Handler (1978) 24.
[445] Chisholm and Napo (1999) 41 *Agenda* 35.
[446] Chisholm and Napo (1999) 41 *Agenda* 36.
[447] Chisholm and Napo (1999) 41 *Agenda* 36.
[448] Chisholm and Napo (1999) 41 *Agenda* 36-37.
[449] Chisholm and Napo (1999) 41 *Agenda* 37.
[450] Chisholm and Napo (1999) 41 *Agenda* 37.
[451] Cf Froneman J's remarks in *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) para 27.
[452] Sarkin (2002) 18 *SAJHR* 630. Francis (Liberty conference) 71 confirms that legal aid is provided in criminal matters only and that the Legal Aid Board "has inherited a logistical mess".

rural law firms; LAB-funded law clinics; LAB-funded justice centres; uncompensated private lawyers (*pro bono*; *pro amico*; *in forma pauperis*); public interest law firms; independent university law clinics; advice offices staffed by paralegals; legal insurance schemes; contingency fee arrangements and the small claims courts.[453] Sarkin deplores the fact that more free legal work was done during Apartheid,[454] and advocates the creation of a *pro bono* clearing house.[455] Francis highlights a number of issues that hamper access to justice: the high cost of private attorneys, the uneven geographical distribution of legal services, a lack of information about legal services, the intimidating image of lawyers, limited small claims court jurisdiction and the failure of many lawyers to provide community service.[456] He states that attorneys in rural areas serve primarily wealthy farmers with whom they share linguistic, cultural and political links, which leaves few attorneys to assist the majority of impoverished rural population. He argues that to ordinary people the law remains an area of mystery and attorneys are regarded as shrewd and unscrupulous, which means that ordinary people are loath to use legal services.[457] Francis offers the following suggestions to improve access to justice: the training of paralegals to provide primary legal services; an increase in the jurisdiction of the small claims court and the establishments of these courts throughout South Africa; the removal of barriers to enter the legal profession, mandatory externships; encouraging contingency fee arrangements between attorneys and clients; the setting up of public-interest departments in large law firms; simplifying court procedures; and big business providing funding to NGOs to provide free legal services to the poor.[458] Christie suggests that "enforcement tribunals to determine discrimination complaints and commissions to promote awareness are North American and European devices which may be irrelevant to the overwhelming majority of the really poor". [459]

7. Some authors argue that the attempt to equalise the social position of disadvantaged groups and the restructuring of the overall benefits in a given society is a political task best left to

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[453] Sarkin (2002) 18 *SAJHR* 631. I assume he has those cases in mind where the client does not have the funds to afford an attorney of own choice.
[454] Sarkin (2002) 18 *SAJHR* 638.
[455] Sarkin (2002) 18 *SAJHR* 641.
[456] Francis "Liberty Conference" (2000) 72-73.
[457] Francis "Liberty Conference" (2000) 73.
[458] Francis "Liberty Conference" (2000) 73-76.
[459] Christie in MacEwen (ed) (1997) 188.

Parliament, as courts are ill equipped and ill trained in this regard.[460] For example, Koopmans argues that judges are inherently conservative as it is their role to maintain the established order; those who wish to change the existing order should turn to politics,[461] while Waldron points out that courts are not set up as representative law-making institutions.[462] Likewise, Nedelsky argues that legislatures in a constitutional state have a duty to deliberate collectively on the common good[463] – again, this is not something courts are set up to do. Parliaments are more accessible than courts; members of Parliament are more accountable and likely to be a more diverse group than judges.[464] In most instances Parliament would have better access to resources, different points of view, and data.[465] It then follows that the legislature is much better placed to effect fundamental redistributions in society.[466]

In the context of combating discrimination, the drafters of the 1996 Constitution seem to have agreed with the argument that societal transformation is a political task best left to a democratically elected legislature. Section 9(4) of the Constitution obliged Parliament to enact anti-discrimination *legislation*. The implication is that the drafters of the Constitution felt that combating discrimination was a *legislative task* and not something to be left to the courts to solve in a piecemeal, case-by-case fashion. However, the drafters of the Act were faced with a dilemma:[467]

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[460] See in general Koopmans (2003) 98-104. As to anti-discrimination legislation, see Freedman (1998) 115 *SALJ* 251; Freedman (2000) 63 *THRHR* 320; Koopmans (2003) 215-216 and Moon (1988) 26 *Osgoode Hall LJ* 673.
[461] Koopmans (2003) 274.
[462] Waldron in Bauman and Kahana (eds) (2006) 22; 25.
[463] Nedelsky in Bauman and Kahana (eds) (2006) 123.
[464] Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 325-326.
[465] Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 327.
[466] Eskridge and Ferejohn in Bauman and Kahana (eds) (2006) 350.
[467] Réaume (2002) 40 *Osgoode Hall LJ* 143; my emphasis. Scott (1998) 309 argues in similar vein: "Any large social process or event will inevitably be far more complex than the schemata we can devise, prospectively or retrospectively, to map it"; at 335: "[N]o forms of production or social life can be made to work by formulas alone"; and at 22: "No administrative system is capable of representing any existing social community except through a heroic and greatly schematized process of abstraction and simplification". One of the drafters of the Napoleonic Code observed that "[A] code may look very complete, but a thousand unexpected questions present themselves to the judges as soon as it is finished: for laws, once drafted, remain as they have been written down, but people never rest" – Koopmans (2003) 224. At 284 Koopmans says that "ultimately, life always defies general schemes".

> The human phenomenon of *discrimination* – of those in relative positions of power denying full human status and opportunity to those in relative positions of disadvantage – *is not capable of being codified in precise terms* of the sort that have characterised past legislative efforts.

The drafters' solution to this dilemma was reasonable: In Reaume's terms, they codified a general theory and left it to the courts to work out the detail.[468] It could be argued that the South African legislature in effect appropriated the law of delict as a tool to bring about social change as the Act creates a quasi-constitutional delict of unfair discrimination. The Act contains a general definition of "discrimination", a test for recognising "prohibited grounds" not listed in the Act, and a general test for "fairness/unfairness". Over time equality courts will have to work out the detail, fleshing out on a case-by-case basis what would be "fair" or "unfair" discrimination in a great variety of contexts and circumstances. The upside is that a more accessible enforcement mechanism was created: Instead of having to approach an expensive magistrate's court or High Court, an equality court may be approached without legal representation. The downside is that all the usual disadvantages of using litigation to solve social ills will follow.[469] I revisit the question whether a court or the legislature is better placed to address discrimination in chapter 6.2.1.3 below, where I raise the possibility of an inter-institutional dialogue between the three branches of state authority and civil society.

2.7 Conclusion

As will be expanded on in the next chapter, the drafters of the Act took the typical defects of a court-driven dispute resolution mechanism into account and as a result the Act creates the (currently untapped) potential for wide-ranging court-driven societal transformation.

However, some of the Act's underlying assumptions are unrealistic or false. The Act implicitly assumes that the equality courts will address at least a significant number of incidents of discrimination effectively – how else will real transformation take place?[470] For example, consider

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[468] Réaume (2002) 40 *Osgoode Hall LJ* 142.
[469] Ngcobo J in *National Education Health and Allied Workers Union v UCT* 2003 (3) SA 1 (CC) para 14 is more positive. He sees the courts and Parliament acting in *partnership* to give life to constitutional rights (where legislation has been enacted to give effect to the Constitution.)
[470] This seems to have been the viewpoint of at least one of the drafters of the Act. On p 6 of the "Draft Project Plan" drafted by the Chief Director: Transformation and Equity and the Chief Director: Legislation in the Department of

clause 4(c) of the Schedule to the Act, in terms of which the legislature targets unfair discrimination in the provision of housing bonds, loans or financial assistance on the basis of race, gender or other prohibited grounds. Assume that a bank's lending policy has the effect of disproportionately denying loans to black applicants. If only a few applicants approach the courts, that bank may very well settle each of the few individual cases. A bank will likely only consider changing its policy if a large number of applicants who have been denied a loan approach an equality court. If a particular individual is an avowed racist, the Act will only reach him if a particular defendant approaches a court to complain. His or her behaviour will likely only change once he has been sued and it becomes too expensive to be a racist. (More promisingly, the Act allows claims to be brought as class actions[471] or as public interest actions,[472] but this potential remains untapped, arguably because of the complexities involved in bringing a class action, and the high threshold established for a public interest action by the Constitutional Court.[473])

Another unrealistic assumption driving the Act is the role that law plays in ordinary South Africans' lives. As I have set out above, law is absent from the vast majority of South Africans' lives. In the context of anti-discrimination laws specifically, consider for a moment the Cronje-Davids rugby controversy that erupted a few weeks prior to the 2003 Rugby World Cup. Cronje, a white player, allegedly refused to share bathroom facilities with Davids, a "coloured" player from another provincial side and a rival for the same position in the final national (Springbok) squad. The incident was widely reported in the media. The same pattern that I have identified from Joubert's study emerges again: Very few commentators, if any, refer to *the law* in criticising or defending Cronje's decision. Comments relating to the incident could broadly speaking be divided into four categories: racism, interaction between rugby players, emotive reactions and comments linking the incident to the broader South African society.[474] The vast majority of reactions linked the incident to racism.[475] The second-largest group of reactions focused on the nature of the interaction

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Justice and Constitutional Development (copy of document in my possession), it was estimated that 1.5 million people would use the dispute resolution mechanisms established in terms of the Act in the first year of operation.

[471] S 20(1)(c).

[472] S 20(1)(d).

[473] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) read with *Ferreira v Levin NO* 1996 (1) SA 984 (CC) para 234.

[474] I do not suggest that the newspaper clippings that I collected amount to a representative sample.

[475] I *inter alia* collected the following reactions: "there were no racist words" (*daar was geen rassistiese woorde*) (*Beeld* (2003-09-05) 3); "is South African rugby racist? The answer may be yes, depending on your parameters". (*Mail &*

between rugby players and between players from different provincial sides.[476] About seven of the clippings I collected referred to the incident in emotive terms[477] and three reactions tied the incident to the broader South African situation.[478]

I could not locate a single reference to the Act or a debate as to whether Cronje "fairly" or "unfairly" "discriminated" against Davids, which would have been the lawyerly way of "solving" the "problem" – the way such an incident is treated in terms of the Act.[479] If ordinary people do not refer to the law in criticising or justifying similar incidents, why would the law have any influence in their daily

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Guardian (2003-09-05) 56); "there was not conclusive evidence that this activity was based on racism" (*Mail & Guardian* (2003-09-05) 56); "[Coach] Straeuli and his squad insist racism played no part in the players' decision to change rooms last week" (*Sunday Times* (2003-09-07) 21); "the controversy now includes full-blown accounts of racism and deceit" (*Sunday Times* (2003-09-07) 21); "racism cover-up" (*Sunday Times* (2003-09-07) 1).

[476] Some of the reactions included: "Dale Santon asked whether he would have been guilty of racism if he asked to share a room with Davids, on of his friends" (*Dale Santon het gevra of hy ook aan rassisme skuldig sou wees as hy gevra het om saam met Davids, een van sy vriende, 'n kamer te deel*) (*Beeld* (2003-09-05) 1); "as to the alleged incident of racism between Geo Cronjé and Quinton Davids, the Bok Captain said that it often happens that players swap rooms for various reasons. In this case it was wrongly interpreted as racism" (*wat die beweerde voorval van rassisme betref waarin Geo Cronjé en Quinton Davids na bewering betrokke was, het die Bok-kaptein gesê dit gebeur gereeld dat spelers om verskeie redes van kamer verander. 'In hierdie geval is dit verkeerdelik vertolk as rassisme'*) (*Beeld* (2003-09-05) 3); "[I]t was a simple swop as players normally do… team management did not allow it this time and Cronjé went back to rooming with Davids before it blew up as a race issue in the papers" (*Sunday Times* (2003-09-07) 30); "'Why is it racism when Geo and Quinton swop but not when Victor and AJ do it?' asked an irate Werner Greeff" (*Sunday Times* (2003-09-07) 30); "You're dealing with 30 players and not all of them are the best of friends. Without being involved, it's very difficult to say if it could have been done differently" (*Sunday Times* (2003-09-07) 30); "They are competing for the same position in the World Cup squad. It is understandable that there could have been friction between them (*Hulle ding albei mee om dieselfde plek in die Wêreldbeker-groep. Dis te verstane dat daar wrywing tussen hulle kon gewees het*) (*Beeld* (2003-08-29) 3).

[477] "Race storm" (*rassestorm*) (*Beeld* (2003-09-06) 8); "race racket" (*rasseherrie*) (*Beeld* (2003-09-05) 1); "race drama" (*rassedrama*) (*Beeld* (2003-09-05) 3); "Bok crisis" (*Rapport* (2003-09-07) 1); "a scandal" (*'n skandaal*) (*Rapport* (2003-08-31) 1); "rugby race row" (*Sunday Times* (2003-09-07) 7); "a racism bomb" (*'n rassisme-bom*) (*Beeld* (2003-08-29) 1).

[478] "In the greater scheme of things South African rugby is absolutely irrelevant. The ideals of the Rainbow Nation are in tatters not because of a few muddied oafs with funny shaped balls, but because a decade of free and fair governance has taught us one important lesson: we actually don't like each other very much" (*Mail & Guardian* (2003-09-05) 56); "Race *is* a factor in South African rugby, as it is a factor in all fascets of our daily living. What is important is how it is treated. If every racial incident in South Africa leads to the kind of polarisation that we have seen over the past ten days, our days are numbered" (*Ras ís 'n faktor in Suid-Afrikaanse rugby, soos dit 'n faktor is in al die fasette van ons alledaagse bestaan. Hoe dit hanteer word, is wat tel. As elke voorval in Suid-Afrika met 'n ras-element lei tot die soort polarisasie wat die afgelope tien dae aanskou is, kan ons maar by voorbaat Ikabod skryf oor die toekoms*) (*Rapport* (2003-09-07) 18); "Madiba has on various occasions said that we must all realise that racism still exists in South Africa. It will not suddenly disappear. People were raised with certain values and it takes time to change those values. He believes it must be eradicated over time and therefore he advised Straueli and minister [of sport] Balfour to not tolerate it" (*Madiba het al by verskeie geleenthede gesê ons moet almal besef dat daar nog rassisme in Suid-Afrika bestaan. Dit is nie iets wat oornag kan verdwyn nie. Mense is grootgemaak met sekere denkwyses en dit verg tyd om daardie denkwyses te verander. Hy glo dit moet mettertyd uitgeroei word en daarom het hy vir Straueli en minister Balfour aangeraai om dit nie te duld nie*) (*Rapport* (2003-09-07) 1).

[479] Griffiths in Loenen and Rodrigues (eds) (1999) 316 states that people's interpretation of what happened to them depends on their social surroundings, not the law.

decisions? As Marcus puts it, "people ... don't seem to think legalistically or in terms that are derived from the law".[480] The entire incident could have played out completely differently. Cronje could have decided to say nothing and could have stayed in the room. Davids could have decided to say nothing. Apparently Davids overslept and that is how the team management discovered that the players swapped rooms. Had he not overslept, nothing may ever have become known. Somehow the media heard about the incident – had that not happened, the incident may well have been covered up. These are only some of the possible outcomes, and "the law" played no part in the outcome of any of these scenarios. "The law" can always step in afterwards, but to do what exactly? The damage has been done; after the fact analysis of what each of the role players said or did or did not say or did not do plays no role in steering or driving anyone's behaviour. The Austinian concept of law as command assumes that citizens will obey all laws, lest they be subjected to sanctions. The above exposition shows this approach to law as flawed. The underlying assumption to legal rules is that humans are rational beings and that they will direct their behaviour according to legal principles, but at best humans are a-rational.[481]

A number of authors' views on the role of law in a given society complement each other. Whether one distinguishes between "simplex" and "multiplex" relationships,[482] or propose that "law varies

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[480] Marcus in Sarat and Kearns (eds) (1995) 248.

[481] Fukuyama (2005) 105; Stout in Drobak (ed) (2006) 13. Berger (1991) 22 *S Afr J Sociol* 73-77 highlights four relatively recent events that have occurred since the Second World War that were not foreseen by sociologists: (a) the cultural and political turmoil in Western countries in the late 1960s and early 1970s; (b) the rapid economic growth of newly industrialised countries in the East in the 1970s and onwards; (c) the Iranian revolution and (d) the quick collapse of the Eastern European communist regimes. He laments the fact that sociologists generally fall into two camps; what he calls "ideologists" and "trivialisers". The ideologists imagine a "bigger picture" that simply does not exist; the trivialisers see the minute parts but does not realise that it is part of something bigger. He says that the social sciences are children of the Enlightenment and that they are based on a *basic erroneous assumption about the rationality of human action* (my emphasis). Aubert (1983) 141 puts it thus: "Underlying our presentation of reasons for preferring an alternative conflict-solving device, there is the *assumption of rationality* on the part of the actors. It is rational to act in accordance with the mini-max principle, to save time and money, to shun publicity. However, *this assumption of rationality is not always realistic*; nor is it always correct to look upon the individual actor as a separate entity, free from ties to other actors" and at 142: "Rationality is a difficult concept. Unusual steps may appear irrational because they are unsuited to furthering the welfare of the actor in the conventional sense. *However, an actor may be prompted by a desire to realize unusual values*, *for the achievement of which these apparently irrational means are suitable"* (my emphasis). Fuller (1978) 92 *Harv L Rev* 360: "[A] more general criticism that may be directed against the whole analysis being presented here, namely that it grossly overstates the role of rational calculation in human affairs. It forgets that men (sic) often act in bland conformity to custom, in passive acquiescence to authority, and – sometimes at least – in response to inarticulate impulses of altruism. But there is no intention here to deny that the springs of human actions are diverse and often obscure".

[482] Kidder (1983) 70-72.

inversely with other social control",[483] or distinguishes between a "Gemeinschaft" and "Gesellschaft" conception of society,[484] or talks of a continuum ranging from intimacy to open hostility,[485] the same pattern emerges: The closer a particular society mirrors a close-knit, co-dependent, "happy (or unhappy) family",[486] the smaller the role that (official state) law will play.[487] To this one could add authors' observation that neutral and instrumental areas of life may to a degree be controlled by law,[488] but that "areas of emotion" are extremely difficult to direct.[489] This does not bode well for an Act that was *inter alia* put in place to address the intimate spheres of life.[490]

Consider just one example of the Act's likely impotence. It is at least arguable that a society will only change if the basic relationships in a society change: For example, as long as the division of labour within a household is skewed in favour of men, real substantive equality between the sexes will not be achieved.[491] However, it is precisely in this sphere that the Act will most probably fail most spectacularly. Although the Act may in theory arguably intrude into the home and perhaps

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[483] Black (1976) 6-7.
[484] Tőnnies (2002) 37-102; Kamenka and Tay in Kamenka and Tay (eds) (1980) 8-11.
[485] Fuller (1981) 237.
[486] It is then, for example, not surprising that a legislative attempt in Tanzania to outlaw female genital mutilation, has not been particularly effective. In 1998 the practice was criminalised and made punishable by imprisonment of up to 15 years. However, no one has been found guilty of violating this law yet. Those prosecuted under this law are usually acquitted because the daughters involved have been unwilling to testify against their parents. http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=72766 (accessed 2006-08-23).
[487] 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.
[488] 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 to argue 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.
[489] 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 customs 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 successful. 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.
[490] Cf Albertyn *et al* (eds) (2001) 4.
[491] Cf Wollstonecraft as interpreted by Pateman in Boucher and Kelly (eds) (2003) 270-287; and at esp 285: "[T]he interrelationship between marriage, employment, and citizenship is only slowly being acknowledged, and the legacy of old institutions and convictions about women's proper place lingers on".

may assist a wife who wishes to sue her husband for failing in his role as a sensitive, caring, burden-sharing companion,[492] it is extremely unlikely to happen. Such a claim faces a number of hurdles. The loving wife will probably not realise that a potential claim lies against her errant husband. The clerk of the equality court may turn the complainant away, perhaps even laugh in her face. The presiding officer may dismiss the claim as frivolous and award a punitive costs order against her. Even if a far-reaching remedy is awarded, an unsympathetic husband will likely laugh off the claim and she will be forced to institute another action, or have him thrown in jail for contempt of court, whereafter divorce could follow (which is perhaps what she should have done in the first place, without first wasting money on a case that may well be dismissed as frivolous.) And if only a few wives should follow the equality court-route, even assuming that their husbands will adhere to far-reaching court orders, other wives' position will remain unchanged.[493]

In a "society" of about 40 million inhabitants consisting of banks and lenders, insurance companies and insureds, farmers and labourers, shopkeepers and customers, restaurants and clients; African chiefs and their subordinates; schools and pupils, universities and students, employers and employees, it is the powerful "repeat players" that will likely come out on top and it is likely that the "one-shotters" will lose more than they win.[494] In dependent (or multiplex) relationships, such as

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[492] My example is not absurd. S 8(d) of the Act outlaws "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child". Sen in Drobak (ed) (2006) 254 argues that these kinds of obligations should not be legislated: "[I]n a male-dominated traditionalist society … the social recognition of a wife's 'human right' to be consulted in family decisions may be a very important move. But it does not follow that a human right of this kind should be put into the rule books through legislation – perhaps with the husband being arrested, locked up, or otherwise punished by the state if he were to fail to consult his wife".

[493] Gardner in Hepple and Szyszczak (eds) (1992) 149 puts it more eloquently: if we see "social life" as state-family-market, then law has almost nothing to do, as it a weapon of the "state" sphere only; as "economic and personal activities are generally assumed to be organized so that they can look after themselves". When courts are relatively reluctant to intrude in the market and the family, how does one call into question long-established patterns of domination internal to such activities? In other words, most people cannot be atomistic, rational "authors of their own lives". Fuller (1978) 92 *Harv L Rev* 370-371: "Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined "rights" and "wrongs". Courts have, for example, rather regularly refused to enforce agreements between husband and wife affecting the internal organization of family life". MacKinnon in Sarat and Kearns (eds) (1995) 111-112: "No law addresses the deepest, simplest, quietest, and most widespread atrocities of women's everyday lives. The law that purports to address them, like the law of sexual assault, does not reflect their realities or is not enforced, like the law of domestic violence. Either the law does not apply, is applied to women's detriment, or is not applied at all. The deepest rules of women's lives are written between the lines, and elsewhere". I would argue that the Act attempts to address these "deepest atrocities" but in an unrealistic way.

[494] In an empirical study completed in 2005 it was shown that from 1994-2004, approximately 930 275 farm labourers and their dependents were illegally evicted from farms. The study concluded that only about 1% of evictions that occurred after 1997 were performed in terms of the relevant legislation. In six out of seven cases the farm workers had

farmer-labourer, it is extremely unlikely that courts will be utilised.[495] And in simplex relationships, it is likely that a potential claimant will decide to walk away from a potential lawsuit, *inter alia* because of the material and emotional costs involved.[496] The Parliamentary hearings process relating to the finalisation of the Act partly bears out this argument. The most vociferous opponents of the Bill were the insurance and banking industry – arguably well-informed, well-resourced "repeat players" that may be expected to be sued often.[497] These organisations are also involved

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no legal representation when their eviction case was heard in court. *Sake24 (Beeld)* (2007-03-19) 12. This finding is not surprising from a socio-legal perspective.

[495] It is at least arguable that vulnerable groups are more likely to be caught up in multiplex (dependent) relationships and therefore more likely *not* to utilise courts. In Annexure D I set out reported decisions by the various Canadian anti-discrimination tribunals. Only 28% of cases were brought by minority groups to the Canadian Human Rights Tribunal. The respective percentages for Alberta, British Columbia and Ontario are 15%, 16% and 29%.

[496] A limited empirical survey that I undertook in 2001 suggests that the South African legal system still suffers from a severe legitimacy crisis, which would be another reason why ordinary people do not easily approach lawyers and courts for assistance. (See chapter 5 for more detail).

[497] See Gutto (2001) 108-109. Gutto made available his files relating to the lobbying process to me. I extracted the submissions from the following bodies from these files. The following bodies argued in favour of an "economic differentiation" defence in the Act: The Banking Council submitted that "the Bill as currently formulated would preclude banks from using appropriate systems and mechanisms to arrive at sound judgments 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 must 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". 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'". The Life Offices' Association's (LOA) submission was in similar vein. The submission contains the following alarmist sentence: "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" (my emphasis). LOA further argued that the Bill negated the basic principles of risk insurance. It proposed the following defence: "No insurer may unfairly discriminate against any person in the provision of insurance services on any of the prohibited grounds. 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". The South African Insurance Association (SAIA) proposed the following scheme: "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

in "instrumental" or "neutral" areas of life, where law may be expected to play a larger role. The lobbyists for the "one-shotters", the likely plaintiffs, argued in favour of the removal of barriers to lessen the strategic disadvantage they would face in giving life to the Act.[498]

Even authors who believe that law has a potentially meaningful role to play, provide severe provisos. For example, Evan puts forward seven conditions that would allow law to play an "educational function".[499] His second condition prescribes that a new law must "clarify its continuity and compatibility with existing institutionalized values".[500] Read with his fourth condition, "law must make conscious use of the element of time in introducing a new pattern of behaviour",[501] it seems that at best he suggests that a new law will have (some) effect only over the (very) long term. A radical departure from "institutionalised values" will then probably never be implemented. His final condition, "effective protection must be provided for the rights of those persons who would suffer if the law were evaded or violated",[502] could be unattainable in a resource-limited country, especially if a large number of agitated defendants exist.[503] Morison's "advice to Machiavelli's Prince today

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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".

[498] A number of bodies for example argued for the inclusion of further, explicitly listed, prohibited grounds in the Act. The AIDS Law Project (ALP) regretted that HIV/AIDS was not listed as a prohibited ground and not explicitly defined as a disability for purposes of the Bill. It described this omission as "unfortunate, ill advised and unhelpful". ALP argued that one could not simply rely on the "natural progression of law" to decide if HIV/AIDS could be deemed to be "any other recognised ground" but that the Bill "must be clear about locating HIV/AIDS in the legislative framework of equality and should do so by listing HIV/AIDS as a prohibited ground". ALP also argued for the explicit inclusion of the additional prohibited grounds of family status and family responsibility, socio-economic status and nationality. The Commission on Gender Equality argued for the inclusion of family responsibility, family status, HIV/AIDS status and socio-economic status. COSATU submitted that family responsibility, national origin, HIV/AIDS and socio-economic status be added as prohibited grounds. The Equality Alliance requested Parliament to replace the various definitions of (unfair) discrimination with a single definition as the various definitions were inconsistent with one another; it made the Act inaccessible; it could give rise to confusion; and the various definitions do not take cognisance of the intersectionality of discrimination. The Alliance also asked that the Act be amended to make it clear that an action could be brought on more than one ground. It also submitted that the Act should distinguish between individual cases of discrimination and systemic forms of discrimination, to ensure the promotion of protection from structural discrimination. The Alliance argued for the inclusion of HIV/AIDS, nationality, socio-economic status and family status in the list of grounds. The Gender Project, Community Law Centre argued for the inclusion of HIV/AIDS status, family status, family responsibility and socio-economic status in the list of prohibited grounds. The National Coalition for Gay and Lesbian Equality submitted that nationality, HIV/AIDS status, socio-economic status, family status and family responsibility be added to the list of prohibited grounds.

[499] Evan in Evan (ed) (1980) 557-561.

[500] Evan in Evan (ed) (1980) 558.

[501] Evan in Evan (ed) (1980) 559.

[502] Evan in Evan (ed) (1980) 560.

[503] Assume for a moment that a hundred thousand wives sue their hundred thousand husbands, and assume that a hundred thousand equality court judgments order the husbands to share the household burdens equitably.

as to the limits and possibilities of law" leads to the same conclusion.[504] His first condition, "the goal of the lawmaker must be realizable through law",[505] and his fourth condition, "the required change must be able to be implemented",[506] leads nowhere as he does not answer the question *when* the lawmaker's goal will be realisable and *when* the change will be able to be implemented.[507] Morison also insists that the "purpose behind the legislation must be compatible to existing values to a degree",[508] which also implies that radical change will take a long time to be realised.

At first blush authors such as Chemerinsky and Budlender seem to come to a different conclusion and seem to be much more positive about the potential effect of utilising the law. Chemerinksy ostensibly argues that courts "make a difference" and that changes in the law lead to changes in society.[509] However, a careful reading of his argument reveals that he has a very narrow definition of what would constitute "effective" court action. He seems to argue that an anti-discrimination Act would be effective if it provides redress to injured *individuals*.[510] He uses tort law as an example: Tort law is effective because it compensates innocent victims, although it may not deter dangerous products and practices.[511] He takes solace from *Brown v Board of Education* because it was an "enormously important" statement of equality, although it had little effect.[512] He argues that court cases upholding the (American) Constitution protects key values and therefore have "great social importance" even if no social change flows from the cases.[513] He correctly argues that categorical statements about the (lack of) ability of courts to achieve social change must be avoided,[514] but he does not provide a single example of a court case that has lead to social change. If anything, he provides examples where courts have *frustrated* social change.[515] Budlender optimistically refers

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[504] Morison in Livingstone and Morison (eds) (1990) 8.
[505] Morison in Livingstone and Morison (eds) (1990) 9.
[506] Morison in Livingstone and Morison (eds) (1990) 9.
[507] At 9 he rather unhelpfully suggests that world peace or a happy Christmas is beyond the scope of the legislature.
[508] Morison in Livingstone and Morison (eds) (1990) 9.
[509] Chemerinksy in Devins and Douglas (eds) (1998) 191-203.
[510] Chemerinksy in Devins and Douglas (eds) (1998) 193; my emphasis.
[511] Chemerinksy in Devins and Douglas (eds) (1998) 193.
[512] At 198-199 he is quite candid about *Brown*'s failure. A decade after *Brown* only 1.2 % black schoolchildren were attending school with whites and in present day America racial separation is increasing.
[513] Chemerinksy in Devins and Douglas (eds) (1998) 193.
[514] Chemerinksy in Devins and Douglas (eds) (1998) 201.
[515] Chemerinksy in Devins and Douglas (eds) (1998) 201-202.

to *Minister of Health v Treatment Action Campaign (No 2)*[516] as an example where court action successfully lead to changes in government policy and the provision of treatment to (poor) people living with HIV.[517] However, in another decision by the Constitutional Court relating to socio-economic rights, *Government of the Republic of South Africa v Grootboom*,[518] very little happened in its aftermath. Three years passed before the national government put in place an emergency housing programme that had still not been adequately implemented.[519] Budlender argues that to be effective, civil society organisations must pressurise government to comply with court orders and the public media must pursue the particular matter.[520] This translates to enormous organisational ability, energy, effort and money; something most litigants do not have.

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.[521] In this belief governments are probably usually mistaken.[522]

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[516] 2002 (5) SA 721 (CC).
[517] Budlender (2006) 15 *IB* 140.
[518] 2001 (1) SA 46 (CC).
[519] Budlender (2006) 15 *IB* 139.
[520] Budlender (2006) 15 *IB* 139 and 140.
[521] Dror (1958) 33 *Tul L Rev* 802. Also cf Dawes *et al* in Pillay *et al* (eds) (2006) 240 who argue that the solution to combating partner violence in South Africa lies in the effective implementation of domestic violence legislation. The characteristics of effective law set out in this chapter, however, would suggest that law will have an extremely limited impact in such intimate settings.
[522] Dror (1958) 33 *Tul L Rev* 802. And perhaps, naively, legislatures truly believe that people will obey laws that have been enacted – cf *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 (1) SA 396 (SCA) para 31; the speech by JO Tlhagale (MP, UCDP) at the consideration of the Bill in the National Council of Provinces, 28 January 2000 (reproduced in Gutto (2001) 82): "No longer will any anybody call anyone derogatory names, no longer will anybody discriminate against anyone on the basis that he or she has no struggle credentials and no longer will anybody discriminate against anyone on the basis of race, gender or disability"; and the speech by MP Themba (MP) at the same occasion (Gutto (2001) 87): "There are many more areas in which the implementation of this Bill will have *immediate and positive effect*" (my emphasis). Lustgarten (1986) 49 *Mod L Rev* 84-85 is more cynical: "It is impossible to say whether the preference for a legal approach was based upon an exaggerated faith in the efficacy of law; or the need, for political reasons, to be seen to do something highly visible, such as enacting a statute; or was a conscious alternative to taking on a wider long-term expensive and controversial commitment". Also cf Unterhalter "Liberty Conference" (2000) 38: "I do think that to some extent we are the *victims of the notion that law cures everything*. We do have this rather imperial view that lawyers and decisions by law-making tribunals of one sort or another *can always rectify every problem* or produce every kind of social good that we want. And sometimes in my view it is better to take a more modest view of what one can achieve, and achieve it better, than to put grand schemes in place" (my emphasis). (At p 34 of the published conference proceedings he notes that there are mainly two approaches of viewing law and the role of the state: "On the one hand, a large and dominant state is welcomed. From this view, what was wrong with apartheid was that it was applied to the wrong object. The opposite view is that liberty and dignity must be seen as the founding values of society and that the state should have a diminished role". If one accepts Unterhalter's analysis, a programme of social change being driven via law depends on a dominant, capacitated state. Fukuyama (2005) argues in this vein.

The question should be posed: What would the purpose of the thesis then be, if in the second chapter I already reach the conclusion that the Act is likely to fail in its stated goals? It would have to be a modest and limited purpose: At least some individuals will approach the equality courts some of the time, and courts can and will provide meaningful relief to some of these individuals. However, perhaps more individuals would approach these courts had the Act been drafted in clearer language, had the "fairness" enquiry been set out more coherently, had the training process run more smoothly, and so on. In the remainder of the thesis I attempt to identify barriers to a more effective implementation of the Act, accepting that the Act will probably not have its intended effect, but will assist some claimants some of the time.[523]

[523] Tamanaha (2001) 132 is to the point: A gap between "law in books" and "real life" is not necessarily problematic. If a gap exists, either abolish the law or find other ways of achieving the result aimed at.

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

3.1 Introduction

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

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

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

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

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[1] Where appropriate I shall also discuss the effect of the use of typical lawyers' language in an Act aimed at laypeople and the effect of lobbying by the banking and insurance industries during the Parliamentary drafting process.
[2] See pp 70-84 above.
[3] See pp 76-77 above.
[4] See p 74 above.
[5] See p 77-78 above.
[6] See p 83 above.

3.2 The limits of traditional anti-discrimination legislation

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

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

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

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[7] Moon (1988) 26 *Osgoode Hall LJ* 687; Varney (1998) 14 *SAJHR* 346; Lacey in Hepple and Szyszczak (eds) (1992) 101; Lacey (1987) 14 *J Law & Soc* 412.
[8] Dickens (1991) 18 *Melb Univ LR* 285-287.
[9] Bailey and Devereux in Kinley (ed) (1998) 308.
[10] (1938) 60 CLR 336.
[11] De Plevitz (2003) 27 *Melb U L Rev* 308.
[12] De Plevitz (2003) 27 *Melb U L Rev* 308.
[13] De Plevitz (2003) 27 *Melb U L Rev* 308.

3.2.2 The enforcement mechanisms are usually constrained by the range of remedies they are allowed to choose from.[14] In the United Kingdom the only remedies available to an equality tribunal are a declaration of rights, action recommendation and compensation, and tribunals cannot order what Dickens refers to as "remedial action".[15] McKenna laments the absence of remedies that reflect the collective nature of discrimination in the Canadian anti-discrimination legislative system.[16]

3.2.3 Enforcement mechanisms are ill-equipped to deal with discrimination complaints: these bodies may be under-resourced, or may have insufficient powers to fulfil their statutory obligations.[17] Dickens points out that in the United Kingdom the individual enforcement mechanism that operates via industrial tribunals does not operate effectively: Tribunals make errors, apply incorrect legal standards, superficially investigate employers' justifications and places reliance on irrelevant or subjective evidence.[18] He also argues that the United Kingdom Equal Opportunities Commission has not been funded sufficiently and runs at sub-optimum staff levels.[19]

3.2.4 Non-experts often chair tribunals.[20] Anti-discrimination legislation often contain complex provisions,[21] and if inexpert tribunals have to enforce these provisions, wrong judgments may often follow.[22]

3.2.5 Legal aid is not necessarily available to complainants.[23] Arguably a party to a suit that has legal representation will fare better than a non-represented litigant.[24]

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[14] Dickens (1991) 18 *Melb U L Rev* 284; Lacey (1987) 14 *J Law & Soc* 412; Lacey in Hepple and Szyszczak (eds) (1992) 101.
[15] Dickens (1991) 18 *Melb U L Rev* 285-287; Connolly (2006) 395.
[16] McKenna (1992) 21 *Man LJ* 325.
[17] Lacey in Hepple and Szyszczak (eds) (1992) 101; Lacey (1987) 14 *J Law & Soc* 412.
[18] Dickens (1991) 18 *Melb U L Rev* 286-287.
[19] Dickens (1991) 18 *Melb U L Rev* 286.
[20] Lacey in Hepple and Szyszczak (eds) (1992) 101.
[21] Eg see Annexures C and E.
[22] Lacey (1987) 14 *J Law & Soc* 413.
[23] Lacey (1987) 14 *J Law & Soc* 413; Lacey in Hepple and Szyszczak (eds) (1992) 101; Dickens (1991) 18 *Melb Univ LR* 285-287.
[24] Galanter (1974) 9 *Law & Soc Rev* 114.

3.2.6 Anti-discrimination Acts generally only allow a claim on a limited number of grounds.[25] The protected grounds may also be interpreted in an underinclusive way.[26] Anti-discrimination regimes also not do necessarily allow a claim on multiple grounds.[27] If the complainant's fact situation does not fit the legislation "arbitrary pigeonhole", the claim fails.[28]

3.2.7 Anti-discrimination Acts generally have a limited reach or area(s) of application.[29] Where anti-discrimination legislation focuses on particular grounds or has a limited reach, it implies that "less favourable treatment ... where they fall outside the limited ambit of the Act" is legitimate.[30] The optimistic corollary is that "this implication becomes less damaging the more thorough-going the legislation is".[31]

3.2.8 Another well-known complaint about anti-discrimination legislation is the use of a comparator;[32] which usually (consciously or subconsciously) turns out to be a white, heterosexual,[33] male.[34] Because of the insistence on a comparator, the more unequal the individual complainant and the (white male) comparator, the less likely that the legislation

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

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

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

[28] Réaume (2002) 40 *Osgoode Hall LJ* 115.

[29] Réaume (2002) 40 *Osgoode Hall LJ* 124; Bailey and Devereux in Kinley (ed) (1998) 297.

[30] Lacey in Hepple and Szyszczak (eds) (1992) 105.

[31] Lacey in Hepple and Szyszczak (eds) (1992) 105.

[32] Cf Connolly (2006) 63-67.

[33] De Vos (2000) 117 *SALJ* 21; De Vos (1996) 11 *SAPL* 374.

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

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

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

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

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[35] O'Regan (1994) *AJ* 79.
[36] [2001] IRLR 431.
[37] See Hannett (2003) 23 *Oxford J LS* 82-83.
[38] [1998] IRLR 165.
[39] See Barnard and Hepple (2000) 59 *Cam LJ* 563.
[40] Unreported, Victorian Equality Opportunity Board, 3 July 1981, as discussed by Thornton (1991) 18 *Melb U L Rev* 300.
[41] Thornton (1991) 18 *Melb U L Rev* 300.

3.2.9 Some jurisdictions favour conciliation (and secrecy) in stead of public court hearings, which could frustrate attempts to create a broader consciousness of discrimination.[42] Complainants may remain unaware of similar proceedings with favourable outcomes.[43]

3.2.10 Specifically from an African (or developing world) perspective, the judicial system in general (and, it follows, anti-discrimination courts or tribunals in particular) are not accessible. Packer argues that this is so because of the legal costs involved; the length of time required to finalise a case; the kind of language used in most courts; "the non-receptive attitude of personnel and officers involved in the administration of justice"; and the geographical distance between courts and subjects.[44] Bohler laments the fact that traditional and westerns ways of living in Africa "confine women in similar and different ways".[45] Her solution seems to be to encourage courts to listen to the stories of those individuals who live these cultures and that informal, flexible court proceedings should be used so that the real issues are not "swamped by legal technicalities".[46] She does not answer the argument that rural (African) women do not utilise courts to relieve their systemic confinement.

Krishnan paints the following picture of litigating in India:[47]

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

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

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[42] Contra Brand (2000) Autumn *W&A* 17 that believes that litigation should be the last option and that discrimination disputes should be solved in an amicable way.
[43] Bailey and Devereux in Kinley (ed) (1998) 303.
[44] Packer (2002) 149.
[45] Bohler (2000) 63 *THRHR* 292.
[46] Bohler (2000) 63 *THRHR* 292.
[47] Krishnan (2003) 25 *HRQ* 813. At 801 he notes that 20 000 cases are pending at the Supreme Court level and millions of matters are unresolved in the state High Courts.

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

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

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

[49] Handler (1978) 103.

[50] Handler (1978) 103.

[51] Handler (1978) 103.

[52] Handler (1978) 103-104.

[53] Handler (1978) 104.

[54] Handler (1978) 104.

[55] Handler (1978) 103-105.

[56] Handler (1978) 105-118.

[57] 347 US 483.

[58] Handler (1978) 106.

[59] Handler (1978) 106.

[60] Handler (1978) 106.

[61] As quoted by Handler (1978) 106-107.

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

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

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[62] Handler (1978) 107.
[63] Handler (1978) 107.
[64] Putting it in sociological terms, blacks were involved in multiplex relationships with whites and did not dare to "make trouble".
[65] Handler (1978) 109.
[66] Handler (1978) 110.
[67] Handler (1978) 111.
[68] Handler (1978) 111.
[69] Handler (1978) 117.
[70] Millar and Phillips (1983) 11 *Int J Soc Law* 424 refer to research that have indicated that a minority of female employees perceives that discrimination is operating against them. The authors speculate that this may be because females are concentrated in teaching and the civil service where explicit discrimination is less likely to occur, or where almost the entire workforce is female. The authors also note the individualised nature of litigation, which does not

3.2.12 A formal concept of equality coupled with a liberal notion of individual autonomy and free choice has hampered the potential of anti-discrimination legislation:[71]

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

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

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

[71] Lacey in Hepple and Szyszczak (eds) (1992) 102.

[72] Freeman (1978) 62 *Minn L Rev* 1053-1054.

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

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

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

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

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

[74] Freeman (1978) 62 *Minn L Rev* 1053-1057. Also see Fredman (2005) 21 *SAJHR* 163.

[75] Barnard and Hepple (2000) 59 *Cam LJ* 576.

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

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

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

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

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

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

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

[80] Lacey in Hepple and Szyszczak (eds) (1992) 102-103.

[81] O'Regan (1994) *AJ* 66.

[82] O'Regan (1994) *AJ* 66.

[83] O'Regan (1994) *AJ* 67. Also see Loenen (1997) 13 *SAJHR* 418.

[84] O'Regan (1994) *AJ* 66-67.

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

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

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[85] Cf Fredman (2005) 21 *SAJHR* 167: "Those who lack the requisite qualifications as a result of past discrimination will still be unable to meet job-related criteria; women with child-care responsibilities will still not find it easier to take on paid work". Also see Hirsch (2005) 7; Jagwanth (2003) 36 *Conn L Rev* 736; and Sowell (2004). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the "deserving sections" from designated groups should be the benefactors of affirmative action policies, which would imply excluding the "creamy layer" of designated groups from the benefits of affirmative action programmes. See Nair (2001).
[86] Hepple (1997) 18 *ILJ* 603-604.
[87] Hepple (1997) 18 *ILJ* 603-604.
[88] Hepple (1997) 18 *ILJ* 603-604.
[89] Hepple (1997) 18 *ILJ* 603-604.
[90] Hepple (1997) 18 *ILJ* 603-604.
[91] Hepple in Hepple and Szyszczak (eds) (1992) 19.
[92] Hepple in Hepple and Szyszczak (eds) (1992) 19.

individuals in employment, housing and the provision of services and that overt discrimination has decreased.[93]

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

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

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[93] Hepple in Hepple and Szyszczak (eds) (1992) 20.
[94] Coussey in Hepple and Szyszczak (eds) (1992) 36.
[95] Coussey in Hepple and Szyszczak (eds) (1992) 36.
[96] Coussey in Hepple and Szyszczak (eds) (1992) 36-37.
[97] Coussey in Hepple and Szyszczak (eds) (1992) 37.
[98] The law of delict offers a similar problem where a "mass wrong" had occurred. Cf Marcus in Sarat and Kearns (eds) (1995) 253: "Throughout the twentieth-century history of torts, the most difficult cases have been those in which the connections between the injured and the injurers have been the most difficult to establish". Marcus discusses the *Agent Orange* case in the United States as an example of such a "mass tort": 2.4 million Vietnam veterans, their wives, their born and unborn children, soldiers from New Zealand and Australia versus 7 corporate defendants and the United States government. Marcus shows how the existing tort law could not cope with this situation. The "solution" was a mass settlement, orchestrated and coerced by the presiding judge. Had a different judge presided over the matter, the plaintiffs may well have received nothing, in the face of massive problems relating to causation. Also see Mamdani (1998) 15: "[P]erpetrators are personally and individually guilty, beneficiaries may not be. They may be unconscious beneficiaries of systemic outcomes, where benefits cannot necessarily be linked to individual agency". I would argue that courts follow a "perpetrator paradigm" and searches for individual "fault". Where someone has benefited from an immoral system, but did not actively participate in some evil deed whereby harm was caused to an identifiable "victim", courts will likely not recognise a cause of action.
[99] Hepple (1997) 18 *ILJ* 604-605. Where an individual perpetrator may be identified, the remedy that a court will grant will probably only affect that individual perpetrator and not lead to ongoing, structural changes to society. Davel (2006)

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

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

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

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

100 1998 (2) SA 363 (CC).

101 2004 (6) SA 505 (CC).

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

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

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

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

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

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[105] This matter relates to a black-owned engineering firm who applied to court for an order that the relevant Gauteng provincial department apply its affirmative action procurement policy. A possible outcome of this case would be that more black-owned firms obtain engineering contracts from the Gauteng province.
[106] The *Du Preez*, *King* and *Language* cases (see Annexure F.2.1 for more information.)
[107] *Kuypers v Nedbank* (see Annexure F.2.1 for more information.)
[108] Parghi (2001) 13 *CJWL* 141. The author lists the following reasons for the absence of these kinds of cases at 146-152: Subtle environmental factors must be identified that hinder true equality; complex empirical evidence may be needed to establish that equality-hindering attitudes and norms have resulted in unequal effects; expert evidence may be required to analyse the evidence, to explain the assumptions underlying it and to assist the court in drawing inferences from it; and it is doubtful how effective systemic remedies are. In short, "such cases require a great deal of effort".
[109] Employment-related discrimination; the salary structure was different for female employees.
[110] Employment-related discrimination; the 105 female complainants alleged that they were discriminated against by the respondents as they were not credited with annual leave and sick leave while they were on maternity leave.
[111] Employment-related discrimination; the complainant argued that the departmental seniority regime set up by collective agreements signed in 1981 and 1989 systemically discriminated against women.
[112] Employment-related discrimination; the complainant alleged that the respondent pursued a policy which limited spousal benefit coverage to heterosexual married and common law couples.
[113] Employment-related discrimination; the complainants alleged that the respondents pursued a policy or practice that tended to deprive a class of individuals (gay members) of employment opportunities.

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

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

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

[116] The complaint related to discrimination in the provision of health care services; Alberta Health Care did not cover same-sex partnerships in terms of the definition of "dependants" in the relevant legislation.

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

[118] The complainant complained about the respondent's policy that people in wheelchairs could only gain access to the premises by a locked and unstaffed entrance and that that entrance was used exclusively for people in wheelchairs.

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

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

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

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

[123] A disabled complainant lodged a claim because of insufficient wheelchair access to a movie theatre.

[124] The complainants challenged their employers' pension benefits, insured health benefits and uninsured employment benefit plans for excluding same sex spousal relationships.

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

[126] Accessibility of the Prince County courthouse to wheelchairs.

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

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

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

> Critical Race theorists differ about the way in which to address racism. What Delgado describes as the "idealist school", holds that race is a social construction.[129] Groups are "racialised" through thoughts, words, messages, stories and scripts that infuse people's minds with images of inferiority.[130] Racism is to be overcome by speaking out against it, using education to expose whites to blacks, controlling hate speech, emphasise storytelling by minorities and to encourage whites to rid themselves of any unconscious racism.[131] If the social image of people of colour is changed, the racial fortune of these groups will rise.[132] "Materialists", on the other hand, proclaims that material factors such as competition for employment, and the class interests of privileged or elite groups, play a larger role in a system of white dominance.[133] According to this train of thought, racism reinforces material or psychic advantages for powerful groups.[134]
>
> Bell is very skeptical about the possibilities of anti-discrimination legislation.[135] The conflict in anti-discrimination disputes (specifically private discrimination) between racial equality and freedom of association, he believes, will not be resolved in court cases by reference to "neutral principles", but by the "existing power relationships in society and the perceived self-interest of the white elite".[136] He refers to Dubois who believes that *Brown* would not have happened had it not been for the perceived threat of communism and the United

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[128] Terreblanche (2002) 33; Christie in MacEwen (ed) (1997) 177-178; O'Regan in Loenen and Rodrigues (eds) (1999) 14; Liebenberg and O'Sullivan (2001) 2.
[129] Delgado (2002) 37 *Harv CRCL LR* 370.
[130] Delgado (2002) 37 *Harv CRCL LR* 370.
[131] Delgado (2002) 37 *Harv CRCL LR* 370.
[132] Delgado (2002) 37 *Harv CRCL LR* 370.
[133] Delgado (2002) 37 *Harv CRCL LR* 371.
[134] Delgado (2002) 37 *Harv CRCL LR* 371.
[135] Bell (1980); Freeman (1981) 90 *Yale LJ* 1880.
[136] Bell (1980) 435.

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

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[137] Bell (1980) 412.
[138] Bell (1980) 306.
[139] Bell (1980) 565.
[140] Bell (1980) 93 *Harv L Rev* 518.
[141] Bell (1980) 93 *Harv L Rev* 523. Also see Delgado (2002) 37 *Harv CRCL LR* 371: *Brown* happened because "the United States needed to do something large-scale, public and spectacular to reverse its declining fortunes on the world stage". At 386 his conclusion is depressing: "[P]rogress for marginalized groups comes most easily when a strategic concession benefits power brokers in government and industry. Without an alignment of interests, the road to reform is long and dark. At the moment, the mood of the country, as in much of the West, favors investment and revenge over social justice and redistribution".
[142] Bell (1980) 93 *Harv L Rev* 523.
[143] Bell (1980) 93 *Harv L Rev* 524.
[144] Bell (1980) 93 *Harv L Rev* 524.
[145] Bell (1980) 93 *Harv L Rev* 526.

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

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

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

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[146] Bell in Hepple and Szyszczak (eds) (1992) 3-18.
[147] Bell in Hepple and Szyszczak (eds) (1992) 15.
[148] Bell in Hepple and Szyszczak (eds) (1992) 15.
[149] Bell in Hepple and Szyszczak (eds) (1992) 15.
[150] Delgado (2001) 89 *Geo LJ* 2287.
[151] Delgado (2001) 89 *Geo LJ* 2288.
[152] Crenshaw (1988) 101 *Harv L Rev* 1331.
[153] Crenshaw (1988) 101 *Harv L Rev* 1334.
[154] Crenshaw (1988) 101 *Harv L Rev* 1339.
[155] Crenshaw (1988) 101 *Harv L Rev* 1334.

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

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

[157] Crenshaw (1988) 101 *Harv L Rev* 1348.

[158] Freeman as discussed by Crenshaw (1988) 101 *Harv L Rev* 1352.

[159] Crenshaw (1988) 101 *Harv L Rev* 1357.

[160] Tushnet (1984) 62 *Tex L Rev* 1371 as understood by Crenshaw (1988) 101 *Harv L Rev* 1364.

[161] Crenshaw (1988) 101 *Harv L Rev* 1364; 1365.

[162] Crenshaw (1988) 101 *Harv L Rev* 1385.

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

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

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

The drafters of the Act explicitly rejected a formal concept of equality.[163]

The Act defines "equality" as follows:[164]

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

This definition of equality refers to the concept of "substantive equality".[165] The Constitutional Court has accepted that the Constitution embraces this understanding of equality, in contrast with "formal equality".[166] If one accepts the premise that the Constitution is a transformative document

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[163] See 3.2.12 above.

[164] S 1(1)(ix).

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

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

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

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

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

[167] De Vos "Equality Conference" (2001) 7-8.

[168] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 43.

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

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

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

[172] Eg Albertyn and Kentridge (1994) 10 *SAJHR* 165.

[173] Cf Wentholt in Loenen and Rodrigues (eds) (1999) 57 and further. Also see Albertyn and Kentridge (1994) 10 *SAJHR* 166.

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

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

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

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

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

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

[178] Case number CCT 51/06; unreported.

[179] Para 44 (per Langa CJ) and para 164 (per O'Regan J).

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

[181] Para 42.

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

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

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

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

> [A]ny other ground where discrimination based on that other ground—
> (i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*.

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[182] Para 44 (per Langa CJ). O'Regan J in para 164 found the following comparator: "[T]hose learners who have been afforded an exemption to allow them to pursue their cultural or religious practices, as against those learners who are denied exemption, like the learner in this case".
[183] See 3.2.6 above.
[184] See Loenen (1997) 13 *SAJHR* 407: "In time, other grounds not mentioned may come to be considered 'suspect' if they begin to lead to patterns of disadvantageous treatment and exclusion. The open formulation as to the grounds of discrimination thus leaves room for development, or for new sensitivities to old forms of exclusion".

Instead of having to follow the "pigeon-hole" approach of for example the Canadian anti-discrimination jurisdictions,[185] courts may of their own accord "invent" or "discover" new grounds that are worthy of protection.

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

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

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

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

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

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

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

3.3.3 The Act eases the complainant's burden of proof

The drafters of the Act took note of the evidentiary burden usually imposed on claimants in anti-discrimination legislation, and substantially eased the complainant's burden of proof.[193]

Compared to the usual principles that apply in civil cases, the Act substantially eases the complainant's evidentiary burden.[194] Briefly put, the complainant must establish that "discrimination" occurred. It is then up to the respondent to justify the discrimination.[195]

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[189] 1998 (1) SA 745 (CC).
[190] 2001 (1) SA 1 (CC).
[191] Albertyn *et al* (eds) (2001) 86 seem to argue that the Constitutional Court did not make an explicit finding that HIV/AIDS status is a prohibited ground in terms of the test laid down for the recognition of additional grounds. This argument is difficult to follow. The Court explicitly finds that the SAA "discriminated" against the appellant because of his HIV status (para 29). "Discrimination" can only take place on a ground protected in the Constitution, else it will be mere "differentiation". At para 40 the Court repeats that "the denial of employment to the appellant because he was living with HIV *impaired his dignity and constituted unfair discrimination*" (my emphasis). The only question the court explicitly leaves open is if HIV status could also be read into "disability". (Para 40). De Vos (2003) 7 *LDD* 85 fn 11 argues that the Constitutional Court in *Hoffmann* "found that differentiation on the basis of HIV status constituted unfair discrimination in terms of s 9(3) of the Constitution".
[192] Lane (2005) 20 (internet version).
[193] See 3.2.1 above.
[194] S 13 provides as follows: (1) If the complainant makes out a *prima facie* case of discrimination— *(a)* the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or *(b)* the respondent must prove that the conduct is not based on one or more of the prohibited grounds. (2) If the discrimination did take place— *(a)* on a ground in paragraph *(a)* of the definition of ''prohibited grounds'', then it is unfair, unless the respondent proves that the discrimination is fair; *(b)* on a ground in paragraph *(b)* of the definition of ''prohibited

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

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

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

[195] Also see Albertyn and Kentridge (1994) 10 *SAJHR* 174.

[196] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

[197] *Harksen v Lane NO* 1998 (1) SA 300 (CC).

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

[199] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

[200] *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[205] 1997 (3) SA 1012 (CC).

[206] None of the powers accorded to equality courts listed in s 21 of the Act relate to criminal penalties.

[207] Para 38.

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

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

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

3.3.4 The Act creates an accessible enforcement mechanism: Equality courts

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

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

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

[209] See 3.2.3, 3.2.4, 3.2.5 and 3.2.10 above.

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

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

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

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

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

[211] GN No R764, *Government Gazette* No 25065, 2003-06-13.

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

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

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

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

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

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

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

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

The regulations also envisage an active, interventionist presiding officer. In "ordinary" litigation presiding officers do not generally subpoena witnesses.[217]

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

On the face of it, the Act does not have a limited reach or limited areas or sectors of application.[218]

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

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

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

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

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

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

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[218] See 3.2.7 above.
[219] Eg, would a cause of action exist in terms of the Act if I decide not to invite any of my black co-workers to my wedding? What about an old man who rents out a room in his house and explicitly tells prospective tenants "No blacks please"? Would it be different if the old man owned a block of flats and extended his "no blacks" policy to the entire block of flats? Could a house owner be taken to court if he or she does not have ramp outside his or her house to allow disabled people easy access to his house? Would it be different if a state department or a large company does not have ramps outside their buildings? The Act does not provide easy answers. Some foreign jurisdictions provide for explicit defences or exclusions. I refer to a few examples: S 36 of the ACT Discrimination Act allows for single sex educational institutions and s 46 allows for religious educational institutions (Annexure E1). S 51 of the Northern Territory Anti-Discrimination Act provides that the Act does not apply to the ordination of priests (Annexure E3). S 43 of the Queensland Anti-Discrimination Act provides that educational institutions may set a minimum qualifying age (Annexure E4).
[220] Australian and Canadian anti-discrimination legislation contains extensive exclusions and defences. See Annexures C and E below. Watkin (1992) 2 *NJCL* 63 laments the existence of four tests relating to justification under Canadian anti-discrimination law.

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

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

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

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

Section 14(2)(a) makes it clear that each case will be a contextual enquiry. [223] This "context" includes the existing South African social, economic and political circumstances when the specific

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[221] Albertyn *et al* (eds) (2001) 38.
[222] 2004 (6) SA 121 (CC) at para 36.
[223] For example, a billionaire's right to vote cannot be taken away because he has so many other privileges that it does not matter to him, but he may be taxed at a higher rate than a low wage earner.

case is heard.[224] This approach is also in accordance with Constitutional Court judgments.[225] Bohler interprets a contextual approach to equality as "individualised justice":[226]

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

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

Section 14(2)(b) refers the reader to section 14(3) which in turn lists a number of criteria, most of which has their origin in *Harksen v Lane NO*:[229]

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

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

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[224] De Vos (2000) 63 *THRHR* 67; De Vos (2000) 117 *SALJ* 19.
[225] Eg *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.
[226] Bohler (2000) 63 *THRHR* 291.
[227] "Open-ended" could mean indeterminate. (Cf Van der Walt and Botha (1998) 13 *SAPL* 35). See the discussion below relating to the indeterminacy of the unfairness test contained within s 14 of the Act.
[228] Liebenberg and O'Sullivan (2001) 37 are concerned about the possible effect of this subsection: If market generated inequalities are regarded as reasonable and justifiable differentiation in all circumstances, the goal of substantive equality for women will become increasingly remote. The weight that courts give to this factor in relation to other factors in subsections (2) and (3) is critical". They even raise the possibility that this subsection is unconstitutional as it may be argued that this subsection subtracts from the protection offered by the Constitution in s 9. I argue in chapter 6 below that s 14(2)(c) should be deleted from the Act.
[229] 1998 (1) SA 300 (CC).
[230] Albertyn *et al* (eds) (2001) 40.
[231] Loenen (1997) 13 *SAJHR* 412.

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

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

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

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

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

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

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[232] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 48.
[233] Albertyn and Kentridge (1994) 10 *SAJHR* 162; Loenen (1997) 13 *SAJHR* 408, 411 and 412; De Waal (2002) 14 *SA Merc LJ* 154; *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 64. This factor perhaps best illustrates the asymetrical nature of discrimination. Loenen (1997) 13 *SAJHR* 411-412; Kende (2000) 117 *SALJ* 751.
[234] De Waal (2002) 14 *SA Merc LJ* 155. The *kind* of discrimination may affect the outcome of the fairness enquiry. A presidential pardon (*Hugo*) was treated with more deference than other forms of exercise of state power. (Carpenter (2001) 64 *THRHR* 626.)
[235] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) may be used as an example. President Mandela freed a number of female prisoners who had children under 12. The respondent was a male prisoner with a child under 12 and complained that the President unfairly discriminated against him. The Court held that the discrimination was fair, *inter alia* because the purpose of the discrimination was to create a more equal society.
[236] De Waal (2002) 14 *SA Merc LJ* 154.
[237] In equality litigation based on s 9 of the Constitution, this factor overlaps with the threshold "rational connection" test. Rautenbach (1997) *TSAR* 578 and Rautenbach (2001) *TSAR* 332. The Act does not explicitly prohibit irrational differentiation.

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

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

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

- It is very difficult to distinguish between factors that establish whether discrimination was "fair" in terms of section 9 of the Constitution, and factors that establish whether unfair discrimination was "justifiable" in terms of section 36.[239] Currie and De Waal argue that

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

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

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

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

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[240] Currie and De Waal (2005) 237.
[241] Van der Vyver (1998) 61 *THRHR* 391.
[242] Albertyn and Goldblatt (1998) 14 *SAJHR* 270.
[243] It is not clear to what extent the requirement of "law of general application" applies in cases of private discrimination. Van der Vyver (1998) 61 *THRHR* 376 is of the view that "law" of general application includes the internal conduct rules of social entities such as a church association, sport body, mercantile company and so on. He refers to the *Barthold Case* 1985 PECHR Series A vol 90 par 46 where it was held that the internal rules of the veterinary board forms part of "law". The Constitutional Court has not yet had the opportunity to express itself on the relationship between s 9 and s 36 in the context of private discrimination. In *Hoffmann* the Constitutional Court held that the SAA was an organ of state (para 23) and further held that its employment practice of refusing to employ HIV positive cabin stewards was not law of general application. (Para 41.) In *Walker*, where decisions by the City Council of Pretoria's officials were under scrutiny, the Court held that the justification query also did not arise as the respondent council's conduct was not authorised, expressly or by necessary implication, by a law of general application (para 82.) Rautenbach (2001) *TSAR* 340 points out that if the "fairness" and "justifiability" defences are not kept strictly apart, the "law of general application" requirement is likely to be subverted. That is exactly what happened when the Act was drafted – fairness/justifiability was seen as one step and the "law of general application" threshold requirement fell away, although some of the other factors listed in s 36 have been incorporated into s 14.

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

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

- The impact or likely impact of the discrimination on the complainant. It is easy enough to state that the more severe the impact, the more likely that the discrimination will be unfair, but *how* should a court decide when the cut-off is reached between permissible and impermissible harm?

- The position of the complainant in society whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage. Barring white, able-bodied, heterosexual males, the other members of South African society may all be described as suffering in one way or the other from patterns of past

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[244] Cf Albertyn *et al* (eds) (2001) 41 and further. Carpenter (2002) 65 *THRHR* 182-183 argues that ss 14(f) – (i) are inappropriate in the context of private or domestic relationships and that this should have been better set out in the Act.
[245] I return to this issue in chapter 6.
[246] Van der Walt and Botha (1998) 13 *SAPL* 35. The authors contend that the indeterminacy follows from "the margin for contextualisation" allowed by this approach. Any test is likely to be indeterminate. Consider the test suggested by Bohler-Muller (2000) 16 *SAJHR* 640: A court must consider all circumstances "and listed to all voices before reaching a conclusion which is the least harmful to the most vulnerable party or group". How are different harms to be compared? How are degrees of vulnerability ascertained?
[247] Cf Kende (2002) 117 *SALJ* 770. Also see Davis (1999) 116 *SALJ* 413: "The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer". Carpenter (2002) 65 *THRHR* 58, discussing the *Walker* case, believes that "race issues in particular may turn out to be essentially 'undecidable'". Kentridge (1996) 112 *The Law Quarterly Review* 250: "It would be naïve to imagine that there is a single 'right' answer to all the issues which the court will have to decide. Some may say that the search for objective standards is an illusion". In the context of discrimination complaints, s 14 would make many answers possible. Woolman (1997) 13 *SAJHR* 121 offers the following "solution": "What our gut tells us and what we choose to do after extended reflection are sometimes two very different things … The difference between storytelling and cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be – for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to be". In other words, s 14 offers judges the chance to offer "better explanations" than simply saying "my gut feeling is that the discrimination is fair/unfair". McAllister (2003) 15 *NJCL* 35 criticises the Supreme Court of Canada equality test set out in *Law v Canada (Minister of Employment & Immigration)* [1999] 1 SCR 497 as ultimately unhelpful and too unpredictable.

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

- Whether the discrimination is systemic in nature. The same argument applies to this factor: The vast majority of South Africans have been victims of systemic discrimination in one way or the other and it is not necessarily helpful to state that systemic discrimination is more likely unfair than non-systemic discrimination.

- Whether the discrimination has a legitimate purpose. How is a court to decide when a discriminatory purpose would be "legitimate"?

- Whether there are less restrictive and less disadvantageous means to achieve the purpose. It is almost always possible to think of a less extreme way to achieve a particular result. How is a court to decide on the cut-off point?

Two judgments of the Constitutional Court strikingly illustrate the indeterminacy of the "fairness" test.[252] The factors set out in section 14 of the Act have largely been extrapolated from the Constitutional Court's equality jurisprudence. It is therefore illuminating to consider the marginal

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[248] Cf Jagwanth (2003) 36 *Conn L Rev* 738: "… the only group which does *not* qualify for preferential treatment is able bodied white men, a group which, at 4.64%, comprises a relatively small percentage of the population".
[249] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44.
[250] Cf *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 7 and *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 118.
[251] To complicate matters even more, the Constitutional Court has said that the prohibition on unfair discrimination was not designed solely to avoid discrimination against people who are members of disadvantaged groups: Carpenter (2001) 64 *THRHR* 634; *Hugo* para 41; *Harksen* para 50. Where a previously disadvantaged group is treated less favourably than another previously disadvantaged group, the issue becomes even more vexed. (Cf *Motala v University of Natal* 1995 (3) BCLR 374 (D)). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the "deserving sections" from designated groups should be the benefactors of affirmative action policies – see Nair (2001).
[252] Carpenter (2002) 65 *THRHR* 58 goes so far as to describe race issues as "undecidable".

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

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

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[253] 2002 (6) SA 642 (CC).
[254] 1998 (1) SA 300 (CC).
[255] Compare Goldstone J's remark in *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 19: "[R]easonable minds may well differ on the outcome of similar or even identical cases". Also see Schutz JA in *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) 185I: "Notoriously the views of Judges as to what the ordinary man expects sometimes differ. This happens when value judgments have to be made ..."
[256] Cf Fredman (2005) 21 *SAJHR* 172.
[257] Cf Carpenter (2001) 64 *THRHR* 420: "Thus even though the Constitution says nothing about varying levels of scrutiny, there may well be intuitive differentiation between the different kinds of classification that could lead to discrimination". Van der Walt and Botha (1998) 13 *SAPL* 30 argue that the *Harksen* court showed a greater degree of deference to (mere) economic discrimination than to other forms of differentiation and at 38 argue that the judges felt they owed a certain degree of deference to Parliament relating to the regulation of trade and industry. Also see Carpenter (2001) 64 *THRHR* 640. For the same general reason Moon (1988) 26 *Osgoode Hall LJ* 691 criticises the American Supreme Court's "colour-blind" approach to affirmative action. Moon argues that if the goal of the anti-discrimination principle is to overcome societal prejudice, then a racial classification which benefits a historically disadvantaged group should not be subjected to strict scrutiny.

3.3.6 The Act creates broad standing provisions

The Act embraces a broad notion of standing in section 20, and in this way also attempts to broaden access to justice.[258]

The Act allows standing to the following individuals and institutions:

A complainant acting in his or her own interest

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

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

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

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

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

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[258] See 3.2.10 above.
[259] 1975 (2) SA 294 (A).
[260] 2002 (6) SA 66 (T) 79A.

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

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

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

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

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

These principles would obviously also apply in the equality courts.

A complainant acting in the public interest

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

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[261] 2001 (10) BCLR 1039 (A)
[262] Para 5 of the judgment.
[263] Para 17 of the judgment.
[264] For an example of such a disclosure order, see the trial court's order as set out in *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and another* 2000 (12) BCLR 1322 (E).
[265] Para 24 of the judgment.

An association acting in the interests of its members

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

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

SAHCR; CGE

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

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

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

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

3.3.7 The Act creates wide-ranging remedies

The Act in no way constrains presiding officers in the range of remedies they are allowed to impose.[269]

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

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

[269] See 3.2.2 and 3.2.13 above.

[270] 1997 (3) SA 786 (CC).

[271] Para 69.

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

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

3.3.8 The Act creates a duty to promote equality

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

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

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

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

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

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

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

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

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

[276] GN No 563, *Government Gazette* No 26316, 2004-04-30.

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

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

3.4 Measuring the Act against the characteristics of effective legislation

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

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

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

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[277] Cf Jagwanth (2003) 36 *Conn L Rev* 744.

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

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

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

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

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

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[279] Cf Galanter (1974) 9 *Law & Soc Rev* 141 and further.
[280] Cf ss 2(d), 2(f) and 16 of the Act.

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

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

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

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

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[281] Handler (1978) 19.
[282] 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).
[283] *Cape Argus* (2006-10-17) 10; p 3 of the minutes as they appear on the PMG website.
[284] Ie, the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. http://www.pmg.org.za/viewminute.php?id=8738 (accessed 2007-05-15).
[285] *Cape Argus* (2007-03-12) 9.
[286] *Cape Argus* (2007-03-12) 9.

follows logically that if South Africans do not trust the judicial system, the equality courts will be underutilised.[287]

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

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

1.3 "The change-inducing law must provide for effective remedies".

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

[287] Also refer to chapter 5 of the thesis. The results of an empirical survey in parts of greater Tshwane in 2001 suggest that most South Africans do not trust the judicial system.
[288] See chapter 6 and Annexures C and E for examples.
[289] See ss 25(4)(b) and 26(a) of the Act.

telephonic empirical survey, equality courts have been mainly granting orthodox remedies.[290]

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

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

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

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

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[290] Refer to Annexure F.
[291] See pp 177-180 of the thesis.
[292] In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). At these hearings the Department of Justice presented a Microsoft™ Powerpoint presentation in which it recorded that it had a "draft database which gives some indication of the available pool of human capacity for equality courts; the database still needs verification by the provinces".
[293] See fn 1, p 623 (Annexure F.1) of the thesis.
[294] Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330;

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

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

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

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

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

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

[296] P6 of the "Draft Equality Review Report".

[297] P 8 of the "Draft Equality Review Report".

[298] Act 55 of 1998.

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

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

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

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

[300] See fn 497 (p 106) and pp 324-328 of the thesis.

[301] Reproduced in Gutto (2001) 27.

[302] Liebenberg and O'Sullivan (2001) 37. Parghi (2001) 13 *CJWL* 137 is extremely forthright. The author considers the suggestion that "social condition" be added as a prohibited ground to the Canadian Human Rights Act and concludes

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

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

2.4 "Models or reference groups must be used for compliance".

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

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

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

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

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

[304] See the Preamble to the Act.

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

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

[305] Gutto (2001) 114-119. The publication of the Bill (for the Bill as it read in October 1999, see http://www.info.gov.za/gazette/bills/1999/b57-99.pdf) and the promulgation of the Act stirred up controversy. I refer to three opponents of the Bill, as examples: (a) The insurance industry argued that the Act would cripple its legitimate business of differentiating between categories of people and charging premiums commensurate with risk (Eg *Rapport* (1999-11-28) 2, *Beeld* (1999-12-06) 8, *Financial Mail* (1999-12-03) 54, http://www.deneysreitz.co.za/seminars/item/insurance_seminar__september_2000_the_impact_of_recent_civil_rights_legislation_on_the_insurance_industry,158.html (accessed 2007-08-06)). (b) Banks raised their concerns about the effect of the Act on their lending policies (Eg *Beeld* (1999-12-28) 15). (c) The media focused on hate speech provisions in the Bill and speculated that the Bill would severely limit freedom of expression (Eg *Rapport* (1999-11-28) 2; *Mail & Guardian* (1999-11-11) 40; *The Cape Times* (1999-10-08) 5; *Beeld* (1999-12-06) 8; *The Star* (1999-10-29) 16 (cartoon); *The Star* (1999-11-08) 8 (cartoon)). See p 169 for the two cartoons.

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

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

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

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

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

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

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

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[308] Cf Griffiths in Loenen and Rodrigues (eds) (1999) 319: "[M]uch of the public to whom anti-discrimination rules are addressed is diffuse, inexpert: small businesses, individual home-owners and small landlords, individual members of organizations ... Producing a significant level of accurate legal knowledge in such a public is not an easy project".
[309] Refer to the discussion in chapter 1.
[310] Refer to chapter 2.
[311] Refer to Annexure D.
[312] See Annexure F.

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

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

4.2 "The required change must be able to be communicated to the large majority of the population".

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

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[313] Act 66 of 1995.
[314] See van der Westhuizen in Viljoen and Nienaber (eds) (2001) 61-70 and Armstrong in the same source at 71-77.
[315] Interview by the author with Shadrack Gutto, one of the drafters of the Act, 27 March 2003. In a document prepared by the Equality Legislation Drafting Unit (ELDU), "Draft Discussion Document 4, first outline of a draft bill", p 23, it is stated that "[T]he intention is to finally prepare a draft in plain and simple, but legally correct, language".
[316] Although not directly in point, during the Parliamentary hearings Focus on Elder Abuse proposed that the following clause be added to the Act: The state may not discriminate against any member of the population regarding (i) the knowledge of the proposed formulation of new or amended legislation (ii) the manner in which submissions can be given (iii) the knowledge of the date of commencement of new legislation (iv) the knowledge of existing legislation including how to access this in any manner including the following: (a) the failure to alert the general public regarding (i), (ii), (iii) and (iv) via various media including via acceptable ways of communication in rural areas, and where access

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

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

[317] See Bekink and Botha (2007) 28 *Stat L Rev* 37 who argue that a legal document (presumably including legislation) written in plain language improves communication, shares information more effectively, and informs all the role players better of what is expected of them. Nienaber (2002) 27 *TRW* 2 argues that the promise in the Preamble of the Act is effectively nullified because the Act is written in language that is accessible only to legislators and the legal profession. At 9 she argues that the Act was written in pompous language that creates distance between the legislature and the people. At 12 she submits that the Act is (ostensibly) aimed at bringing about social change and that the Act should therefore be accessible to the average population and to people of average intelligence and education. At 12 fn 26 she refers to a previous study by her (Nienaber (2001) 34 *De Jure* 113) that has found that people with education less than matric made no sense of extracts of the Constitution given to them. Arguably the Act was written in more obtuse fashion than the Constitution. From own experience as a lecturer of first and second year law students, the Act is extremely inaccessible to people with limited exposure to the law. My students struggle immensely to apply the Act's definition of "discrimination", not to mention the list of factors to determine "fairness/unfairness" in s 14. If law students struggle to interpret the Act, it will arguably be completely incomprehensible to ordinary South Africans.

[318] Hunt (2002) 23 *Stat L Rev* 24. Also see Bekink and Botha (2007) 28 *Stat L Rev* 63.

[319] Hunt (2002) 23 *Stat L Rev* 28.

[320] Bohler-Muller and Tait (2000) 21 *Obiter* 414.

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

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

the booklet has been distributed. As to the media's involvement, the Department has acknowledged that the public awareness campaign has not been a success.[323]

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

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

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

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

3.5 Conclusion

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

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

[324] See fn 212 (p 143) above.

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

> incapable of really reproducing a coherent view of society. The Act attempts it through the power of law in a way that I think ultimately is implausible.[326]
>
> What does equality mean for a person who is illiterate, unemployed, lacks a decent shelter, cannot afford adequate food or health services and is disabled? What does equality mean in the face of massive poverty and deprivation in our country?[327]

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

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

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

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[326] Unterhalter "Liberty Conference" (2000) 38.
[327] Dlamini (2002) 27 *TRW* 36.
[328] A summary of his opening address is contained in the "Executive Summary Report" of the National Seminar (see fn 107 (p 191), fn 148 (p 204) and p 202.)
[329] My emphasis.
[330] Speech made on 28 January 2000, reproduced in Gutto (2001) 71 and further; my emphasis.

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

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

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

Chapter Four: An inadequately trained pool of equality court personnel due to institutional incapacity

4.1 Introduction

It is my contention that the existing pool of equality court personnel has been inadequately trained, due to the incapacity of state institutions, notably the Department of Justice and Constitutional Development, exacerbated by the lack of proper project management by the individuals tasked to oversee the training of equality court personnel.

This chapter is therefore mainly concerned 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".[1] The underlying theme to this chapter is the (current) incapacity of the South African state to ensure the effective accomplishment of this requirement.

Below I set out what I understand to be state "incapacity", first as a general concept, and then as it translates to South Africa. Thereafter my focus becomes much more specialised when I analyse one particular project, namely the training of equality court personnel undertaken by the Department of Justice. I discuss the initial project undertaken from 2001 to 2003 in some detail and I also provide an overview of more recent events. (In drafting this chapter, I relied heavily on documents obtained from the offices of the Equality Legislation Education and Training Unit (ELETU), housed within the Department of Justice and Constitutional Development. The project manager of the training project allowed me to access the ELETU offices and to make copies of any documents that I deemed relevant to the thesis. Annexure G contains a schedule of the documents obtained from the ELETU offices that I relied on in drafting the thesis.) I borrow principles from the discipline of public administration in analysing the management of the training

[1] See pp 76-77 and 166 of the thesis.

project. I also discuss the potential benefits of the interdisciplinary approach that I adopted in this chapter.

4.2 State incapacity

Authors such as Fukuyama[2] and Scott[3] concern themselves with state (in)capacity in the context of "Grand Schemes": Soviet collectivisation,[4] compulsory "villagisation" in Tanzania,[5] Le Corbusier's urban planning theory as realised in Brasília,[6] agricultural modernisation in the tropics,[7] and American-led "state building" in Afghanistan and Iraq.[8] Scott focuses on the ability of "high modernist" state plans to create much misery and disruption; Fukuyama argues that weak or failed states are the source of many of the world's problems ranging from poverty, AIDS and drugs to terrorism. Scott focuses on authoritarian states that had the ability and the political will to use the full weight of its coercive powers to bring its designs into being;[9] Fukuyama's concern is with states at the other side of the spectrum: Many countries in sub-Saharan Africa,[10] state collapse or state weakness in Somalia, Haiti, Cambodia, Bosnia, Kosovo and East Timor.[11]

Clapham *et al* examine state failure or state "dysfunctionality" in Africa and specifically consider the following "big" African states, who all exhibit signs of dysfunctionality: Angola, Sudan, Democratic Republic of Congo, Ethiopia, Nigeria and, to a much lesser degree, South Africa.[12] In the opening chapter Herbst and Mills define "state dysfunctionality" for the purposes of this study as "the lack of provision of welfare and opportunity to the population, a sustained period of civil unrest, economic decline, state atrophy and social corrosion".[13] South Africa is then described as a "largely coherent nation exhibiting very little threat of balkanisation",[14] and as a "geographically coherent, politically

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[2] Fukuyama (2005).
[3] Scott (1998).
[4] Scott (1998) 193-222.
[5] Scott (1998) 223-261.
[6] Scott (1998) 103-146.
[7] Scott (1998) 262-306.
[8] Fukuyama (2005) 124-160. Perhaps Rousseau (1968) 119 says it best: "It is easier to conquer than to administer".
[9] Cf Scott (1998) 4-6; 341.
[10] Fukuyama (2005) xix.
[11] Fukuyama (2005) xix.
[12] Clapham *et al* (eds) (2006). Mukandala *et al* in Fox and Liebenthal (eds) (2006) 3 refers to African states in general as "fractured, fragile, dependent, and weak".
[13] Herbst and Mills in Clapham *et al* (eds) (2006) 1.
[14] Hughes in Clapham *et al* (eds) (2006) 155.

stable, industrially developed and economically sophisticated country".[15] Only if the definition of "dysfunctionality" is extended to "degrees of poor performance and implementation of state policy" does South Africa's record become mixed and sometimes paradoxical.[16] The study highlights three areas of concern: land reform,[17] crime prevention,[18] and health policies relating to HIV/AIDS and tuberculosis.[19] Evaluated as a whole, South Africa still counts as a relative success in Africa, the study concludes.[20] Reasons suggested for South Africa's success include the administrative capacity of its state apparatuses, high levels of social cooperation and the quality of its political leadership.[21] Hughes argues that the Apartheid state was highly organised and that the Apartheid policy required a highly bureaucratised country; "effectively administered in most respects of public and private life"; leading to a situation where the "state was … manifestly present" in every "township, city, border area and most rural areas".[22] The author seems to imply that this state of affairs was carried over into the democratic South Africa.

Other authors are not as optimistic about the state of the South African state. Hirsch drafts "South Africa's apartheid balance sheet" and in the column headed "liabilities" *inter alia* lists "most labour very poorly educated and trained, and severe shortage of management skills".[23] Manning contends that South Africa has had a "management deficit" for a long time,[24] and laments the current inadequate state of the South African public service.[25] In a much more thorough-going book Picard suggests that the institutional legacy of the Apartheid homelands policy lives on in present-day South Africa.[26] He argues as follows:

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[15] Hughes in Clapham *et al* (eds) (2006) 182.
[16] Hughes in Clapham *et al* (eds) (2006) 164.
[17] Hughes in Clapham *et al* (eds) (2006) 169-171.
[18] Hughes in Clapham *et al* (eds) (2006) 171-176.
[19] Hughes in Clapham *et al* (eds) (2006) 176-181. Bhorat and Kanbur in Bhorat and Kanbur (eds) (2006) 13 refers to South Africa's "policy inertia" regarding crime and HIV/AIDS.
[20] Hughes in Clapham *et al* (eds) (2006) 181-183.
[21] Hughes in Clapham *et al* (eds) (2006) 183. As to leadership, Ayee in Clapham *et al* (eds) (2006) 263 describes all of South Africa's leaders from Verwoerd to Mbeki, except Mandela, as "technocratic", indicating being "grounded on administrative competence and professionalism". Mandela is described as having been a "charismatic/reconciliatory/patriarchal" leader.
[22] Hughes in Clapham *et al* (eds) (2006) 160.
[23] Hirsch (2005) 27. Also see Van der Berg in Bhorat and Kanbur (eds) (2006) 227.
[24] Manning (2006) 29. Also see Hirsch (2005) 243.
[25] Manning (2006) 30 and 45. Also see Pillay in Pillay *et al* (eds) (2006) 3.
[26] Picard (2005) xii.

In May 1994 the new democratic government inherited "an authoritarian local level state administration, tolerance of widespread corruption and the institutionalised use of patronage in the public service to advance Afrikaner ethnic claims".[27] Up to 1990 public sector workers were poorly educated, with as many as 600 000 whites in the late 1980s with a grade ten education or less.[28] The Apartheid state lead to a bloated government structure that provided sheltered employment for whites from poor socio-economic backgrounds.[29] The public sector in 1994 contained many whites ideologically opposed to social change and the public service became an affirmative action target for blacks.[30] The homelands policy led to a situation where, by 1990, South Africa had 150 government departments, five State Presidents, ten Prime Ministers, 206 Cabinet Ministers, 1190 Members of Parliament and 11 National Assemblies.[31] However, institutional transition and civil service reform was not a priority of post-1994 the Government of National Unity.[32]

Over time though, pressure grew to make the public service more representative.[33] Generous voluntary retirement programmes were set up to create space for affirmative action appointments.[34] White officials were replaced by existing black bureaucrats, mainly from the homelands,[35] as the homelands had more black senior civil service positions that any other region in South Africa.[36] Many skilled and experienced officials had left and their skills and expertise could not be replaced easily or immediately,[37] while "unproductive and supernumerary workers remained".[38] Apartheid South Africa had seriously neglected black civil service training.[39] Although the homelands presented an opportunity to blacks to be trained in the public service,[40] the quality of these administrators was generally poor.[41] During the 1990s many short-term (3 to 6 months) training

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[27] Picard (2005) 5.
[28] Picard (2005) 56.
[29] Picard (2005) 268-269.
[30] Picard (2005) 12.
[31] Picard (2005) 66. Also see Skjelten (2006) 43.
[32] Picard (2005) 118.
[33] Picard (2005) 121.
[34] Picard (2005) 127.
[35] Picard (2005) 139.
[36] Picard (2005) 296.
[37] Picard (2005) 157.
[38] Picard (2005) 181. Also see Pillay in Pillay *et al* (eds) (2006) 3.
[39] Picard (2005) 190. The establishment of access to basic services was also severely neglected by the Apartheid government, as Leibbrandt *et al* in Bhorat and Kanbur (eds) (2006) 129 point out.
[40] Picard (2005) 302.
[41] Picard (2005) 303. Also cf Calland (2006) 83.

courses were introduced at South African universities and institutes, but these programmes could not substitute a fully developed educational system and years of experience.[42] (It could be added that the ANC-in-exile did not prioritise management skills.[43]) Thus, the public service is faced with too many underqualified employees unable to cope with huge backlogs.[44] Picard is forthright: "The ANC did not inherit a strong state but a weak one".[45]

4.3 The benefits of a microscopic study

Like the studies referred to above, this chapter is also concerned with state incapacity. However, the focus here is microscopic: Rather, I describe the inability of the South African state to have devised and implemented one particular element of institutional "capacitation" important to the implementation of the Act, namely an effective training programme for equality court personnel. This chapter focuses on the Department of Justice's planning and implementation of training programmes for judicial officers relating to the Act. I provide 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.[46] Below I analyse the training process and point out shortcomings in the planning and training stages. As set out in the first few lines of this chapter, the main aim of this chapter is to discuss, in some detail, how the Department of Justice mismanaged one of the suggested requirements of effective legislation. I show below in paragraphs 4.5 to 4.13 that a well-trained cadre of equality court personnel had *not* been established.

This microscopic study may have a secondary purpose, or added benefit. Kuye suggests that one aim of public administration research would be to reform public organisations and agencies and their work, such as service delivery initiatives.[47] Reform-minded "gap" studies in socio-legal

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[42] Picard (2005) 213.
[43] Calland (2006) 66.
[44] Picard (2005) 148. Also cf Calland (2006) 68: "The legacy of apartheid, especially in terms of the skills and education deficit for the majority community of the country, means that the period of transition [for the public service] is elongated". At 93 Calland suggests that while the vast majority of current Director-Generals are of very good quality, at middle-management levels the public service face serious skills shortages.
[45] Picard (2005) 365.
[46] I acted as minute secretary to most of the meetings.
[47] Kuye in Kuye *et al* (2002) 2.

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 this chapter I *inter alia* analyse 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, in this chapter there is an interplay between the disciplines of public administration and socio-legal studies. Because context matters in public administration research,[48] I paint a particularly (and perhaps painfully) detailed picture of the surrounding facts and circumstances of the initial training implementation project.

4.4 Sketching the ideal?

I will utilise 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.[49] Pollitt argues that academia frowns upon management "gurus and their recipes" mainly for two reasons: (1) "Evidence of the beneficial impact of such formulaic approaches is distinctly mixed" and (2) the advice offered by these gurus "tends to be both unhelpfully abstract and laced with internal contradictions. As a result the cook finds that it is often hard to relate the general recipe to the specific task at hand".[50] However, the main aim of this chapter is not to "give advice" as such to policy makers, or to empirically test the supposed beneficial impact of such a step-by-step approach to public sector management, but rather to point

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[48] See the discussion in chapter 4.2.

[49] 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".

[50] Pollitt (2003) 152.

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 should be *measured*, and that is the only role I envisage for the "management principles" I set out below.[51] The analysis of the training programme in chapter 4.14 below will follow this same four "steps". 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 unfortunately did not avoid.

4.4.1 Plan: Determine the objectives[52]

Many authors emphasise that as much clarity as possible should be aimed for when a particular activity is planned. The following "principles" may be identified. The plan of activity should set out:

- why the proposed programme must be implemented;[53]
- what action is necessary to achieve the goal(s);[54]
- where the activities will take place;[55]
- when it will take place;[56]
- who will perform the activities;[57]

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[51] 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".
[52] Terry and Franklin (1982) 33.
[53] Ie, the the problem that is to be solved must be clarified – Terry and Franklin (1982) 169.
[54] Terry and Franklin (1982) 172; Roux in Kuye *et al* (2002) 71 and 90. The goals should be clear and unambiguous - Manning (2006) 47; Van der Waldt (2004) 129 and 292; Terry and Franklin (1982) 124. If clear goals are not set, "activity" is often mistaken for "accomplishment" - Terry and Franklin (1982) 124; 148. Vague and open-ended terms should be avoided - Van der Waldt (2004) 48; Terry and Franklin (1982) 124. For example, Pollitt (2003) 11 criticises the UK Chancellor of the Exchequer who stated in 1998 that the government would deliver a "world class" education so that schoolchildren would reach their "full potential". Pollitt suggests that these term are too vague to be of any use – "how were [the Department of Education] supposed to discover and measure the 'full potential' of every schoolchild in the country? What is a 'world class education service' anyway, since different individuals, groups and cultures disagree about what the style, content and even purpose of education should be?" Too many goals should not be set and goals should be prioritised - Manning (2006) 26; 47.
[55] Terry and Franklin (1982) 172; Roux in Kuye *et al* (2002) 71 and 90.
[56] Terry and Franklin (1982) 172; Roux in Kuye *et al* (2002) 71 and 90.
[57] Terry and Franklin (1982) 172; Roux in Kuye *et al* (2002) 71 and 90. Roux at 90 argues that financial requirements, the administrative and organisational capacity of the department who will be responsible for implementation and human resource requirements must be taken into account when drafting the suggested plan because available trained staff and their commitment to pursue the stated goals in a professional manner will be vital to effective implementation.

- how it will be completed;[58] and
- what the standard or measure of success will be.[59]

Terry and Franklin suggest that "planning" entails obtaining as much information as is possible about the activities involved; analysing and classifying the information; establishing planning premises and constraints; determining alternate plans; choosing a proposed plan from this range of possibilities; arranging the detailed sequence and timing for the plan; and providing progress checkup to the proposed plan.[60] Manning advocates the following sequence: Identify the issues; classify and rank the issues; consider the various options; define the purpose of the project; define the key programmes within that project; agree to goals for each of the projects; agree to actions with deadlines for each of the key programmes.[61]

4.4.2 Organise: Distribute the work; establish and recognise needed relationships[62]

Terry and Franklin define this "step" in management planning as "the establishing of effective behavioral relationships among persons so that they may work together efficiently and gain personal satisfaction in doing selected tasks under given environmental conditions for the purpose of achieving some goal or objective".[63]

A few "principles" may again be suggested:

- create clear lines of authority[64] and responsibility in the organisation;[65]
- assign tasks to specific people with specific deadlines;[66] and
- keep proper records of work to be done and completed work.[67]

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[58] Terry and Franklin (1982) 172; Roux in Kuye *et al* (2002) 71 and 90.
[59] Manning (2006) 76; Ströh (2001) 20 *Politeia* 67. The plan must provide clear guidelines as to what is expected - Manning (2006) 26. Key performance indicators must be established - Pollitt (2003) 12.
[60] Terry and Franklin (1982) 169-171.
[61] Manning (2006) 81-84.
[62] Terry and Franklin (1982) 33.
[63] Terry and Franklin (1982) 194.
[64] Terry and Franklin (1982) 219 define "authority" as the legal right to command action by others and to enforce compliance. However, even in the absence of this kind of authority, other ways of achieving compliance exist: persuasion, sanctions, requests, coercion, constraint or force – Terry and Franklin (1982) 219.
[65] Terry and Franklin (1982) 194; Van der Waldt (2004) 293; Manning (2006) 50; Digue (2006) 22 *Management Today* 51.
[66] Manning (2006) 49; Digue (2006) 22 *Management Today* 50.

4.4.3 Actuate: Ensure that the members of the group carry out their prescribed tasks willingly and enthusiastically[68]

Terry and Franklin define actuating as "getting all the members of the group to want and to strive to achieve objectives of the enterprise and of the members because the members want to achieve these objectives".[69] A large part of actuating involves effective communication.[70] The "message" must be consistent and must be repeated and the manager should encourage fast feedback from the bottom to the top.[71] "Effective" communication should be distinguished from "efficient" communication. Efficient communication minimises time and costs while effective communication entails the accurate sending and receiving of information, full comprehension of the message by both parties, and appropriate action taken on completion of the information exchange.[72] Organisational structure impacts on communication. A small number of organisational levels expedite communication.[73]

Effective actuating entails enlisting support from subordinates at an early stage of implementation.[74] The manager-planner should also aim to win the support of key stakeholders who will facilitate implementation.[75] The manager must ensure that subordinates identify with the purpose of the project.[76] Subordinates must understand and support the initiative.[77] Subordinates must know what is expected from them, must have the necessary information, resources and support,[78] and must be motivated to perform the required task(s).[79]

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[67] Manning (2006) 49.
[68] Terry and Franklin (1982) 33. Terry and Franklin use the term "actuate" of which the dictionary meaning is "to cause to act".
[69] Terry and Franklin (1982) 272.
[70] See Terry and Franklin (1982) 353-384 for a detailed discussion of what communication entails in this context.
[71] Manning (2006) 77.
[72] Terry and Franklin (1982) 353-384. For example, communication by letter or fax would be more efficient than a face-to-face meeting with a subordinate in another province, but a face-to-face meeting is likely to be more effective – cf Manning (2006) 75; 116.
[73] Terry and Franklin (1982) 207.
[74] Manning (2006) 3; 74.
[75] Manning (2006) 4.
[76] Brynard (1993) 13 *Publico* 23; Hofmeyr (1997) 15 *People Dynamics* 32; 34.
[77] Louw and Martins (2004) 30 *SA Journal of Industrial Psychology* 57.
[78] Ströh (2001) 20 *Politeia* 69.
[79] Manning (2006) 76.

4.4.4 Control: Control the activities to conform to the plans[80]

"Controlling is determining what is being accomplished – that is, evaluating the performance and, if necessary, applying corrective measures so that the performance takes place according to plans".[81]

Controlling therefore entails:

- measuring the performance;[82]
- comparing the actual performance with the ideal standard;[83]
- ascertaining the difference;[84] and
- correcting unfavourable deviation by means of remedial action.[85]

Control will only have the required effect if the person doing the controlling has adequate authority.[86]

In chapters 4.5 to 4.13 below, I compare the "real" planning and implementation of this programme with the "ideal" yardstick I have set out above. I will discuss the main features of the implementation of the project to train equality court personnel: an overly optimistic business plan,

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[80] Terry and Franklin (1982) 33.
[81] Terry and Franklin (1982) 422. Manning (2006) 7 rather obliquely states that a manager must ensure that strategy becomes action. Brynard (1993) 13 *Publico* 22 states that effective control requires compilation of information, processing of the information and reporting to the manager.
[82] Terry and Franklin (1982) 424; van der Waldt (2004) 310.
[83] Terry and Franklin (1982) 424; van der Waldt (2004) 310. The pre-set ideal standard is the key to control - Terry and Franklin (1982) 437. The standard should use some form of measurement, preferably quantitative - Terry and Franklin (1982) 437; Zammuto (1982) 9. The standard should be unambiguous, explicit and particular - Brynard (1993) 13 *Publico* 22; Ströh (2001) 20 *Politeia* 64. Performance measurement must happen relatively frequently - Ströh (2001) 20 *Politeia* 67; 69.
[84] Terry and Franklin (1982) 424; Van der Waldt (2004) 310. Measuring the deviance between actual performance and the ideal pre-set standard is particularly difficult when the set standard is intangible or dependent on means such as judgment or indirect clues - Terry and Franklin (1982) 424-425; Van der Waldt (2004) 48; Fukuyama (2005) 75; Zammuto (1982) 9.
[85] Terry and Franklin (1982) 424; Van der Waldt (2004) 310; Brynard (1993) 13 *Publico* 22; Ströh (2001) 20 *Politeia* 69. When a significant deviation is identified between the actual performance and the results initially planned, vigorous and immediate action is imperative, and should be accompanied by fixed and individual responsibility - Terry and Franklin (1982) 426. The real cause of the deviance should be uncovered and appropriate action must be taken to eliminate the source of the deviance - Terry and Franklin (1982) 426. Subordinates charged with a particular action must be informed if their performance did not meet the required standard - Crous in Kuye *et al* (2002) 159.
[86] Terry and Franklin (1982) 438.

ineffective monitoring of progress, management inertia, too much sensitivity to some stakeholders' interests, and inadequate budgetary support. Each of the subdivisions follows a detailed, chronological discussion of relevant events. In chapter 4.14, I analyse and criticise the training project by explicitly utilising the four "management steps" I have set out above.

4.5 An overly ambitious and unrealistic initial business plan

Apparently, very little happened for a number of months after the Bill became an Act on 2 February 2000.[87] It was very clear that presiding officers of the to-be-established equality courts had to be trained and designated before the Act could come into force.[88] Ms Thuli Madonsela, at that time the Chief Director: Transformation and Equity within the Department of Justice (and one of the drafters of the Bill), drafted a business plan entitled "Capacity Building (through Training and Public Education) for Effective Implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000".[89] The plan envisaged "decentralised training activities" that would target judges, magistrates, clerks of the court, prosecutors, masters of the high court, managers and other personnel in the department of justice, state attorneys and law advisors.[90] It was suggested that the training and public education activities would be coordinated nationally and implemented provincially through local training providers and centres. "Service providers" (in other words judges, magistrates and clerks of the court) would undergo "intensive training" over a period of one year, commencing with a three week programme. Thereafter, formal refresher courses would take place at least once a year. During the first year of training, a "train the trainer" component would be built into the training to facilitate the transfer of skills to understudies to the consultants,

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[87] I located a document in the ELETU offices, entitled "Chief Directorate Transformation and Equity: Second Status Report on Implementation of the Equality Legislation" dated 31 January 2001, drafted by Ms Madonsela. This document states that the planning of the implementation of the Act had been taking place under the leadership of the Chief Directorate since December 1999. It is however not clear what form these planning activities took.

[88] Ss 16(2) and 31 of the Act. The initial business plan drafted by Ms Madonsela noted on p 18: "The Act cannot be implemented without preceding such implementation with training and public education because this is a new area for service providers in this country. The Act makes training a precondition for implementation".

[89] This document was distributed at a meeting of the TMT on 23 August 2000. I located an undated "Draft Project Plan" drafted by Ms Madonsela, at that stage the Chief Director: Transformation and Equity and Mr Laurence Basset, Chief Director: Legislation. This document anticipated that the Act would be incrementally implemented. The Act would have commenced within ten months of its enactment and would have been fully implemented within three years of commencement. This plan envisaged that that training materials would have been developed by February 2000, that a team to develop policy would have been appointed by August 2000 and that 14 judicial officers and court assistants would be appointed by February 2001. Funding would have been sourced from the Department and donors. The envisaged costs for the first year of the project was almost R62 million. A much smaller amount was allocated to the project - see 4.10 below.

[90] In the thesis I focus on the training of judges, magistrates, and clerks of the court.

departmental trainers and other equality experts. Training materials would be developed nationally. The business plan stated the purpose of the project as "to ensure that there is adequately trained personnel to implement the Act within less than a year of it's [sic] promulgation. The project also seeks to ensure that the public is adequately aware of the rights enshrined in the Act and the legal processes for effective use of the Act to protect their rights".[91] The plan listed the following "key outputs/indicators": [92]

- at least 300 judges and magistrates trained within 12 months and a target of 20% of these (in other words 60) trained by 15 November 2000;
- at least 500 clerks trained within 12 months and a target of 20% (ie 100) trained by 15 November 2000;
- a professionally packaged loose-leaf resource book produced for judicial officers;
- a professionally packaged loose-leaf resource book produced for clerks of the equality courts;
- videos, books on equality, publications and other relevant educational material to form a resource pack, to be regularly updated, to support service providers;
- training policy guidelines as envisaged in the Act, developed and tabled as prescribed in the Act, by 1 February 2001;
- at least 1200 persons in the other groups of service providers provided with some training albeit not as intensive as the equality court officials, by July 2001; and
- training coordinating mechanisms established and running effectively at the national level, in all provinces and at cluster level.

The plan also contained a "schedule of activities and budget". According to this schedule, trainers and trainees were supposed to be secured by May 2000; relevant academics (training consultants) identified by mid May 2000; training policy guidelines drafted by mid May 2000; two loose-leaf resource books developed and at least 500 copies printed by July 2000; training venues used from June 2000; and public awareness posters, pamphlets, print adverts and paid air time on radio and

[91] P 4 of the business plan.
[92] Pp 5-7 of the business plan.

television commenced by June 2000.[93] (Not one of these deadlines was met.) USAID was approached for funding and "existing departmental resources" were to be used where possible. The implementation of training would be based on "the 20:80 principle of achieving more with less resources".[94] R500 000 was allocated to public awareness raising and this allocation was based "on a communications strategy which uses existing resources and cost free communication avenues as much as possible".[95]

The plan listed the following "risks and assumptions":[96]

> 10.1 The Project Plan assumes that there will be buy-in and cooperation within the leadership of all potential service providers, including the Judiciary and Prosecutorial Services.
>
> 10.2 It is also assumed that existing Departmental resources including the Canada-Justice Linkage Programme and other relevant training activities at Justice College, will play a crucial role in the implementation of the training envisaged in this Project and ensuring the sustainability of such training. Another assumption is that government resources such as the South African Management Development Institute (SAMDI), Justice College and the Foreign Service Institute will play a central role in the training of the groups of service providers who will not be involved in the equality courts.
>
> 10.3 The Project Plan also assumes that adequate financial resources will be made available within Departmental resources to ensure that additional personnel required for the Equality Courts and coordination of the overall implementation as well as infrastructural requirements are provided speedily.
>
> 10.4 It is also assumed that government will continue to treat the issue of ending discrimination and achieving equality, as a national priority.

The plan estimated that up to 2000 service providers would be trained in the first year and that 40 million people would be reached through various media in the public awareness programme. It was envisaged that the public awareness programme would target "every person in society including rural and illiterate people" who would be "targeted mainly through the radio, TV and

[93] Pp 8-17 of the business plan.
[94] P 18 of the business plan.
[95] P 18 of the business plan.
[96] Pp 19-20 of the business plan.

community visits. NGO's would be drawn in to assist in the public education programme".[97] It was also envisaged that "some impact assessment" would be undertaken within a year of commencement of the Act.[98]

The business plan would have been drafted and then finalised between December 1999, when the planning of the implementation of the Act started,[99] and August 2000, when the first TMT meeting was held.[100] By the time the first TMT meeting was held, many of the targets in the plan had already been missed,[101] and the plan had consequently already become unrealistic: The plan anticipated that academics would be selected who would act as training consultants. These academics would then presumably have been responsible for drafting the resource books, and the resource books would presumably have acted as the basis for the training of equality court personnel. This would mean that the academics who would be selected would have had about a month to draft the training material, which was an unrealistic schedule.[102] The suggestion in the business plan that every single South African would be reached with the public awareness programme, was very optimistic, to put it mildly.

4.6 An ineffective overseeing body and unclear lines of accountability

The business plan referred to above set out the following structure relating to project management:[103]

11.1 A Project Manager located in the Department of Justice and Constitutional Development, will co-ordinate the project with the assistance of a National Equality Legislation Training Working Group.

11.2 The Working Group will comprise members of the Judicial Service Commission, The Magistrate Commission, Department of Constitutional Development, South African Human Rights Commission, the Commission on

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[97] P 22 of the business plan. In a document entitled "Draft Project Plan", drafted by Thuli Madonsela and Laurence Bassett, Chief director: Legislation, handed out at the first meeting of the TMT, it was estimated that 1.5 million people would use the dispute resolution mechanism in the first year; 150 000 personnel be trained and 40 million people reached through radio, bill boards, posters, TV, bus/train adverts, newspapers and other media. Even without the benefit of hindsight, these estimates are absurdly optimistic.
[98] P 22 of the business plan.
[99] See fn 87 above.
[100] See 4.6 below.
[101] See the "schedule of activities and budget" referred to at p 187 above.
[102] See 4.7 and 4.11 below.
[103] P 21 of the business plan.

> Gender Equality and representatives of Civil Society. Provincial Training Working Groups will also be established in the nine provinces to facilitate decentralization and responsiveness.

The "National Equality Legislation Training Working Group", referred to in paragraph 11.1 of the business plan, held its first meeting on 23 August 2000.[104] The invitation letter to attend the meeting noted that the Department of Justice and Constitutional Development had "developed a general Project Plan for training which requires un-packing and implementation". The letter also stated that the department planned to implement the Act by 10 December 2000 and that it was therefore "critical that training commences soon and that there are enough adequately trained people to form a pool for designating those to deliver services in the pilot sites that will commence on December 10".

This working group, initially entitled the "Interim Training Management Team on Equality Legislation", later the "Equality Legislation Training Management Team" (TMT) and then the "Equality Legislation Training Management Board" (TMB) eventually met 17 times.[105] Initially the manager and coordinator of the training project, Ms Madonsela, chaired the meetings. Supreme Court of Appeal Judge Ian Farlam chaired the eighth to 17th meetings.[106] In a document drafted by Ms Madonsela entitled "proposed annual work plan for the period February 2001 to January 2002" handed out at the 11th meeting, this working group was described as an "advisory body" that

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[104] A document entitled "Proposed Annual Work Plan: Equality Legislation Education and Training Unit Implementation Plan for Capacity Building Project (Equality Legislation Implementation) February 2001 – January 31 2002" lists the team members as follows: Hon Mr Justice Ian Farlam (chairperson JSC training committee), Hon Mr Joe Raulinga (Chief Magistrate Bloemfontein), Ms Thuli Madonsela (project manager and head of ELETU), Hon Mr Justice Ralph Zulman (judge of the Supreme Court of Appeal, resource person and seconded to ELETU up to November 2001), Hon Ms Justice Yvonne Mokgoro (judge of the Constitutional Court and resource person), Hon Ms Justice Jeanette Traverso (Deputy Judge President Cape Provincial Division and resource person), Ms Valerie Gciba (Chief Magistrate Eastern Cape and resource person), Mr Andre Keet (SAHRC), Ms Mmathari Mashao (CGE), Prof Shadrack Gutto (CALS at WITS, Project leader ELETU Programme 1 Tender No 1), Prof Frans Viljoen (CHR at UP, Project leader: resource manual for equality court clerks), Mr Anton Kok (CHR at UP, secretary), Prof Cathi Albertyn (CALS at WITS and resource person), Ms Sury Pillay (NIPILAR, resource person), Mr TP Mudau (Senior magistrate and resource person), Hon Mr Justice Johann van der Westhuizen (judge Transvaal Provincial Division, resource person) and Mr Reuben Mukhavhuli (administrative assistant).

[105] The dates of the meetings were 23 August 2000, 6 September 2000, 18 October 2000, 15 November 2000, 20 December 2000, 14 February 2001, 28 March 2001, 28 May 2001, 4 July 2001, 21 August 2001, 17 September 2001, 7 November 2001, 12 December 2001, 27 February 2002, 19 June 2002, 21 August 2002 and 8 October 2002. The 18th meeting was cancelled due to "cash flow problems" and the team was dissolved. Regular attendees included Supreme Court of Appeal judges Ian Farlam and Ralph Zulman, Cape High Court judge Jeanette Traverso, professors Cathi Albertyn and Shadrack Gutto from the Centre of Applied Legal Studies at the University of the Witwatersrand, magistrate Joe Raulinga, magistrate Valerie Gqciba, Cecile van Riet from Justice College and the author.

[106] Judge Farlam would have chaired the seventh meeting but for an (unexplained) emergency that arose.

assisted the Equality Legislation Education and Training Unit (ELETU) in the execution of its mandate. (ELETU was the "main implementation agency" of training and education activities on the Act and in effect comprised of two permanent personnel – the project manager and an administrative secretary.[107])

At the first meeting, the TMT agreed to function as an interim body pending a planned meeting between the Minister of Justice and Constitutional Development, the Chief Justice, the Judicial Services Commission (JSC), the Magistrates' Commission (MC), the South African Human Rights Commission (SAHRC) and the Commission on Gender Equality (CGE). (However, this meeting never took place.[108])

At its second meeting, the TMT resolved that the role of the provincial training working groups (see paragraph 11.2 of the business plan above) would be mainly to implement training programmes rather than policy development. It was agreed that the Judges-President of each High Court division should be tasked to set up provincial training structures. At magistrates' court level the cluster heads[109] would be tasked to coordinate localised training.

At the fourth meeting the TMT discussed and then proposed a restructuring of the existing overseeing body. The team agreed that an executive-driven process had to be avoided and that a judiciary-controlled training process should be put in place. Ms Madonsela undertook to talk to the Minister to obtain his approval of the suggestion that the judiciary should be more actively involved in the training process and training management. At the sixth meeting Ms Madonsela advised the

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[107] See "Executive Summary Report & Evaluation National Seminar for Equality Court Judicial Educators: Aloe Ridge Hotel Gauteng, April 16-21, 2001", distributed at the eighth TMT meeting.

[108] A "Draft Project Plan" (see fn 470 (p 100), fn 89 (p 186) and fn 97 (p 189)) envisaged that the overall management of the project would have vested in a "steering committee" chaired by the Minister of Justice and Constitutional Development and would have comprised of the Chief Justice, President of the Constitutional Court, Chairpersons of the Human Rights Commission and Commission on Gender Equality, the Director-General of the Department of Justice and Constitutional Development and the Ministers that reviewed the bill for cabinet. Presumably the planned meeting had as its aim to discuss the establishment and working of this steering committee. When it became clear that the meeting would not be held, the *ad hoc* interim training management team took the place of the envisaged steering committee.

[109] A number of magisterial districts are grouped together with a chief magistrate as the head. Some provinces would have more than one chief magistrate, of which one would then be the cluster head for the province. My thanks to Jakkie Wessels, regional magistrate, who provided me with the information about the court structure, in an email dated 8 May 2007.

team that after discussions between the Department, JSC and MC it was decided that future meetings of the team would be chaired by the judiciary. The chairperson of the JSC committee on education would chair the meetings and a delegate from the MC would act as deputy. At the seventh meeting Ms Madonsela confirmed that Judge Farlam would in future act as the chairperson and Mr Raulinga as the deputy chairperson.

At the same meeting the team was advised that advertisements for the positions of project administrator and project coordinator had been placed. At the sixth meeting Ms Madonsela advised the team that she had been appointed as project manager. She told the meeting that the project manager would be held accountable to the task team.[110] Mr Reuben Mukhavhuli was introduced to the team as project assistant. Ms Madonsela expressed a need for a secretary that she would discuss with the Director-General. The team was also advised that it had been decided that the interim training management team would become the final training management team and that the JSC and other key stakeholders were satisfied with the composition of the team. At the eighth meeting Ms Meme Sejosengwe was introduced to the team as Project Manager: Broad Implementation of Equality Legislation while Ms Madonsela would remain as Project Manager: Equality Legislation Education and Training. The team was advised that Ms Sejosengwe and Ms Madonsela reported directly to the Director-General on separate and complementary projects.

At the 11th meeting the project manager distributed an amended work plan for the period February 2001 – January 2002. This document does not clearly explain who would ultimately be responsible for the implementation of training and public awareness programmes. The plan indicated that ELETU's mandate was "managing the implementation of the Capacity Building Project … which seeks to provide judicial and public education" on the Act.[111] It stated that the "core personnel" of ELETU "included" a project manager and administrative secretary; that consultants were engaged from time to time for specific tasks, and that ELETU was *assisted in its mandate* by the TMT.[112] The document stated that the conceptualisation of projects, quality assurance and most of the administrative work were undertaken by ELETU (in other words, the project manager and

[110] Although not explicitly referred to in the minutes, the project manager would presumably ultimately be held accountable to the Director-General, Department of Justice and Constitutional Development.
[111] P 1 of the document.
[112] P 1 of the document; my emphasis.

secretary.[113]) The document indicated that the supervision of work was *fully supervised* by the project manager and that the project manager set relevant time frames with the assistance of the executive committee,[114] the JSC, the MC and the TMT.[115] The TMT and the executive committee met monthly to review the work of ELETU and to discuss the way forward.[116] The plan noted that ELETU submitted bimonthly reports to the Director-General and the Minister of Justice and Constitutional Development, the chairperson of the JSC and the chairperson of the MC.[117] The document stated that Ms Madonsela is the accounting officer at unit level with the *ultimate responsibility and accountability* for finance, procurement and performance management while the Director-General would be the accounting officer with *final responsibility* for financial and procurement management.[118]

An item in the minutes to the 14th meeting entitled "training guides" contains a hint that ELETU was not destined to continue in its then-existing format. The minutes reflect that it would be ELETU's responsibility to coordinate the updating of training material "for as long as ELETU continued to exist". The 15th meeting confirmed this state of affairs: Ms Madonsela advised the meeting that ELETU would cease to exist at the end of January 2003 and that avenues had to be explored for institutionalising the project to ensure the sustainability of the training project beyond ELETU's lifespan. At that point the head of Justice College, Ms Cecile van Riet, advised that Justice College would build equality training into its curriculum for the training of magistrates, and Judge Farlam reported that the JSC would be setting up its own project relating to the training of judges. Ms Madonsela reacted by saying that she had hoped that the joint training of judges and magistrates could be continued. Mr Raulinga shared this sentiment. The meeting agreed to defer the matter. The issue of joint training seminars for judges and magistrates was not raised at any subsequent TMT/TMB meetings.

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[113] P 5 of the document.
[114] The work plan indicated that the executive committee consisted of Hon Mr Justice Ian Farlam, Hon Mr Justice Ralph Zulman, Hon Mr Joe Raulinga and Ms Madonsela.
[115] P 5 of the document; my emphasis.
[116] P 5 of the document.
[117] Pp 5-6 of the document.
[118] P 6 of the document; my emphasis.

4.7 *Footdragging in the development of training material*

The initial business plan distributed at the first TMT meeting envisaged national co-ordination and provincial implementation of training.[119] Universities would be asked to assist with training.[120] Selected service providers would undergo intensive training over a one year period, starting with a three week programme.[121] Formal refresher courses would take place once a year.[122] The project would have included a train-the-trainer component: This would have entailed attaching presiding officers as understudies to the trainers at the initial training seminar.[123] Centralised development of training material would include the drafting of a resource book to foster a common national approach to the Act.[124] A trainers' seminar would have taken place to have the trainers agree on a common approach to training.[125] The broad objectives of the plan included the existence (therefore the drafting) of a training policy framework to facilitate judicial education and the existence of training resource packs (two loose leaf resource books, one for presiding officers and one for clerks.[126]) The key outputs of the programme included the development and tabling of training policy guidelines by 1 February 2001.[127] The plan envisaged national (ie central) materials development and standard setting while the training as such would take place on provincial level.[128]

At the first TMT meeting it was agreed that a "call for expression of interest" to academic institutions relating to the development of training materials and the provision of training would be reviewed at the second meeting. Mr André Keet from the SAHRC would assist the Department of Justice to prepare a document on training design that would be discussed together with the "call for expression of interest". At the second meeting Mr Keet presented a draft framework on training design. The framework envisaged outcomes-based training material. The framework set out the objectives of the training material as to translate the legislation and its philosophical framework into

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[119] Para 2.2 of the business plan.
[120] Para 2.2 of the business plan.
[121] Para 2.3 (erroneously marked 2.2) of the business plan.
[122] Para 2.3 of the business plan.
[123] Para 2.4 of the business plan.
[124] Para 2.5 of the business plan.
[125] Para 2.5 of the business plan.
[126] Para 4 of the business plan.
[127] Para 5 of the business plan.
[128] Para 5 of the business plan.

interactive training and learning materials; to train practitioners on the objectives of the Act, the Act's provisions, the Act's relation to relevant international obligations and other national legislation and the Act's implications for the daily execution of their duties; and to develop an enhanced operational understanding of equality and the role of this legislation in facilitating the transition to a democratic society. The framework envisaged interactive peer-group education, using a peer (a judge or magistrate), an "expert" and a "facilitator". The framework document suggested that the outcomes of the project would be that participants:

- demonstrate a clear understanding of the Act and its social context;
- display a sound comprehension of the Act, its role in the South African democracy, and international customary law and international obligations relevant to the Act;
- exhibit a sound grasp of the notions of equality, diversity, equity, social justice, human dignity and how these notions are linked to the objectives of the Act;
- be perceptive to the global and national struggle against unfair discrimination; and
- demonstrate a critical understanding of anti-discrimination, anti-bias and multicultural approach and application to issues of diversity and equality.

The framework also envisaged assessment instruments. The minutes to the second meeting indicates that the training design framework was accepted with minor amendments and agreed that some of its elements would be incorporated into the "call for expression of interest". The design framework would apparently also have been used to form the basis for evaluating responses to the "call for expression of interest". At the same meeting the "call for expression of interest" was settled.

At the second meeting it was agreed that the Department of Justice would develop terms of reference for the national and provincial structures to clarify roles, particularly with regard to policy development and implementation. The minutes to the second meeting indicates that one of the issues that needed to be clarified was who would appoint or accredit trainers. (This never happened – the provinces were allowed to appoint their own training panels). At the same meeting it was agreed that people trained in other courses (for example a Master's degree in Equality Law) could be deemed to have been trained in accordance with the provisions of the Act, provided that

the training was accredited. The team agreed that international and local judicial officers would be involved in the training and that university lecturers in law, sociology, psychology and other relevant fields would be involved to the extent of their strengths. (To my knowledge, university lecturers in law were involved in the training but lecturers in other fields were not asked to assist either at the national or provincial seminars.)

At the same meeting the TMT agreed that Judge Zulman and Prof Gutto would draft policy directives relating to training (and as envisaged in the Act) that would be tabled at the third meeting. These "draft policy directives on training of equality court presiding officers, court clerks and auxiliary personnel" were tabled at the third meeting.[129] Various TMT members suggested changes to the draft directive.[130]

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[129] The directives *inter alia* included the following: "4. Operational strategy for training potential equality courts' presiding officers and clerks. 1. By the end of January 2001, a core of dedicated volunteer judges drawn from the Constitutional Court, Supreme Court of Appeal and the High Courts, some senior magistrates and legal academics and practitioners with appropriate expertise and seniority would have been trained as trainers for the equality courts' presiding officers, clerks and auxiliary personnel, especially assessors and interpreters. 2. In February 2001, training of a core of judges, magistrates, clerks and some auxiliary staff, selected through a consultative process… would be accomplished in time for the designation of presiding officers and court clerks by 21 March 2001. 3. Thereafter, all the sitting magistrates and judges, as well as court clerks and other auxiliary personnel will be encouraged to participate in the training programmes that will be undertaken on regional basis under a central co-ordination unit. 4. Equality courts will be established in all courts presided over by judges and magistrates who have participated in the training programme. 5. Composition of training teams and the development and content of training courses. 1. To ensure the development of uniform norms, standards and procedures in the equality courts, the basic substantive and procedural aspects of the training programme shall be the same. 2. The composition of the training teams shall include trained judges or magistrates, as the case may be, and trained legal academics and other experts from the profession and civil society. 3. The basic substantive and procedural aspects of the training programme shall include the following: 3.1 the broader historical and social context, with particular reference to the policy, laws and practices of *apartheid* and the introduction of *constitutional democracy*; 3.2 the meaning of equality as expressed in s 9 of the Constitution with reference to local, international and comparative jurisprudence; 3.3 South Africa's international obligations under international law, especially under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women; 3.4 the structure and content of the Equality Act, including aspects of promotion of equality; 3.5 the Bill of Rights set forth in Chapter 2 of the Constitution; 3.6 the role of the equality courts, including the determination of fairness and unfairness of a discriminatory act or omission, listed and unlisted grounds, the significance of s 29 and the Schedule to the Act, procedural requirements, representation of complainants, referrals, appeals, orders and remedies; 3.7 understanding diversity awareness and consciousness, especially with regard to differentiation based on class, race, gender and disability in the South African legal and social context.

[130] I list a few of these suggested amendments, as reflected on p 3 of the minutes to the meeting: The directive should make it clear that the training process envisages the dissemination of expert knowledge and that the Act is based on the understanding that a specialist approach be followed in applying the Act; the long title and Preamble to the Act could be used in this regard; it must be made clear in the directive that new and unique courts are being set up and that the training is aimed at equipping judicial officers to effectively deal with the Act; mention could be made in the purpose statement of the directive of the need to prepare standardised training material; para 4.1 and para 5.2 of the draft directive needs to be reconciled in that the composition of the training teams is described differently in these two paragraphs; para 4.1 should not mention assessors as the team is still discussing if and how assessors should be

At the same meeting the TMT was informed that the internet-advertised "call for expression of interest" received a very poor response – only the UCT-based Race and Gender Unit had responded. The TMT was informed that the advertisement would appear in the *Mail & Guardian* newspaper as well. The minutes to the fourth meeting indicate that six responses were received in response to the advertisement. However, the State Tender Board had advised that a "call for expression of interest" was not sufficient and that a formal tender process should have been followed. To solve this problem, the Director-General was asked to issue a certificate of urgency relating to the drafting of the training material. New advertisements would be published relating to the provision of training.

Prof Gutto tabled an amended draft policy directive on training at the fourth meeting. Team members suggested a number of changes. It was also agreed that the Minister would discuss the final wording of the directive with the JSC and MC.

At the fifth meeting somewhat amended policy directives were again tabled.[131]

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trained. (Par 4.1 should simply mention that "auxiliary personnel" will be trained.); paras 4 and 5 blurs the three stage training process (development of materials, train the trainers, trainers train the groups) and should be cleared up; the time frames in para 4 should be adapted to read "by 15 February 2001" in para 4.1 and "by 21 March 2001" in para 4.2; reference could be made to an annual trainer's seminar; the sequencing of the training programme as set out in para 5.3 needs to be fine-tuned; the document should be described as a "preliminary draft"; it should be made very clear that the Minister and the Department of Justice is not married to the document and that it will serve as a mere starting point in the consultative process with the JSC and MC.

[131] "…4. Operational strategy for training potential equality court presiding officers and clerks. A three stage education and training process is envisaged, namely, the development of appropriate training and resource materials, the training of trainers and the training of groups by the trainers. 1. By 15 February 2001 ~~By the end of January 2001~~ a core of dedicated volunteer judicial officers, ~~judges drawn from the Constitutional Court, Supreme Court of Appeal and the High Courts, some senior magistrates~~ legal academics and practitioners with appropriate expertise and seniority would have been trained as trainers for the Equality Court presiding officers, clerks and auxiliary personnel. ~~especially assessors and interpreters.~~ 2. By 21 March 2001 ~~In February 2001~~ training of a core of judges, magistrates, clerks and some auxiliary staff, selected through a consultative process… will be accomplished in time for the designation of presiding officers and court clerks ~~by 21 March 2001~~. 3.Thereafter, all the sitting magistrates and judges, as well as court clerks and other auxiliary personnel will be encouraged to participate in the training programmes that will be undertaken on regional basis under a central co-ordination unit. 4. Equality courts will be established in all courts presided over by judges and magistrates who have participated in the training programme. 5. It is anticipated that an annual trainers' seminar will be held.

5. Composition of training teams and the development and content of training courses. 1. To ensure the development of uniform norms, standards and procedures in the equality courts, the basic substantive and procedural aspects of the training programme shall be the same. 2. The composition of the training teams shall include the persons referred to in paragraph 4.1 hereof. ~~trained judges or magistrates, as the case may be, and trained legal academics and other experts from the profession and civil society.~~ 3. The basic substantive and procedural aspects of the training

It was resolved that the (draft) policy directives would serve as the basis for the development of the training material. At that point the Minister had not yet taken up the wording of the policy directives with the JSC or MC. The meeting was informed that a committee consisting of members of the Department, the judiciary and magistracy had decided that judicial training material would be developed by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand in cooperation with the Centre for Human Rights at the University of Pretoria, while the training material and curriculum[132] for the training of clerks would be drafted by Justice College and Prof Frans Viljoen and the author, from the University of Pretoria.

At the sixth meeting it was decided that Ms Madonsela and Mr Keet would modify the training design document and that the document would be used to evaluate the training material, to evaluate the structuring of the training seminars and to evaluate tenders for training delivery.[133] The meeting was informed that the JSC and heads of court had met to discuss the draft policy directives. The chairperson of the JSC thought that aspects of the directives were unconstitutional and the status of the directives had therefore become unclear. (The original intention was that a number of these directives would be published in the Government Gazette.[134] As at 31 October 2007, no "directives" had been published.)

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programme shall include the following: 3.1 understanding diversity awareness and consciousness, especially with regard to differentiation based on class, race, gender and disability in the South African legal and social context; 3.2 the Bill of Rights set forth in Chapter 2 of the Constitution; 3.3 the meaning of equality as expressed in s 9 of the Constitution with reference to local, international and comparative jurisprudence; 3.4 South Africa's international obligations under international law, especially under the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women; 3.5 the structure and content of the Equality Act, including aspects of promotion of equality; 3.6 the role of the equality courts, including the determination of fairness and unfairness of a discriminatory act or omission, listed and unlisted grounds, the significance of s 29 and the Schedule to the Act, procedural requirements, representation of complainants, referrals, appeals, orders and remedies; 3.7 the broader historical and social context, with particular reference to the policy, laws and practices of *apartheid* and the introduction of constitutional democracy; 3.8 other relevant skills".

[132] The curriculum for the training of presiding officers was drafted by two Australian experts who were commissioned by the Department. The TMT suggested certain changes to this draft curriculum at the fifth TMT meeting.

[133] Uncertainty arose at the seventh meeting as to the role of the training design document in the training process. The TMT resolved that Mr Mukhavhuli would procure copies of the minutes of the first six TMT meetings and the training design document and would set up a meeting between Ms Madonsela and Mr Keet to discuss how the document would relate to the upcoming training seminar for judges and magistrates. The role of this "training design document" remained unclear.

[134] Prior to its amendment s 31(4) of the Act read that "[T]he Minister must, after consultation with the Magistrates Commission and the Judicial Service Commission, issue policy directives and develop training courses with a view to— *(a)* establishing uniform norms, standards and procedures to be observed by presiding officers and clerks in the performance of their functions and duties and in the exercise of their powers; and *(b)* building a dedicated and

The TMT agreed that technical teams had to be established that would review the content of the bench book and resource manual. The technical teams would use the curriculum, policy guidelines (previously called policy "directives") and training design document to evaluate the two texts.

The TMT was informed that the Department had issued a tender relating to the provision of training and that the closing date for tenders was 19 February 2001. The tender document envisaged an initial six day trainers' seminar to be attended by 20 - 30 people which would include presentation techniques and adult training skills and a subsequent education programme for judicial officers of 5 - 8 days and a further series of ½-day seminars over a six month period thereafter. A similar process was envisaged for clerks and registrars.

The minutes to the sixth meeting indicate that "some difficulty" arose between the Department and CALS as to the format and process of training of judges and magistrates.[135] As to the curriculum of the bench book, the TMT was informed that the Department made certain changes to the curriculum pursuant to the previous meeting's suggestions. CALS and Ms Madonsela would meet to discuss further changes to the curriculum. The JSC accepted that the judges and magistrates who served on the TMT would monitor the curriculum and did not wish to approve the curriculum. At the seventh meeting Ms Madonsela reported that she had met with CALS and that they had agreed on a few minor changes.

As to the curriculum of the resource manual, Prof Viljoen distributed a suggested draft curriculum to the TMT members and requested that suggested changes and improvements be sent to him. At the seventh meeting it was reported that a technical team had met on 22 March 2001 to discuss the resource manual. The manual was emailed to the technical team on 20 March with the intention that the manual be read on the public holiday. At the meeting it became clear that most

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experienced pool of trained and specialised presiding officers and clerks". Act 52 of 2002 amended s 31(4) and it now reads that "[T]he Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing- (a) social context training for presiding officers; and (b) uniform norms, standards and procedures to be observed by presiding officers in the performance of their functions and duties and in the exercise of their powers".

[135] CALS was tasked to coordinate the first training seminar for judges and magistrates.

members of the technical team either did not receive the emailed version or had not read it. It was then agreed that comments would be emailed to me by 30 March 2001. The technical team met again on 11 April 2001 to discuss the edited version of the manual. The project manager and team members sent a few comments to me via email during the next few months. The manual was eventually finalised during November 2001, although older versions of the manual were utilised during 2001 training seminars.

4.8 Inadequate trainers' seminars for judges, magistrates and clerks

At the sixth TMT meeting, after a meeting between the JSC and heads of court, the TMT was informed that judges and magistrates would be trained during April 2001. At that stage it was envisaged that an initial trainers' seminar would be held from 17 – 21 April 2001, where a uniform approach to training would be developed. This first session would then have been followed by a second seminar from 30 April – 4 May 2001, when the actual training of practitioners would have taken place. At the same meeting, the TMT was informed that clerks could be trained during March 2001. Exact dates for training would be set in consultation with Justice College so as not to clash with other training. Various options were put to the Director-General: senior clerks could be trained; new clerks could be appointed; new posts could be created for people with paralegal skills; recent graduates could be employed in "learnerships" or a selection could be made from existing clerks to be trained as equality court clerks. All of these options would create difficulties: cluster heads would not want to release competent clerks for training; clerks were already overstretched with training taking place on a number of Acts and should clerks be taken out of their existing positions their duties would have to be filled by clerks who already have too many obligations or new clerks would have to be employed; learnerships would probably leave at the end of their year stint, which would mean that training would have to take place annually; learnerships would also not receive the practical training component of candidate attorneys; and existing clerks would probably struggle with some of the conceptual issues in the Act. The TMT suggested that the various options be put to the Director-General for a decision. Pending the decision by the Director-General, specific dates were not set for the training of clerks.

Ms Madonsela informed the seventh meeting that the first training seminar on the Act would proceed from 16 – 21 April 2001.[136] The TMT agreed that *curricula vitarum* of suggested trainers had to reach Ms Madonsela by 2 April 2001. A decision would then be made as to who would be involved in training the trainers. The team also agreed that the seminar had to be structured in such a way that sufficient time would be spent on imparting teaching skills.

Ms Madonsela informed the seventh meeting that the results from the tender process relating to the provision of training were disappointing. It was decided that CALS at WITS would become the civil society partner of the Department relating to the training of judicial officers while the University of the North West (as it then existed) would become the civil society partner together with Justice College relating to the training of clerks.

The eighth TMT meeting took place after the first "national seminar for equality court judicial educators" took place from 16-21 April 2001 at Aloe Ridge Hotel. Ms Madonsela and judges Farlam and Zulman informed the meeting of the seminar. Most of the participants considered the seminar to have been a success.[137] The main complaint centered on the fact that participants were not trained on how to train. The team agreed that the follow-up seminar would focus in some depth on training needs. The team also agreed that CALS and the University of the North West would have to draft trainers' guides to the bench book and resource manual as well.

A serious issue that arose during the seminar was a widely held view among participants that the provisions in the Act relating to the designation of presiding officers were unconstitutional. A letter was sent to the Minister explaining that the Act should ideally be amended to avoid the unhappy situation of having the Act held up in courts, awaiting a final verdict on its (un)constitutionality.[138]

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[136] The TMT discussed the format of the training and tentatively suggested the following: 17 April 2001 social context training and international and comparative law conceptions of equality; 18 April follow-on from the previous day's afternoon session, the South African Constitutional framework of equality and an overview of the Act; 19 April the application of the Act; 20 April the application of the Act, case management, referrals and other skills and techniques; 21 April judidical independence.

[137] The executive summary of the seminar tabled at the meeting indicated that of the 22 participants that returned the evaluation form, one rated the seminar as excellent, 15 rated it as good, 4 rated it as average and 4 rated it as poor.

[138] The letter, dated 23 April 2001, read as follows: "[Judge Farlam] has been requested by the judicial officers attending the national seminar for equality court judicial educators, consisting of a substantial number of judges and magistrates from all over the country, to inform you that it is their considered view that certain provisions of the Act are likely to be declared unconstitutional in that they infringe upon the independence of the judiciary and the principle of the

The team expressed concern that should the Act have to be amended, it could delay implementation considerably: if the time lag between the training and implementation became too long, the training would likely have to be repeated. The TMT requested Prof Gutto to set up a meeting with the Minister, to be attended by Prof Gutto, Mr Raulinga, Ms Sejosengwe, Ms Madonsela and judges Farlam and Zulman, to discuss the proposed amendment.

The eighth meeting was informed that a seminar would take place for the training of clerks from 10-15 June 2001 in Pretoria. The University of the North West would coordinate the training in partnership with Justice College. Invitations had been sent to cluster heads to nominate seminar participants.

Ms Madonsela tabled an "Executive Summary Report & Evaluation on the National Seminar for Equality Court Judicial Educators" at the eighth TMT meeting.[139] The report indicated that 70 people attended the seminar of which 55 were judges or magistrates.[140] The report envisaged that "phase 2 of trainers' course" would take place during the last week of July 2001 and "phase 3 of

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separation of powers. The provisions in question are ss 31(1)(a), 31(2)(a), 31(3), 31(4) and 31(5), read with s 16(1)(b). The decision as to whether a particular High Court judge or magistrate is "suitable" to hear a particular case or type of case is one which should be made by the Judge President or Deputy Judge President or the Chief Magistrate or Regional Court President of the court to which the particular judicial officer is attached. It is understood that you have indicated that it is your intention to apply s 16(1)(b) as if, instead of the expression "after consultation with", the expression "in consultation with" were used. There are, however, two difficulties with this approach: firstly it would not bind any of your successors and secondly it is considered, as has been said, that the decision as to whether a particular judicial officer is "suitable" to hear a particular case or type of case is one which should be made by the relevant Judge President or Deputy Judge President or Chief Magistrate or Regional Court Magistrate alone and not in consultation with anyone else. It is further the opinion of the judicial officers attending the seminar that the Act should be amended as soon as possible so as to remove the provisions which may well render the Act unconstitutional. In this regard it is considered that if the Act is not so amended its constitutionality will be challenged by some discontented litigant against whom an order has been made by an equality court. Such a constitutional challenge will paralyse the whole system of equality courts until it is resolved and will, as has been said, probably be successful. In this regard it is relevant to refer to the experience in Australia where a system of national equality tribunals (conducted by the Human Rights and Equal Opportunity Commission) was undermined for over two years because of a successful constitutional challenge: see *Harry Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 (HC). It must be emphasised that it is accepted without reservation that it is not your intention to infringe the independence of the judiciary or the separation of powers but it is considered that a constitutional challenge against the Act is nevertheless likely to succeed. All the participants in the seminar are anxious that the noble aims of the Act are realised. It is for this reason that it was decided that this letter be addressed to you. As a matter of courtesy a copy of this letter is being sent to Mr Justice Chaskalson, the Acting Chairperson of the Judicial Service Commission, Mr Justice Ngoepe, the Chairperson of the Magistrates' Commission, as well as Mr Justice Hefer, the Acting Chief Justice". Judge Farlam drafted the letter in his capacity as the chairperson of the organising committee.

[139] Also see fn 107 and fn 148.

[140] P 3 of the document.

trainers' course" would take place during October 2001.[141] Decentralised training of judicial officers, where judicial officers trained at the trainers' seminars would be involved as trainers, were envisaged to take place in August-September 2001 (phase 1), October-December 2001 (phase 2) and January 2002-February 2002 (phase 3).[142]

The executive summary and report listed the following main concerns raised by seminar participants: not getting materials (supposedly the bench book) in advance; time allocated to topics; the size of breakaway groups; the need for more and elaborate practicals, including moots; and the fact that too much time was spent on rather long presentations at plenary.[143] At the end of the seminar participants expressed a strong need for ELETU to establish an information service on equality issues such as national and international case law and policy debates.[144] The participants also expressed a strong desire to participate in additional trainers' seminars.[145] Key topics that were identified included judicial training techniques, social context awareness training, international and comparative law, practical exercises and/or moot courts, the Act's relationship with the Employment Equity Act and alternative forums for dispute resolution under the Act.[146]

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[141] P 3 of the document.
[142] P 3 of the document.
[143] P 5 of the document.
[144] P 5 of the document.
[145] Pp 5-6 of the document.
[146] Pp 5-6 of the document.

An executive committee[147] of the TMT met after the Aloe Ridge seminar to evaluate the seminar.[148] The executive committee agreed that CALS at WITS would be awarded the tender for the train the trainer programme and for the decentralised training of presiding officers in the Gauteng province.[149] The University of the North West was awarded the tender for training of clerks of the equality courts with Justice College as an equal partner relating to implementation. The University of the North West was also awarded the decentralised training programme of presiding officers in the North West province.[150] The executive committee agreed that a tender for decentralised training of presiding officers in the other provinces would be reissued.[151]

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[147] The committee consisted of Judges Farlam and Zulman and Ms Madonsela. Mr Raulinga could not attend the meeting but endorsed the minutes and recommendations of the executive committee afterwards.

[148] The minutes to the meeting of the executive meeting was distributed at the eighth TMT meeting as pp 6-12 of the "Executive Summary Report & Evaluation, National Seminar for Equality Court Judicial Educators, Aloe Ridge Hotel, April 16-21 2001". This executive committee agreed to the following "way forward" (pp 8-9 of the report): "(1) Programme to be finalised well in advance and distributed at least 10 days before the seminar and materials to be distributed at least a week before the seminar. (2) More break away sessions with much smaller groups (about six groups of 8) and constituted before the seminar through a preregistration form asking participants to chose (sic) sessions in order of priority. A caution to be included that where there are electives, people's preferences are not guaranteed. (3) Facilitators and rapporteurs to be selected in advance and properly trained or prepared for their role at least a day before the seminar. The training is to cover 'how to facilitate' and 'key points to be dealt with in the breakaway session'. (4) Guidelines for proceedings in the groups to be prepared in advance and provided in writing to break away groups. (5) More and realistic hypotheticals to be prepared by CALS/Faculty. (6) Sessions to deal with points and counter points with emphasis on role play or simulations to enhance experiental learning. (7) A major (flagship) moot court to be organized in advance and participants allowed to prepare for it using other sessions in the week to conduct research. Other moot or opportunities for arguing points and counterpoints to be provided throughout the training. Judgment for the main moot to be prepared in groups (break away sessions) after hearing all arguments during the court session at plenary. (8) Session on alternative fora: Someone to prepare a guide on all key alternative fora including addresses and contact numbers. This topic to be dealt with as follows: Plenary discussion involving representatives from chapter 9 institutions and other key alternative fora; breakaway sessions to deal with hypotheticals involving alternative fora and the question of referrals; copy of Resource Book for Clerks/Registrars of the Equality Court to be supplied to all TMT members. (9) Session on International & Comparative Law: Compendium of materials on this topic to be prepared and provided to participants in advance. Experiential session to be organised. (10) Session on social context awareness to be organised and integration of social context/diversity awareness in rest of seminar and materials. More in depth social context awareness training to be done at provincial level. (11) Hypothetical involving the Employment Equity Act to be included. (12) Next seminar with the same group, to be three days and one evening. The evening to be utilised for registration and keynote address". It is questionable to what extent the guidelines set out in this "way forward" were adhered to in follow-up training seminars.

[149] P 9 of the "Executive Summary Report".

[150] P 10 of the "Executive Summary Report".

[151] P 10 of the "Executive Summary Report". The tender for decentralised training seems never to have been issued. At the ninth TMT meeting Ms Madonsela informed the meeting that a tender would be issued "shortly". At the 10th meeting the TMT was informed that the Western Cape had started to plan its provincial training programme. Further TMT/TMB meetings were then informed of various provincial initiatives without any indication that a successful tenderer were coordinating the training sessions. The minutes to the 11th TMT meeting indicates that Ms Madonsela requested the TMT to authorise her to grant R100 000 to each province to give effect to provincial training programmes.

The executive committee agreed to the following provisional work plan following on the Aloe Ridge seminar:[152]

Clerks

June 2001	Trainers' seminar for clerks
July 2001-January 2002	To be negotiated with key role players

Presiding officers

Mid-end July 2001	Phase II of train the trainer programme
August-September 2001	Launch of decentralised training programme in the provinces
October 2001	Phase III of train the trainer programme
November 2001-January 2002	To be negotiated with civil society partners and key stakeholders

By the time the ninth TMT meeting took place, the trainers' seminar for clerks had taken place and Mr Behari (Justice College) and Ms Madonsela provided feedback to the team on the seminar. The majority of participants rated the seminar as "excellent" or "good" but felt that more training was needed on training methodology and the court process. The Department of Justice would meet with the University of the North West to plan the "way forward".

Prof Gutto distributed a draft programme relating to phase II of the trainers' seminar (presiding officers). He said that phase II would consist of a large number of hypotheticals and moot courts during which the focus would be on procedural issues and the application of the Act. TMT members provided a number of suggestions to the draft programme.[153] Prof Gutto requested TMT members to provide him with additional comments by the end of the week to enable CALS to

[152] Pp 10-11 of the "Executive Summary Report" (see fn 107, fn 148 and p 202.)

[153] Suggestions included the following: Ms Madonsela thought that more attention should be given to training methodology (Prof Gutto was of the view that the hypotheticals and moot courts will provide sufficient room to also focus on training methodology); information should be provided on labour issues; international and comparative law aspects need to be reinforced; a session could be added on "how to develop hypotheticals"; to focus on training methodology, after each hypothetical the participants should be told why the hypothetical was drafted in that particular way; a proper link must be made with phase one in that phase two must consolidate the process and must cover the ground not covered during phase one; it should be made clear that the participants will be released after phase two to become trainers; videos should be shown in context and after proper discussion of the content; greater emphasis could be placed on social inequalities as this was not done during phase one; a lunch could be held on eg the outskirts of Mamelodi or Soweto to allow participants to share in the living conditions of fellow South Africans; a "where are we going" session should be included.

finalise the programme. He also informed the TMT that judge Zulman had been seconded to CALS for the purpose of the training of judicial officers. It was noted that an amount of R180 000 had been overspent on phase I. This apparently happened because of a number of last minute arrangements that had to be made; it being the first time that a training seminar had been arranged; and a degree of "overkill" to legitimise the process.[154] This overspending impacted on the budget for phase II of the training. The team was informed that CALS and Ms Madonsela had been in discussion relating to the budget for phase II. After discussion the TMT resolved that CALS could proceed with budgeting for the seminar up to a maximum of R525 per participant per day. It was envisaged that about 40 people would attend phase II. At this stage already the main aim of the initial training seminars seems to move to the background. If the am of the initial seminars was to equip judicial officers as trainers, why was the same group of participants not invited to the second seminar? Why was a smaller group agreed to?

During the same meeting Ms Madonsela reported that a tender would be issued shortly relating to decentralised training. She had met with potential partners. She hoped that local universities would tender for the regional training. She indicated that Gauteng would probably act as a pilot project. After some discussion the team agreed that during phase II of the trainers' seminars participants from the various provinces would start to plan provincial training and that it was imperative that participants during phase II would know what their responsibilities would be regarding provincial training.[155]

The tenth TMT meeting took place after phase II of the trainers' seminar for judicial officers had taken place. Judge Zulman distributed a report that contained feedback from the participants. The majority of participants rated the seminar as a success. Most TMT members were less optimistic about what was achieved at the seminar while prof Gutto took a more optimistic view. Ms Van Riet

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[154] For example, the "Executive Summary Report" distributed at the eighth TMT meeting mentions on p 12 that "the cost has also been increased by the fact that judges prefer to have seminars in hotels out of town and not University facilities as originally planned". Two Australian judges were invited and attended the first seminar, which would also have inflated costs. (P 4 of the "Executive Summary Report" reflects that AUSAID had originally offered to fund the visit but had then run out of funds.)

[155] My own notes contain an indication that a TMT member expressed the opinion that the project manager had not spent enough time cultivating the judge presidents and cluster heads and that they had to be brought on board to understand the training process. An opinion was also expressed that the Minister had not played a hands-on role in the implementation of the Act.

was concerned about the number of magistrates that attended and noted that Justice College staff did not attend. After some discussion it became clear that a misunderstanding occurred as to budgeting for Justice College staff and that that was the reason they were not invited to the seminar.[156] Ms Madonsela said that Justice College staff formed part of the core of people that had to be trained on the Act and that it was unfortunate that they did not attend. It was agreed that Mr Behari, who did attend the training, would arrange a seminar for Justice College staff. Prof Albertyn doubted that participants grasped the relevant issues, but admitted that it would have been difficult to measure. She thought that the participants would have had a better ability to apply the Act after two training sessions. Judge Traverso thought that the content of the hypotheticals could have caused difficulty as not many participants would necessarily have been exposed the subject nature of the hypothetical (insurance). Prof Gutto thought that the participants may not have had sufficient time to study the hypothetical while judge Zulman thought that they had enough time but perhaps did not study the Act in sufficient detail. Ms Pillay thought that strong facilitators sometimes inhibited group participation. She thought that participants were left with piecemeal information and that a clearer picture should have emerged during phase II of "where the Act was". Ms Madonsela agreed that gaps still existed, for example she thought that a large group of participants did not grasp the concept indirect discrimination. She thought that the time lag between the two seminars was too large. (This makes nonsense of her statement in the "executive summary and report" relating to the first seminar that "enough judicial officers now exist for the first group of equality courts to be announced by the Minister in terms of the Act".[157]) Prof Albertyn said that participants did not view the hypothetical as an equality law issue and that the assumption that participants would have internalised the concepts explained at phase I, turned out to be false. She agreed that too much time had passed from the phase I seminar to the phase II seminar. Ms Van Riet thought that more time had to be spent on training methodology while judge Farlam thought that a genuine attempt had been made at the phase II seminar to address training skills. Judge Farlam was disappointed in phase II in the sense that participants did not seem to have fixed in their minds what they had learnt at phase I and that they had not digested the phase I training. Judge Zulman was concerned about the lack of participation from Gauteng-based judges. Prof Gutto said that looking back, the process had taken steps forward and that the project had

[156] R70 000 was spent during phase I to pay for travel and accommodation costs for two foreign speakers. CALS was told to decrease the budget for phase II.
[157] Document distributed at the eighth TMT meeting, p 12.

achieved some goals. He said he would have been surprised if people had been fully conversant with the Act after two seminars. He thought that a basic awareness of the Act had been created. He acknowledged that deficiencies still existed that would have to be addressed.[158]

Judge Zulman distributed a short document at the tenth meeting,[159] setting out his proposed course of action to initiate provincial training and expressed his concern that the training process would lose momentum if action was not taken soon. After discussion,[160] the team agreed that judge Zulman should visit the provinces and meet with judges-president, and cluster heads and judicial officers that have attended the training programmes. He would be accompanied by Mr Raulinga and Ms Madonsela. Judge Zulman and Mr Raulinga would be involved in "selling" the training programme while Ms Madonsela would be required to answer detailed questions on budgets, work plans and the like.[161] A deadline of three weeks was set during which all the provinces had to be visited and provincial training programmes developed.

At the same meeting, judge Traverso enquired about the provisions in the Act dealing with the designation of presiding officers. Ms Madonsela informed the meeting that the Minister had

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[158] A letter by a magistrate from KwaZulu-Natal was distributed at the 11th TMT meeting that was somewhat critical of the approach followed at the second training seminar, and the approach followed by his fellow presiding officers to the hypotheticals discussed at the seminar.

[159] The document simply read "1. Visit main centres of the RSA. 2. Meet with judge presidents, cluster heads, judges and magistrates from the centre in question trained at Aloe Ridge and Helderfontein Estates. 3. Purpose of visit to discuss and advise the aforementioned in regard to the setting up of a training programme by them in their particular centre and the budgeting in respect thereof. 4. Immediate cost – travel costs of Zulman JA to travel to and from the various centres from Johannesburg". Ms Madonsela apparently also sent a letter to each of the judge presidents, dated 8 August 2001, in which the judge presidents was requested to set up provincial training managements teams. These teams were to conduct an assessment of training needs, draw up an implementation plan indicating how training would be implemented in the province and who would be trained, determine dates for training and to forward the implementation plan to Ms Madonsela's office by Mid August 2001.

[160] My own notes reflect that some TMT members expressed concern about a lack of communication between judge Zulman, Ms Madonsela / ELETU, and the judge presidents / cluster heads and that it appeared that "everyone is doing their own thing".

[161] At the 12th meeting Judge Zulman distributed a report on a number of centres he had visited. "Annexure A" to this report contained a list of topics that was discussed at the various provincial visits: "1. Appointment of a regional chairperson and regional symposium planning committee. 2. Date/s of symposium. 3. Total number of invited participants. 3.1 Judges. 3.2 Magistrates. 3.3 Facilitators. 4. Venue/s. 5. Time and number of sessions. 6. Refreshments during sessions (teas etc). 7. Content of each session and name of facilitator to conduct each, eg: 7.1 A detailed consideration of each of the provisions of the Act; 7.2 A discussion of potential problem areas in the Act; 7.3 The relationship between the Act and the Employment Equity Act; 7.4 Discussion of the role of alternative fora; 7.5 Presentation and discussion of a video of a moot on the Act or alternative hypothetical/s on the Act; 7.6 Social awareness training; 7.7 Training of registrars and clerks; 7.8 Presentation and discussion of social awareness video/s; 8. Materials required for distribution. 9. Preparation of a draft budget. 10. General".

requested a legislation team to draft an amendment to the Act.[162] Judge Farlam noted that it had been suggested to the Minister that the Judges-President and cluster heads should decide who should staff the equality courts.

At the 11th meeting Mr Behari informed the team that a dispute had arisen between the Department of Justice and the University of the North West regarding payment to the university for phase I of the trainers' seminar (clerks).[163] A meeting took place between Justice College (Mr Behari and Ms Lamprecht), the Centre for Human Rights at the University of Pretoria (CHR) (the author) and ELETU (the administrative secretary, Mr Mukhavhuli). This meeting resolved that should the deadlock between the University of North West and the Department continue, CHR and Justice College had sufficient resources to coordinate and present phase II of the trainers' seminar (clerks). The TMT found this suggestion unsatisfactory. Prof Gutto suggested that the Department be given some time to attempt to resolve the deadlock and only if this could not be done, that the TMT authorise CHR and Justice College to proceed with training. Ms Madonsela pointed out that the agreement with the University of North West was a co-sourcing agreement and that Justice College could at least plan phase II. The TMT agreed that Mr Behari and Mr Mukhavhuli could coordinate phase II but that invitations to participants must not be sent until the deadlock with University of North West had been resolved.

Judge Zulman and Mr Raulinga informed the TMT that a number of clerks from some centres did not attend phase I of the trainers' seminar. Team members were dissatisfied with the way in which invitations to the seminar were sent and how receipt of the invitations was monitored. Ms Madonsela said that according to the information in her possession only a selected number of clerks from KwaZulu-Natal failed to attend the training due to a misunderstanding that arose in the relevant regional office. She had already discussed the issue with the KwaZulu-Natal bench and agreed that a local remedial training seminar would be held for those clerks.[164]

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[162] At the 11th meeting Ms Madonsela informed the TMT that the Director-General had set up a task team with Mr Dean Rudman as team leader. Ms Madonsela was appointed as a member of the task team. The task team was mandated to propose a draft amendment to the Act.

[163] Ms Madonsela explained that the deadlock revolved around the tender process and alleged overcharging by the University of North West.

[164] Mr Behari from Justice College and I conducted a condensed training seminar for clerks from KwaZulu-Natal, Northern Province and Eastern Cape in Durban from 22-24 October 2001.

Judge Zulman thought that phase II should involve participants that were not trained during phase I. Ms Madonsela had to remind him that the project proposal was drafted according to a "train the trainer" principle and that after phase II had been completed, the trained participants would then become a training resource. Ms Madonsela reminded the TMT about the training policy framework formulated by the TMT and accepted by the Minister, JSC and MC.

At the same meeting judge Zulman provided feedback on the provincial centres he had visited. Mr Raulinga accompanied him on all of the visits while Ms Madonsela accompanied them to KwaZulu-Natal. The provinces were asked to establish local training committees. Mr Raulinga reported that the Free State had set dates for training and Ms Madonsela reported that KwaZulu-Natal had set dates for training. Judge Traverso presented a draft programme for training to take place in Cape Town.

Ms Madonsela distributed an amended work plan at the 11th meeting and requested the TMT to authorise her to grant R100 000 per province to enable to provinces to plan and implement local training seminars. Prof Albertyn said that the letter to be sent to each of the provinces had to contain clear guidelines on how the R100 000 was to be spent. The TMT resolved that a subcommittee be set up between Mr Raulinga, Ms Madonsela and Ms Van Riet to coordinate and plan the transfer of funds, spending guidelines, the allocation of an account code to each of the provinces, provincial variations and the presentation of a business plan by each of the provinces.[165]

At the 12th meeting Ms Madonsela reported that phase II of the trainers' seminar (clerks) would take place from 13 – 15 November 2001 in Pretoria for a group of about 85 clerks and registrars.

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[165] The letter that was drafted and apparently sent to the various judge-presidents did not contain precise guidelines relating to training and the content of training seminars. The letter read as follows: "ELETU wishes to confirm that R100 000 has been allocated to your province for the decentralised equality courts training programme (judges, magistrates, clerks and registrars). Kindly take note that this amount can be spent as follows: Training consultants, venue, accommodation, catering, transport and administrative expenses (stationary, telephone, video, photographer and printing). Further kindly take note that any services or purchases over R30 000 from a single supplier should be subjected to the tender procedures. Amounts less than that require three quotations. Kindly submit your claims for relevant expenses directly to [name] quoting responsibility code [number], major account [number], minor account [alphabet letters] and sub-minor account [number]. Should your budget exceed this amount, kindly indicate so that an adjustment could be arranged. Kindly liaise with the cluster head in your province regarding development and execution of your provincial training programme ..."

Judge Zulman reported on decentralised training. He had visited a number of additional centres and attended a number of training seminars.[166] Mr Raulinga and Ms Madonsela accompanied him on most of the visits.

At the 13th meeting Ms Madonsela, Ms Ballakistan and I provided feedback on phase II of the trainers' seminar (clerks). Ms Ballakistan expressed concern that if a long delay would follow the implementation of the Act, the training would have to be repeated. Some discussion followed relating to the proposed amendment to the Act. Ms Madonsela confirmed that as soon as sections 16 and 31 of the Act were amended, it would come into force. Judge Farlam said that pressure was building and that the Act had to be brought into operation soon to maintain momentum. Judge Zulman agreed that the Act had to be brought into operation as soon as possible as the training and enthusiasm would wane if too much time passed between the seminars and the implementation of the Act. Judge Zulman reported on a number of provincial seminars that had taken place since the last meeting.

The project manager's report tabled at the 14th TMT meeting indicated that Mpumalanga "and other provinces" (these provinces were strangely not identified) had indicated that they were ready to proceed with decentralised training for clerks and registrars. The report indicated that the provinces had been asked to submit work plans and that as soon as the budget allocation to ELETU had been finalised, they would be "advised" – presumably they would be told to proceed with training. Ms Madonsela reported at the same meeting that according to the training policy guidelines that had been drafted, an annual trainers' conference had to be held. Funding for this purpose had been secured. The TMT approved the symposium for 24-26 April 2002. Ms Madonsela also referred to the proposed business plan for the period February 2002 – January 2003. She explained that the budget as set out in this plan had been drafted in October 2001 and had to a degree been overtaken by events. She explained that the project now mainly resided in

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[166] He visited Ngoepe JP in Johannesburg; Galgut, McCall and Nicholson JJ in Durban; Jafta, Maya, Kruger, Miller and Schoeman JJ in Umtata; Pickard and Ebrahim JJ in East London; Somalyo, Kroon and Pillay JJ in Port Elizabeth; Goldstein and Claassen JJ in Johannesburg; Hartzenberg and Van der Westhuizen JJ in Pretoria; Steenkamp and Kgomo JJ in Kimberley; Friedman and Mogoeng JJ in Mmabatho, chief magistrate Ngobeni in Pretoria and Hetisane in Johannesburg. He attended (parts of) the training seminars in Cape Town (judges), University of the Western Cape (magistrates) and Bloemfontein.

the provinces and that the only key national events that remained were the annual trainers' symposium and the "judicial information service for equality courts" (JISEC).

Although the minutes do not clearly reflect it, by the time the 15th meeting took place (on 15 June 2002), the project was in a serious crisis. No training had taken place since January 2002 and very few clerks and registrars had been trained.

At the 15th meeting the project manager tabled a report on the national trainers' symposium that had been held about a month earlier. At the symposium's closing session (titled "the way forward") a number of questions were posed. The meeting resolved the following answers to the questions:

"Is the implementation of the Act relevant to the issue of training?" – This issue provoked some debate. The TMB raised its concern about the delay in bringing the Act into operation. Apparently the draft amendment to the Act had not been tabled at cabinet level yet. Judge Traverso said that her impression was that the amendment had been agreed to in January already. Prof Gutto said that this issue had to be prioritised. He suggested that the chairperson must take it up with the Minister's office. Prof Gutto said that the chairperson must write a letter that prof Gutto would present to the Minister over the upcoming weekend. Prof Gutto said a letter constitutes a record that the board is concerned about the delay. Judge Zulman agreed that a letter should be written to the Minister. Judge Farlam was concerned that an important Act, mandated by the Constitution, was gathering dust and said that he was prepared to speak to the Minister. The TMB resolved that judge Farlam should handle the matter as he deemed fit. Mr Mudau suggested that further training should be held in abeyance until the proposed amendment had been finalised because those trained before the amendment were effected may require retraining on issues changed by the amendment and also because the Act in its current form lead to negative sentiment. Ms van Riet agreed with Mr Mudau. She thought that training opportunities should not be wasted but added that Justice College usually did not undertake training on an Act until the regulations had been finalised.[167] Judge Farlam said that clarity must be obtained on the rules of the equality courts as well. Ms Madonsela said that (draft) regulations had been ready since August 2001. After the proposed amendments were put forward, the regulations were altered accordingly. Ms Madonsela

[167] At this stage the regulations pertaining to discrimination had not been promulgated yet.

stated that although she shared the TMB's concern concerning the delay in finalising the proposed amendment, training should proceed without waiting for the amendment to be effected and that the existing (draft) regulations should be used at the training seminars.[168] The TMB agreed that training would proceed in the mean time and that the draft regulations would be used at the decentralised training sessions.

"Should the education programme aim to expand the number of judicial officers trained, and/or intensify the training of those who have already received some training?" – Ms Madonsela reminded the TMB that the existing policy guidelines contained the content and minimum time of training.[169] She however suggested that before more intensive training commenced of groups that had been trained, everybody should be exposed to some training on the Act and the principles that underlay it. Mr Mudau mentioned that the key complaint at the Gauteng training was that the participants were not familiar with the Act and that they attended the sessions without any insight into the Act. These groups would also have to be trained again on the regulations. Funds permitting the same group should be exposed to further training. It was agreed that the priority was to reach all the judicial officers first and then to consolidate the training of those already introduced to the Act and the principles underpinning it. (Sadly, the project never moved to the "consolidation" of training.) The TMB resolved that ELETU must furnish the board with a full list of trained magistrates and trained judges, trainers, and training programmes.

"What are the training priorities for those who have attended the first round and after the implementation of the Act?" – This question was not resolved at this meeting and the discussion was deferred to a future meeting. In fact, this issue was never resolved and never dealt with satisfactorily. As analysed in more detail below, the project never moved beyond an "awareness raising" exercise for judicial officers.[170]

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[168] Ms Madonsela noted that North West had arranged a training programme for clerks that was scheduled to proceed in May (and was presumably rescheduled to a later date) and that Eastern Cape would have had in August 2002. Mpumalanga had also expressed an interest to commence with the implementation of their local training programme.
[169] The policy guidelines may well contain the content of the training programmes but nothing is said about the minimum time of training. See pp 196-198 above for the substantive content of these "policy guidelines".
[170] See pp 247-249 of the thesis below.

"How do we ensure uniform content and quality training?" – It was agreed that the core elements, taking into account the approved training policy guidelines, must be communicated to the provinces and that room had to be allowed for provincial peculiarities.

"What materials are necessary for training?" – It was agreed that videos, experiential learning, hypotheticals, role-play, moots and the equality court bench book and resource manual had to be used.

"Who should control the equality court education programme?" – The project manager drew the TMB's attention to the fact that matters relating to the roles and responsibilities of all role players involved in the project were clearly set out in the project's founding documents, namely the project business plan and the approved training policy guidelines (originally referred to as the training directives.) In terms of these documents, the Director-General seem to have been responsible for the effective implementation of the education programme.[171]

The TMB proceeded to discuss decentralised training in some detail.

Judge Farlam informed the board that Judge Zulman had been seconded to the project until the end of 2002 on the basis that large numbers of magistrates had not been trained yet and that it was imperative that as many magistrates as possible had to receive training as soon as possible. Judge Zulman had set up an office at CALS again and he would have assisted regional committees.

Judge Zulman thought that magistrates that had not been trained, had to be targeted and that judges had to be drawn in on a voluntary basis. Magistrates would be involved in the bulk of cases and they would not have much choice when told to attend training sessions. Training sessions had to be planned well, and well in advance. He suggested that training should not take place over weekends and should take place in court time, in the court buildings, where possible. Training should be practical and should consist of a formal programme where the focus is on the Act.

[171] See pp 244-245 of the thesis below for an analysis of the lines of accountability as set out in the founding documents.

Academics and practitioners had to be involved. Judges should be encouraged to attend these sessions. There was no need for generalised training and no need for overseas guests unless funding could be obtained from elsewhere. The country should be divided into convenient districts and the existing training committees should be used. He emphasised that it was important to establish who had not been trained.

After discussion on the content of training seminars and duration of the programmes, Ms Madonsela expressed concern about the TMB's vacillation on the issue of uniform training standards, particularly on the issues of duration of training and critical areas that had to be covered. She noted with concern that despite the existence of the training policy guidelines developed by the TMB and approved by the JSC and MS, confusion reigned as to what would constitute adequate training for an equality court presiding officer or clerk. (Only the project manager could be faulted for this confusion. If these "training policy guidelines" were so important to the training of judicial officers, why did she not emphasise the role of these guidelines to attendees at the first two training seminars, and to the provincial training committees?) She noted that TMB members seemed confused about these standards, which was *inter alia* demonstrated by the manner in which some TMB members dealt with this issue when it was raised at the trainers' symposium. She noted that as having printed these guidelines in the bench books did not seem to alleviate the confusion, the training guidelines should be published in a separate booklet for easy reference. (How a separate booklet was to solve the problem is difficult to understand. The project manager did not clearly communicate the aim and purpose of the training seminars and perhaps had not in her own mind clarified the aim of the training seminars.)

Judge Zulman stated that the ongoing training was commendable, but that a coordinated programme had to be put in place. He said that decentralised training was a fiction as the Act was a uniform national Act. Regional committees had not read the training guidelines in the bench book, and some areas' training programmes were planned according to the availability of particular trainers. Ms Madonsela noted that provinces are and should be using their initiative if the goal of reaching every presiding officer and clerk by the end of the year was to be reached.

Prof Gutto said that Judge Zulman's return to the project must be communicated to the provinces and that provinces must consult judge Zulman for assistance when arranging training. He endorsed the principle that the TMB should consider how to ensure uniformity of quality, content and duration and that this must be communicated to the provinces. He was of the view that the TMB would be redundant if would only be informed of training seminars; clearer guidelines had to be sent to the provinces. The TMB agreed that such a letter with training proposal had to be sent to all the provinces. Ms Pillay suggested that the guidelines had to identify the core content, while leaving room for province-specific detail.

Mr Raulinga said that the training of clerks and registrars should be prioritised. Judge Farlam said that Mr Raulinga must liaise with Mr Behari about the future training of clerks and registrars. Ms van Riet said Mr Behari had been involved in the training of clerks in North West and would be willing to assist. The TMB resolved that when the provinces were informed of Judge Zulman's involvement, the role of Justice College in the training of clerks should also be set out.

The board agreed that a letter must be sent to each of the provinces, setting out Judge Zulman's involvement in the training of presiding officers, as well as the involvement of Mr Behari, Ms Ballakistan and Mr Prinsloo in the training of clerks. Judge Farlam suggested that the chairperson of each regional committee assign a member of the committee to oversee the training of clerks and registrars. The board agreed. (It is not clear whether this ever happened. The training of clerks was eventually tasked to Justice College.)

The discussion moved to the "core elements" of training programmes. Judge Zulman said that the Act and the Regulations must receive priority – issues such as jurisdiction, the Employment Equity Act, unrepresented complainants, other forums, and practical detail. Ms Gqiba suggested that Judge Zulman must draft a document setting out the core elements and send it to the provinces. Prof Gutto said that the bench book covered all of the elements that judge Zulman was concerned about, and that, as far as possible, training had to cover all of the elements contained in the bench book. Ms van Riet thought that the bench book should not be used for training and that judge Zulman should draft a curriculum of what should be covered in the training. Ms Madonsela reminded the meeting that policy guidelines had been drafted and agreed to by the TMT at the start

of the process and that these guidelines were used to draft the curriculum and the bench book. She suggested that judge Zulman should study these guidelines and make suggestions relating to aspects he thought should be revised by the TMB. Mr Raulinga said when judge Zulman visited the provinces, he presented a number of core points to the provincial training committees, and that judge Zulman should have regard to these points when he reviewed the training policy guidelines. Ms Madonsela repeated her view that the training policy guidelines should be printed in an A5 booklet format to ensure that those people involved in equality court training management would consult it regularly.

The TMB resolved that each province had to prepare a comprehensive budget for the R100 000 allocated to it as agreed at the trainers' symposium and had to send it to ELETU and that Ms Madonsela had to write to the provinces in this regard. The letter had to contain guidelines on financial and procurement management. Each province would receive R100 000 which would be available until the end of 2002 (practically November 2002). Mr Mudau said that the allocation per province was unfair towards provinces such as Gauteng, with large numbers of magistrates to be trained. Ms Madonsela said where provincial budgets were exceeded, negotiations with the Department would follow.

The 16th meeting achieved very little as the project manager was absent. A project manager's report was also not tabled. Judge Zulman presented a written report to the TMB on decentralised training activities that had taken place. According to the information he had received from regional court presidents and cluster heads, 1631 magistrates in the country had received training, while 1106 had not.[172] Judge Zulman was however not satisfied that the information was necessarily correct - he attempted to reconcile these figures with the information in ELETU's possession, but could not do so. Ms Madonsela apparently undertook to extract the necessary information from the

[172] In the letter he had written to heads of court Judge Zulman mentioned that the training of clerks was being attended to by Justice College and that Justice College would be in contact with the heads of court. However at the 15th TMB meeting it was agreed that the chairperson of each provincial training committee had to assign a member of the committee to oversee the training of clerks and registrars. A copy of a memorandum from Ms Madonsela to each of the provincial training coordinators was distributed at the 17th TMB meeting. This memorandum indicated that the funding provided to each province "also covers clerks/registrars". These documents seem to imply that each provincial committee would have had to take the initiative in coordinating the training of clerks, not Justice College. It is also not clear why judge Zulman had to be presented with the number of presiding officers who still had to be trained before provincial seminars could be arranged – surely he could have written to the heads of court and could have requested them to arrange training seminars urgently for those magistrates who had not been trained yet?

files in her office and provide it to judge Zulman to allow him to cross-check the figures again, but she had not done so by the time judge Zulman had written his report. In the same report judge Zulman that "some confusion" existed "as to how the R100 000 promised for training in the various areas is to be dealt with".

At the same meeting Mr Behari reported that about 100 clerks had been trained. (It is not clear whether he referred to recent training activities, or the total amount of clerks trained to date. It seems as if he referred to the latter.) The TMB resolved that each provincial training committee had to include the head of clerks / control officer / office manager and that this person had to contact Justice College regarding the training of clerks. The project manager's report relating to the 15th meeting was distributed at the 16th meeting. This report indicated that the North West province was the only province that had commenced with plans for decentralised training of clerks. The province had submitted a comprehensive business plan to ELETU prior to the trainers' symposium but ELETU did not confirm that they could proceed as the plan required about R100 000 for the training of clerks only. The project manager entered into discussion with judge Mogoeng who then met with the team coordinating the training to explore ways of reducing the envisaged expenditure. The report also indicates that the project manager had received "several calls" regarding the way forward. She had referred all the callers to the decision made at the trainers' symposium to proceed with decentralised training seminars and that R100 000 had been provisionally allocated to each province for the training of both clerks and presiding officers.

The invitation to attend the 17th meeting included the project manager's report relating to the 16th meeting.[173] The report indicated that Eastern Cape, North West, KwaZulu-Natal and Gauteng had or were planning a second round of training seminars. The list that indicated which magistrates had received training, were revised following a meeting with judge Zulman. The project manager had requested account details for the transferring of R100 000 to each province. The report ominously states that this process had been "slow". It appears that more than one letter went out to the provinces, each containing new instructions on the utilisation of these funds.[174] The report

[173] The margins on the report were incorrectly set when the document was printed and it is difficult to follow.
[174] Judge Zulman distributed a report at the 17th TMB meeting which included a copy of a letter sent to Ms Madonsela from judge McCall (Durban), in which he expressed his dismay at the confusion relating to the procedure to be followed to obtain funding for the provincial training seminars.

concludes that project work had progressed more satisfactorily since the permanent appointment of two assistants in the ELETU office. The report noted that decentralised training "had picked up" while the training of clerks were "being addressed".

It is difficult to establish what transpired at the 17th (and as it turned out, the last) meeting of the TMB from the official documentation.[175] Judge Zulman reported that he had still not been able to reconcile his own and ELETU's lists of trained presiding officers.[176] It seems as if the meeting was informed that it was the Department of Justice's understanding that Justice College would train the clerks. Judge Traverso informed the meeting that training in the Cape for magistrates had stalled as the head of the steering committee had apparently lost interest. The TMB was informed of administrative problems that had occurred relating to training in the Eastern Cape, KwaZulu-Natal and North West. Judge Traverso expressed unhappiness about having to send clerks from the Cape to Pretoria for training. She thought that Justice College had arranged this training but it transpired at the meeting that ELETU had arranged it. Ms Madonsela reported that after a meeting with judge Zulman relating to the slow progress on the training of clerks, she had decided to arrange a training session in Pretoria as a stop gap measure. Judge Mokgoro stated that these problems seemed to relate to inadequate coordination. She thought that judge Zulman had to visit the centres and had to deal with the issues that had developed.

The project manager's report relating to the 17th meeting indicated that "review seminars" had taken place in the Eastern Cape, Gauteng, Free State and North West and that events had been planned in KwaZulu-Natal, Northern Province and Mpumalanga. The project manager anticipated that she would establish from Northern Cape and Western Cape whether events had been planned and whether they required assistance. The seminars targeted presiding officers who had not been trained yet. (This means that at least some presiding officers would have received their "training" on the Act in 2001 at one seminar, not to be exposed to the Act again.) "Administrative hiccups" were experienced in KwaZulu-Natal when three (different and conflicting) communications were received by the training committee on what had to be done. North West also experienced difficulties relating to the training of judges. The report noted that the lists of trained and untrained

[175] I was not present at this meeting and the minutes was drafted in telegram-like style.
[176] The project manager's report tabled at the same meeting indicates that the lists had been reconciled.

magistrates had been finalised and sent to the cluster heads for confirmation. The training of clerks still lagged behind. North West's training seminar for clerks proceeded from 7 – 9 October 2002, with a second group of clerks that would have been trained from 14 – 16 October 2002. The project manager had also arranged a national seminar for clerks from 14 – 16 October 2002, and asked the author, Mr Behari and magistrate Abrahams (Durban) to assist. The Eastern Cape was also planning to stage a training seminar for clerks from 14 - 16 October. ELETU had requested Mr Behari to liaise with provincial coordinating committees to accelerate training of clerks. He had undertaken to ensure that all provinces would train an additional 20 clerks by November 2002.

Mr Behari distributed a document at the meeting that related to the training of clerks and the relationship between ELETU and Justice College. The document contained a number of email messages between Mr Behari and Ms Madonsela. From these email messages it appears that Ms Madonsela was of the view that Justice College was responsible for the training of clerks and registrars, although ELETU would ultimately be responsible for project delivery. (This seems to contradict an earlier TMT decision that the provincial training committees would be responsible for initiating the training of clerks.[177]) In an email dated 25 September 2002 from Ms Madonsela to Mr Behari she confirms the following arrangement: Mr Behari would liaise with provincial training committees to plan and implement training seminars for clerks and registrars, and would ensure that each province would train 20 participants by 31 October 2002. A seminar was also to be arranged for 14 – 16 October for a new group of participants and would be used to "consolidate any gaps that may exist in decentralised training". The email also indicates that Ms Madonsela would meet with Ms van Riet about "improving ELETU's business relationship with Justice College". Mr Behari indicated in the document that he would be able to meet the agreed-to deadlines regarding the training of clerks.

The TMB agreed to meet again on 4 December 2002 but this meeting was postponed due to a "cash flow problem". No further TMB meetings were called.

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[177] At the 15th TMB meeting it was agreed that the chairperson of each provincial training committee had to assign a member of the committee to oversee the training of clerks and registrars. A copy of a memorandum from Ms Madonsela to each of the provincial training coordinators was distributed at the 17th TMB meeting. This memorandum indicated that the funding provided to each province "also covers clerks/registrars". These documents seem to imply that each provincial committee would have had to take the initiative in coordinating the training of clerks, not Justice College.

As it then stood at the end of 2002, according to the minutes of the various TMT/TMB meetings, documents distributed at these meetings, and documents sourced from the ELETU offices,[178] the following training seminars had taken place:

- two national ("train the trainer") seminars for judges and magistrates (April 2001 and July 2001 respectively);
- one round of provincial training seminars for judges and magistrates during late 2001/early 2002;
- a so-called "annual" trainers' symposium (April 2002);
- a second round of provincial training seminars for judges and magistrates during the latter half of 2002. The second round of seminars mainly involved judges and magistrates not trained during 2001;[179]
- National training seminars for clerks took place during June 2001, November 2001 and October 2002.

The Act came into force on 16 June 2003, which meant that at the very least about eight months passed between the last training seminars and the coming into effect of the equality courts. In many instances court personnel would have been "trained" 18 months prior to the coming into effect of the equality courts.[180]

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[178] Ms Madonsela graciously allowed me access to the ELETU offices and allowed me to make copies of material I deemed relevant to my doctoral research. See Annexure A.1 and A.2 for the content of those training programmes that I could source from the minutes of the TMT/TMB meetings and the ELETU offices.

[179] Para 2.1 of the project manager's report dated 19 June 2002 refers to a training seminar in the Eastern Cape where participants would be magistrates "not trained previously". Para 2.1.1 of the project manager's report dated 8 October 2002 notes that "[the second round of] training seminars targeted people who have not yet been reached". The minutes to the 15th meeting reflects that it was decided that the education programme was to "reach all first and then to consolidate the training of those already introduced to the Act and the principles underpinning it". The training programme never turned to "consolidation".

[180] It also does not appear that proper records were kept of trained equality court personnel. A "Progress Report on the Implementation of PEPUDA" (hand delivered to me on 2007-07-07), drafted by Department of Justice and Constitutional Development, indicates in para 3.3 the "none availability of records of magistrates and clerks that have been trained" and in para 3.4 "no list [of every clerk who has completed the training course on the Act] existed and in the last financial year the process of compiling the list began. The list of clerks who have completed training as at 2001 to date is attached ... but still requires confirmation and verification by the regions". Para 3.5 records that such lists for trained judges and magistrates also did not exist.

By about February 2004, Justice College became responsible for the training of equality court magistrates, clerks and registrars.[181] At that point, 60 designated courts had been set up.[182] "Phase B" envisaged the designation of a further 160 courts, and Justice College were to have trained the relevant personnel between April and June 2004.[183] "Phase C" entailed the designation of the remaining courts and the personnel for these courts were to be trained early in 2005.[184] Cluster heads identified magistrates to be trained and court managers identified clerks to be trained.[185] Training for clerks occurred over three days and for magistrates over four days.[186] The training that took place was attendance-based with no form of assessment,[187] except class exercises and class presentations.[188] By September 2006 Justice College had trained "most" of the clerks and magistrates.[189] Since ELETU's demise, no further formal training of judges on the Act has been arranged nationally or centrally,[190] but at that point a sufficient number of judges had been "trained" to enable each High Court in the country to have judges available for equality court hearings.[191]

In October 2006, a Parliamentary Joint Committee held hearings on the impact of the Act.[192] During these hearings, the Chief Director: Policy, Research, Coordination and Monitoring reported

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[181] Various email correspondences with the relevant Justice College trainer during February 2004.
[182] Various email correspondences with the relevant Justice College trainer during February 2004.
[183] Various email correspondences with the relevant Justice College trainer during February 2004.
[184] Various email correspondences with the relevant Justice College trainer during February 2004.
[185] Email correspondence with the relevant Justice College trainer; 28 August 2006.
[186] Email correspondence with the relevant Justice College trainer; 28 August 2006.
[187] Various email correspondences with the relevant Justice College trainer during February 2004.
[188] Email correspondence with the relevant Justice College trainer; 28 August 2006.
[189] Email correspondence with the relevant Justice College trainer; 28 August 2006. From 26-29 September 2006, 16 magistrates were trained in the Eastern Cape; from 16-19 October 2006, 13 magistrates were trained in Mafikeng; from 23-27 October 2006, 35 magistrates were trained in Johannesburg and from 6-9 November 2006, 14 magistrates were trained in Durban – email correspondence with the relevant Justice College trainer, April 2007.
[190] Provincial training seminars may have been arranged. Telefaxes sent to Judge Farlam dated 15 February 2005 and 29 August 2006 respectively; and telephone conversations with judge Farlam during February 2005 and August 2006.
[191] Email correspondence with relevant Department of Justice official, 30 September 2004. Annexure "D" ("trained judges") of a "Progress Report on the Implementation of PEPUDA", hand delivered to the author during July 2007, contains a column headed "date trained" for the lists of judges of the various divisions of the High Court. For most of the divisions, the column simply states "no records of date and year trained". For Grahams Town, Umtata and Cape Town, the date reflected reads "2019/06/03", which seems to indicate 19-20 June 2003, if compared to the date format of other columns in the document.
[192] 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).

that at that point 220 equality courts existed. In terms of the Department of Justice's medium-term strategic framework target, an equality court should be set up in all 366 magisterial districts, which target would apparently have been met before the end of the 2007 financial year. (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.[193] This report indicated that by April 2008 every magisterial district will have an equality court – 366 in total.) The Chief Director also reported at the October 2006 hearings that clerks had felt that the training they had received up to that point did not capacitate them to assist complainants. A meeting would have taken place in October 2006 with Justice College, the trainer of clerks, to discuss this issue. Training for clerks consisted of four days during which the following topics were covered: social context, jurisdiction, *locus standi*, the regulations, section 21 remedies, the development of equality rights and the analysis and application of case law.

At the "Equality Indaba Two Workshop" held at their premises on 23 November 2006, the SAHRC reported on a monitoring project of the 24 operational Gauteng equality courts (magistrates' courts) that it undertook during September 2005.[194] It performed this task in terms of section 184(c) of the Constitution and section 25(2) of the Act.[195] The survey was carried out from 8 to 30 June 2005 and focused on accessibility for people with disabilities to the courts; advertising material at the courts; whether people at the reception areas at the courts were aware of the existence of the equality court in the same building; the number of complaints lodged and adjudicated since their inception; infrastructure; whether the court officials had received sufficient training; the structure of the courts; and which challenges were faced by equality court clerks in facilitating the operation of these courts.[196] The study showed that most of the courts did not have promotional material available and no signage in the building directing people to the equality courts; most of the courts lacked resources such as computers and stationary; and most of the officials at reception were not aware of the equality court situated in the same building.[197] As to training specifically, most of the officials interviewed (clerks and magistrates) complained about the nature of the training they

[193] http://www.pmg.org.za/viewminute.php?id=8875 (accessed 2007-05-15).
[194] Mere (2005).
[195] Mere (2005) 2.
[196] Mere (2005) 2-3.
[197] Mere (2005) 3-4.

received on the Act and felt that they were not equipped to deal with equality court matters due to the insufficient training.[198] Most of these officials felt that refresher courses should be organised.[199] A document distributed at the same workshop entitled "Equality Court Survey Report" contained data on a survey conducted by the SAHRC at operational equality courts throughout the country during 2005 and 2006. In some instances the report indicated that appointed court personnnel had not received any training.[200] Where court personnel reported on the length of training, it ranged from "unable to recall"; or "one day" to "a month".[201] Where provided, the average length of training in most cases seemed to be about three days. These two documents read together tend to suggest that the current training programmes are also not as effective as they may have been.

During March 2007, an *ad hoc* committee of Parliament reviewed the so-called "Chapter Nine Institutions".[202] At these hearings, the SAHRC reported that their research had shown that training of equality court personnel had sometimes been poor and sometimes had occurred a long time ago and had been forgotten, and that many officials did not understand their duties and responsibilities. Many complainants were told to approach the Legal Aid Board or an attorney, instead of the clerk

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[198] Mere (2005) 6.
[199] Mere (2005) 6.
[200] The report's data is not always easy to interpret and the data had not been recorded in a consistent format for the nine provinces. The following seems to be the position. Free State: At four of the 12 operational courts, court personnel had received training. Gauteng: At two of the 23 operational courts, court personnel had not received training. Eastern Cape: All court personnel at operational courts had been trained. However, what is disturbing is that, based on the SAHRC's data, only two equality courts are operational in the Eastern Cape. KwaZulu-Natal: 21 equality courts are operational. At five courts the presiding magistrate had not been trained and at three courts the clerk had not been trained. Limpopo: At seven of the 20 operational courts the presiding officer had not been trained while at six of the courts the clerk had not been trained. North West: At five of the 18 operational equality courts the presiding magistrate had not been trained and at one court the clerk had not been trained. Mpumalanga: If I have interpreted the data correctly, at 16 of the 19 operational courts the presiding officers had not been trained while three courts operate without a trained clerk. Western Cape: 41 equality courts are operational. Eight courts function without a trained presiding magistrate and at eight courts the clerk had not been trained. Northern Cape: One of the 21 operational courts is staffed by an untrained presiding magistrate while 12 of the courts do not have a trained clerk.
[201] Annexure C ("[trained] magistrates") of a "progress report on the implementation of PEPUDA" (hand delivered to me on 2007-07-07) contains a list of magistrates designated in terms of s 16(1)(d) of the Act. Next to the name of each of these magistrates appears the date of training of that magistrate. In most cases, training occurred in 2001 or 2002. Where specific dates are provided, training usually occurred over two or three days. In the North West province, training occurred either in 2003 or 2006 (only the years are provided for North West; dates are not provided.) In the Northern Capem, training occurred either in 2004, 2005 or 2006 (only the years are provided for the Northern Cape; dates are not provided.) The year that features most often is 2004. In the Western Cape, training in some cases occurred as far back as October 2001 or February 2002, but in most instances occurred in February 2005 or March 2006.
[202] Ie, the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. http://www.pmg.org.za/viewminute.php?id=8738 (accessed 2007-05-15).

of the court assisting the complainant in completing the prescribed form to lodge a complaint at the equality court. According to the minutes of this hearing, the SAHRC reported that training on the Act had terminated by March 2007.

Towards the end of February 2007 the Minister for Justice and Constitutional Development tabled the South African Judicial Education Institute Bill in Parliament.[203] The Preamble to the Bill suggests that the Bill was drafted *inter alia* because there is a need for the education and training of judicial officers in a quest for enhanced service delivery and the rapid transformation of the judiciary. The Preamble also records that the need for education and training of aspirant, newly appointed and experienced judicial officers had long been recognised and that the principle is practised and entrenched in many judicial systems. The Bill envisages the establishment of the South African Judicial Education Institute which would be responsible for the judicial education and training of aspiring and existing judicial officers.[204] If the Bill is enacted in its current form, the Institute will consist of a Registrar as head of the administration, an Operations Officer who will report to the Director-General of the Department of Justice, academic staff, judicial educators and administrative staff.[205] A Council will be responsible for the governance of the Institute and will be composed by the Chief Justice as chairperson, the Deputy Chief Justice, the Minister of Justice or her nominee, a judge of the Constitutional Court, a person or judge nominated from the JSC, the President of the Supreme Court of Appeal, two judges-president, two other judges of whom one must be a woman, three magistrates of whom one must be a woman and of whom one must be a Regional Court Magistrate, a retired judge, one advocate nominated by the General Council of the Bar of South Africa, one attorney nominated by the Law Society of South Africa, two university teachers nominated by the South African Law Deans Association, and two members of the public who are not involved in the administration of justice.[206] The Council must appoint a Director as head and executive officer of the Institute, subject to the direction of the Council.[207] I presume that

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[203] http://www.pmg.org.za/bills/020726b4-07.pdf (accessed 2007-08-08).
[204] Clause 2 of the Bill as it was at 31 October 2007. All references to clauses from this Bill refer to the Bill as it appeared at 31 October 2007.
[205] Clause 5(2).
[206] Clause 7.
[207] Clause 11.

training on the Act would in future be conducted by this Institute, once it has been established.[208] A possible future research project could then entail a comparison between the efficiency and effectiveness of training programmes on the Act, established under the auspices of the Institute, and the implementation of ELETU's training programmes.

4.9 Too much sensitivity to judicial opposition to training

At the first TMT meeting, concerns were already expressed about the possibility of the training process being seen as the provision of "secret riding instructions" to the judiciary. At the second meeting judge Zulman suggested that peer group pressure be used to persuade recalcitrant judges to participate in the training programmes, but that a confrontational approach should not be adopted. At the third meeting, judge Zulman said that the Minister had to engage the judiciary in the planning and implementation of the training if the process were to have any credibility. He said that the judiciary was a critical constituency that needed to be approached sensitively. At the same meeting some team members remarked that antagonistic views towards the Act and the obligatory training programmes have been expressed by members of the judiciary and magistracy and that a consultative process had to be followed. The team thought that the JSC and MC had to form part of the training and implementation process and that the time frames could even be amended to allow for proper participation by the JSC and MC. At the fourth meeting proposals were put forward regarding the restructuring of the TMT, specifically for the process to be seen as controlled by the judiciary. At that point the JSC had not yet been informed about the training process. The team agreed that a formal slot be requested at the next JSC meeting (that would have occurred at 22 January 2001) to address the JSC on the training process and to gauge the JSC's views on the suggested changes to the TMT's structure and the envisaged way forward. (The MC was supposed to have been addressed at its next meeting on 23 November 2000, but that did not take place.) After discussions between the Department, JSC and MC the TMT's meetings were chaired by judge Farlam from the eighth meeting onwards. At the sixth meeting it was reported that the JSC and heads of courts met to discuss the proposed "draft policy directives" relating to the

[208] The "Draft Equality Review Report" referred to at pp 165-166, 223 and fn 138 (p 332) records on p 13 of the report that the Portfolio Committee on Justice and Constitutional Development recommends that the office of the Chief Justice, together with the JSC, the MC and Justice College must ensure that continuous training in respect of the Act takes place and that all judicial officers must be reached. The to-be-established Institute seems to be well-placed to be mandated to complete this task.

training process.[209] It was reported that the chairperson of the JSC thought that aspects of the directives were unconstitutional in that the Minister could not issue "directives" to the judiciary. The TMT was told that the heads of court accepted judicial training in principle, with the proviso that the process had to remain judge-controlled.

The minutes to the tenth meeting contain hints that tensions existed between judges and magistrates as well. At this meeting the team discussed the second national training seminar that had occurred at Helderfontein Estates.[210] Mr Raulinga mentioned that members of the magistracy felt sidelined and that a perception existed that magistrates did not know civil procedure and did not know the law. He felt that training should occur in mixed groups (ie, judges and magistrates combined).[211] At the same meeting Judge Zulman expressed concern about the lack of participation from judges in Gauteng in the training that had occurred at Helderfontein Estates.

At the 11th meeting, judge Traverso presented the draft training programme for Western Cape-based judges and magistrates. When prof Gutto criticised the programme on the basis that all the main facilitators where white, judge Traverso responded by noting that the presenters were not hand-picked, but that institutions were approached, who then put forward certain names. She also mentioned that she had experienced resistance to the training from Cape judges and that the draft programme was the best way to start with the process. Ms van Riet thought that resistance from judges had to be approached strategically and that the composition of the facilitators would be such a strategy. Judge Traverso repeated that the Cape training committee did not start out with the idea of having an all-white training team.[212]

At the 12th meeting, a report by judge Zulman on some of the provincial training seminars was presented. Paragraph 6 of his report dealt with training in the Eastern Cape. He reported that only 2 judges attended the training, although the other judges in the region were invited to attend. Some of the judges were apparently critical of the need for the seminar. The judge president of

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[209] Also see pp 196-198, 226 and 234.
[210] Also see pp 205-208 above and Annexure A.1 below.
[211] Many of the provincial training programmes were presented in separate groups. See Annexures A.1 and A.2 below for more detail on the provincial training seminars.
[212] The panel of facilitators was subsequently altered to be more representative.

that region had also not attended the training programme. Reporting on Natal, he noted that the coordinating judge had received very little support from this colleagues and that only three judges attended the Natal seminar. At the Mmabatho training seminar, the leadership left after the morning session. He also reported that many regional magistrates seemed to have boycotted the training programmes. Three (black) regional magistrates attended the Gauteng seminar; one (black) regional magistrate attended the Bloemfontein seminar and no regional magistrates attended the Northern Province seminar. The Witwatersrand Local Division Deputy Judge President boycotted the Johannesburg-based training seminar. The minutes to the last meeting reflects that judge Zulman noted that the difficulty with the training seminars was to persuade people to attend and to convince them that the training was not "brainwashing".

Ms Madonsela drafted a memorandum to the Director-General and Minister of Justice and Constitutional Development relating to the letter drafted by judge Farlam in which it was proposed that certain amendments be made to the Act.[213] The memorandum notes that "the success of the equality courts and general implementation of the Act will be substantially affected by the attitude of the judiciary towards the Act and courts set up under it".[214] The memorandum suggests that "while the Act currently stands on sound legal grounds and can definitely withstand impartial judicial scrutiny, strategically, it may be proper for the Minister to demonstrate some sensitivity to the concerns of the bench. However, this should not be done at the expense of potential justice seekers, the majority of whom clearly do not have confidence in the inherited judicial system regardless of the few black and female faces that have been added over the last seven years".[215] The memorandum recommends that the Minister should respond immediately and should indicate that a process of amending the Act had been initiated and indeed initiate such a process. At the same time the equality courts should be implemented on the basis provided for in the Act but administratively adjusted along the lines of the amendment proposed in the memorandum.[216] The memorandum notes that "the strategic question relating to judicial buy-in must be addressed while the Act is being implemented as it is … Implementation will ensure that while changes are being

[213] See fn 138 for the letter's contents.
[214] Para 10.7 of the memorandum.
[215] Para 12 of the memorandum.
[216] Para 14 of the memorandum.

considered, the legitimacy of the equality courts at the level of the general public, is not compromised".[217]

At the second national seminar for judges and magistrates, the Minister of Justice again confirmed that he intended to designate presiding officers "in consultation with" the court leadership rather than "after consultation with", as set out in the Act. He also confirmed that he understood "in consultation with" to indicate that the agreement or consent to the designation would be sought. He said that he foresaw that in the short term he would "gazette" those judicial officers who had completed the appropriate levels of training, simply to "kick-start" the process but that he would in the meantime look into ways of effecting technical changes to the Act to ensure that any possible existing ambiguities are removed. He called on the participants to "read creatively into the sections that you are not comfortable with, with the view of ensuring that the interest of justice for the poor, the weak and the vulnerable are not sacrificed at the altar of literal and formalistic interpretations of the legislation in question". He concluded by saying that "from the government's point of view, it is the capacity building through training and continuing education that is more important than who does the designation".[218]

In a contribution in an academic journal, judge Zulman stated that the purpose of the training seminars had been to provide judges with information and orientation concerning important and unfamiliar legislation without any attempt to prescribe, and that the concern of some judges that the training aimed at indoctrinating them in the "party line" and would seriously compromise judicial independence, was misplaced.[219] However, to a degree the training would have needed to be "prescriptive" in the sense that a judge who would apply the Act in a way that would frustrate societal transformation, would not be fulfilling his or her ostensible role as agent of transformation, as required in terms of the Constitution and the Act. Being sensitive to the (misplaced) fears of the judiciary meant that the project lost valuable time. The Minister of Justice, Director-General and project manager should have met with the judges-president and Chief Justice prior to the first TMT meeting to address any fears that may have existed at that stage.

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[217] Para 16 of the memorandum.
[218] I located a hard copy of the Minister's speech in a file in the ELETU offices. I did not attend the Helderfontein seminar and do not know if the Minister read aloud the entire printed speech.
[219] Zulman (2002) 76 *Austr LJ* 46.

4.10 Inadequate budgetary support

The minutes reflect that the training and public awareness projects were not sufficiently funded. The project is still not sufficiently funded.[220]

The initial business plan stated that funding was being requested from USAID and that existing departmental resources would be used where possible. The plan noted that the costing would only cover the first 12 months of the project and that the department had been requested (the plan does not indicate by whom) to integrate future training and public awareness costs into its Medium Term Expenditure Framework. Paragraph 9.2 of the business plan states that the strategy that underpins the implementation of the training is based on the "20:80 principle of achieving more with less resources". Under "risks and assumptions" the plan notes that it is assumed that "adequate financial resources will be made available within Departmental resources to ensure that additional personnel required for the Equality courts and coordination of the overall implementation of the Act as well as infrastructural requirements are provided speedily".

The minutes to the first meeting erroneously reflect that USAID had allocated $3.5 million towards capacity building for the implementation of the Act and that $3 million were set aside for training – the amounts allocated were R570 000 (salaries and administration) and R2 985 000 (direct costs –

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[220] A document emailed to me on 19 July 2004 by Mr Skosana, Department of Justice, entitled "Project Plan Implementation Report", dated April 2004, states that "an incremental approach to implementation mitigates *resource constraints* thereby compelling us to adopt a phased approach" (my emphasis; p 5 of the document); "there is tremendous pressure to have the Act wholly operational and *the issue of budgetary constraints remains an obstacle*" (my emphasis; p 2); "at this stage due to *lack of funds* we encounter difficulties in carrying out our mandate" (my emphasis; p 43.) According to this document, R10 million was allocated to the project for the 2003/2004 financial year, which is much less than the initial R50 million asked for in the "Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill" that accompanied Bill B57B-99 (ISBN 0 621 29135 8). 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. (Accessed at 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 on 2007-05-15.) During these hearings, the AIDS Law Project argued that the Department of Justice must address budgetary issues as some magistrates' courts had indicated that lack of funds had prevented them from establishing an equality court or from undertaking training activities and public awareness campaigns. During the same hearings, the CGE also argued that the allocation of resources to the equality courts were not sufficient. The Department of Justice indicated in its submission that for the 2006/2007 financial year, R12 million was allocated to the equality court project, of which R6 million was earmarked for the appointment of permanent clerks (salaries) and R6 million for furniture, stationery and the like.

training, workshops, materials development, consulting, travel and per diem) respectively.[221] This funding became available from September 2000.[222] It would appear as if USAID funding also paid the project manager and project assistant. The minutes to the third meeting indicate that at that point the positions of project manager and project administrator had not been filled yet "because of a lack of funding". A subcommittee, that included an USAID representative, was then set up to settle the advertisement and to consider applications for the positions. The minutes to the third meeting also indicates that the project business plan would be made available as soon as USAID had approved it. It would therefore appear that the entire training project was funded via USAID money.[223] When the Act was passed, Parliament was told that the Act would require additional resources – R50 million – to be properly implemented.[224] After the Act was passed, the Department was told to implement the Act with existing resources.[225] In a document entitled "Chief Directorate Transformation and Equity: Second Status Report on Implementation of the Equality Legislation"[226] dated 31 January 2001 it is noted that "initially, no allocation was made for the implementation of the Act from the Department's budget".[227] Not surprisingly, "the inability of the Department to allocate a budget for the implementation of the Act has inter alia had a negative effect on the state of readiness for the implementation of the Act, particularly the identification and preparation of pilot sites for equality courts".[228] The same document indicates that in view of limited governmental resources the Department had taken a policy decision to incrementally implement the Act.[229]

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[221] A letter dated 2 October 2000 addressed to the then Minister of Justice by the team leader, Democracy and Governance, USAID/South Africa confirms that a funding proposal was submitted to USAID by the Transformation and Equity Unit of the Department of Justice and that the funding proposal sought funding to support the training of justice officials who would be involved in the implementation of the Act. In a memorandum drafted by Ms Madonsela to the then Director-General (dated 13 December 2001) she notes that R3.5 million had been provided by USAID while the Department contributed office space, furniture, equipment and administrative support.

[222] This is presumably the reason why the project relating to the training of judicial officers only became operational in September 2000.

[223] The USAID letter (fn 221) reflected an amount of R570 000 for "salaries and administration", which would presumably have been set aside for the project manager's and project assistant's salaries. Also see para 1 of the "Executive Summary Report & Evaluation, National Seminar for Equality Court Judicial Educators, Aloe Ridge Hotel, Gauteng, April 16-21, 2001", distributed at the eighth TMT meeting, which seems to confirm this conclusion.

[224] "Memorandum on the Objects of the Promotion of Equality and Prevention of Unfair Discrimination Bill" that accompanied Bill B57B-99 (ISBN 0 621 29135 8).

[225] Para 4.3 of the minutes to the ninth TMT meeting.

[226] Also see fn 87 and p 291.

[227] Para 3, p 5 of the document.

[228] Para 3, p 5 of the document.

[229] At its first meeting the TMT was informed that due to "infrastructural and human resource requirements", implementation would commence with a small number of equality courts, to be increased annually. At the sixth meeting

By October 2000, it was clear that USAID funding would be available for the first year of the project as the remaining uncommitted USAID funds were to be used to "support activities related only to the recently revised program description relating to Criminal Justice Strengthening Program".[230] For the second round of training, EU Foundation for Human Rights funding was obtained for an "Equality Court Judicial Educators' Symposium" that was held in April 2002.[231] Funding was obtained from the Department at a very late stage for 2002 projects. The project manager's report distributed at the 13th TMT meeting indicated that although the Director-General had approved phase II funding, "the business plan and extent of finance, is still under discussion".[232] The same document reflects that "generally all provinces would like to undertake more activities in the coming year. Until now ELETU could not guarantee the availability of money. The DG has now provided assurance".[233] For the funding cycle starting in 2002, USAID changed its focus to "strengthening the criminal justice system" and it obviously became very difficult, if not impossible, to fit equality court training into this funding cycle.[234] The unused funds at that point was estimated at R400 000 and it was agreed with USAID that the residual funds multiplied by ten (in other words about R4 million) would be reallocated to ELETU for interim use, until discussions on the new funding cycle had been finalised.[235] The same document indicated that for 2002/3, an amount of R32 million[236] had been asked for and for 2003/4, an amount of R43 million[237] had been asked for. The Director-General approved the business plan that set out the breakdown of these amounts, had assessed the plan to determine its place in the new USAID funding programme, and requested the project manager to approach other donors as well.[238]

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the TMT was informed that all magistrates' courts would be operationalised at the same time as it was deemed "socially unacceptable" that only a selected number of courts would function as equality courts. Judge Zulman noted with surprise at the 17th TMB meeting that the Department had during August 2002 again taken the decision to rather establish pilot courts.

230 Para 4 of the USAID letter (fn 221).

231 Para 3 of the project manager's report, distributed at the 13th TMT meeting and para 3.5 of the project manager's report distributed at the 14th meeting.

232 Para 3 of the document.

233 Para 5. The report was dated 12 December 2001.

234 Para 4.3 of the minutes to the 14th meeting.

235 Para 3.2 and 3.3 of the project manager's report distributed at the 14th meeting.

236 R20 million of which consisted of proposed expenditure relating to public awareness.

237 R31 million of which consisted of proposed expenditure relating to public awareness.

238 Para 3.4 of the project manager's report and para 4.3 of the minutes to the 14th meeting.

However, in the project manager's report tabled at the 17th meeting, it is stated that "no additional finance" had been allocated to the project. Provinces who had indicated that the R100 000 afforded to them were inadequate, were informed that they would have to forward a business plan to ELETU, who would then take it up with the Department and potential funders.[239] At the same meeting a letter was read to the TMB that indicated that the Act was one of the "unfunded mandates" in the department. The 18th meeting was cancelled due to a "cash flow problem" and no further TMB meetings were called. Presumably ELETU closed down at about the same time; in other words towards the end of 2002.

The Equality Review Committee has also been under-funded.[240]

4.11 Deadlines missed; bureaucratic bungling

Another unhappy aspect to the implementation of the requisite training of judges, magistrates and clerks, was that deadlines and target dates shifted continuously.

In the letter that invited participants to the first TMT meeting, it is mentioned that the Department of Justice planned to implement the Act by 10 December 2000 and that it was therefore "critical that training commences soon and that there are enough adequately trained people to form a pool for designating those to deliver service in pilot sites ..." This letter was dated 14 August 2000, which left approximately 4 months to set up the necessary mechanisms to meet the December deadline. This deadline existed on paper only, and at the first TMT meeting the target date for implementation shifted to 21 March 2000. The rationale for the extension at that stage was that

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[239] Para 3.1 of the project manager's report dated 8 October 2002.

[240] The minutes to the fifth meeting reflects that "it is imperative that the Equality Review Committee brings it to the attention of the Minister that the Committee cannot fulfil its legislative mandate without adequate budgetary support". At a conference arranged by the SAHRC entitled "Equality Indaba" from 24 to 25 June 2004, the Deputy Minister of Justice indicated that the future existence of the ERC was under discussion within the Department. 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). Pursuant to these hearings, the Justice and Constitutional Development Portfolio Committee met on 27 March 2007 to debate a draft "Equality Review Report" that was drafted after the October 2006 hearings. At this meeting in March 2007, the chairperson of the committee informed its members that the ERC was no longer in existence. http://www.pmg.org.za/viewminute.php?id=8875 (accessed 2007-05-15).

judges would only become available for training towards January/February 2001 and the workload of academics in November did not allow for training to take place then.[241]

At the second TMT meeting, the following time frame was agreed to:[242]

Closing date for expression of interest[243]	30 September 2000
Draft policy directives[244]	9 October 2000
Final date for submission of training materials[245]	30 October 2000
Finalisation of policy directives	30 November 2000
Finalisation of training materials	30 November 2000
Trainers Seminar	January 2001
Provincial seminar for practitioners	February 2001
Implementation of equality courts	21 March 2001

At the third meeting, TMT members agreed that it was obligatory that the JSC and MC form part of the training and implementation process and that it may therefore become necessary to move dates forward to ensure proper participation by the JSC and MC. The time frame was amended as follows at the third meeting:

Draft policy directives	9 October 2000
Closing date for expression of interest	10 November 2000
Finalisation of policy directives	30 November 2000
Final date for submission of training materials	30 December 2000
Review of materials	15 January 2001
Submission of materials to JSC, MC	end of January 2001

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[241] Para 3.6 and 4.9 of the minutes to the first TMT meeting.
[242] Judge Zulman expressed concern that this time frame was unrealistic at the third TMT meeting.
[243] The "expression of interest" related to a public announcement by the Department of Justice that it was seeking the assistance of academic institutions to develop training materials and to provide training on the Act (see pp 194 and 197 above.)
[244] The "draft policy directives" related to s 31(4) of the Act – as the Act read prior to its amendment in 2002, the Minister of Justice had to issue policy directives *inter alia* relating to the training of equality court personnel (see pp 196-198 above.)
[245] The "training material" related to the bench book for judges and magistrates and the resource manual for clerks (see 4.7 above.)

Trainers Seminar	5-9 February 2001
Fine-tuning of training material	After 9 February 2001
Provincial seminar for practitioners	After 9 February 2001
Implementation of equality courts	21 March 2001

At the fifth TMT meeting the deadline for the submission of training material was extended to 15 January 2001.

By the time that the sixth TMT meeting took place, the JSC and heads of court had met and it was agreed that judges would become available for training in April 2001 and training of clerks could proceed during March 2001. The deadline for the submission of the resource manual for training of clerks was extended to 7 March 2001 and the submission date of the bench book for training of judicial officers was extended to 30 March 2001. The sixth meeting was also informed that an implementation date for the Act had not yet been decided but that it would not be later than 16 June 2001.

At the seventh TMT meeting, the deadlines for the submission of the bench book and resource manual were extended again, to early April 2001 and 15 April 2001, respectively.

At the eighth meeting, copies of the finalised resource manuals were distributed to team members. The deadline for the submission of the bench book was extended to June 2001.[246]

The minutes to the ninth meeting reflects that a delay was caused in the editing of the bench book when a disk was misplaced at the ELETU offices. Ms Madonsela indicated that she would provide additional comments to the drafters of the (finalised) resource manual that she had received from trained clerks. A deadline of 31 July 2001 was set to finalise the resource manual.

[246] Para 7 of the minutes to the eighth meeting and para 2 of the "Executive Summary Report" relating to the Aloe Ridge Seminar for presiding officers, distributed at the eighth TMT meeting.

At the tenth meeting, a deadline was set of 27 August 2001, by which date all comments on the bench book had to reach the drafters. The final product had to reach ELETU by 3 September 2001.

At the 11th meeting it was agreed that final comments relating to the bench book had to reach the drafters by 19 September 2001 and the final product delivered to ELETU by 27 September 2001. The minutes to the same meeting indicate that it was uncertain at that stage when the Act would come into force.

At the 14th meeting a document was distributed entitled "Schedule of activities & Budget Feb 2002 – Jan 2003" which reflected that all judicial officers (about 200 judges and 1500 magistrates) were to be reached by July 2002 and fully trained by November 2003. Each province was to run at least four equality court judicial education seminars per year. The schedule also anticipated that "at least every court has a clerk or registrar who have received some basic training on the Act by April 2002 and all clerks and registrars have been introduced to the Act by 31 December 2002". These deadlines were not met.[247]

During the same meeting, judge Zulman asked whether a list existed of people who had attended training sessions. Ms Madonsela reported that some provinces had provided reports and that a list would be drawn up by her office. At the 15th meeting Ms Madonsela distributed a list of trained magistrates and indicated that a list of trained judges would also be provided. The meeting agreed that judge Zulman would liaise with heads of court to verify the names of those presiding officers who had been trained.

At the 16th meeting, a number of participants expressed their unhappiness about the ineffectiveness of ELETU. The project manager did not attend the meeting. Judge Zulman found this disturbing. Judge Farlam agreed that there was no reason why she could not attend and that he was not informed that she would not be present. Prof Gutto asked for clarification about other positions she might be occupying and referred to the previous meeting's minutes that referred to

[247] As at 31 August 2006 this was still not the case. Email correspondence with the relevant Justice College trainer, August 2006; and telephone conversations with Judge Farlam during February 2005 and August 2006.

the project manager's "CRES office". Ms Van Riet said that the previous meeting had also not gone well and that it was important that the project not become derailed. Prof Albertyn wished to know to whom the project manager was accountable and that it appeared that there was a total lack of accountability. The meeting resolved that judge Farlam would speak to the project manager and to the Director-General.

At the same meeting, Mr Mudau, the magistrate who was tasked with arranging the Gauteng training of presiding officers, reported that the procedure set up to deal with the payment of expenses caused tremendous difficulties. Judge Zulman confirmed that Natal and the Eastern Cape experienced the same problems. Prof Gutto said that the procedure set out in the fax sent to the provinces was ambiguous and vague. Prof Albertyn reported that logjams existed in the system and that ELETU had not dealt efficiently with claims in the past. The team also heard that an insufficient number of bench books had been printed and distributed and that a small number of clerks had been trained. Prof Albertyn noted that these facts indicated that ELETU was not functioning effectively.

The available documentation reflects organisational problems at some of the training seminars:

- At the first national training seminar for judges and magistrates, the majority of participants were not satisfied with the organisation of the seminar. (Participants were *inter alia* concerned about not receiving training materials in advance and the length of presentations at plenary.[248])
- At the second national training seminar for judges and magistrates, the programme and training materials were again not distributed in advance.[249]
- At the first national training seminar for clerks, communication and coordination of arrangements for the seminar were less than perfect.[250] Administrative bungling caused a number of previously identified clerks and registrars to miss out on the first national

[248] P 4 of "Executive Summary Report & Evaluation National Seminar for Equality Court Judicial Educators" (see fn 107, fn 148 and p 202). One the reasons why the planning was less than perfect was because the tender relating to the seminar was awarded to CALS at a very late stage – summary minute of the TMT executive committee meeting, 15 May 2001, Bloemfontein.
[249] Paras 3.9 and 3.15 of Judge Zulman's report relating to the second training seminar.
[250] Prof Mbao's report on the trainers' seminar, distributed at the 10th TMT meeting.

seminar for clerks and registrars and a (shortened) training programme was devised to accommodate these clerks and registrars that took place from 22 – 24 October 2001 in Durban. At the seminar, it transpired that the clerks were only informed of the seminar on 19 October. The clerks were telephoned directly without involving their heads, which lead to some agitation.

- Insufficient numbers of bench books were sometimes distributed at the training seminars. and were sometimes put together in a completely disorganised and wrong order.[251]
- Funding for training sessions in Kwazulu-Natal (2002) ran into difficulties and was resolved at a very late stage.[252] Bench books were again not distributed in advance.[253]
- Ms Madonsela's report relating to the "National Symposium for Equality Court Educators" that took place during April 2002, indicates that "planning at short notice led to various administrative hiccups".[254]

4.12 Absent impact assessment

Although mentioned in the initial business plan, an impact assessment of the Act was never seriously considered. Paragraph 13.4 of the initial business plan noted that "some impact assessment will be conducted with the training participants and members of the public, within a year of commencement". The minutes to the fifth meeting of the TMT indicates that Germany at that point had indicated that it wanted to assist the Department of Justice in monitoring the implementation of the Act and that it was willing to assist in the establishment of an information support system. This matter was not raised again at any of the subsequent meetings.

4.13 An ill-considered Australian study visit

It is difficult to assess the value of a visit undertaken to Australia by a number of TMT members. A report on the visit was never tabled at any of the TMT meetings despite repeated promises. Judge Zulman, Ms Madonsela and Prof Gutto presented brief reports on the visit at the fourth TMT meeting.

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[251] Para 2 of Judge Zulman's report to the 17th TMB meeting; Annexure A.3.
[252] Para 4 of Judge Zulman's report to the 17th TMB meeting.
[253] Fax from Judge McCall to Ms Madonsela dated 3 October 2002, distributed as part of Judge Zulman's report to the 17th TMB meeting.
[254] P 4 of the document.

Judge Zulman thought the visit to have been "interesting" and "valuable". The team members visited three states – Western Australia, Queensland and New South Wales. Each of the states has their own peculiar institutions in place and a nationwide anti-discrimination statute does not exist. Non-discrimination commissions exist at state and federal level. These are conciliatory bodies and most of the cases are settled with little if any publicity. Apparently a large number of complaints are brought by minority groups. Should a litigant not be satisfied with the outcome of the commission proceedings recourse may be had to a tribunal presided over by a judicial officer. The tribunals do not carry a large workload, as these bodies also attempt to conciliate cases. Judge Zulman mentioned that the team did not witness a live hearing and he suspected that they were given a "sanitised" version of the system. He thought that the Australians established a good system in theory. As to judicial education, New South Wales took it very seriously and judges at senior level are involved.

Prof Gutto mentioned that the commissions used informal and inexpensive procedures and he hoped that the same approach would be used in the drafting of the regulations to the Act. Limited legal aid is available. At commission and tribunal level the commission in effect becomes the applicant's lawyer (unless represented), which removes the need for legal aid to a degree.

Ms Madonsela reported that the Australian system had a number of weaknesses: It used a formal approach to equality; did not recognise systemic discrimination as a cause of action; lacked affirmative action legislation on race and had adopted a fragmentary approach to equality issues. Its strengths included well-resourced courts; a good public education system; and good data collection procedures.

The only lesson learnt from the visit seems to have been to set up accessible and inexpensive enforcement bodies (as reflected in the regulations to the Act.) However, the drafters of the Act already anticipated the use of accessible forums,[255] and many of the bodies and institutions that appeared before the *ad hoc* Parliamentary committee when the Bill was finalised, argued for

[255] Cf ss 4(1)(a), 4(1)(b), 4(1)(c) and 30(1)(a) of the Act.

accessible, informal enforcement mechanism.[256] The visit to Australia seems to have been a rather costly and wasteful exercise.

4.14 Analysis: Management failure

From the above exposition of the implementation process, a number of instances of management failure appear. Based on my analysis of the available documentation, although some training of judicial officers and clerks occurred during the lifetime of the ELETU project, it was a relatively chaotic and poorly planned and executed event.[257] The analysis also shows that the budget allocated to the project was wholly insufficient and the Department of Justice, which includes the Minister and the Director-General, did not accord a high priority to the Act.

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[256] I sourced the following written representations from the files graciously made available to me by Prof Gutto, one of the drafters of the Act. COSATU stated that the enforcement mechanism "must be accessible and understandable to ordinary people". COSATU supported in principle the establishment of equality courts. It suggested that a gradual or incremental approach be followed in implementing the Act and that priority be given to the training of presiding officers. The Human Rights Committee supported the establishment of equality courts. It noted that magistrates' courts are the most accessible existing forums but not affordable for the majority of people who would want civil claims settled in a court. The committee noted that the Bill empowered the Minister to draft regulations relating to appropriate cases qualifying for legal aid and proposed that the litigant's socio-economic status be considered as a guideline in drafting the regulations. It also proposed that the regulations be put in place within six months to allow simple, fair and affordable procedures. The committee also referred to clause 53 in the Bill that suspended the enforcement of the Act pending the designation of presiding officers. The committee proposed that a six month timeframe be put in place for the designation of presiding officers. As to the possibility of referring matters to more appropriate forums, the committee proposed that the Act must define relevant role-players and that accessibility must be the overarching principle governing the determination of the most appropriate forum. IDASA submitted that tribunals should be utilised instead of courts as they are "speedy, coherent and effective… inquisitorial and user-friendly… cost-effective… accessible and not intimidating". It also suggested adjudication by a representative jury and in cases of sector-specific discrimination, a jury selected from stakeholders within the relevant sector. The Act should clearly indicate the complaints procedure so that people wanting to enforce their rights will be able to easily access the relevant procedure. It also proposed that the SAHRC be mandated to accept and investigate complaints. It submitted that the Act must incorporate an investigation procedure that provides for *inter alia* the gathering of documents, interviewing of witnesses and obtaining search warrants. The National Coalition for Gay and Lesbian Equality supported the Equality Alliance and its members in the call for "clear, enforceable and accessible enforcement mechanisms". The South African Council of Churches (SACC) argued that the enforcement mechanisms must be speedy and accessible (physically and financially) to all people and in principle supported the establishment of equality courts. The SACC also appreciated the Human Rights Committee's concerns and endorsed its submission. The Women's Legal Centre and the Socio-Economic Rights Project, Community Law Centre (WLC/CLC) argued that he forum of first instance must be accessible to poor and vulnerable groups and suggested that the Act should make the magistrates' courts the mandatory court of first instance, unless otherwise agreed between the parties. WLC/CLC also supported the development of new rules of court for the equality courts that would facilitate an inquisitorial approach, flexibility, limited pre-trial procedures, expedited hearings and ease of access for complainants.

[257] A regional court magistrate informed me via email dated 8 May 2007 that training on the Domestic Violence Act 116 of 1998 was completed in three months. Training on the Equality Act has still not been completed four years after the Act's coming into operation.

What should have happened seems easy enough to imagine. The training project should have been budgeted for via the Treasury and should not have been reliant on donor funding. From a very early stage the various heads of court should have been engaged with, and their complete support should have been obtained. Equality law experts and Justice College trainers should have been briefed to draft training material before any trainers' seminars were held. Each Judge President should have acted as chairperson of a provincial or subprovincial training committee and these committees should have been supplied with explicit guidelines as to what should be included in the training seminars and who to invite as trainers. The project manager should have followed up with each of the provincial committees on a regular and sustained basis to ensure that training would have taken place at regular intervals. By the end of 2000 a sufficient number of equality court personnel should have been trained to allow the coming into effect of the Act.

Drawing on Hansen's typology, Budlender identifies three causes of constitutional violations by a state: inattentiveness, incompetence and intransigence.[258] Inattentiveness results from a failure to appreciate the nature and extent of the (constitutional) obligation; incompetence results from inadequate state machinery; and intransigence results from a state's decision not to comply with its obligations.[259] The same causes could be used to describe a particular state's performance generally. As to the training and public awareness activities relating to the Act, the state's performance would have to be described as a mixture of inattentiveness and incompetence. The required degree of supervision and control by the Director-General and Minister of Justice was lacking, and ELETU's full-time staff was not up to the task of coordinating the various training activities and ensuring that continuous training took place. The result was an inadequately trained cadre of equality court personnel, and inadequate levels of public awareness relating to the Act.[260]

In analysing the defects in the training programme, I will rely on the four "management principles" set out in chapter 4.2 above: plan; organise; actuate; and control the activities.[261]

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[258] Budlender (2006) 15 *IB* 139.
[259] Budlender (2006) 15 *IB* 139.
[260] Cf Annexure F.1, where many of the equality court clerks referred to the lack of public awareness to explain the lack of cases brought to the equality courts. Also see chapter 5 below as to the levels of public awareness relating to the Act in 2001, ie at a time when ELETU was still functional.
[261] Pollitt (2003) 122-123 states that the most frequently used criteria to assess public management projects are effectiveness, cost effectiveness, overall impacts, efficiency, economy, responsiveness, and procedural correctness.

4.14.1 Plan: Determine the objectives

Fukuyama argues that one of the sources of organisational ambiguity is that organisational goals "are often unclear, contradictory, or otherwise poorly specified".[262] The "train the trainer" seminars were supposedly held to equip the attendees to go back to their provinces and conduct the training themselves. This ostensible "organisational goal" was not articulated explicitly enough and many provincial seminars were arranged where many members of the training faculty were *not* "trained trainers", but academics, and the involvement of trained judges and magistrates was usually limited to opening the proceedings or facilitating the moot court video session.[263] To this extent at least, the initial two training seminars failed.

If the training had truly been aimed at empowering presiding officers to play their part in facilitating societal transformation by applying the Act, one would have expected a stronger emphasis on social context training.[264] To the TMT's credit, a number of team members at various stages

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Van der Waldt (2004) 10-12 suggests that good governance has eight major characteristics: participation (direct participation by citizens or through legitimate institutions or representatives), rule of law (fair legal frameworks, impartial enforcement of laws), transparency (follow rules and regulations when taking decisions, information freely available), responsiveness (serve stakeholders within a reasonable timeframe), consensus oriented (mediation of different interests), equity and inclusiveness (all members feel stake in outcome), effectiveness (results that meet needs) and efficiency (best use of resources at disposal), and accountability. I am mainly concerned with the criterion of *effectiveness*, ie to what extent did the training programmes meet the objectives set out in the initial business plan.

[262] Fukuyama (2005) 69.

[263] Annexure A.1 sets out the content of those national and provincial training seminars that I have been able to source from TMT minutes and the ELETU offices. Where available I also indicate the identity of the trainers involved in the seminars. Academics from UCT, WITS, UOFS feature prominently. According to my handwritten notes relating to the 11th TMT meeting judge Zulman remarked that judge McCall (KwaZulu-Natal) had telephoned him and enquired whether it was expected that KwaZulu-Natal judges would now train fellow presiding officers. Judge McCall said that KwaZulu-Natal judges did not feel equipped to train.

[264] Cf Albertyn and Goldblatt (1998) 14 *SAJHR* 261: "This contextual approach clearly affects the type of evidence and argument that is needed by the Court. Statistical and sociological evidence is crucial as is socio-economic analysis in many cases. This approach also poses greater challenges to judges to ensure that they are able to step outside their own experiences and critically consider situations that are either not before them or that they have not previously encountered". Bohler-Muller (2000) 16 *SAJHR* 639 suggests that equality court officers be trained "to deal with the substance and values of cases in a constitutional, contextual and concrete manner without needing recourse to rigid rules or universal truths". At 640 she suggests that equality courts should listen to all voices and consider all circumstances before reaching a conclusion that is least harmful to the most vulnerable litigant. Bohler (2000) 63 *THRHR* 290 argues that "these new equality courts should create a space in which to make emphathetic judgments based on the circumstances of the individuals who convey their suffering to the court" and that "a wise judgewould listen to the stories of the characters involved and make a judgment which takes into consideration the histories and complexities of that particular case and those particular characters". She concurs with Massaro 1989 *Mich L Rev* 2116 that calls for individualised justice; that judges "should focus more on the context – the result in *this* case to *these* parties – and less on formal rationality – squaring this result with results in other cases". These kind of viewpoints were probably not raised often enough at training seminars; certainly not the training sessions that I participated in or attended. Also cf Fuller (1978) 92 *Harv L Rev* 391: "[A]nother kind of 'partiality' is much more dangerous. I refer to the

suggested or commented on the need for social context training,[265] but this insight was unfortunately not carried through to all of the provincial training seminars.[266]

4.14.2 Organise: Distribute the work; establish and recognise needed relationships

The Department of Justice wished the training project to be seen as judge-controlled and therefore the project manager did not have, or did not exercise, any real authority over the various provincial training committees in the traditional sense of the word of "the legal right to command action by others and to enforce compliance".[267] What the project manager should have done was to have achieved compliance with the goals set out in the business plan by other means such as persuasion and repeated, diplomatic requests.[268] She should have engaged with the heads of court[269] from the moment it became clear that equality court personnel would have to be trained in terms of the Act and should have enlisted their support.

It does not seem as if clear lines of accountability were established relating to the implementation of the training programmes.[270] A business plan distributed at the 11th TMT meeting stated that the execution of the project was fully supervised by the project manager and that she set the time frames with the assistance of the executive committee, the JSC, the MC and the TMT.[271] The plan

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situation where the arbiter's experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from a single vantage point. Here a blind spot of which he is quite unconscious may prevent him from getting the point of testimony or argument".

[265] Eg see the minutes of the following TMT meetings: para 3.3 of the fifth meeting; para 3.3 of the seventh meeting; para 6 of the eighth meeting; para 6 of the 12th meeting and para 4.1.2 of the 14th meeting.

[266] See Annexure A.1 and A.2. Of the ten 2001 training seminars listed in Annexure A.1, 4 seminars did not include social context training while 5 seminars devoted 1 hour to social context training and one seminar devoted 1 ½ hours to social context training. Of the 5 2001 training seminars listd in Annexure A.2, 3 seminars did not include social context training while 2 seminars included 1 hour of social context training. At the June 2001 seminar for clerks, 45 minutes out of 3 days were devoted to social context training and at the November 2001 seminar, 1 ½ hours out of 3 days were devoted to social context training.

[267] Terry and Franklin (1982) 219.

[268] Terry and Franklin (1982) 219.

[269] At the level of judges, she should have engaged with the various judge presidents. The judge president of each Division acts as leader and manager of the team of judges in that division. Calland (2006) 206. Chief magistrates and cluster heads should have been drawn in as well relating to the training of magistrates. (A number of magisterial districts are grouped together with a chief magistrate as the head. Some provinces would have more than one chief magistrate, of which one would then be the cluster head for the province.) As to the training of clerks, regional offices of the Department of Justice are empowered to send instructions to office managers at the various magistrates' courts to ensure that clerks attend training sessions. (My thanks to Jakkie Wessels, regional magistrate, who provided me with the information about the court structure, in an email dated 8 May 2007.)

[270] Cf van der Waldt (2004) 30 and 134 as to the importance of ensuring accountability by heads.

[271] Para 4 of the business plan.

also stated that ELETU submitted bimonthly reports to the Director-General and the Minister.[272] The project manager accepted ultimate responsibility for project management.[273] The project manager's report tabled at the 13th TMT meeting thanked the Director-General for his "hands off approach" to the project. This phrase is illuminating. In light of the long lapse between the enactment and coming into force of the Act, the long lapse between training seminars and the implementation date and the long time that elapsed before the amendment to the Act was effected, it would appear that the Director-General either took no interest in the implementation process, or abdicated his responsibility relating to the implementation to the project manager.[274] The bimonthly reports were either not read, or not read carefully. When the project manager apparently lost interest in the project,[275] the Director-General did not notice it.[276] The long lapse between the training seminars and the eventual implementation date of the Act would also suggest a lack of coordination between ELETU and the Department. One would think that the project manager would have interacted with the Department more closely to ensure a close fit between the training seminars and the coming into effect of the equality courts. The Minister explained the delay in the coming into effect of the Act as "bureaucratic bottlenecks, management inertia and financial considerations".[277] "Management inertia" need not necessarily imply bad faith but at the very least it tends to suggest a lack of interest in or a lack of prioritisation of the Act. "Financial considerations" tend to suggest that the project was under-funded.

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[272] Para 5 of the business plan.
[273] Para 6 of the business plan.
[274] Ultimately of course accountability ends with the political head of the Department of Justice. Mafunisa in Kuye *et al* (2002) 195.
[275] The 16th meeting proceeded in the absence of the project manager. The minutes to the 16th meeting reflects that at least some members of the TMB had at this point become critical of her performance. She had by this time apparently also become involved with an NGO. (The "project manager's report" dated 21 August 2002 reflects at para 4 that "the project manager now works … from her NGO office where resources are better".) Judge McCall's email to judge Zulman dated 3 October 2002 (distributed as part of Judge Zulman's report to the 17th TMB meeting) refers to the project manager's regular unavailability.
[276] At best, the project manager truly saw her role as a facilitator and not as project *leader*. In her project manager's report relating to the 15th meeting, in which she discusses the National Symposium for Equality Court Educators that took place from 24-26 April 2002, she states on p 5 of the report: "The TMB's attention is drawn to the specific issues that came up during the symposium *and which require the TMB's leadership*" (my emphasis). One would think that the project manager would or should have played a more pro-active leadership role in this regard.
[277] Typed speech that the Minister presented at the Helderfontein training seminar on 24 July 2001 (copy in my possession.) I was not present at the seminar and I do not know if this part of the speech was read at the seminar or not.

The training of clerks and registrars lagged behind the training of magistrates and judges. By the end of 2001 about 85 clerks and registrars had been trained, while approximately 600 magistrates and 90 judges had been trained.[278] The communication and coordination between Justice College and ELETU in this regard were insufficient. The minutes to the TMT/TMB meetings reflect some uncertainty as to which institution would ultimately be responsible for the training of clerks. The minutes to the 15th meeting indicate that the TMB resolved that each of the chairpersons of the provincial training committees would have to assign a member of the relevant committee specifically to coordinate the training of clerks while the minutes to the 16th meeting reflect that each provincial training committee had to include the head of clerks or control officer or office manager and that this person had to contact Justice College to coordinate the training of clerks, but the minutes to the 17th meeting state that Justice College would ultimately be responsible for the training. During 2002 a number of training sessions for clerks and registrars took place towards the end of the year.[279]

4.14.3 Actuate: Ensure that the members of the group carry out their prescribed tasks willingly and enthusiastically

Fukuyama points out that many aspects of organisational theory revolve around one central problem: delegated discretion.[280] Efficiency sometimes requires the delegation of discretion in decision making and authority but the very act of delegation creates problems relating to control

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[278] A document entitled "Seminars Organized under Equality Legislation Education and Training Programme [2001-2002]" distributed at the 14th TMT meeting stated that by year-end 2001, 602 magistrates and 99 judges had received training while 56 clerks and 29 registrars attended training sessions. The figure for clerks and registrars is probably inflated as the same clerks and registrars who attended the first training seminar (10-15 June 2001) were supposed to have been invited to attend the second seminar (12-14 November). (The figure for trained magistrates and judges is probably also somewhat overstated for the same reason.) Given the relatively small number of clerks trained, it would still have been possible to put into operation a (small) number of pilot equality courts towards the end of 2001/start of 2002.

[279] Memorandum to the chairperson of the TMB from Mr Behari, Justice College, dated 10 August 2002, distributed at the 17th TMB meeting. The situation has improved somewhat in the meantime. Lane (2005) 10-11 (internet version) reports that by September 2004 about 800 magistrates had undergone a three-day training course in "equality matters" and "the unique procedures of the equality courts". Another 250 magistrates were trained in November 2004. By May 2004 about 700 clerks had been trained and a further 330 clerks were trained in November 2004. Lane notes that the clerks' reaction to the training had been "lukewarm" and complained that the training was far too short. What I have not been able to establish from the relevant trainer at Justice College is (a) what training material is used; (b) once a clerk/magistrate has been on the Justice College course, is that clerk/magistrate then deemed fully trained and may then preside in an equality court; (c) were clerks/magistrates trained under ELETU's auspices (2001-2002) trained again by Justice College, or were they deemed fully trained and designated to sit in the first equality courts?

[280] Fukuyama (2005) 59-60. Also cf van der Waldt (2004) 30.

and supervision.[281] The history relating to the training programmes bears out this problem. The project manager did not liaise with the provincial training committees on a sustained, energetic basis and the training was suboptimal. The available documentation indicates that the project manager was of the view that after the initial national training seminars took place, decentralised provincial training seminars were to be held and that these provincial seminars had to be arranged locally.[282] It is not at all clear, however, on what basis and how often the provincial committees were contacted, either by letter or email or telephone calls, to ensure that decentralised training commenced and continued.[283] Available documentation suggests that the project manager played a *reactive* role and did not proactively ensure effective provincial training.[284]

4.14.4 Control: Control the activities to conform to the plans

After the initial training of judges and magistrates took place during April and July 2001, the project seemed to start to lose its direction. Perhaps understandably some time elapsed before the *initial* training seminars for judges, magistrates and clerks took place. A consultative process had to be followed and the judiciary's support and buy-in needed to be obtained. The Department also

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[281] Fukuyama (2005) 59-60. Cf Rousseau (1968) 92: "The governors have too much to do to see everything for themselves; their clerks rule the state". Manning (2006) 3 puts the same idea across, if less eloquently: "Politicians ... are in the hands of the bureaucracy. They give orders, but results are produced by the executives they appoint ... The real action is far from the Presidency, the Cabinet room, or any ministerial office".

[282] Paras 2.1 and 2.2 of the business plan distributed at the first TMB meeting anticipated "decentralized training activities" that would be coordinated nationally and implemented provincially. The minutes to the 14th meeting notes that the project manager informed the TMB that the "project now mainly resides in the provinces". I located a document in the ELETU offices dated 20 September 2001 that was drafted by the project manager and intended for the Director-General, in which she listed as one of the "project achievements": "memorandum to judges president and cluster heads explaining framework and process for decentralised equality court training and specifically requesting the (sic) to initiate planning prioritising the establishment of provincial training management teams, drawing up of integrated provincial implementation plans and determination of dates for training". In this same document, at para 2.2.6 the project manager reported that she had visited five provinces to date. Para 2.2.7 of the document states that she interacted on an ongoing basis with the provinces to ensure that decentralised training commenced. However, in the documents I could locate, there is very little if any evidence of ongoing communication with the provinces to ensure continuing training activities.

[283] I could only locate four letters from the project manager to the heads of the provincial training committees, dated 8 August 2001, 27 September 2001, 13 August 2002 and 27 August 2002 respectively. Only the first letter dealt with substantive issues: conducting a needs assessment, drawing up a business plan, determining dates for training and forwarding the business plan to ELETU. The last three letters only related to the accounting procedures that had to be followed.

[284] Para 2.1 of the project manager's report dated 19 June 2002 notes that "with regard to judicial education, *the project manager has received several calls regarding the way forward*. She had referred all callers to the decision at the symposium to proceed with decentralized equality court education activities…" (my emphasis). Para 2.1.3 of the project manager's report dated 8 October 2002 noted that "the project manager has successfully handled all problems *that were brought to her attention*" (my emphasis).

wished to be seen to support judicial independence.[285] The JSC and MC could only be engaged with towards the end of 2000/early 2001 and dates for training were set in consultation with these bodies. However, why the *follow-up* national seminars and provincial seminars took place more than six months after these initial seminars is difficult to explain. Inexplicably, the second round of provincial training seminars took place eight to twelve months after the first round of training, and another six months passed after the second round of training before the Act came into force.[286]

The initial business plan envisaged national "train the trainer" seminars whereafter these trained judges, magistrates and clerks would train their peers. Presumably judges and magistrates with a particular interest in equality issues were invited to the national "train the trainer" seminars. Once these individuals were trained, it was matter of engaging with them on an ongoing basis to ensure that decentralised training seminars be arranged. However, this part of the project already started to break down at the second national seminar, when not all the participants from the first seminar attended the second, follow-up training seminar for trainers.[287]

The training probably did not even familiarise the participants with the Act to a sufficient degree. In my view the training programmes entailed little more than awareness-raising sessions: Most of the participants received one day of training,[288] with as little as two hours of the training devoted to unlocking the Act's provisions.[289] No attempt at any form of assessment was made at any of the

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[285] Eg para 3.4 of the first TMT meeting: "Agreed that the role of government was *facilitatory*…" [as it related to the provision of training to equality court personnel] (my emphasis).

[286] The project manager blamed it all on the judges. In a memorandum from the project manager to the Director-General dated 13 December 2001 she explains that dates had to be moved "to accommodate a number of consultative processes that had to be undertaken in recognition of judicial independence and because judicial education is not yet incorporated in the normal work calendar for judicial officers (particularly High Courts). In the project manager's "final project report" dated January 2002 (para 4.1) she explains that delays in the implementation process were primarily due to having entrusted decision making to judiciary and that the judiciary often made decisions based on their circumstances which often resulted in postponement of activities.

[287] Cf Judge Zulman's observation at the 10th TMT meeting that some Gauteng-based judges did not attend the second seminar after having been "invested in during phase one".

[288] The project manager stated that "the number of training days for each person was far less than what had been planned in the Business Plan. This was due to time constraints experienced by the judiciary". (Project manager's report to the 14th TMT meeting; para 3.1.)

[289] Annexure A.1 sets out the content of the training seminars for judges and magistrates that I could locate that occurred under ELETU's auspices and Annexure A.2 sets out the content of the training seminars for clerks that I could locate that occurred under ELETU's auspices.

training seminars.[290] Even on the project manager's version, judges only received "some introduction" to the Act while a significant number of magistrates were "reached".[291] An email sent by magistrate Abrahams (Durban) to judge Zulman and distributed at the 17th TMB meeting is illuminating. Mr Abrahams was a member of the provincial training committee (KwaZulu-Natal). In the email he puts forward the following strong, and in my view correct, argument:

> [The groups that received training in November 2001] I am advised ... are not to be considered for any further training, and are now to be considered "trained". I do not share this view, and I explain why: (1) That programme was the first conducted by us and it could be that our committee emphasised the theoretical and academic focus at the expense of the practical aspects. The result is that we were only able to work through one hypothetical scenario, and superficially at that. (2) At the end thereof, it was understood that there would be refresher courses and whenever enquiries were made to me, I confirmed this stance. I have been directly involved with publicising the training programme amongst the lower court judiciary ... since September 2001, and I continue to do so to date. I also interact with the initiates practically on a daily basis, and I am painfully aware of the shortcomings of that first training programme, as well as their grasp of the content thereof. (3) Almost ten months have passed since then and it would be manifestly unfair to consider ... that these groups would be the "trained", in fairness to themselves, ourselves, and our responsibility to the community. (4) Above all, this approach will taint the integrity of the whole programme, and will be contrary to the requirements of s 180 of the Constitution since s 16(2) of [the Act] is legislation contemplated by that provision.

As an example of the insufficient nature of the training seminars that were held, I refer to the Gauteng training that took place in December 2001 at Gallagher Estates. I formed part of the training faculty at these seminars and attended for the whole day for some of the sessions. The organiser arranged for questionnaires to be distributed to the participants.[292] I managed to locate a file in the ELETU office that contained the feedback from those magistrates that completed and

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[290] Attendance-based "training" is a misnomer as no guarantee exists that attendees actually take in much of what is presented. Cf Hunt (2002) 71 *Henn L* 21.

[291] Project manager's report to the 13th TMT meeting; para 5.

[292] Participants were *inter alia* asked the following questions: "A. What are your views as to (i) the format of the training session; (ii) the presentation on your date of attendance; (iii) the Moot Court discussion; (iv) any other discussion"; "B. Which of, or which part of, the training sessions did you regard as most valuable, and why?"; "C. Do you have any suggestions or comments as to aspects which were not dealt with: (i) as to the subject matter generally; (ii) as to the presentations specially"; "D. As far as future training goes, how should you like to see the sessions structured and what should they cover"; "E. Any general comments on the legislation which you would like to make?"

returned the questionnaires. On the whole their comments indicate that the one-day seminar served as an awareness-raising session but that as a *training* event, it was not sufficient.[293]

After the initial provincial seminars took place towards the end of 2001, one would have thought that the Act could have come into effect in early 2002, as at stage a sufficient number of judges, magistrates and clerks had been exposed to the Act to at least establish a number of pilot courts. Inexplicably the Act came into effect another year and a half later. This meant that participants in the initial provincial seminars received training on the Act, in most cases for a single day, a year and a half before the Act came into force. By contrast the initial business plan envisaged an initial *three week* programme and annual refresher courses.[294]

Training iniatives that were undertaken since ELETU's demise has been sporadic. Since ELETU's demise, Justice College has been responsible for the training of clerks and magistrates. As to magistrates, cluster heads identified magistrates to be trained and training occured on a decentralised level. As to clerks, court managers identified clerks to be trained and clerks were trained nationally in Pretoria where 40 clerks could be accommodated at one time. Training for clerks occured over three days and for magistrates over four days. The training was optional and attendance-based - no tests were written but class exercises were discussed.[295] I have not been able to establish the following: (a) which training material were used; (b) once a clerk or magistrate had attended a Justice College course, was that clerk or magistrate then deemed fully trained and could he or she then operate within any equality court; (c) had clerks or magistrates that had been trained under ELETU's auspices (2001-2002) been trained again by Justice College, or were such clerks and magistrates then deemed fully trained and designated to function in any equality court?

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[293] A number of participants simply wrote "good" when asked to comment on the format of the training session and the presentations on their date of attendance. I did not regard these answers as an honest appraisal of the training seminars. I collated the other responses in Annexure A.3 below. Also cf the views of the magistrate responsible for the coordination of Gauteng training, as reflected in the minutes to the 15th meeting: "Mr Mudau supported the need for more intensive training, indicating that in Gauteng the key complaint was the participants felt that the one-day seminars were too short and did not adequately familiarise them with the Act and provide them with in depth insight into it…" In his report to the project manager, Mr Mudau noted that "many respondents are of the view ... that a day is not adequate for such important training". (I sourced the report in the ELETU offices; copy in my possession.)

[294] Para 2.3 (incorrectly marked 2.2) of the business plan distributed at the first TMT meeting.

[295] As established per email correspondence with the relevant Justice College trainer during February 2004 and August 2006.

Based on an analysis of a recent Department of Justice "progress report",[296] it appears that the Department of Justice has taken the view that if an equality court presiding officer or clerk had attended *any* training seminar, irrespective of the date, such a magistrate or clerk would be deemed "trained".[297]

Since ELETU's demise, no further training of judges on the Act has been arranged nationally or centrally. Provincial training seminars may have been arranged.[298]

One of the "risks and assumptions" listed in the initial business plan was that "government [would] continue to treat the issue of ending discrimination and achieving equality as a national priority".[299] It is difficult to avoid the conclusion that the Department of Justice did not give any priority to the Act's implementation or to the obligations relating to the training of equality court personnel and presiding officers:

- The Act was passed in early February 2000 yet the first attempt at coordinating a national training programme only took place in September of that year, when the first TMT meeting was called.
- After it transpired at the first national training seminar for judges and magistrates that most of the participating presiding officers thought that aspects of the Act were unconstitutional, it took almost two years before the suggested amendments were effected.[300]
- The Department did not fund the implementation process and USAID was requested to provide funds. Only two full-time personnel coordinated the training project and they were paid from USAID funds.[301]

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[296] "Progress Report on the Implementation of PEPUDA", hand delivered to the author during July 2007.
[297] Annexure "C" of the progress report contains a list of designated magistrates. Next to each magistrate's name appears the date when that magistrate was trained and the date that magistrate was designated as an equality court presiding officer. In many instances, the "year trained" columns reflects 2001 and 2002, the years when ELETU was responsible for training. Annexure "E" of the same progress report contains similar information for equality court clerks. Similarly, in many instances the "date trained" reflects 2001 or 2002.
[298] Telefaxes sent to Judge Farlam dated 15 February 2005 and 29 August 2006 respectively; and telephone conversations with judge Farlam during February 2005 and August 2006. Annexure "D" of the progress report, contains a list of trained judges. For judges, the "date trained" column either contains dates from 2001 or 2002, or states "no records of dates". For Grahamstown, Umtata and Cape Town, the date reflected reads "2019/06/03", which seems to indicate 19-20 June 2003, if compared to the date format of other columns in the document.
[299] Para 10.4 of the business plan, distributed at the first TMT meeting.
[300] The seminar took place in April 2001. The amendment came into force on 15 January 2003.

- It was resolved at a meeting of the Equality Review Committee (ERC) on 3 February 2001 that a firm commitment be given by the Department that the Act would be implemented on 16 June 2001; that priority attention be given to the Act; that a Director be designated to handle the implementation of the Act was a matter of urgency; that the chairperson of the ERC write to the Director-General to request him to give a firm assurance of the Department's commitment to implement the Act on 16 June 2001 and to give the necessary support structure to the ERC; and that it be recommended that the Director-General encourage the various directorates involved in the implementation of the Act to prioritise the implementation of the Act and that everything necessary be done to implement the Act by 16 June 2001.[302] As it turned out, the Act came into force on 16 June 2003, two years later than asked for.

4.15 Conclusion

From a socio-legal perspective, I painted this detailed picture of the planning and implemenation of the training of equality court personnel, because an analysis of the provisions of the Act and reflection on the nature of the Act and the stated purpose of the Act is not sufficient – the social factors surrounding the Act should also be taken into account when assessing the full scope of "living discrimination law" in South Africa.[303] One of these social factors is the nature of the training obtained by equality court personnel. (The current state of awareness of the existence of the Act and perceptions relating to discrimination and the achievement of equality among ordinary South Africans could also be seen as another social factor making up a part of the "living discrimination law" in present day South Africa.[304] I consider these perceptions in chapter 5.)

Another (at least implied) argument that emerges from this detailed picture is the contingent nature of most, if not all, planned schemes, whether of the "grand" kind referred to in chapter 4.2 above, or

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[301] Para 1 of the "Executive Summary Report & Evaluation, National Seminar for Equality Court Judicial Educators, Aloe Ridge Hotel, Gauteng, April 16-21, 2001", distributed at the eighth TMT meeting. Also see the discussion under 4.6 above.
[302] Paras 3.8, 3.12 and 4.2 of the minutes of this ERC meeting; copy in my possession. (Minutes sourced from the ELETU offices.)
[303] Cf Curzon (1995) 152-153 where he discusses Ehrlich's concept of the "living law". As Curzon explains it, the "living law" is an "amalgam of formalities, current social values and perceptions". Also see pp 36-38 above, where I discuss Ehrlich's concept of "living law".
[304] Curzon (1995) 153.

much smaller schemes, such as the training initiative discussed in chapter 4.5 to 4.13. I illustrated the perhaps trite point that laws have or do not have an effect because of what humans do or not do, and because of the way particular humans interact with other humans. There was nothing inherently misguided about the legislature's insistence on properly trained equality personnel; if anything it was an essential element to ensure effective implementation of the Act. However, the mere fact that Parliamentarians decided that training was a good idea did not guarantee compliance; it depended heavily on the personnel chosen to oversee the training. Put differently, the training programme was not destined to fail. Had different personalities been involved, it may well all have turned out differently.

As stated at the ouset of this chapter, the main focus here was that of *management failure*. 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 (failed) training initiatives, as a standard against which future results could be compared. I would then (humbly) describe this chapter as an empirical study,[305] 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.[306]

[305] 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.
[306] Cf Kuye in Kuye *et al* (2002) 2.

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

5.1 Introduction

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

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

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

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

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

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

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

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

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

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

5.2 Research methodology

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

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

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

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

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

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

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

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

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

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

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

Sinoville	21 questionnaires
Meyerspark	23 questionnaires
Moregloed	23 questionnaires

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3 Results of the survey

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

5.3.1 Demographical profile of the respondents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[29] Allott (1980) 73.

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

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

5.3.3 Profile of the respondents' views on discrimination

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

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

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

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

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

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

5.3.4 Profile of the respondents' experiences of discrimination

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

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

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

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

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

White respondents' experience of discrimination

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

Black, coloured and Asian respondents' experience of discrimination

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

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

Male respondents' experience of discrimination

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

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

Female respondents' experience of discrimination

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

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

Profile of nature of discrimination experienced by respondents

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

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

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

Other	16 (13.1%)

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

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

Respondents' approach of formal institutions

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

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

5.3.5 Profile of the respondents' views on hate speech

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

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

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

	Whole group	White	Black, coloured and

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

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

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

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

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

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

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

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

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

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

5.3.6 Profile of the respondents' opinion of lawyers

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

Respondents expressed the following views on lawyers:

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

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

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

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

5.3.7 Profile of the respondents' views on South African courts

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

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

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

Respondents' views on courts' decisions

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

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

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

Respondents' views on courts' decisions relating to discrimination

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

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

5.4 Analysis of the results of the survey

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

5.4.1 An ongoing legitimacy crisis

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

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

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

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

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

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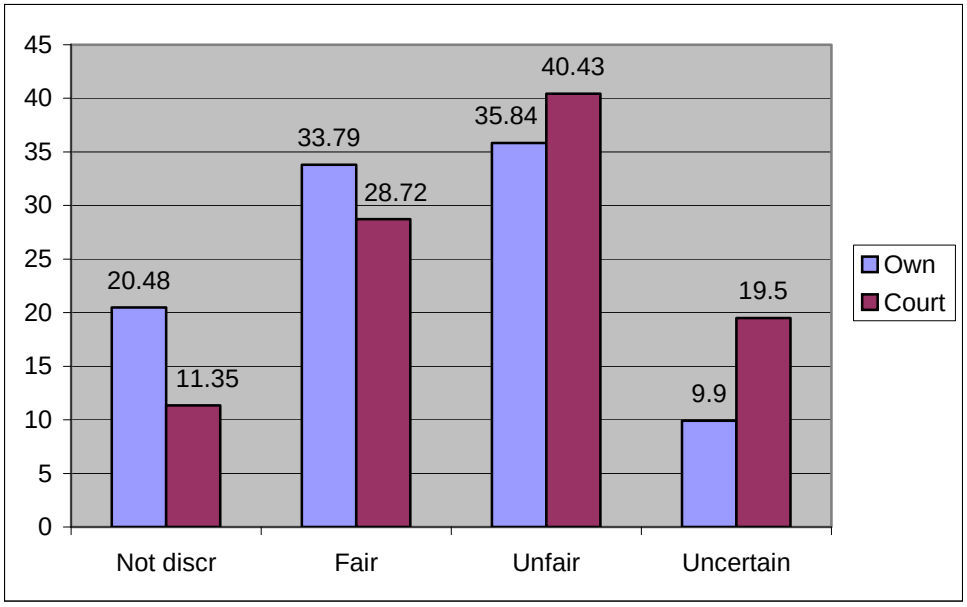
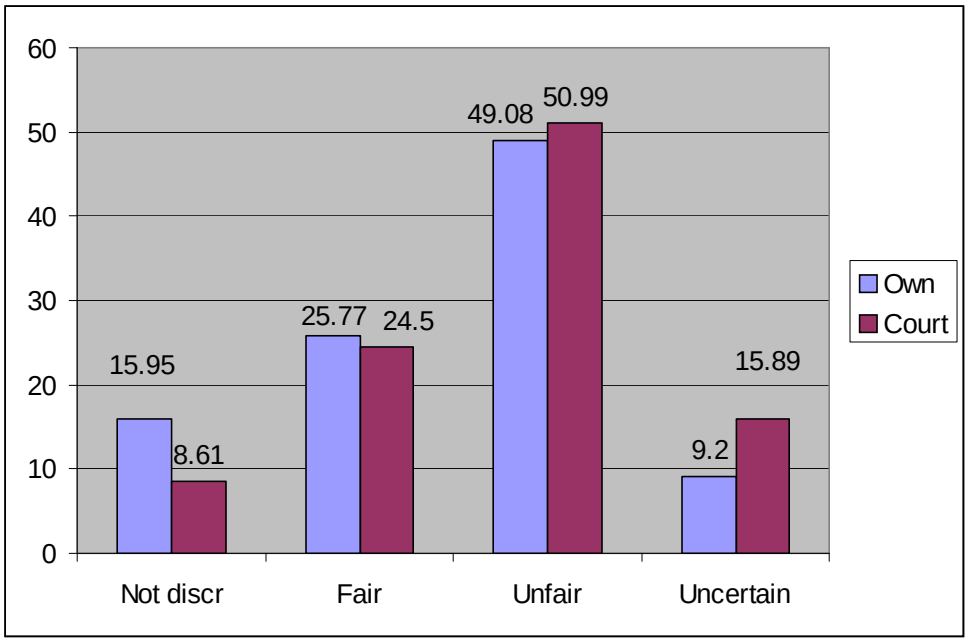
[44] "What do you think a South African court will decide on the following practices: gay couples are not allowed to adopt children; the Department of Justice invites job applications for prosecutors and makes it clear that no white males will be considered; Pretoria municipality charges Faerie Glen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

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

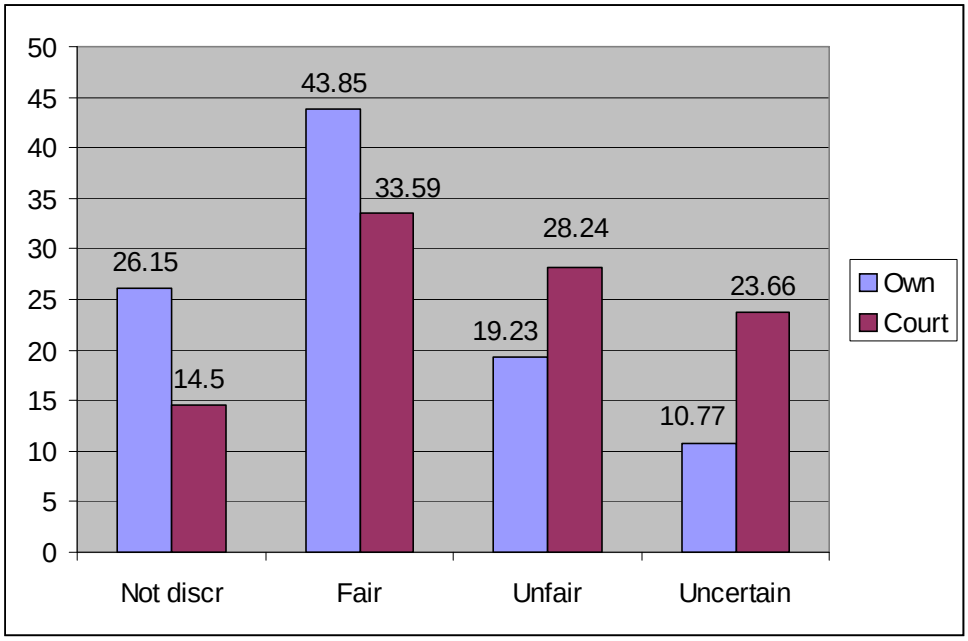
"Gay couples are not allowed to adopt children": The group taken as a whole



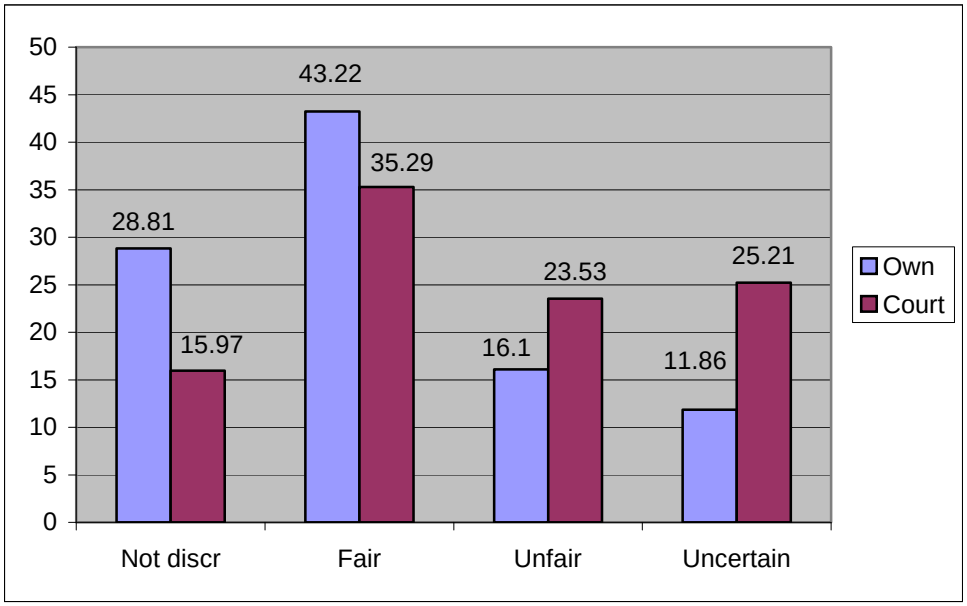
"Gay couples are not allowed to adopt children": The black community



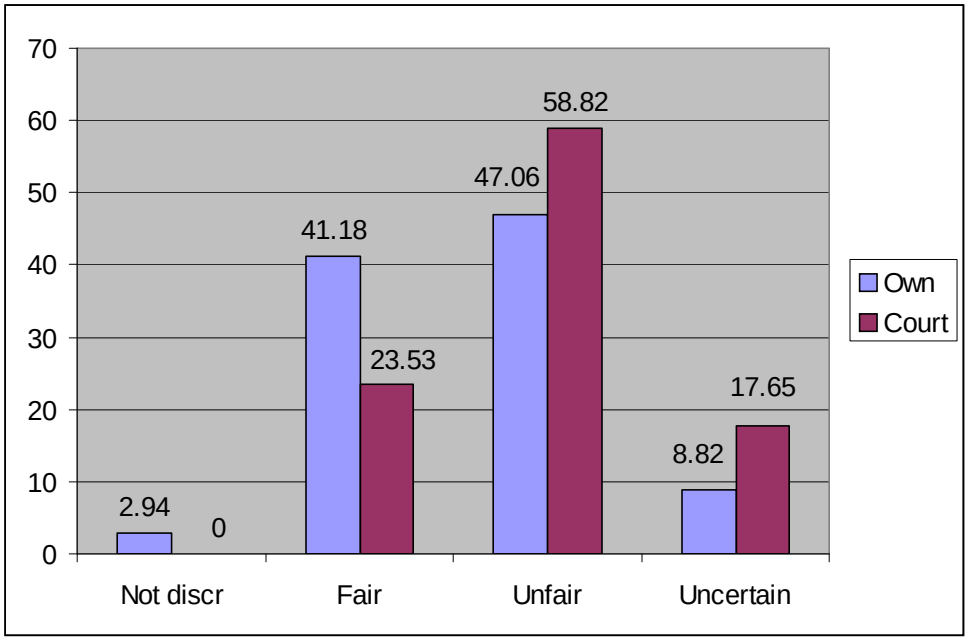
"Gay couples are not allowed to adopt children": The white community



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

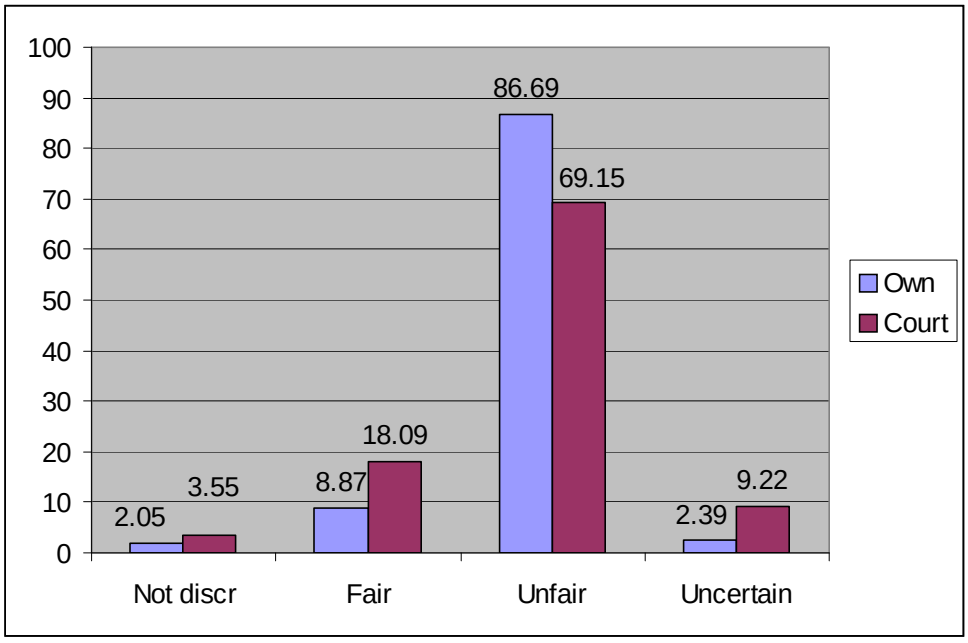


"Gay couples are not allowed to adopt children": The English community

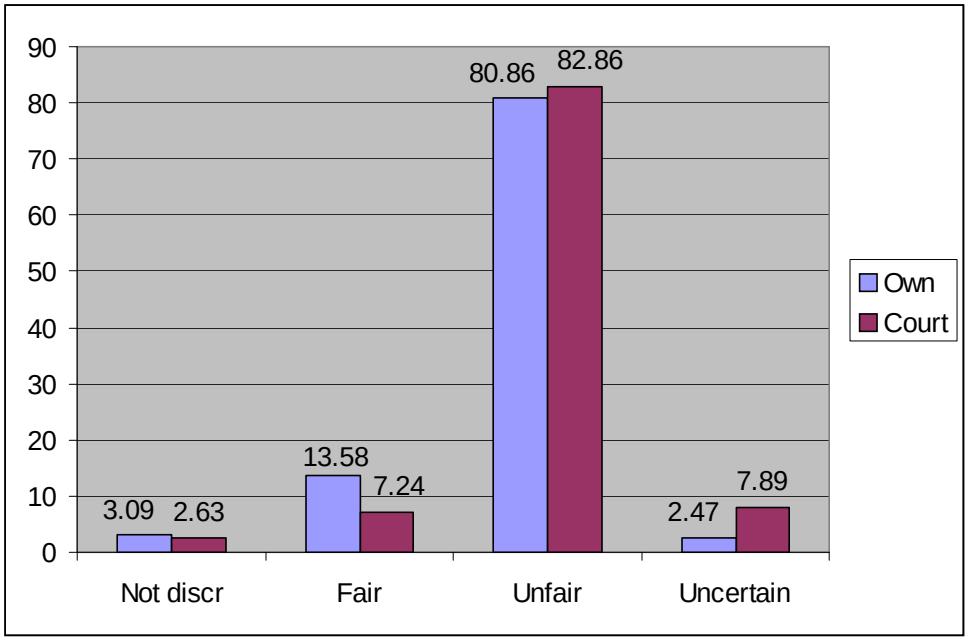


This "disconnect" in the white community is much more striking in the following two examples, that both deal with race discrimination:

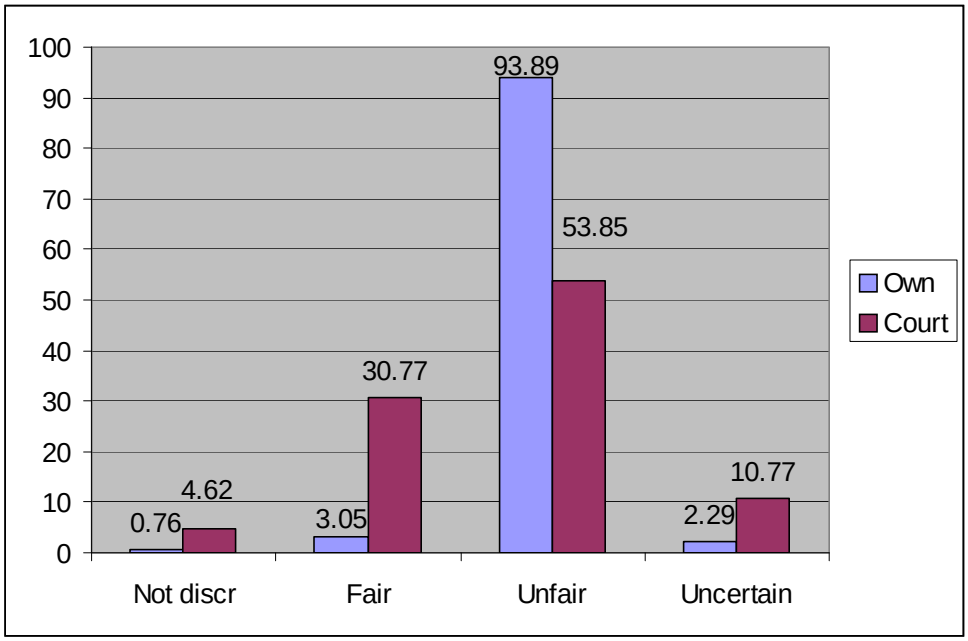
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The group taken as a whole



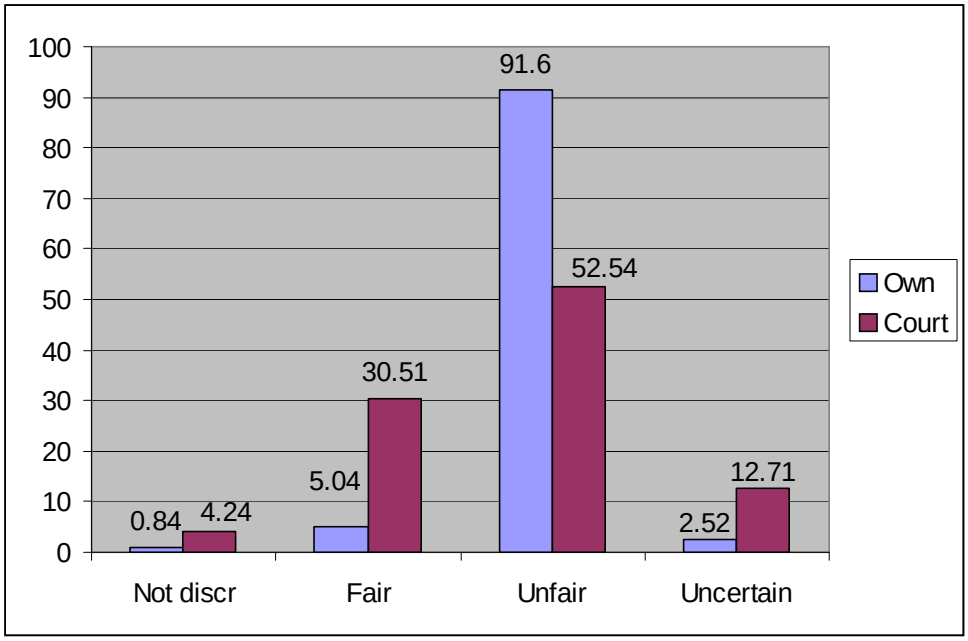
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The black community



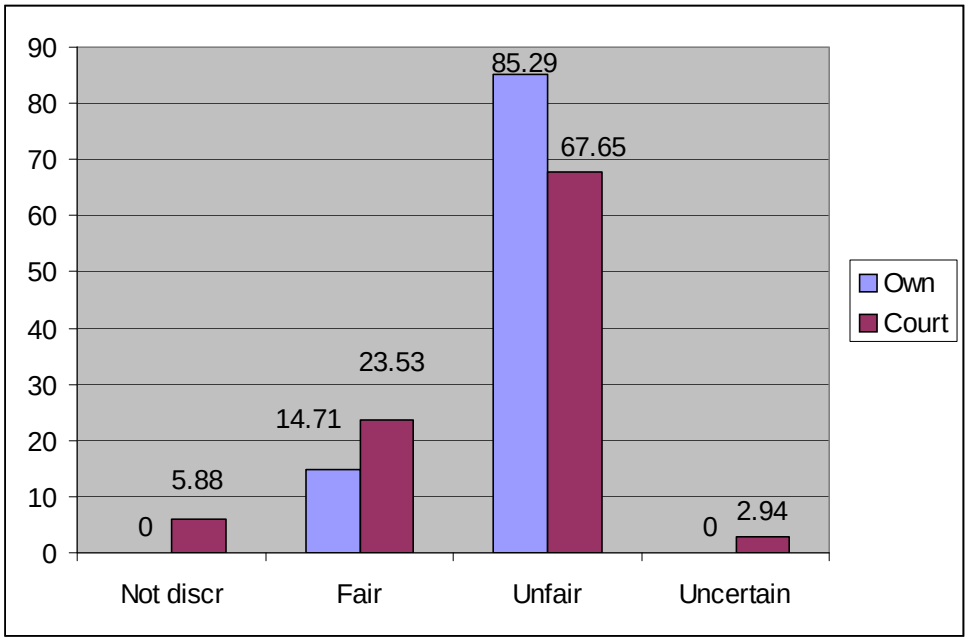
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The white community



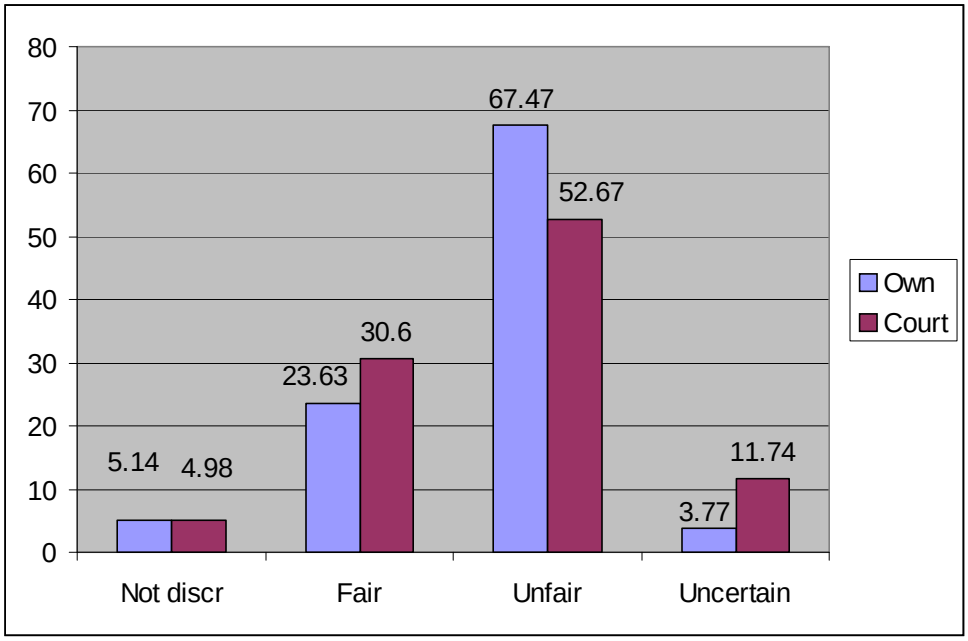
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The Afrikaans community



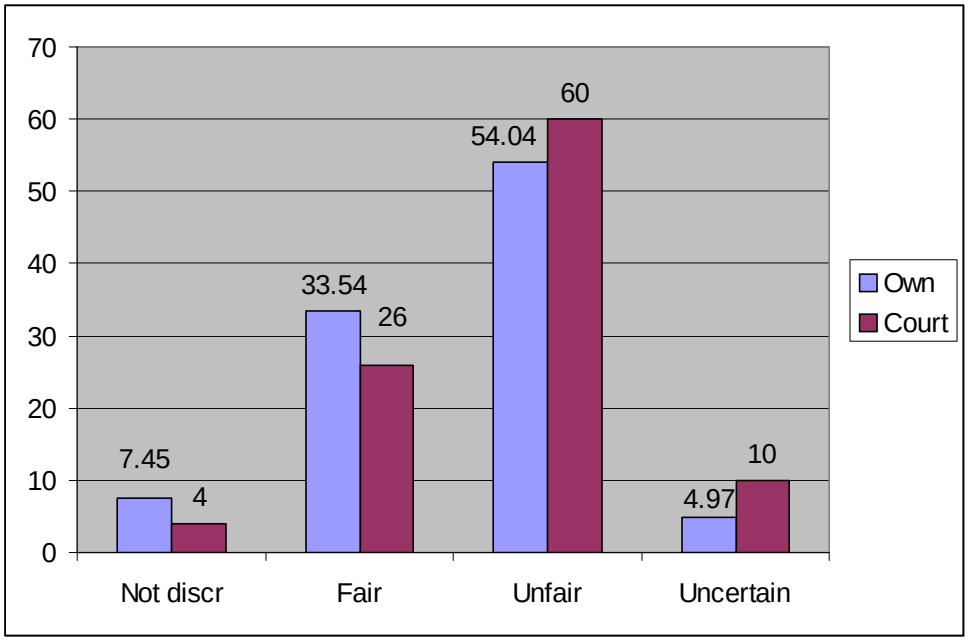
"The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered": The English community



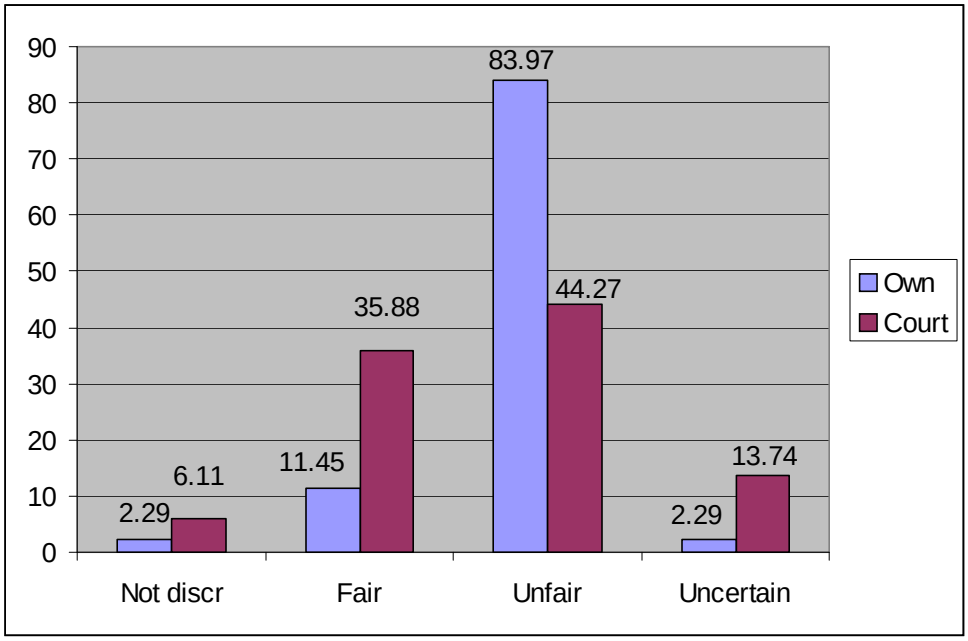
"Differentiated charges": The group taken as a whole



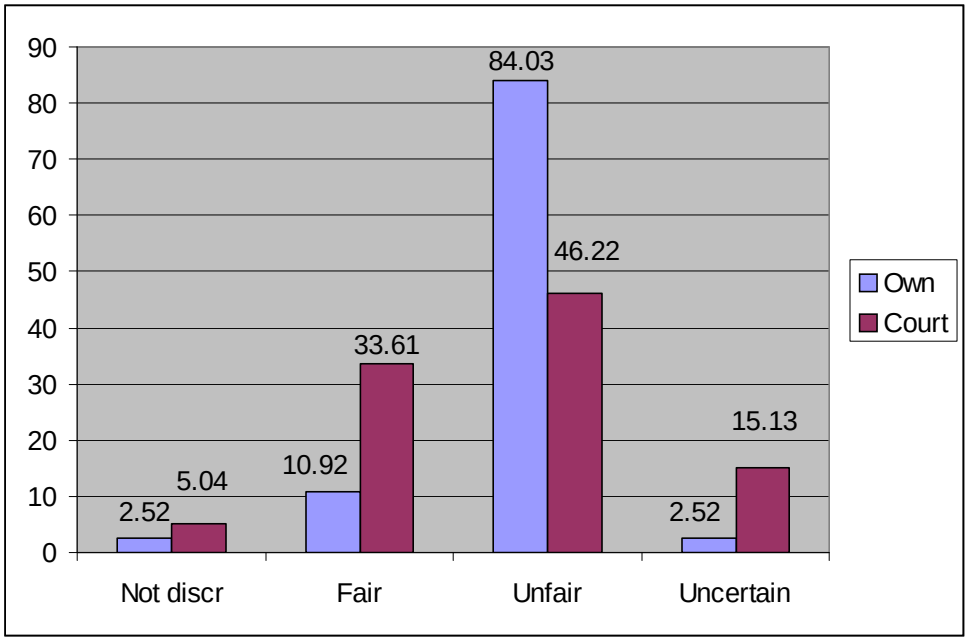
"Differentiated charges": The black community



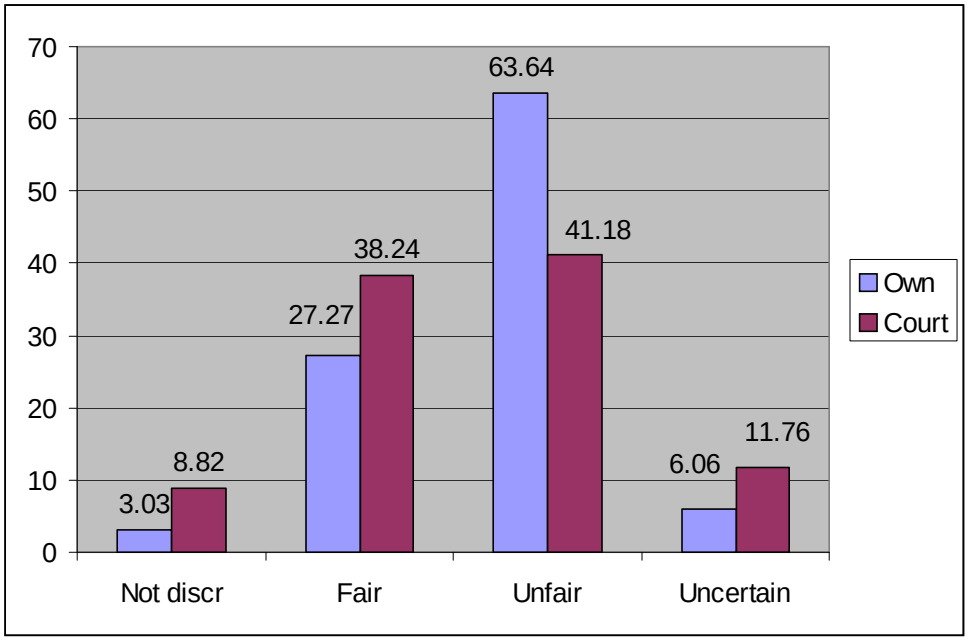
"Differentiated charges": The white community



"Differentiated charges": The Afrikaans community



"Differentiated charges": The English community



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

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

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

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

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

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

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

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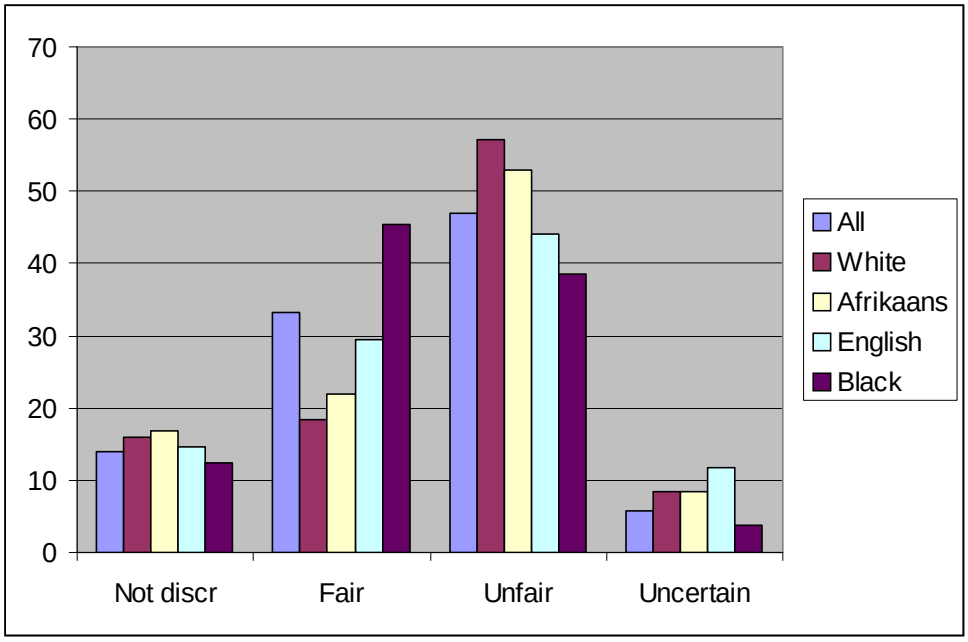
[47] In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings the SAHRC reported that the majority of discrimination complaints that reached their offices related to race and disability discrimination. The Commission reported that "most cases appear to be direct discrimination cases. We are yet to see cases of indirect discrimination being brought in the equality court. The racial discrimination cases also appear to be direct and blatant discrimination cases".

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

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

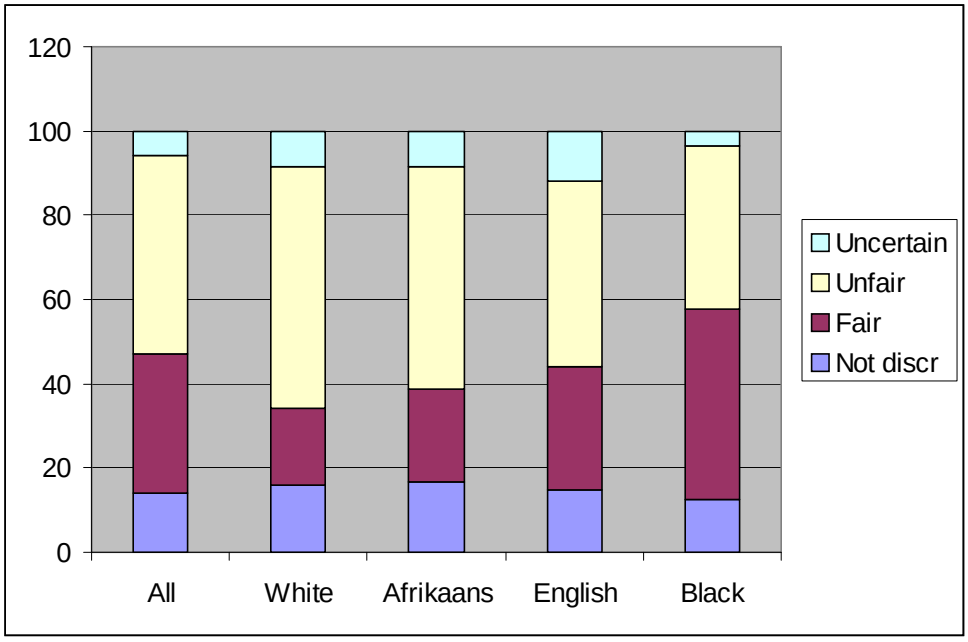
Two of the hypotheticals related to substantive equality in the sense of (a) allowing for corrective measures to be taken, and (b) treating two groups differently, by taking relevant differences into account, while at first glance they appear to be similarly situated. The respondents labeled these examples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

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

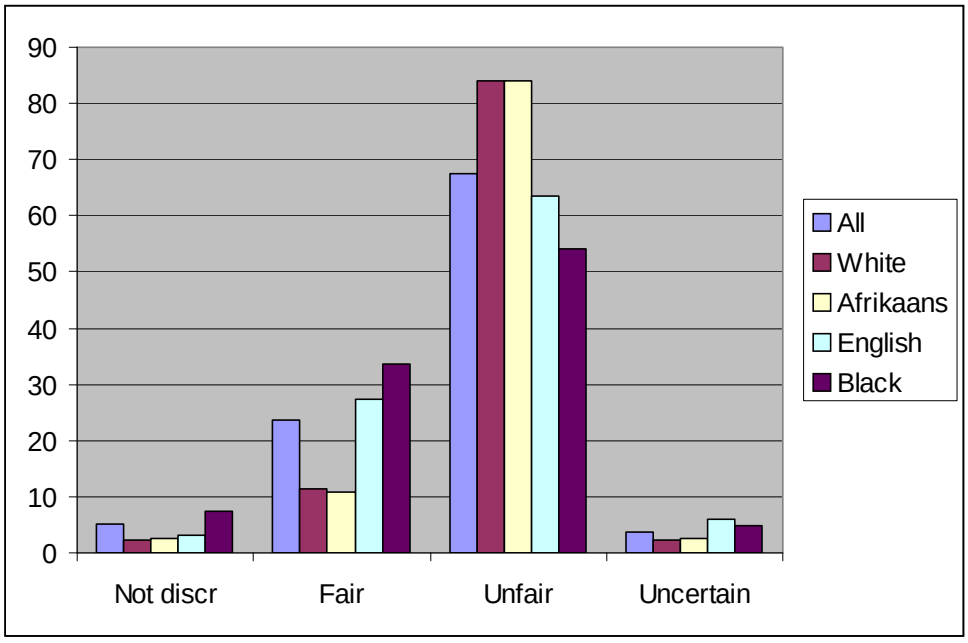


[49] "A pleasure park does not allow children under a certain age to go onto their rides". This is of course age discrimination; yet 51.15% of white respondents labeled it as "not discrimination". 32.53% of the group as a whole labeled this example as "not discrimination". 29.32% of white respondents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

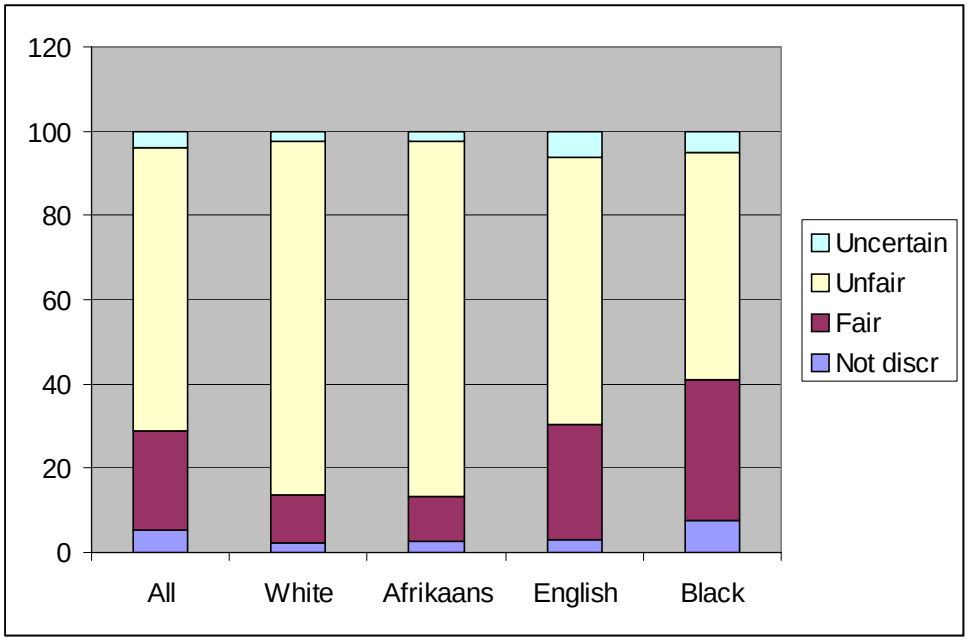
"SARFU declares that in future all Springbok rugby teams must include at least two black players"



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



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



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

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

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

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

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

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

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

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

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

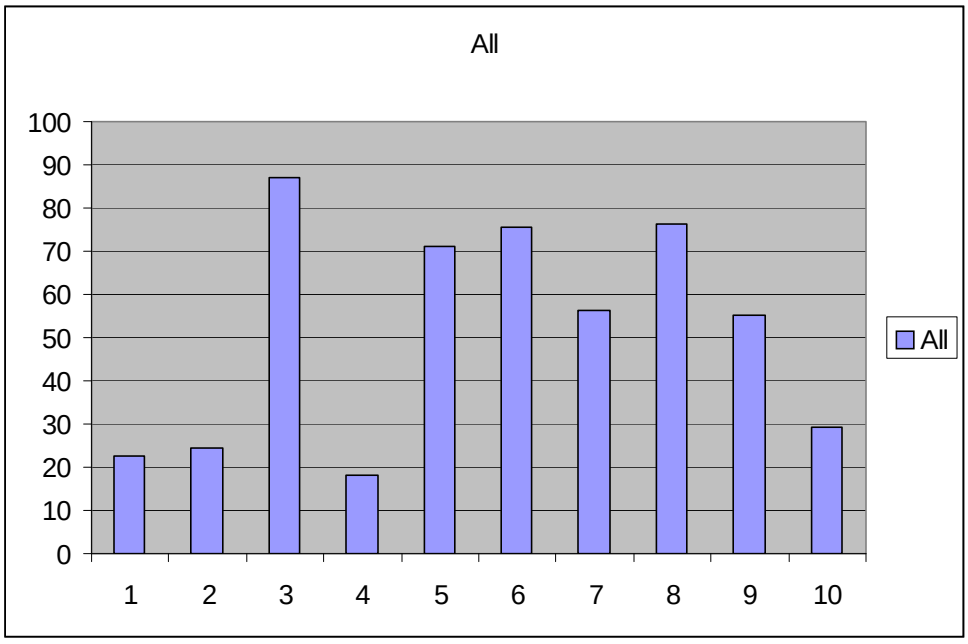
[58] *Hoffmann v SAA* 2001 (1) SA 1 (CC).
[59] S 14(3)(a), (b), (c), (h) and (i) of the Act. To my mind the risk of contracting HIV/AIDS from a dentist is extremely small.
[60] *Du Toit v The Minister for Welfare and Population Development* 2003 (2) SA 198 (CC).
[61] The guide dog would be a "supporting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

Director after she falls pregnant	

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

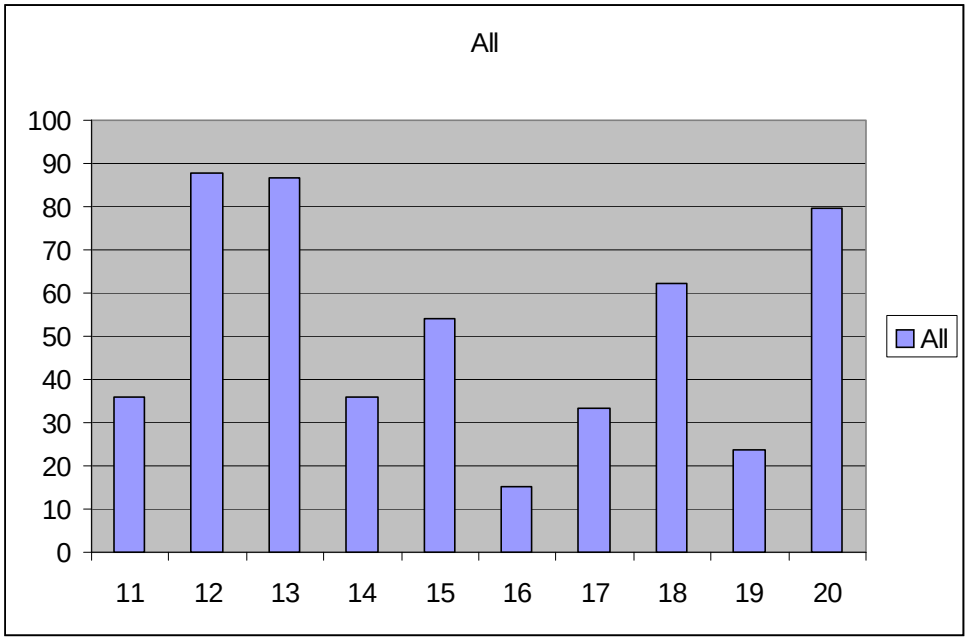
How did the respondents fare in picking the "correct" answer? Below I set out the respective percentages of the group members as a whole and the members of the white and black communities who, to my mind, picked the correct label for each of the 20 hypotheticals:

The group as a whole: Hypothetical 1-10

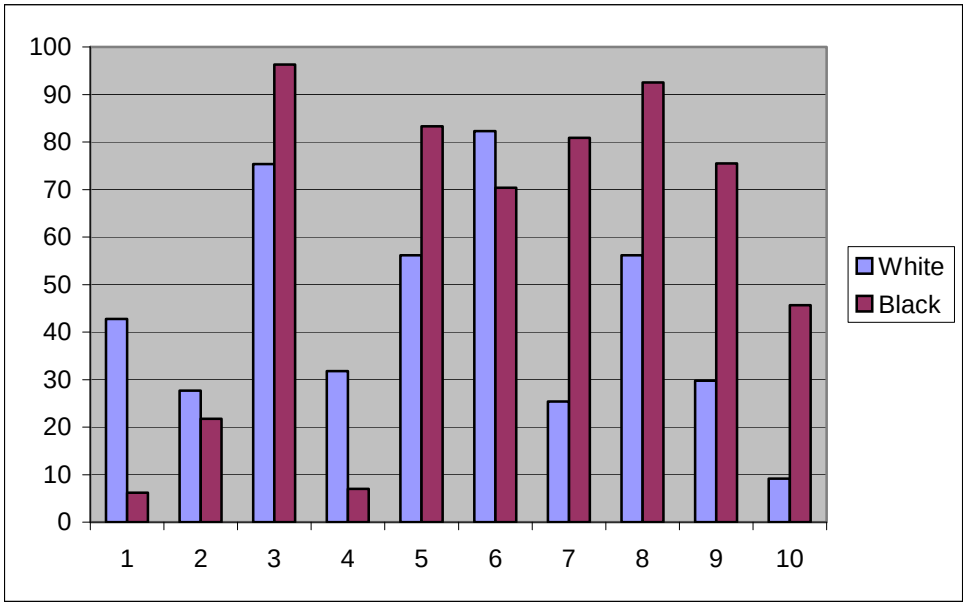


[69] *Whitehead v Woolworths (Pty) Ltd* (1999) 20 *ILJ* 2133 (LC).

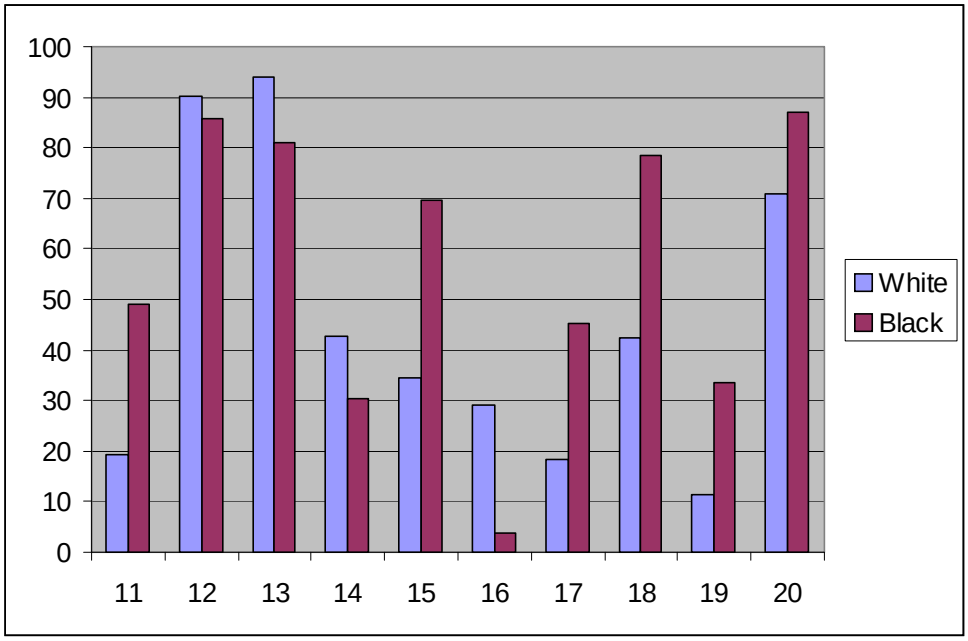
The group as a whole: Hypothetical 11-20



Black and white communities: Hypothetical 1-10



Black and white communities: Hypothetical 11-20



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

5.5 Inadequate public awareness campaigns

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[77] *Sowetan* (2005-03-17) 9; *Burger* (2004-02-26) 19; *Cape Argus* (2004-03-10) 12; *Cape Times* (2003-11-28) 5; *Mail & Guardian* (2006-11-16) 3; *Sunday Times* (2005-03-20) 15. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings the chairperson of the SAHRC reported that victims of discrimination who approached the SAHRC were generally unaware that legal representation was not needed in equality court proceedings.

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

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

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

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

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

5.6 Conclusion

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

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difficulties in carrying out our mandate" (my emphasis). Despite repeated requests, I have not been provided with a more recent "project plan implementation report". In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act - Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). On my interpretation of the documentation made available on the PMG website, for the 2006/2007 financial year no funds were set aside for promotional activities relating to the Act. The Department of Justice reported that R12 million had been allocated to the equality court project for the 2006/2007 financial year, of which R6 million had been allocated for the appointment of permanent clerks and R6 million for "goods and services", which seems to have been earmarked for furniture for the equality courts.

[82] Mere (2005).

[83] Mere (2005) 2.

[84] Mere (2005) 2-3.

[85] Mere (2005) 3-4.

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

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

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

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

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

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

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

[88] Delgado (2001) 89 *Geo LJ* 2295; Handler (1978) 223; Lacey in Hepple and Szyszczak (eds) (1992) 102-103; Verwoerd and Verwoerd (1994) 3 *Agenda* 70. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings, the Chief Director: Promotion of the Rights of Vulnerable Groups argued that the low reporting of equality court complaints "could be explained by the mere fact that people regard discrimination as part of their lives and were thus unaware that institutions such as the equality courts existed to challenge such discrimination".

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

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

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

As referred to in chapters 2 and 3 as well,[93] Parliament, as the collective body of democratically elected representatives, is arguably more legitimate than the judicial system but Parliament's "solution" to the problem of effectively combating discrimination has been to throw the problem back to the courts. It follows logically that if South Africans do not trust the judicial system, the equality courts will be underutilised. The low utilisation of the equality courts tends to suggest that the legal system is still held in low regard by the South African population, but would have to be confirmed by further empirical surveys.[94]

The results of the survey could be read to indicate that many, if not most South Africans have come to accept that explicit race discrimination is unacceptable and to the extent that the Act confirms this view, the Act will be followed by the majority of South Africans. However, many South Africans would probably not consider indirect and subtle discrimination based on race as

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

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

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

[92] See Annexure F.1 below.

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

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

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

As to the third criterion, public awareness campaigns on the Act must be maintained over the long term. The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change. As discussed above, the public awareness campaigns relating to the Act have been inadequate, if not almost entirely absent. The necessary funds have not been made available to the equality legislation project and the equality courts are not properly resourced. Mass media reporting on the equality courts have been sporadic.[96] The Department of Justice has certainly not utilised the mass media in a sustained, vigorous manner. The equality court statistics referred to above also tend to suggest that South Africans are insufficiently aware of the existence of the equality courts and that the public awareness campaigns that have been undertaken,[97] have been ineffective.

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

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

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

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.

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.

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

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[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".

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.

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

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.

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.

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.

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

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

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.

- 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

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 …").

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.)

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

[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.

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.

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.

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

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.

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

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[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

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.

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.

> 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 –

[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.

(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,

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[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).

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.

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.

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

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.

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).

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.

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]

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[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.

Annexure A: Content of initial training seminars – Judges, magistrates, registrars and clerks

I set out below the content of those training programmes that I could source from TMT/TMB meetings and the ELETU office.

A.1 JUDGES AND MAGISTRATES

A.1.1 National seminar 16 – 21 April 2001

16 April

18:00-21:00	Registration, welcome and opening address (Chaskalson P, as he then was.)

17 April

9:00-10:00	Key note address (judicial education) (Judge Kirby, Australia)
10:00-11:00	Panel discussion
11:00-11:15	Tea
11:15-12:30	Group discussions
12:30-13:00	Plenary (reports and discussion)
13:00-14:00	Lunch
14:00-15:00	The Australian framework for equality
15:00-16:00	The Act and equality litigation in the United States: A comparative perspective
16:00-16:15	Tea

18 April

9:00-10:00	Social context and achieving equality in a constitutional democracy
10:00-11:00	Panel discussion on social context (difference and disadvantage, systematic inequality and discrimination, social bias in the judicial process and the challenge of achieving equality regardless of difference)
11:00-11:15	Tea
11:15-12:30	Group discussions
12:30-13:00	Plenary

13:00-14:00	Lunch
14:00-15:00	Part B of bench book: The South African framework for equality (values, substantive equality, unfair discrimination, emerging South African equality jurisprudence and the constitutional basis for the Act)
15:00-16:15	Group discussions
16:15-17:30	Plenary
20:00-21:00	Videos

<u>19 April</u>

9:00-10:00	Key challenges for the judiciary in the implementation of human rights legislation with a focus on the Act, CEDAW and other international obligations
10:00-11:00	Part C(1) and D of the bench book (overview of the Act, equality courts and related enforcement mechanisms)
11:00-11:15	Tea
11:15-12:30	Group discussions
12:30-13:00	Plenary
13:00-14:00	Lunch
14:00-16:00	Part C(2) of the bench book (unfair discrimination, systemic discrimination, indirect discrimination, race, gender and disability discrimination, hate speech, harassment, dissemination of information that unfairly discriminates)
16:00-16:15	Tea
16:15-17:30	Group discussions
17:30-18:00	Plenary
20:00-21:00	Video

<u>20 April</u>

9:00-10:00	Part E(1) of the bench book (listed grounds, highlighted grounds; judicial method)
10:00-11:00	Group discussions
11:00-11:15	Tea
11:15-12:30	Plenary

12:30-13:00	Part E(2) and F(1) of the bench book (unlisted grounds, section 34 grounds; role play)
13:00-14:00	Lunch
14:00-15:00	Group discussions
15:00-16:00	Plenary
16:00-16:15	Tea
16:15-18:00	Panel discussion on judicial method and section 29

21 April

9:00-10:00	Part F(2) of the bench book (values and ethical issues, judicial independence, case management, language, referrals and other practical service delivery issues for equality courts)
10:00-11:00	Group discussions
11:00-11:15	Tea
11:15-11:45	Plenary
12:00-12:50	The way forward
12:50-13:00	Closing remarks

A.1.2 National Seminar 24 – 27 July 2001

24 July

3:00 – 4:30	Facilitators' meeting
5:30 – 6:30	Registration

Dinner and key note address (Minister of Justice)

25 July

8:30 – 9:30	Welcome, introductions, objectives, explanation of programme and resources
9:30 – 10:30	Panel discussion on training methods and strategies
10:30 – 11:00	Tea
11:00 – 13:00	Hypothetical to be discussed in small groups
13:00 – 14:00	Lunch
14:00 – 15:30	Report back from small groups and plenary discussion

15:30 – 16:00 Tea

16:00 – 17:00 General discussion on the hypothetical as a training method

19:00 Dinner at Wandi's (shebeen in Soweto)

<u>26 July</u>

9:00 – 10:15 Video session: "A Woman's Place", raising issues of customary law, culture and equality

10:15 – 11:30 Moot court

11:30 – 11:45 Tea

11:45 – 13:00 Break away groups to discuss judgment

13:00 – 14:00 Lunch

14:00 – 15:45 Team of judges (one member from each breakaway group) gives decision and discussion

15:45 – 16:00 Tea

16:00 – 17:00 General discussion on methodology of mock trial / moot court

19:00 Dinner

<u>27 July</u>

9:00 – 10:30 Presentations on international law, the directions enquiry, alternative fora

10:30 – 11:00 Tea

11:00 – 13:00 The way forward: question and answer session on training; panel discussion

13:00 Lunch and departure

A.1.3 Eastern Cape 27-28 September 2001

<u>27 October</u>

10:00-10:30 Registration and tea

10:30-10:45 Welcome

10:45-11:40 Overview of the Act, structure and key issues covered by the Act

11:40-12:00 Tension between the Act and the Employment Equity Act

12:00-12:45 Questions and answers

12:45-14:00 Lunch

14:00-15:00	Social context and awareness; alternative fora
15:15-15:45	Questions and answers
15:45-16:00	Tea
16:00-17:15	Video on gender equality

28 October

8:30-9:45	Video of equality court moot; distribution of other hypotheticals
9:45-11:00	Group discussion of hypotheticals
11:00-11:15	Tea
11:15-12:15	Report back by groups on hypotheticals
12:15-12:45	Questions and answers
12:45	Closure
13:00	Lunch and departure

A.1.4 Western Cape 15-19 October 2001

15 October (judges)

15:30-16:00	Discussion of the Act
16:00-17:00	The social context of the Act
17:00-17:45	Problem areas of the Act

16 October (judges)

15:30-16:00	Video of a moot court session.[1]

[1] The moot court related to the following hypothetical: "Rights for All is an NGO that assists people in taking up human rights violations. It is based in Pretoria. It has several complaints against Muddle and Fuddle, an insurance company which has its registered office in Pretoria and which conducts business throughout South Africa.
Mr Jock, a white male aged 22 who drives a red BMW and who lives in Sea Point, complains that he is paying a higher insurance premium for comprehensive car insurance than his twin sister, Sharon, who has a white Corolla.
Mr Daniels is a single man of 40 who lives in a luxury flat in Clifton and who has been refused life insurance. In the application form prepared by Muddle and Fuddle, he was asked to fill in a range of "lifestyle questions", including his marital status and whether he lived alone. He was also asked to undergo an HIV test that was negative.
Mrs Khumalo who lives in a shack in Khayalitsha, is a 60 year old ex smoker who wants to buy a private hospitalisation plan. She is granted a policy but her premiums are 25% higher than the average. She is told in a letter from Muddle and Fuddle that her premium has been loaded because of her medical history and also because she is a "black woman of no real economic worth who lives in squalor".
The final complaint relates to a community of black farm workers composed of 40 adults and 126 children. They live in Boplaas, a small Karoo settlement, near Beaufort West, surrounded by several large farms owned by white farmers. Some own small houses and others live in shacks. Each household has one or two cattle and a few chickens. They

also undertake small vegetable gardening around their dwellings. All white farmers in the area have insured themselves, members of their families, their homes, equipment, such as expensive tractors and threshing machines, livestock and agricultural produce. The black community applies for insurance with a similar coverage to that of the white farmers. The insurance company writes back stating that it does not normally provide cover to rural households where the value of the annual income or combined assets is less than R500 000. The company also states that it is not in the business of dealing with people who do not have a history of proven creditworthiness that is certified by financial institutions of good standing.

The policy application of Daniels was refused at Muddle and Fuddle's office in Pretoria. The policy application by the Boplaas community was refused at the offices of Muddle and Fuddle in Beaufort West. The other two policies were entered into at Muddle and Fuddle's Pretoria office.

Rights for All brings a public interest challenge in its own name, claiming that all of the above actions amount to unfair discrimination by Muddle and Fuddle.

Rights for All submits and asks for the following:

i) The higher premium paid by Jock is unfair discrimination on the basis of sex, gender and age. It asks that the premium be lowered to the rate that Jock's sister is paying.

ii) Daniels is unfairly discriminated against on the basis of marital status, sex, gender, age and sexual orientation. Rights for All asks for an order granting him life cover and a public apology. It also asks that Daniels's name be removed from the register of names that the insurance industry maintains of refused applications.

iii) Khumalo is unfairly discriminated against on the basis of age and the unlisted ground of "health status" and furthermore that she has been subjected to "hate speech". Rights for All asks for an order reducing the premium and for damages of R20 000 and an apology consequent upon the alleged "hate speech".

iv) The Boplaas community is unfairly discriminated against on the basis of race and the unlisted ground of socio-economic status. Rights for All asks for an audit of the insurance practices of Muddle and Fuddle and for an order directing Muddle and Fuddle to reconsider the application of the Boplaas community.

v) A general audit of the policies and practices of Muddle and Fuddle, to be reported back to the court within six months, at which stage the court should make whatever order it deems fit.

vi) Further or ancillary relief is requested.

vii) Costs against the respondent.

At the hearing Muddle and Fuddle raises several objections to the claim:

i) It objects to the jurisdiction of the equality court in the Cape Town magistrates' court and asks for the matter to be removed to the High Court of the Cape alternatively of the Transvaal because of the amounts involved and the precedent-setting nature of the case, and the place of the conclusion of the relevant insurance policies, alternatively that the matter be referred to the South African Human Rights Commission alternatively the Gender Equality Commission.

ii) Alternatively it asks for a postponement of the matter as the notice of complaint was served by fax (which Muddle and Fuddle admits receiving) and that the original was not received in the mail. The original is in the court file.

iii) In the event that the preliminary objections being dismissed Muddle and Fuddle asks that all of the claims be dismissed with costs.

Once the preliminary questions are resolved, evidence is led which shows the following:

1. While red cars are more likely to be in accidents that white cars, owners of white Toyotas are more likely to be hijacked. Men are more likely to be involved than women and young people are more likely to have accidents than other age categories (except people over 60). These are statistics that are calculated for the industry as a whole. Evidence shows that the claims profile of the respondent does not support loading of premiums according to age. In addition, Jock has never had an accident and has an advanced drivers' certificate.

2. The insurance industry has a common set of questions for all life insurance applicants. Marital status is one of these. An internal company document, obtained by the process of discovery, shows that Daniels was refused insurance because "he fits the profile" of a gay man, and that the insurance company thus assumes that he might engage in high risk behaviour for HIV. According to the company, white, gay men are a high risk group. They support thus with UK and US statistics. The evidence of the complainants' experts proves that a 40 year old white, gay male is at a lower risk than a 40 year old black, married woman in South Africa.

3. Medical evidence shows that ex-smokers who have stopped for 7 years or more are not a greater risk than non-smokers. Khumalo stopped smoking in 1992. He is asthmatic. The experts disagree on whether previous smoking and asthma are linked. The insurance company has statistics that show that older people are more likely to be hospitalised and argue that late entry into an insurance plan justifies higher premiums.

16:00-18:00 Discussion and consideration of the moot court problem

17 October (magistrates)

15:30-16:00 Discussion of the Act

16:00-17:00 The social context of the Act

17:00-17:45 Strengths and weaknesses in the Act

18 October (magistrates)

15:30-16:00 Moot court video

16:00-18:00 Discussion and consideration of moot court problem

19 October (joint session; judges and magistrates)

15:00 The Act: A frank discussion

A.1.6 Free State 2-3 November and 16-17 November 2001 (two identical sessions)

2/16 November

9:00-9:30 Registration

9:30-9:40 Welcome

9:40-10:15 Introduction to the Act

10:15-10:45 Interpretation and application of the Act

10:45-11:15 Tea

11:15-12:00 Grounds of discrimination, elements of a prima facie discrimination case, presumption of unfairness

12:00-13:00 Disability and HIV/AIDS discrimination

13:00-14:00 Lunch

14:00-14:45 Harassment and hate speech

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4. Evidence shows that the Boplaas community is a stable and self-sustaining one. Members of the community have jobs in town and some work on the surrounding farms as permanent and seasonal workers. In addition, the community produces enough basic food for their own requirements. In addition, expert evidence shows that 90% of whites and 30% of blacks are insured in South Africa. The rate of rejection by applicants of insurance companies in the last six years is the reverse – 30% of whites and 60% of blacks. Expert evidence is also led about the Grameen Bank in Bangladesh which has a 98% repayment of small loans.
Matters for determination: i) Which of the complainants, if any, should succeed and if so, to what extent; ii) What remedies, if any, should be granted".

14:45-15:45	Video: moot court
15:45-16:15	Coffee
16:15-17:00	Discussion of moot court

3/17 November

9:00-10:30	Equality courts, evidence and procedure
10:30-11:00	Tea
11:00-12:00	General discussion and questions
12:00	Closure

A.1.7 KwaZulu Natal 26-27 November 2001

26 November

9:30-10:00	Registration
10:00-10:10	Welcome and introduction
10:10-11:15	Opening address
11:15-11:30	Tea
11:30-12:30	Comparative law and the Constitution
12:30-13:45	Lunch
13:45-15:15	The Act and possible difficulties in its interpretation and application
15:15-15:30	Tea
15:30-16:15	Questions and discussion

27 November

9:00-10:00	Key concepts in the Act
10:00-11:00	Jurisdiction of the equality courts with special reference to labour matters
11:00-11:15	Tea
11:15-13:00	Mock equality court video and discussion groups
13:00-14:15	Lunch
14:15-15:40	Group representatives present judgments on mock trial; presentation of hypothetical cases and group discussion
15:30	Closing remarks; tea; departure

A.1.8 North West 2 December 2001

8:30 Tea

Welcome address

Introduction

An overview of the Act

11:00 Tea

The social context of the Act

Discussion of the Act

13:00 Lunch

13:45 Questions

Video

Closure

A.1.9 Gauteng 3, 5, 7, 10-14 December 2001[2]

9:00 – 9:30 Welcome and introductions

9:30 – 11:00 The Act (especially ss 6-14, 20, 21)

11:00 – 11:15 Tea

11:15 – 11:45 The Act (continued)

11:45-13:00 Social context

13:00 – 14:00 Lunch

14:00 – 16:30 Moot video and discussion (including tea) (facilitated by judges)

A.1.10 Gauteng 4 December 2001 (judges of the Transvaal Provincial Division)[3]

9:00 – 9:30 Tea, welcome and introduction to the symposium

9:30 – 11:15 The Act (especially ss 1(1)(viii), (xiii), (xxii), 6-14, 19(1), 20 & 21)

11:15 – 11:30 Tea

11:30 – 12:15 The Act (continued)

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[2] The training programme for the 8 days followed the same broad sequence. A number of facilitators were used to present an analysis and explanation of the Act and to facilitate the moot court.

[3] The seminar for judges of the Witwatersrand Local Division that took place on 6 December 2001 followed a similar sequence. Judges Zulman and Goldstein introduced the programme while Prof Albertyn again did most of the training.

12:15 – 13:00	Social context
13:00 – 14:00	Lunch
14:00 – 16:30	Moot court exercise (facilitated by a judge)

A.1.11 Northern Province 5-7 December 2001

5 December

16:30 – 18:00	Arrival and registration
18:30 – 20:00	Dinner
	Welcome address
	Keynote address

6 December

9:00 – 9:40	Cultural diversity
9:45 – 10:30	Interpretation and application of the Act
10:30 – 10:45	Tea
10:45 – 11:45	Grounds of discrimination; elements of a prima facie discrimination case; presumption of unfairness
11:50 – 12:50	Disability and HIV/AIDS discrimination
12:50 – 13:50	Lunch
13:50 – 14:50	Harassment and hate speech
14:55 – 15:55	Video of the moot court
16:05 – 17:00	Discussion of the video

7 December

9:00 – 10:15	Equality courts: evidence and procedure
10:15 – 10:30	Tea
10:30 – 11:30	Introduction to the Act
11:35 – 12:35	General discussions and questions
12:40	Closure

A.1.12 Northern Cape 8 December 2001

9:00 – 16:00

Chairperson's remarks and introduction

Opening address

Purpose, background of the Act and related professional development activities

Overview of the Act, scope and application and importance of understanding law in context

Tea

Key provisions in the Act (theories of equality, concept of unfair discrimination, hate speech, harassment and dissemination of information that unfairly discriminates)

Enforcement mechanisms, including enquiry for determination of unfair discrimination, remedies and referrals

Lunch

Video on hypothetical insurance case

Facilitated breakaway groups

Judgments

Way forward and closure

A.1.13 Eastern Cape 14-15 December 2001

<u>14 December</u>

9:00-9:30	Registration
9:30-9:45	Welcome and introduction; purpose of seminar and bench book
9:45-10:15	Background to the Act, its purpose and its importance within the context of our constitutional legislation
10:15-10:45	Questions and discussion
10:45-11:00	Refreshments
11:00-11:40	The role of the equality courts, overview of the Act, jurisdiction in respect of causes of action
11:45-12:25	Other important provisions, complaints procedure, nature of hearing, role of presiding officer
12:25-13:00	Questions and discussion
13:00-14:00	Lunch

14:00-14:30	Concept of equality and its constitutional importance
14:30-15:00	Unfair discrimination, race, gender and disability, hate speech, harassment, dissemination of information that unfairly discriminates
15:00-15:30	Questions and discussion
15:30-15:45	Refreshments
15:45-16:45	Video on moot court session

15 December

9:00-9:45	Group discussions on moot court session – each group to prepare a brief judgment on the basis of the arguments presented to the moot court
9:45-10:05	Report back on judgment prepared by each group
10:05-10:30	Questions and discussion
10:30-10:45	Refreshments
10:45-13:15	Social context in relation to equality and a video relating to social context
13:15-14:00	Lunch
14:00-15:00	Referral to alternative fora, list of unfair practices in certain sectors, regulations, international and comparative foreign law
15:00-15:45	Questions and discussion
15:45-16:00	Closure

A.1.14 Mpumalanga 3-5 February 2002[4]

3 February

16:00-18:00	Registration
18:30	Dinner; Welcome address

4 February

9:00-9:30	Welcome and introduction
9:30-10:15	Introduction to the Act; background and constitutional imperatives
10:15-10:45	Questions and discussions

[4] The seminar of 10-12 February 2002 (for a second group) followed the same broad sequence. Trainers at this seminar included Mr Raulinga, Mr Khunou, the author, Ms Madonsela, Prof Albertyn and Mr Kollapen.

10:45-11:45	Tea
11:45-12:30	Interpretation and application of the Act
12:30-13:00	Questions and discussion
13:00-14:00	Lunch
14:00-15:00	Grounds of discrimination, elements of a prima facie case, presumption of fairness
15:00-15:30	Questions and discussion
15:30-15:45	Tea
15:45-16:30	Harassment, hate speech, disability and HIV/AIDS discrimination
16:30-17:00	Questions and discussion

5 February

9:00-10:30	Social context of the Act; forms of diversity in South African society; vulnerable groups; bias and stereotyping; power relations
10:30-11:00	Questions and discussion
11:00-11:15	Tea
11:15-12:00	The way forward
12:00-12:30	Alternative fora
12:30-13:00	Questions and discussion
13:00-13:30	Thanks and closure
13:30-14:30	Lunch

A.1.15 Bloemfontein 27-28 September 2002

27 September

9:00-9:30	Registration
9:30-9:40	Welcome
9:40-10:15	Introduction to the Act
10:15-10:45	Interpretation and application of the Act; social context; relationship with Employment Equity Act 55 of 1998
10:45-11:15	Tea
11:15-12:00	Grounds of discrimination; elements of a *prima facie* case; presumption of unfairness

12:00-13:00	Disability and HIV/AIDS discrimination
13:00-14:00	Lunch
14:00-14:45	Harassment and hate speech
14:45-15:45	Applying the Act
15:45-16:15	Coffee
16:15-17:00	Discussion of hypothetical cases

28 September

9:00-10:00	Video: moot court
10:00-10:30	Tea
10:30-11:30	Discussion of moot court
11:30-12:00	Outline of contents of bench book
12:00	Closure

A.1.16 North West 1,2 and 3 October 2002[5]

8:00-8:45	Registration and tea
8:45-9:00	Welcome of guests and introduction of speakers and facilitators
9:00-9:55	Introduction to the Act
9:55-10:45	Discussion of the Act; principles; scope and application; constitutional and international legal basis
10:45-11:00	Tea
11:00-12:30	Substantive aspects with emphasis on race, gender, disability, hate speech and harassment; procedural matters
12:30-13:15	Lunch
13:15-14:15	Video
14:15-15:30	Social context education

[5] The workshops were attended by three different groups; the content of the programme for the three days did not change.

A.1.17	Gauteng October/November 2002[6]
8:30-9:00	Registration and tea
9:00-9:05	Welcome and introduction to speakers
9:05-9:30	Background to the Act and judicial training (Langa DCJ as he then was)
9:35-10:05	The Act and the Employment Equity Act
10:05-11:00	The Act
11:00-11:20	Tea
11:20-13:00	The Act (continued)
13:00-14:00	Lunch
14:00-15:00	Moot video and discussion
15:00-15:30	Tea
15:30-16:30	Moot video discussion
16:30	Closure

A.1.18	Mpumalanga 15 November 2002
8:00-8:15	Registration
8:15-8:45	Breakfast
9:00-9:15	Welcome and introduction
9:15-10:30	Background to the Act, its purpose and its importance within the context of our constitutional legislation
10:30-10:45	Questions and discussion
10:45-11:00	Tea
11:00-12:15	The role of equality courts, overview of the Act, jurisdiction in respect of causes of action, practice and procedure
12:15-12:30	Questions and discussion
12:30-13:30	Lunch
13:30-14:30	Social context
14:30-14:45	Questions and discussion
14:45-15:00	Tea

[6] The training seminars ran over a number of days during October/November 2002 and followed the same broad sequence. On some of the days a session on social context was presented by Jody Kollapen, SAHRC.

15:00-16:00	Video
16:00	Closure and thanks

A.1.19 KwaZulu-Natal October/November 2002

8:00-9:00	Arrival, registration and tea
9:00-9:15	Welcoming remarks
9:15-10:00	The Act: Background and constitutional context
10:00-11:00	Introducing the bench book, the framework of the Act, bringing a complaint
11:00-11:30	Tea
11:30-13:00	The adjudication process (listed and unlisted grounds, hate speech, harassment, dissemination of information that unfairly discriminates, remedies)
13:00-13:45	Lunch
13:45-14:15	Introducing the hypothetical
14:15-15:15	Group discussions of the hypothetical
15:15-16:00	Report back, comments and evaluation

A.2 CLERKS

A.2.1 National seminar 11-15 June 2001

11 June

8:00-8:30	Registration
8:30-9:00	Opening and introduction; house-keeping rules
9:00-9:15	Expectations of participants
9:15-10:00	The social context of equality and anti-discrimination legislation; forms of diversity in South African society; vulnerable groups
10:00-10:15	Tea
10:15-12:30	Vulnerable groups in South Africa; bias and stereotyping; diversity and historical disparities; power relations in South African society
12:30-14:00	Lunch
14:00-15:30	Contemporary forms of structural inequality
15:30-15:45	Tea
15:45-16:30	Basic introduction to the Act

12 June

8:30-10:00	International and national context of equality and anti-discrimination legislation; concept of unfair discrimination
10:00-10:15	Tea
10:15-12:30	Enforcement mechanisms
12:30-14:00	Lunch
14:00-15:30	Listed and unlisted grounds of discrimination including the three highlighted grounds of discrimination
15:30-15:45	Tea
15:45-16:30	Continuation of grounds of prohibited discrimination
16:30-17:00	Hypothetical

13 June

8:30-10:00	Practice and procedure; the enforcement mechanisms with the emphasis on the equality courts; The A-Z of the court process and the role of the equality court
10:00-10:15	Tea
10:15-12:30	Practice and procedure (continued)
12:30-14:00	Lunch
14:00-15:30	Practice and procedure (continued)
15:40-15:45	Tea
15:45-16:30	Hypothetical/feedback

14 June

8:30-10:00	Practice and procedure; the role of the clerk at the various stages of the process; case management and referrals
10:00-10:15	Tea
10:15-12:30	Practice and procedure; assessors; legal aid; victim support services
12:30-14:00	Lunch
14:00-15:30	Hypotheticals
15:30-15:45	Tea

15:45-17:00 Skills and ethics

15 June

8:30-10:00 Training management and techniques; adult education methodology and skills

10:00-10:15 Tea

10:15-12:30 Training methodology

12:30-14:00 Lunch

14:00-16:30 Way forward; practicals

A.2.2 KwaZulu-Natal seminar 22-24 October 2001

Monday

8:00-8:30 Registration

8:30-10:30 Part 1, 2 and 6 of the resource manual

10:45-13:00 Vulnerable groups, international law on human rights, referrals, unfair and fair discrimination

14:00-15:30 Listed and unlisted grounds, the schedule to the Act, hate speech, harassment, dissemination of material that unfairly discriminates

Tuesday

8:00-8:30 Revision

8:30-13:00 Practice and procedure

14:00-15:00 Practice and procedure

15:00-16:00 Hypothetical and training methodology

Wednesday

8:00-11:00 Hypothetical and training methodology

A.2.3 National seminar 12-14 November 2001

12 November 2001

8:00-9:00 Registration

9:30-10:30 Welcome

10:30-10:45	Tea
10:45-12:15	Social context
12:15-13:00	Lunch
13:00-15:00	Substance of the Act
15:00-15:15	Tea
15:15-16:15	Background; language; interpretation
16:15-17:15	Practice and procedure and role of the clerks and registrars
17:30	Closure

13 November

9:00-10:30	Practicals
10:30-10:45	Tea
10:45-12:15	Training video including practicals and filling in forms
12:15-13:00	Lunch
13:00-15:00	Training video continued
15:00-15:15	Tea
15:15-16:00	Training video continued
16:00-17:30	Training methodology

14 November

9:00-10:30	Practicals
10:30-10:45	Tea
10:45-12:15	Questions and answers session; the way forward
12:15-13:00	Lunch
13:00	Depart

A.2.4 National Seminar 14-16 October 2002

14 October

10:00-16:00

Introduction

Division of group into working teams

Vision behind the Act

Social context underpinning the Act

Overview of the Act

15 October

Role of clerks/registrars

Case flow management and procedure

Responsive service delivery taking into account diversity

Referrals to alternative forums

16 October

Group presentations on application of principles to hypotheticals/case studies

Review of organisation of decentralised training

Course review/evaluation

Closure

A.3 COMMENTS: GAUTENG QUESTIONNAIRE

- "A detailed discussion of the Act would have come in handy, not just a broad overview ... the video was too long and dealt with too many issues ... very superficial training. More intensive training required to empower judicial officers to be able to deal with the legislation ... Sessions were mostly awareness raising and not very helpful for future use".
- "More time should be devoted to group work – around procedure, listening to arguments, writing judgments ... in the moot court issues should be dealt with separately and should not be shown after lunch ... one day is not enough to prepare magistrates, I still do not know about the procedure to be followed etc ... very annoying and disruptive to the process of paying attention when attempting to find stuff in a manual that is 'deurmekaar' ..."
- "The duration must be extended for detailed discussion and the moot video must be fitted in before lunch ..."
- "All aspects should be structured in follow up seminars in the assessment and evaluation after the implementation of the legislation".

- "Hardly any input was contributed to the difference between the concepts of 'formal equality' and 'substantive equality' which is the central theme of the Act itself. Had I not already understood these concepts I would have been in no better situation after the seminar ... material to be handed to trainees in advance with notification that they are expected to have read the contents ..."
- "Moot video session should be made more exciting especially when it is held after lunch".
- "No in depth discussion could take place or informed inputs made due to the fact that this was foreign territory. It would maybe be better to distribute the material first giving delegates an opportunity to study the material and then attend training sessions thereafter ... due to lack of enough knowledge found the moot video boring".
- "Kindly submit the material prior to the seminar".
- "One day not enough. Could've done it over maybe two days or longer".
- "I suggest that this kind of training should be conducted for two days and all sections of the Act must be dealt with".
- "Magistrates do not have access to the case law and other material needed for the implementation of this Act".
- "Well organised. Only an introduction of a very important fundamental aspect of our law ... must have follow ups but only after Act came into operation".
- "It is fine but can be improved by allowing more time on the discussion groups ... one day session on this important issue is not enough ... [training] should be continued especially to those who would be interested in this type of work".
- "A follow-up after implementation of the Act".
- "It was good but if we were given the Act and the relevant sections to go through before this date it would have made the training session more informative".
- "The viewing of the moot video after lunch caused a few to start slumbering ... training should be done more often".
- "More training sessions as follow ups should be organised".
- "Much more training required for magistrates".
- "Two day seminar might have been more appropriate since we had to rush in the afternoon to deal with the moot video and discussions".
- "Would be more valuable if a group discussion was held in stead of watching the video".

- "More time should be allowed [for training]".
- "Cut out video – have discussion between magistrates".
- "A more in depth course is required and special attention should be given to personal social context sensitizing of the various cultural groups, so that we can be made aware of the problems we face and our own prejudices".
- "We are too new to this field to know what was not covered".
- "It is excellent but follow up training must be done when the regulations become available".
- "Found that there was not sufficient time to cover everything in the Act".
- "The video covered too many aspects and thus too lengthy ... not enough active participation by too many attendants (note I don't use the word 'participants' as too many seemed to attend just for the sake of a free lunch and lent no participation)".
- "Meer tyd moes spandeer word op die toetse wat gebruik word en die praktiese toepassing daarvan. Die toetse is een van die grootste bene waarop die hele wetgewing rus en ek het gevind dat dit te vinnig en vaag behandel was ... dit behoort 'n vereiste te wees dat alle landdroste op die 'Law, Race and Gender' kursus gaan voordat hulle aandui of hulle in sake van hierdie aard wil voorsit".
- "Because of less participation by attendants one tends to lose concentration and it becomes boring; let attendants get involved".
- "In future [the training] should be repeated after the courts are established. Then we will be able to share our experiences during presentations".
- "Training was awareness raising in nature; which is important but not enough ... manual a mess, photocopies in wrong order etc, quite unprofessional ... all too superficial to be really valuable ... okay as far as general awareness raising but not sufficient to empower judicial officers to preside in these cases. Need to be more intensive over longer period of time. More practical. Give material in advance with request that people should have read through it before the time".

Annexure B: Tables – Empirical survey

Table A: The training document

Training Document Survey Greater Pretoria

1. Make sure that you have the following:
   (a) Map of the area where you have to do the survey
   (b) Questionnaires (8 if Laudium/Eersterus; 18-25 other areas)

2. Do a "test run" to make sure that you know how to complete the questionnaire; ask me if you are unsure about something.

3. Method Sinoville/Laudium/Eersterus/Mamelodi/Atteridgeville:
   Work out a route to cover the selected area
   Count the number of houses in that area
   Divide the number of houses by the amount of questionnaires that I provided to you to work out the interval at which you have to select houses
   Example: let's say you count 1000 houses and I gave you 20 questionnaires: 1000/20 = 50 – in other words, your interval is every 50th house
   Work out a route to cover the whole area
   Start at house 1, do the interview. Move on to the next house according to the interval. If the interval is 50, then count until you reach the 51st house and do your next interview at that house

4. Method "white" areas
   Choose a starting point in the selected area
   Work out a route to cover the whole area
   Start at house 1, do the interview. Move on to the next house according to the interval. If the interval is 50, then count until you reach the 51st house and do your next interview at that house

I will give you the interval of your area

5. Interview

Knock at the door; explain that you are part of a doctorate research project and that you need that household's cooperation

Ask them to provide you with a list of residents in that house. ("Resident" = person who sleeps in that house at least 4 nights in a week. A domestic worker that sleeps in the house or in quarters adjoining the house at least 4 nights a week forms part of the household.) Write them down in order oldest to youngest on the questionnaire. Write their age next to their names. Do not include residents younger than 18. Do not include residents that will be away for the week of the survey. (ie, if a resident on leave or away on business for the whole week; do not include him/her.)

Use the random table to select who in that household you have to interview. I will show you how to use the table during our training session. Count from the top of the list (ie from oldest to youngest.) If that person is not around, make an appointment to see him/her at a later stage.

"Next house" rule: if the house where you are supposed to do the interview is locked or no one is home, move to the next house after 3 aborted visits. If the house is empty, move to the next house. If you get absolutely no cooperation and outright hostility, move to the next house. When you have to replace a household in this fashion select the next house by counting from the house where you were supposed to do the interview

Example: you are supposed to do the interviews at house 1, 51 and 101. House 51 is empty. Move to house 52. House 52 is locked for three visits. Move to house 53. Do the interview. The next interview will still be at house 101; not 103.

All the questions need to be completed.

Guide to questionnaire

"Stratum" (question 3)

1 "White" North (Sinoville selected randomly)

2 Eersterus

3	Mamelodi, Mahube Valley, Sun Valley, Morelete View
4	Atteridgeville, Saulsville
5	Laudium
6	"white" West (Westpark selected randomly)
7	"white" East (Constantia Park and Newlands selected randomly)
8	"white" Central, North, East (Moregloed, Meyerspark selected randomly)

Woongebied / Suburb (question 4)

1	Sinoville BJ 122 (7 qst) (Paul) (work out interval) (questionnaire 1-7)
2	Sinoville BK 122 (7 qst) (Paul) (work out interval) (questionnaire 8-14)
3	Sinoville BJ 123 (7 qst) (Paul) (work out interval) (questionnaire 15-21)
4	Eersterus "rich" (4 qst) (Celia) (work out interval) (questionnaire 22-25)
5	Eersterus "average to poor" (4 qst) (Celia) (work out interval) (26-29)
6	Laudium "rich" (4 qst) (Marlinee) (work out interval) (questionnaire 30-33)
7	Laudium "average to poor" (4 qst) (Marlinee) (work out interval) (34-37)
8	Wespark (36 qst) (Lisa, Jonathan, friend) (Interval: every 31st house) (38-73)
9	Meyerspark (23 qst) (Kristel) (every 58th house) (74-96)
10	Moregloed (23 qst) (Werner) (every 40th house) (97-119)
11	Newlands (23 qst) (Jean) (every 37th house) (120-142)
12	Constantia Park (23 qst) (Chris) (every 50th house) (143-165)
13	Mamelodi "rich" (22 qst) (work out interval) (Lulu) (166-187)
14	Mamelodi "average" (22 qst) (work out interval) (Joseph) (188-209)
15	Mamelodi "average" (22 qst) (work out interval) (Tshepo) (210-231)
16	Mamelodi "squatter" (22 qst) (work out interval) (Isaih) (232-253)
17	Atteridgeville "rich" (18 qst) (work out interval) (Tshepo) (254-271)
18	Atteridgeville "average to poor" (18 qst) (work out interval) (Marion) (272-289)
19	Atteridgeville "squatter" (18 qst) (work out interval) (Tshepo to arrange) (290-307)

Afrikaans areas / Eersterus:

I will provide you with Afrikaans questionnaires and a few replacement questionnaires in English should you come across an English household. You will note that the English questionnaires have

not been completed (questions 1-4). If you need to use an English questionnaire, please copy the information from the Afrikaans questionnaire onto the English questionnaire and do not use that Afrikaans questionnaire.

For example: you are supposed to use questionnaire 10. You come across an English household who insists on answering in English. Copy the information from questionnaire 10 onto a blank English questionnaire and destroy Afrikaans questionnaire 10. In the end every questionnaire must have its own unique number; therefore you have to destroy the Afrikaans questionnaire.

Table B: The questionnaire

Doctoral Study: Survey of Greater Pretoria area

Impact of Equality legislation

This questionnaire aims at establishing the awareness and understanding of residents of Greater Pretoria of equality legislation and equality issues.

Your answers to these questions will be treated confidentially. We will ask you to provide a contact telephone number but this is only for control purposes. (You might receive a telephone call during which you will only be asked whether an interview was conducted with you.) You do not have to provide contact details if you do not want to.

Respondent's contact details: _____ (Optional)

1.	Respondent number	V1☐☐☐1-3
2.	Card Number	V2☐☐4-5
3.	Stratum	V3☐☐6-7

4. Suburb V4☐☐8-9

Respondent's Biographical Details

1. Race (Note to interviewer: Do not ask)

Black	1
White	2
Coloured	3
Asian	4
Other: State: _____	5

V5☐10

2. What language do you speak most often at home?

Afrikaans	1
English	2
Nguni language	3
Sotho language	4
Other African language	5
Indian language	6
European language	7
Other: State: _____	8

V6☐11

3. Gender

Male	1
Female	2

V7☐12

4. State your age in years: ____ V8☐☐13-14

5. Educational level passed

None	1
Primary School	2
Std 6-9 / Grade 8-11	3
Std 10 / Grade 12	4
B degree	5
Honours degree	6
Master's degree	7
Other: State _____	8

V9☐15

6. What is your current occupation?_____ V10☐☐16-17

7. Do you read a daily newspaper regularly, that is, at least four out of six issues a week?

Yes	1
No	2

V11☐18

8. Estimate how many hours on an average working day, that is, from Monday to Friday, you spend watching TV?

Less than 1 hour	1
1-2 hours	2
2-3 hours	3
3-4 hours	4
More than 4 hours	5
Never watch TV	6
Don't have a TV	7

V12☐19

9. Estimate how many hours on an average working day, that is, from Monday to Friday, you spend listening to radio?

Less than 1 hour	1
1-2 hours	2
2-3 hours	3
3-4 hours	4
More than 4 hours	5
Never listen to radio	6
Don't have a radio	7

V13☐20

10.1 How would you describe the following practices?

Practice	Not Discrimination	Fair Discrimination	Unfair Discrimination	Uncertain			
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	1	2	3	4	V14		21
Males pay a higher premium for motor vehicle	1	2	3	4	V15		22

insurance than females because males are involved in more collisions							
A restaurant refuses to serve black people	1	2	3	4	V16		23
Someone with a garden flat refuses to rent that flat to Muslims	1	2	3	4	V17		24
Banks refuse to grant loans to people wanting to buy property in certain areas	1	2	3	4	V18		25
The municipality requires a matriculation certificate for its garbage removal employees	1	2	3	4	V19		26
Insurance companies refuse to issue a life insurance policy to a HIV+ person or a person who has AIDS	1	2	3	4	V20		27
A nightclub only allows people of Asian origin	1	2	3	4	V21		28
The SAA refuses to employ cabin stewards who are HIV+ or who has AIDS	1	2	3	4	V22		29
The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	1	2	3	4	V23		30
Gay couples are not allowed to adopt children	1	2	3	4	V24		31
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	1	2	3	4	V25		32
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	1	2	3	4	V26		33
A pleasure park does not allow children under a certain age to go onto their rides	1	2	3	4	V27		34
A husband states in his will "My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my	1	2	3	4	V28		35

belongings to the Dutch Reformed Church"							
Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	1	2	3	4	V29		36
SARFU declares that in future all Springbok rugby test teams must include at least two black players	1	2	3	4	V30		37
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	1	2	3	4	V31		38
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	1	2	3	4	V32		39
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	1	2	3	4	V33		40

10.2 What do you think a South African court will decide on the following practices?

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain			
Gay couples are not allowed to adopt children	1	2	3	4	V34		41
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	1	2	3	4	V35		42
Pretoria municipality charges Faerie Glen according	1	2	3	4	V36		43

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

11. Are you aware of legislation that outlaws unfair discrimination?

Yes	1
No	2

V37 ☐ 44

12. Indicate whether you have heard of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 in one or more of the following:

Source	Yes	No			
TV	1	2	V38		45
Radio	1	2	V39		46
Newspapers	1	2	V40		47
Friends or family	1	2	V41		48
Other: state: _____	1	2	V42		49

13.1 Do you think that SA courts grant fair decisions?

Always	1
Sometimes	2
Usually	3
Never	4
Uncertain	5

V43 ☐ 50

13.2 Do you think that SA courts grant fair decisions in cases dealing with discrimination?

Always	1
Sometimes	2
Usually	3
Never	4
Uncertain	5

V44☐51

14. Describe your attitude regarding the general political situation in South Africa at present. Are you

Very positive about SA	1
Positive about SA	2
Neutral about SA	3
Negative about SA	4
Very negative about SA	5

V45☐52

15. Do you think that South Africans from different races and cultures have become more tolerant towards each other in the last three years?

More tolerant	1
Remained the same	2
Less tolerant	3
Uncertain	4

V46☐53

16.1 How many times in the last six months have you experienced unfair discrimination against you on one or more of the following grounds?

Ground	Never	Once	Twice	Three times	Four times	Five or more			
Race/Colour	0	1	2	3	4	5	V47		54
Gender	0	1	2	3	4	5	V48		55
Age	0	1	2	3	4	5	V49		56
Language/Culture	0	1	2	3	4	5	V50		57

16.2 If you indicated that you have suffered unfair discrimination in 16.1, describe the most serious incident of unfair discrimination / the incident that upset you most.

_____

_____

_____

V51☐☐58-59

16.3 If you have suffered unfair discrimination, did you approach any of the institutions listed below:

Institution	Yes	No			
The SA police service	1	2	V52		60
A Court	1	2	V53		61
The Human Rights Commission	1	2	V54		62
A Law Clinic or attorney	1	2	V55		63

17.1 Is it a crime to call someone a “kaffir”?

Yes	1
No	2
Uncertain	3

V56 ☐ 64

17.2 Should it be a crime to call someone a “kaffir”?

Yes	1
No	2
Uncertain	3

V57 ☐ 65

17.3 Is it a crime to shout something like “kill the farmer, kill the boer”?

Yes	1
No	2
Uncertain	3

V58 ☐ 66

17.4 Should it be a crime to shout something like “kill the farmer, kill the boer”?

Yes	1
No	2
Uncertain	3

V59 ☐ 67

18. If racism played a part in a murder or robbery or hijacking, what kind of sentence should a court impose?

Higher sentence	1
Lower sentence	2
Shouldn't make a difference	3

V60☐68

19.1 How many times have you appeared in a South African court as a witness and/or as a party to a lawsuit? _____

V61☐☐69-70

19.2 If you have ever been to a South African court, describe your impression of South African courts:

_____

_____

_____

V62☐☐71-72

20.1 How many times in your life have you consulted with a legal practitioner regarding a personal problem? ____

V63☐☐73-74

20.2 What is your impression of lawyers?

_____

_____

_____

V64☐☐75-76

21. Do you agree with the following statement:

"The government is misusing the term "racist". Whenever they don't like what someone is saying about their policies, they describe such a person as a racist".

Yes	1
No	2
Uncertain	3

V65☐77

22. How effectively has the government been able to implement its anti-discrimination laws and policies?

Not effectively	1
Effectively	2
Very effectively	3
Uncertain	4

V66☐78

Table C: Codes to open-ended options in Question 6

1 Unemployed

2 Pensioner

3	Student / scholar
4	Educational
5	Legal
6	Art
7	Business / Sales / Consultant / Entrepreneur
8	Management
9	Medical
10	Banking / Financial
11	Police / Security
12	Clerical / Secretarial
13	Manual or unskilled labour
14	Housewife
15	Other

Table D: Codes to open-ended options in Question 16.2

1	Work place (affirmative action; interview; retrenchments etc)
2	Social interaction (white-black; black-black; male-female)
3	Police
4	Educational institutions
5	Medical care institutions
6	Resorts, restaurants, shopping complexes

Table E: Codes to open-ended options in Question 19.2

1	Positive view
2	Negative view
3	Ambivalent view

Table F: Codes to open-ended options in Question 20.2

1	Positive view
2	Ambivalent view
3	Expensive / rich / making money out of clients' problems

4	Dishonest / liars / without principles
5	Favours criminals
6	Busy / Under pressure
7	Inaccessible
8	Selfish / self-centered
9	"An occupation"
10	Other negative opinion

Table G: Profile of respondents' attitude towards the general political situation in South Africa (question 14)

	Whole group	White	Black, coloured and Asian	Afrikaans	English and other European languages	African languages	Female	Male
"very positive"	23 (7.82%)	5 (3.82%)	18 (11.04%)	5 (4.2%)	1 (2.94%)	17 (12.32%)	15 (10.07%)	8 (5.63 %)
"positive"	54 (18.37%)	22 (16.79%)	32 (19.63%)	20 (16.81%)	4 (11.76%)	29 (21.01%)	27 (18.12%)	26 (18.31 %)
"neutral"	98 (33.33%)	37 (28.64%)	61 (37.42%)	33 (27.73%)	11 (32.35%)	53 (38.41%)	41 (27.52%)	56 (39.44 %)
"negative"	86 (29.25%)	47 (35.88%)	39 (23.93%)	41 (34.45%)	13 (38.24%)	31 (22.46%)	47 (31.54%)	39 (27.46 %)
"very negative"	33 (11.22%)	20 (15.27%)	13 (7.98%)	20 (16.81%)	5 (14.71%)	8 (5.8%)	19 (12.75%)	13 (9.15 %)

Table H: Profile of respondents' views on racial tolerance (Question 15)

	Whole group	White	Black, coloured, Asian	Afrikaans	English; other European	African languages

					languages	
"more tolerant"	107 (36.77%)	44 (34.11%)	63 (38.89%)	39 (33.33%)	13 (38.24%)	55 (40.15%)
"remained the same"	79 (27.15%)	34 (26.36%)	45 (27.78%)	37 (31.62%)	6 (17.65%)	35 (25.55%)
"less tolerant"	86 (29.55%)	42 (32.56%)	44 (27.16%)	33 (28.21%)	14 (41.18%)	38 (27.74%)
"uncertain"	19 (6.53%)	9 (6.98%)	10 (6.17%)	8 (6.84%)	1 (2.94%)	9 (6.57%)

Table I: Profile of respondents' views on the use/misuse of the term "racist" (Question 21)

	Whole group	White	Black, coloured and Asian	Afrikaans	English; other European languages	African languages
Misuses the term	197 (67.24%)	120 (91.6%)	77 (47.53%)	107 (89.92%)	27 (79.41%)	60 (43.8%)
Does not misuse the term	71 (24.23%)	2 (1.53%)	69 (42.59%)	3 (2.52%)	4 (11.75%)	64 (46.72%)
Uncertain	25 (8.53%)	9 (6.87%)	16 (9.88%)	9 (7.56%)	3 (8.82%)	13 (9.49%)

Table J: Profile of respondents' views on the implementation of anti-discrimination laws and policies (Question 22)

	Whole group	White	Black, coloured, Asian	Afrikaans	English Other European languages	African languages
"not effectively"	147 (50%)	72 (54.96%)	75 (46.01%)	62 (52.1%)	19 (55.88%)	65 (47.1%)
"effectively"	79 (26.87%)	21 (16.03%)	58 (35.58%)	18 (15.13%)	11 (32.35%)	49 (35.51%)
"very effectively"	12 (4.08%)	4 (3.05%)	8 (4.91%)	4 (3.36%)	2 (5.88%)	6 (4.35%)
"uncertain"	56 (19.05%)	34 (25.95%)	22 (13.5%)	35 (29.41%)	2 (5.88%)	18 (13.04%)

Table K: Awareness of the Act specifically

	Whole group	White	Black, coloured and Asian
TV	106 (39.11%)	37 (31.36%)	69 (45.1%)
Radio	101 (37.41%)	26 (22.22%)	75 (49.02%)
Newspapers	99 (36.4%)	32 (26.67%)	67 (44.08%)
Friends or family	66 (25%)	23 (20%)	43 (28.86%)
Other	8 (4.79%)	5 (6.02)	3 (3.57)

Table L: Respondents' response to question 10.1

Practice	Not discrimination (%)	Fair discrimination (%)	Unfair discrimination (%)	Uncertain (%)
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	22.53	35.84	37.2	4.44
Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	6.19	24.4	62.89	6.53
A restaurant refuses to serve black people	4.1	5.12	87.03	3.75
Someone with a garden flat refuses to rent that flat to Muslims	11.15	18.12	64.81	5.92
Banks refuse to grant loans to people wanting to buy property in certain areas	7.19	15.07	71.23	6.51
The municipality requires a matriculation certificate for its garbage removal employees	7.53	12.33	75.68	4.45
Insurance companies refuse to issue a life insurance policy to someone who is HIV+ or has AIDS	16.44	21.92	56.16	5.48
A nightclub only allows people of Asian origin	8.97	7.24	76.21	7.59
The SAA refuses to employ cabin stewards who are HIV+ or who has AIDS	13.27	25.85	55.1	5.78
The South African Medical and Dental Council refuses to allow	21.65	41.92	29.21	7.22

dentists who are HIV+ or who has AIDS to operate on patients				
Gay couples are not allowed to adopt children	20.48	33.79	35.84	9.9
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	2.05	6.14	87.71	4.1
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	2.05	8.87	86.69	2.39
A pleasure park does not allow children under a certain age to go onto their rides	32.53	35.96	27.4	4.11
A husband states in his will "My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church"	13.75	24.05	53.95	8.25
Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	15.36	15.02	66.21	3.41
SARFU declares that in future all Springbok rugby test teams must include at least two black players	14.04	33.22	46.92	5.82
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	10.73	18.69	62.28	8.3
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	5.14	23.63	67.47	3.77
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	3.42	13.36	79.79	3.42

Table M: White respondents' response to question 10.1

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain (%)

	(%)	(%)	(%)	
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	42.75	46.56	6.11	4.58
Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	8.46	27.69	53.85	10
A restaurant refuses to serve black people	7.69	10	75.38	6.92
Someone with a garden flat refuses to rent that flat to Muslims	20.93	31.78	37.21	10.08
Banks refuse to grant loans to people wanting to buy property in certain areas	11.54	24.62	56.15	7.69
The municipality requires a matriculation certificate for its garbage removal employees	6.92	4.62	82.31	6.15
Insurance companies refuse to issue a life insurance policy to a HIV+ person or a person who has AIDS	29.23	38.46	25.38	6.92
A nightclub only allows people of Asian origin	17.69	13.08	56.15	13.08
The SAA refuses to employ cabin stewards who are HIV+ or who has AIDS	23.66	38.93	29.77	7.63
The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	25.19	58.02	9.16	7.63
Gay couples are not allowed to adopt children	26.15	43.85	19.23	10.77
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	0.76	6.87	90.08	2.29
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	0.76	3.05	93.89	2.29
A pleasure park does not allow children under a certain age to go onto their rides	51.15	42.75	3.05	3.05
A husband states in his will “My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church”	22.31	36.15	34.62	6.92
Mary and John invite all their work colleagues to their wedding	30.53	29.01	35.11	5.34

except the black cleaners and tea ladies				
SARFU declares that in future all Springbok rugby test teams must include at least two black players	16.03	18.32	57.25	8.4
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	16.15	33.08	42.31	8.46
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	2.29	11.45	83.97	2.29
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	4.62	18.46	70.77	6.15

Table N: Black, coloured and Asian respondents' response to question 10.1

Practice	Not discrimination (%)	Fair discrimination (%)	Unfair discrimination (%)	Uncertain (%)
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	6.17	27.16	62.35	4.32
Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	4.35	21.74	70.19	3.73
A restaurant refuses to serve black people	1.23	1.23	96.32	1.23
Someone with a garden flat refuses to rent that flat to Muslims	3.18	7.01	87.26	2.55
Banks refuse to grant loans to people wanting to buy property in certain areas	3.7	7.41	83.33	5.56
The municipality requires a matriculation certificate for its garbage removal employees	8.02	18.52	70.37	3.09
Insurance companies refuse to issue a life insurance policy to a HIV+ person or a person who has AIDS	6.17	8.64	80.86	4.32
A nightclub only allows people of Asian origin	1.87	2.5	92.5	3.13
The SAA refuses to employ cabin stewards who are HIV+ or who	4.91	15.34	75.46	4.29

has AIDS				
The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	18.75	28.75	45.63	6.88
Gay couples are not allowed to adopt children	15.95	25.77	49.08	9.2
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	3.09	5.56	85.8	5.56
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	3.09	13.58	80.86	2.47
A pleasure park does not allow children under a certain age to go onto their rides	17.39	30.43	47.2	4.97
A husband states in his will "My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church"	6.83	14.29	69.57	9.32
Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	3.09	3.7	91.36	1.85
SARFU declares that in future all Springbok rugby test teams must include at least two black players	12.42	45.34	38.51	3.73
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	6.29	6.92	78.62	8.18
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	7.45	33.54	54.04	4.97
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	2.47	9.26	87.04	1.23

Table O: Afrikaans-speaking respondents' response to question 10.1

Practice	Not discrimi	Fair discrimi	Unfair discrimi	Uncertain (%)

	nation (%)	nation (%)	nation (%)	
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	47.06	43.7	5.04	4.2
Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	7.63	26.27	55.93	10.17
A restaurant refuses to serve black people	8.47	11.02	73.73	6.78
Someone with a garden flat refuses to rent that flat to Muslims	23.93	29.91	36.75	9.4
Banks refuse to grant loans to people wanting to buy property in certain areas	12.71	22.88	58.47	5.93
The municipality requires a matriculation certificate for its garbage removal employees	6.78	5.93	81.36	5.93
Insurance companies refuse to issue a life insurance policy to a HIV+ person or a person who has AIDS	33.05	32.3	27.12	7.63
A nightclub only allows people of Asian origin	18.64	12.71	55.93	12.71
The SAA refuses to employ cabin stewards who are HIV+ or who has AIDS	25.21	38.66	30.25	5.88
The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	28.57	56.3	9.24	5.88
Gay couples are not allowed to adopt children	28.81	43.22	16.1	11.86
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	0.84	6.72	90.76	1.68
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	0.84	5.04	91.6	2.52
A pleasure park does not allow children under a certain age to go onto their rides	51.26	42.86	2.52	3.36
A husband states in his will “My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church”	22.88	33.9	35.59	7.63

Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	31.93	25.21	36.97	5.88
SARFU declares that in future all Springbok rugby test teams must include at least two black players	16.81	21.85	52.94	8.4
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	17.8	28.81	44.07	9.32
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	2.52	10.92	84.03	2.52
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	5.08	16.95	72.88	5.08

Table P: English-speaking (and other European languages) respondents' response to question 10.1

Practice	Not discrimination (%)	Fair discrimination (%)	Unfair discrimination (%)	Uncertain (%)
Insurance companies insist on an HIV/AIDS test prior to issuing a life insurance policy	17.65	47.06	32.35	2.94
Males pay a higher premium for motor vehicle insurance than females because males are involved in more collisions	17.65	35.29	41.18	5.88
A restaurant refuses to serve black people	0.00	2.94	97.06	0.00
Someone with a garden flat refuses to rent that flat to Muslims	5.88	26.47	64.71	2.94
Banks refuse to grant loans to people wanting to buy property in certain areas	8.82	20.59	64.71	5.88
The municipality requires a matriculation certificate for its garbage removal employees	14.71	11.76	67.65	5.88
Insurance companies refuse to issue a life insurance policy to a HIV+ person or a person who has AIDS	2.94	44.12	41.18	11.76

A nightclub only allows people of Asian origin	2.94	8.82	79.41	8.82
The SAA refuses to employ cabin stewards who are HIV+ or who has AIDS	5.88	29.41	52.94	11.76
The South African Medical and Dental Council refuses to allow dentists who are HIV+ or who has AIDS to operate on patients	11.76	52.94	26.47	8.82
Gay couples are not allowed to adopt children	2.94	41.18	47.06	8.82
A shopping centre does not allow pets into the centre and therefore also refuses blind people to bring their guide dogs onto the premises	8.82	5.88	79.41	5.88
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	0.00	14.71	85.29	0.00
A pleasure park does not allow children under a certain age to go onto their rides	38.24	44.12	11.76	5.88
A husband states in his will "My wife inherits all my belongings but if she chooses to remarry and if she marries a black man I disinherit her and I bequeath all my belongings to the Dutch Reformed Church"	5.88	29.41	55.88	8.82
Mary and John invite all their work colleagues to their wedding except the black cleaners and tea ladies	14.71	29.41	50	5.88
SARFU declares that in future all Springbok rugby test teams must include at least two black players	14.71	29.41	44.12	11.76
A golf club charges an annual membership fee of R40 000 "to keep out undesirable elements"	18.18	39.39	39.39	3.03
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	3.03	27.27	63.64	6.06
A company fails to appoint a woman to the position of Marketing Director after she falls pregnant	2.94	14.71	76.47	5.88

Table Q: Respondents' response to question 10.2

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain
Gay couples are not allowed to adopt children	11.35	28.72	40.43	19.5
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	3.55	18.09	69.15	9.22
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	4.98	30.6	52.67	11.74

Table R: White respondents' response to question 10.2

Practice	Not discrimination (%)	Fair discrimination (%)	Unfair discrimination (%)	Uncertain (%)
Gay couples are not allowed to adopt children	14.5	33.59	28.24	23.66
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	4.62	30.77	53.85	10.77
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	6.11	35.88	44.27	13.74

Table S: Black, coloured and Asian respondents' response to question 10.2

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain
Gay couples are not allowed to adopt children	8.61	24.5	50.99	15.89
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	2.63	7.24	82.24	7.89

Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	4	26	60	10

Table T: Afrikaans-speaking respondents' response to question 10.2

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain
Gay couples are not allowed to adopt children	15.97	35.29	23.53	25.21
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	4.24	30.51	52.54	12.71
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	5.04	33.61	46.22	15.13

Table U: English-speaking (and other European languages) respondents' response to question 10.2

Practice	Not discrimination	Fair discrimination	Unfair discrimination	Uncertain
Gay couples are not allowed to adopt children	0.00	23.53	58.82	17.65
The Department of Justice invites job applications for prosecutors. They make it clear that no white males will be considered	5.88	23.53	67.65	2.94
Pretoria municipality charges Faerie Glen according to actual consumption of water and electricity but charges Mamelodi a flat charge, irrespective of actual consumption, because of inferior services in Mamelodi compared with Faerie Glen	8.82	38.24	41.18	11.76

Table V: Descriptions of discrimination

Workplace

- "Waar ek werk kan die swart en kleurling skoonmakers nie dieselfde toilette gebruik as die wit skoonmakers".
- "When applying for a job, was not black enough to get the job".
- "My kleur – hulle het my werk vir 'n swarte gegee".
- "Couldn't get employment because of my age". (41 year old black male.)
- "Applications for a government post, told that I was very old". (25 year old black male with primary school education.)
- "I was in a job interview and I try to talk one of my African language and I mean it is one of the official language in South Africa, he just said non of the fucken language are allowed in this building".
- "Retrenchment at government organization due to being white".
- "Werksgeleenthede; regstellende aksie op grond van ras".
- "Pos ontneem ogv seksuele voorkeur".
- "Werksgeleenthede beperk tot jonger persone". (45 year old Afrikaans-speaking white female)
- "Retrenchment – was retrenched 9 months ago as a result of age".
- "Werkgeleenthede op meriete".
- "Kry nie werk agv ouderdom". (45 year old white Afrikaans-speaking female)
- "Affirmative action! Need I say more?" (34 year old white English-speaking male)
- "Diskriminasie ogv ras, omdat persoon met swakker kwalifikasies die werk gekry het net omdat hy swart was".
- "Regstellende aksie poste in advertensies vir werk".
- "Every day at work, blacks earn less than whites even if the black may be more qualified than the white".
- "Refused admission in the SANDF". (27 year old black male.)
- "At work".
- "Werksgeleenthede nie beskikbaar vir sekere bevolkingsgroepe".
- "Taalvoorkeur word teen persoon gebruik in werksituasie".

- "Regstellende aksie".
- "Werksgeleenthede nie beskikbaar vir wit mans. (bv RGN), nie oorweeg ogv ras".
- "Diskriminasie in die werkplek agv velkleur". (60 year old white Afrikaans-speaking male)
- "Die feit dat daar geen bevorderingsmoontlikhede vir blankes is nie maar hulle die werkgewer moet dra". (43 year old white Afrikaans-speaking clerk.)
- "Laat ons nie ontstel. My seun agt jaar in Polisie kry nie bevordering omdat hy wit is. Mense wat nie weet hoe nie word brigadiers".
- "Diskriminasie op grond van taal tydens 'n onderhoud".
- "Due for posting outside the country and was refused". (female, did not state age, diplomat assistant, black, alleging unfair discrimination based on race)
- "Volgens maatskappye is 'n kleurling nie voldoende om aansoek te doen vir 'affirmative action' posisies nie". (26 year old coloured female.)
- "They brought a white woman with only 2 years experience and that she should be my supervisor when I have 28 years".
- "Opposed application for black manager".
- "Work situation. I had a matric certificate but a white guy did not have but was my senior and earning more because he was white".
- "If I have grievances at work just because Black they file it aside or I am helping a black person at work the white manager will come and tell me I have to serve a white person".
- "Omdat ek 'n vrou is kan ek nie 'n maatskappymotor kry nie maar die getroude mans kan 'n maatskappymotor kry".
- "Ek het soveel teenkanting ontvang in my posisie as bestuurder dat dit uitgeloop het op 'n dissiplinêre verhoor van een van my werknemers. Ek het rede om te glo dat dit spruit uit die feit dat ek die jongste bestuurder in my maatskappy is".
- "Regstellende aksie in bevordering".
- "All meetings conducted in other languages regardless of the diversity existing among us".
- "When I applied for a sub-contract and was denied the opportunity but a white man of exactly the same position as mine was awarded the contract".
- "Onderhoude word slegs in Engels gevoer".
- "Job applications are turned down on basis of age". (55 year old coloured female.)

- "Clients that call in insist on home language and I do not speak 11 languages".
- "A lady offered me a position as a receptionist without finding out what qualifications I do have".
- "18 maande werkloos van dosyne aansoeke absoluut geen terugvoer ontvang nie, indien wel was antwoord altyd dieselfde. Wit mans word nie aangestel". (28 year old white Afrikaans-speaking male.)
- "At work, same rank but because of racial differences treated differently". (age not stated, male, SAPS, black.)
- "Uit vorige pos agv omgekeerde diskriminasie".
- "Iscor discrimination based on age". (black male, self-employed, did not state age.)
- "Place work, employers favour white employees compared black employees. Military refused to hire me because they said I'm above the age they want".
- "At work – women were demanding same pay. Efforts failed".
- "They say when applying for a job that I am lying about my age because I have a naturally big body". (18 year old Sotho-speaking female.)
- "At a stocktaking job, I was told I am young, and I can't do stocktaking". (18 year old black male.)
- "Promotion – preference given to whites".

Social interaction

- "Worked at Voortrekker Military Hospital and had to prove self-worth amongst fellow peers. As was the only Indian female in male dominated profession (physiotherapy) and had to earn their respect".
- "Iemand wat onder my werk het my 'n kaffirboar genoem en gesê ek het 'n platkop".
- "Blacks at my working place are treated and given orders as if they are children, as compared to their white counter-parts".
- "A client called me a bloody mother-fucking kaffir. I reported it to the manager but nothing was done".
- "At work motorists (white) arrived, saw me in uniform trying to attend to them and they asked me where the people are as if I am not a person simply because I am black".

- People insist on speaking Afrikaans when they know that some people can't understand fully".
- "Mostly from men because I am a woman with an attitude".
- "Toe 'n Engelse vrou vir my 'n 'dumb dutchman' genoem het omdat ek nie geweet het hoe om my parkeerskyfie in die masjien te sit by die Brooklyn winkelsentrum".
- "Was called a 'koolie' in public which was very degrading".
- "Race. Is where by a Indian call me with a kaffir".
- "A beggar begged from me instead of the black guy in the BMW next to me. At a café. When I struck up a conversation with the beggar he asked me to marry him. I asked 'why' he said 'I want to fuck a white woman'".
- "From Witbank at robot there were white guys at the car behind and after overtaking us, they swore at us calling us kaffirs and other insulting names".
- "Unfair jokes about my tribe (Shagane)".
- "Sometimes our fellow students who use the language 'Venda' talk behind our backs, because we can't hear their language".
- "Nie bereid om met my Afrikaans te praat; jonger mans word voorkeur gegee in banktoue". (66 year old white Afrikaans speaking male.)
- "Stood in the way of a white man in town and he nearly fought with me".
- "In Westpark 2 white boys asked me and my friend for a lighter, we told them we don't have and the one guy started fighting my friend (because he knew him)".
- "Spoken to in Afrikaans of which I don't really understand".
- "If your pronunciation is definitely African most white people are less inclined to listen to whatever you have to say".
- "I'm Afrikaans and my friend most Sotho discriminates against me all the time". (49 year old coloured female, living in Atteridgeville)
- "Afrikaaners are not interested in learning our languages, but we are forced to learn theirs and I think that's unfair".
- "Doing interview for a newspaper some interview… [illegible] told me because I am woman can not take the heat".
- "Condescension in hardware section of stores by male customers and clerks".

- "White person swore at me, I bumped into him and I said sorry but he just swore at me".
- "I was on a queu (sic) waiting to withdraw some cash so what happened the teller ask for a white lady to come before me".
- "Chased away from town on a mere suspicion but I think it was racially motivated".
- "You go clubbing and when you get there, because you're black, the white patrons ask you what you want".
- "In Hatfield trying to sell books. The shop attendant refused to buy my books".
- "My position is to give instructions but when I give instructions to whites they do not follow. They don't accept the position I hold". (Self-employed 34 year old black male)
- "Couldn't get help because I can't speak English".
- "Husband consulted or consultation requested after I had made decision on both our behalf and representation".
- "People never accept my language. They think I'm stupid". (23 year old Sotho-speaking male.)
- "Once I was walking in town, whites looked at me funny, they thought I was a criminal".
- "Queue for payment, white person in shop goes before me".
- "Ek het 'n navraag met Assupol uitsorteer. Omdat die swartman nie geweet het om dit te hanteer nie het hy my beskuldig dat ek hom gaan vloek en toe sit hy die foon in [my oor neer?]".
- "Pushing child with pram and wants to run into black lady in shop".
- "Swartes met min respek behandel".
- "Diskriminasie ogv taal. Is my reg om in my taal bedien te word".

Police

- "Crossing the robot at Sunnyside and a white motorist nearly ran me over, I went to the police and they never helped me".
- "I was involved in a car accident. The other driver, a white male, was at fault and he was drunk. He had a phone (I don't) so he called his friends, one of whom was a cop. When they came, the cop said it was my fault and he refused to hear my side of the story".

- "Black traffic cop gives black person fine for not putting on safety belt but white person is told and not given fine".
- "Harassed by two white police man from the Dog Unit".
- "Two white boys driving same car as me, who happen to be my friends, similar speeds, I was stopped by cops but they weren't".

Educational institutions

- "I am currently studying at Tukkies and being black is difficult because of Afrikaans and we are constantly undermined".
- "At school – discriminated on base of race".
- "Refused entry to multiracial schools".
- "Applied to a school, refused to take me because I'm black".

Health facilities

- "Not treated fair in terms of the services in the hospital because of colour".
- "White patients get better medical [than Africans?]".
- "In a hospital where white patients get effective good medication and black patients getting generic medicine".

Restaurants, resorts and similar recreational establishments

- "At Northern Province game lodge".
- "When I go shopping the security guard always follows me like I am a thief" (26 year old coloured female).
- "White people in shopping malls (staff) do not treat us black people equal to white people. Eg once a white person in a shop first looked at how I am dressed or what class I fall under before she could serve me".
- "Someone was kicked out of a restaurant because it was an all white res. I am Tsonga and people always discriminate against me on that basis, even black people".

Other

- "Diskriminasie ogv taal en kultuur. Is aantasting van jou menswees en is 'n gruwelike belediging".
- "Het my nie eintlik beïnvloed nie". (discrimination based on culture.)
- "Ras/kleur: ek dink nie dat dit 'n verskil moet maak watter ras 'n persoon is – hulle is almal dieselfde".
- "For the incident that had happened last time at Dendrone of a guy who have killed by the whites guys".
- "I think there is more Apartheid".
- "Not serious incidents".
- "Aanvaarding dat Blanke/Afrikaanssprekende persone, swartmense ten alle tye wil en sal tenakom".
- "Daar word daagliks teen alle Afrikaanssprekendes se taalregte gediskrimineer".
- "Omdat ons senior burgers is, is ons teikens van berowing en word gedurig besteel".
- "As gevolg van sekere instellinge word ou standaarde gehandhaaf alvorens gekyk word na sekere werklike aspekte".
- "Last year in June, but I can't remember exactly how".
- "Too personal". (X2)
- "Slegs Engelse advertensies".
- "Serving on a National Committee, told the Committee was too 'white'".
- "I needed money to go to town at end of month, I went to police station asking for money policeman said 'you walked in wrong direction, this is not a bank'. Insurance policy company refuses to pay me because I'm black".

Table W : Positive opinions of lawyers

- "Helpful". (X18)
- "Good" / "Very good" / variants (X13)
- "Fair". (X2)
- "They are cool!" (X2)
- "Some are very good at what they do and they really want to help".

- "Hulle is baie gehoorsaam en hulle probeer om probleme uit te sorteer".
- "They help. For example if a company takes your money or charges too much a lawyer can fight for you".
- "They are helpful people, they help you state your case".
- "They are needed".
- "I got acquitted because of a lawyer".
- "They are co-operative and objective".
- "I think lawyers are doing a very good job on helping innocent people".
- "They do their work".
- "Goeie opleiding".
- "Professioneel".
- "Hulle was reg vir my".
- "Worked for lawyers for 30 years. Positive of majority".
- "Positief".
- "Meestal positief".
- "Never personally been to lawyers but I belong to an association … (illegible word) but they are helpful".
- "Regverdig; moeilike werk om te bemeester".
- "Probeer hulle beste lewer onder druk".
- "Verskillende menings, positief en negatief, oorwegend positief".
- "Doen goeie werk onder omstandighede".
- "He was professional and considered my interest".
- "They are able to do their job, they can actually guide as to what to do or not to do in order to win a case".
- "They know what they are doing and they can really help you if you don't know something".
- "Satisfactory".
- "We need them".
- "Really necessary".
- "Kom baie intelligent, met regte antwoorde voor. Kry baie reg".
- "Necessary people. Provide good service".

- "Baie beter georganiseerd as enige iets wat met die staat verband hou".
- "Agting daarvoor".
- "Bekwaam".
- "They do their jobs properly".
- "Bekwaam".
- "They are nice people".
- "Bank se regspan help my met my testament. Hulle ken my en is baie vriendelik teenoor my".
- "Hulle lyk vriendelik".
- "Goed opgelei".
- "I consulted a lawyer regarding my divorce. She was very helpful in terms of the advice she gave me. Very punctual and very expensive!"
- "My man is 'n prokureur. Hulle is 'nice'".
- "Hulle lyk almal baie slim, en dit lyk of almal ryk is".

Table X: Negative opinions of lawyers

Rich / charge too much / money hungry

- "Onbillike tariewe". (X2)
- "Maak net geld uit jou, veral as hulle weet jy het geld".
- "Not considerate, charge a lot to do little work".
- "Hulle is ryk en arrogant".
- "Disinterested in your case; interested in your money".
- "Te duur (prima facie)".
- "Omkoopbaar en duur".
- "Baie duur; nie agter waarheid".
- "Duur".
- "Money making racket".
- "Agter geld aan".
- "Net uit om geld te maak – wettig en onwettig".
- "Not effective in solving our problems but yet we pay money".

- "Very expensive, totally unreliable and mostly unhelpful".
- "Just making money out of others' troubles".
- "Just want money".
- "Professioneel maar is te duur. Prokureurs buit kliente uit".
- "Gold diggers – they don't do their jobs".
- "Black lawyers were initially inferior. Most lawyers are out to make money".
- "They are at times helpful but they demand exorbitant fees".
- "Gold diggers and they don't do their jobs".
- "Geldwolwe en uitbuiters. Sien 'n persoon vir 'n uur waarin 4-5 onderbrekings plaasvind maar hef 'n fooi vir die hele uur".
- "Dit is te duur. Dit neem te lank om 'n besluiting te kry".
- "They are only after money".
- "They love money, they do not have the best interest of people at heart".
- "They charge too much".
- "Just take your money".
- "Working for money. Doing it for sake of money".

Dishonest

- "Hulle is baie ryk, maar ook oneerlik".
- "Hulle is oneerlik en gee nie om vir mense nie".
- "Hulle is skelm en leer mense om te lieg".
- "They take cases that are patently lost and still charge you high fees".
- "They don't help because if a person has killed they will try to twist the facts".
- "Liars, cheats, cheat and take our money".
- "Lawyers are not always honest, they rob people".
- "They are liars, they cheat people of their money".
- "Liars".
- "Klomp skelms".
- "Cheating people to simply get money".
- "They are crooks; they cheat and lie".

- "Skelms".
- "They cheat people of their money, they are liars".
- "They lie most of the time".
- "Crooks!"
- "Not trustworthy".
- "Cheats".
- "Cheats, they only want money. Some people they help, some not".
- "They represent clients at all costs, they do not know if its true or not".
- "Lawyers simply represent their clients it doesn't matter if she/he believes in what he says or not".
- "They stand up for what they do not believe in, they just represent their clients at all costs".
- "Skelms. Rip-offs".
- "They are cheats and liars".
- "Liars".

Inaccessible

- "They sometimes speak so that I didn't understand what they were saying".
- "They treat me like I am stupid".
- "Not easily accessible".

Busy

- "Het nie genoeg tyd vir familie nie".
- "Hulle werk baie hard en het min tyd vir hulle familie".

Other

- "Treurig".
- "Very wary of them and would only go on high recommendation".
- "Sharks in suits".
- "Take very long to show results".

- "The lawyers their not play important role because always their always give a wrong impression by standing for the criminals".
- "Vandag is omkopery aan die orde van die dag veral met betrekking tot rassisme aangeleenthede".
- "On the average, very mediocre, very unprepared and general about specific detail".
- "Het nie beïndruk".
- "Eie belang gewoonlik belangrik".
- "Never helpful".
- "They do not do their job".
- "Met 'n baie gebrekkige kennis oor die regsprofessie, sou ek sê ek het maar 'n baie swak indruk van hulle".
- "Pateties".
- "They are bad".
- "They only care about winning – not what is right – they rarely give you any information so that you can make choices".
- "Relates more in business let alone the question of winning the case".
- "Het nie altyd goeie interpersoonlike vaardighede nie. Magsbehep".
- "Verdedig hul eie party al blyk dit onregverdig".
- "Beskerm die krimineel".
- "Lawyers love/have [illegible] money especially if they don't work for the government".
- "They just say court should not find one guilty, without actually arguing the merits of the case".

Table Y: Ambivalent opinions of lawyers

- "Sometimes good sometimes bad". (X2)
- "My egskeiding – hy was goed maar het baie geld gevra".
- "Ek weet nie wat om te sê nie, ek ken nie een nie, en weet nie hoe hulle is nie".
- "'n Paar is goed".
- "Iemand moet sulke werk doen en hulle moet net regverdig wees".
- "Daar is 'n paar wat baie goeie mense is maar nog ander wat net geld wil maak".

- "'n Mens het hulle nodig as jy in die moeilikheid beland".
- "Iemand moet hulle werk doen en as hulle regverdig is dan is daar nie 'n probleem nie".
- "Ken nie eintlik een nie maar hulle behoort in my opinie slim en eerlik te wees, maar ek dink baie is oneerlik".
- "Most are just doing a job that someone has to do".
- "Fair / liars".
- "Not good to generalize, but if they do their job well, they are helpful".
- "They must take full responsibility to their client until the client get what she/he need because they get paid".
- "Sometimes they are good, often times they lie just so as to defend their client".
- "Sometimes they can save you, but other times they put you in jail".
- "Sometimes they help people ease change".
- "Het nodige hulp ontvang – geweldige koste".
- "Corrupt (some)".
- "Uitgeslape".
- "Noodsaaklik, sal gebruik maak daarvan indien nodig, vermy egter sover moontlik agv hoe kostes".
- "Doen hulle werk. Meer hof se uitsprake wat iets makeer".
- "Slimy, self serving for men. Honest and caring for women".
- "Takes all sorts".
- "Sometimes trustworthy but often times not".
- "They only do their job like everyone else".
- "They appear to be helpful".
- "Verskillende opinies oor verskillende prokureurs / wissel".
- "Wissel van gehalte".
- "Hoe gladder mond, hoe beter is prokureur, ongeag werklike kennis".
- "Moet regte raad verskaf, en nie hofsake onnodig uitrek nie".
- "Goed, alhoewel daar sloms gesloer word".
- "Goed / sleg, elkeen verskil".
- "Doen net hul werk".

- "They are ok. Not great just ok".
- "They deliver a service".
- "They must just stand or side with their clients".
- "Some are crooks".
- "They do their work".
- "My personal lawyer was fair; he was there for me. Government lawyers are generally bad".
- "Others are good in their services but it depends on who you meet / consult".
- "Neutral".
- "I don't know, I guess they're OK".
- "They do their work, try to ensure justice".
- "Baie professioneel maar ook baie formeel. Die regs "taal" is baie ontoerykend vir die gewone man op straat. Ek het weggegaan met die gevoel van 'hoop en vertrou maar vir die beste'".
- "Voor 1982 Baie goed".
- "Redelik".
- "Party is goed in wat hulle doen. Ander verryk hulself ten koste van ander. Regspraktisyns het al 'n slegte naam agv hulle optrede en slinksheid".
- "Redelik".
- "Hard working, but not honest".
- "Some do help some are cheats".
- "Goed. Net duur!"
- "Helpful but for instance murder case, robbery cases they want money, government should not allow such lawyers to do that".
- "Some are fair, some are cheats".
- "They are not the same, some are helpful some are cheats".
- "Some are helpful".
- "They differ. You can't generalize".
- "Must be very careful who you choose. Pick a firm that specializes in the type of work you are dealing with".

- "As jy daarvan hou, doen dit".
- "Noodsaaklike euwel".
- "Hulle integriteit is bo hulle verhewe. Moeilik om te sê".
- "Lawyers are liars – sometimes they help".
- "Weet nie altyd wat hulle van praat nie".
- "Intelligent en goeie luisteraars op vriendskaplike / sosiale vlak".
- "Like food and water a necessity; perhaps a little bitter or cause for heartburn at times".
- "Neutrale houding teenoor regsgeleerdes. Sal opinie vorm wanneer met prokureurs en advokate te doen kry".

Table Z: Positive view of courts

- "Goed". (X3)
- "Fair". (X2)
- "Nie sleg nie, respekvol, nie onorderlik nie".
- "They are okay because the scale is balanced there".
- "They were fair, if they were not I will still be in jail".
- "Helpful".
- "They are generally fair".
- "Goed georganiseerd".
- "They do their work".
- "Generally fair".
- "Baie positief; simpatiek met regters agv oorgangstadium".
- "They were quite fair when I went there, so I would say they are fair".
- "They follow a fair procedure".
- "They were fair".
- "They were fair, they looked or evaluated my evidence – correctly".
- "Fair practice. Justice is done".
- "Good impression".
- "Impartiality".
- "Courts are fair and objective".

- "Courts are fair".
- "They do their job properly, the judgments are fair. Courts are objective". (worked in court as a cleaner, 67 year old black female)
- "Doen goed veral onder situasie".
- "It's OK!"
- "Judges are fair, criminals never admit that they're wrong".
- "They are doing a good job".
- "They do their job well".
- "They do their jobs properly".
- "They're doing their job".
- "Netjies besadig".
- "Positief. Proses is professioneel".

Table AA: Negative view of courts

- "Ek het geskei; dit was baie vinnig en ek het nie baie daarvan verstaan nie".
- "Baie tydsaam".
- "They waste time".
- "Tydsaam".
- "They take a lot of time and sometimes make unnecessary delays".
- "Rat race, confusing and gloomy".
- "Poor and cold".
- "Everything is slow and there is a lot of paperwork before one sees results".
- "They treated me bad until I got a lawyer".
- "Koud en klinies".
- "Nie beindruk agv omkopery".
- "Baie negatief".
- "Try to rush you through system".
- "Langdradig".
- "Koud en onvriendelik. Buite is vuil. Jy voel soos die skuldige".
- "Nie lekker nie, skrikkerig".

- "Not impressed. Feel like criminal even though innocent. Not friendly or courteous".
- "Agv staatsprokureur se onervaarigheid teenoor advokaat was die saak later uitgegooi. Negatief".
- "I didn't understand the proceedings. There is no justice, lawyers help the criminals to get free. The punishment is not enough".
- "They are not doing their jobs".
- "Too bad".
- "Never helpful".
- "Courts are unfair".
- "Court are unfair, don't listen to the poor".
- "They are not fair, for example evidence".
- "Koud en stadig".
- "Ongeorganiseerd; tydrowend".
- "Skrikwekkend, ongeorganiseerd".
- "Stadig. Onregverdig".
- "Die SA regsdiens is 'n mors van tyd. Daar is nie orde. Die reg werk nie en mense is bang om die hof te benader".
- "They don't do their jobs, it's just nonsense. 'Bribes' involved as well".
- "Very unwelcoming and protective of young female prosecutors".
- "They give unfair decisions period".
- "Very formal; scary".
- "If you are black, you're automatically assumed guilty and you must prove your innocence".
- "Very unfair. They were very discriminatory towards me".
- "Not effective, delay cases unnecessarily".
- "Unfair use of language – discriminatory – emphasis on African / Afrikaans [illegible]".
- "Had a bad impression. The court was disorganized".
- "Quite hectic and stressful".
- "Quite intimidating".
- "They are unfair".
- "Not fair".

- "Unfair".
- "Chaos, lêers was nie daar nie, aanklaers wat onvoorbereid opdaag, langdradig en mors tyd. Hele dag daar vir 5 minute met magistraat".
- "Totaal ongeorganiseerd met die klem op persoonlike agenda ver bo die betrokke saak".
- "Koud en onvriendelik".
- "Dit is tydrowend en vuil".
- "Pateties en ondoeltreffend in 2001".
- "They don't do their jobs, dockets missing".
- "Cases take too long perhaps because of lack of manpower, investigations. But definitely take too long. Overtime putting themselves under pressure".
- "They are lazy (prosecutors) probably because they don't get paid".
- "Not advanced, they don't do their work properly".
- "They don't do their job".
- "Not fair".
- "Pateties, mees onproduktiefste opset".
- "Ongenaakbaar en onsimpatiek".
- "They did not treat [me] well – never let me state my case".
- "Court system is messed up".
- "Quite an unpleasant environment. Little consideration and respect for time".
- "My man is 'n prokureur. Pretoria landdroshof is vuil en ongeorganiseerd. Daar is baie mense van swak ekonomiese stand".
- "Koud, onpersoonlik, tydrowend".

Table BB: Ambivalent opinions of courts

- "They do their job". (X2)
- "Very long time ago so has changed".
- "Dit vat te veel tyd om alles te doen maar anders doen hulle hul beste".
- "They try and get things done with the amount of people they have".
- "Some magistrates perform their jobs fairly".
- "I can't say much; I was found not guilty so I wasn't punished".

- "They are okay".
- "In tagtigs – oordeel nvt".
- "Afdelings verskil – sommige goed ander sleg".
- "Besig met oorgangsfase".
- "No impression".
- "They make you very nervous, so I can't really say".
- "The first case was handled well but the second is still pending".
- "There's still room for improvement".
- "Very unpredictable, at times they are disappointing".
- "Courts are fair. Interdicts not fair, favours woman".
- "1966 – regverdig".
- "Te lank terug".
- "Redelik".
- "Redelik. Onseker - ek was nie voorberei op wat van my verwag word nie".
- "No justice sometimes you get justice. Public treated with respect".
- "They do their job sometimes. Rustenburg regional court they only wanted Afrikaaners not blacks or English speaking people. Interpreter they didn't pay me".
- "Okay".
- "Redelik georden maar het nie 'n benul van tyd nie".

Annexure C: Canadian anti-discrimination legislation

C.1 Canadian Human Rights Tribunal

The *Canadian Human Rights Act*[1] prohibits discrimination on the prohibited grounds[2] of race, national or ethnic origin, colour, religion, age, sex,[3] sexual orientation, marital status, family status, disability[4] and conviction for which a pardon has been granted,[5] in the following cases:

- the provision of goods, services, facilities or accommodation customarily available to the general public;[6]
- the provision of commercial premises or residential accommodation;[7] and
- employment.[8]

Section 12 prohibits the publication of discriminatory notices, section 13 prohibits hate messages and section 14 prohibits harassment and retaliation.

Section 15 contains a number of defences to a claim of direct or indirect discrimination:[9]

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[1] RS 1985 c H-6; 1976-77, c. 33, s. 1.
[2] In terms of s 3.1 a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.
[3] In terms of s 3.2, where the ground of discrimination is pregnancy or childbirth, the discrimination is deemed to be on the ground of sex.
[4] Defined in s 25 as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug".
[5] Defined in s 25 as "a conviction of an individual for an offence in respect of which a pardon has been granted by any authority under law and, if granted or issued under the *Criminal Records Act*, has not been revoked or ceased to have effect".
[6] S 5 reads "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public (*a*) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.
[7] S 6 reads "It is a discriminatory practice in the provision of commercial premises or residential accommodation (*a*) to deny occupancy of such premises or accommodation to any individual, or (*b*) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination".
[8] Ss 7-11.
[9] Most of these defences relate to employment discrimination and I will not refer to all of these.

- An employer may show that a refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is based on a "*bona fide* occupational requirement".[10]
- If the discrimination takes place in a manner that is described as reasonable in the guidelines issued by the Canadian Human Rights Commission.[11]
- In other circumstances a respondent may show that where an individual was denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation, or was a victim of any adverse differentiation, that a "*bona fide* justification" exists for that denial or differentiation.[12]

For both these defences the respondent must establish that the accommodation of the needs of an individual or a class of individuals affected would have imposed "undue hardship" on the person who would have had to accommodate those needs, considering health, safety and cost.[13]

The Act also contains a "special programs" defence in section 16(1).[14]

C.2 Alberta

The *Alberta Human Rights, Citizenship and Multiculturalism Act* prohibits discrimination in the following sectors: goods, services, accommodation and facilities;[15] tenancy;[16] employment;[17] and

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[10] S 15(1)(a).
[11] S 15(1)(e).
[12] S 15(1)(g).
[13] S 15(2).
[14] "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group".
[15] S 4: "No person shall (a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public, because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that person or class of persons or of any other person or class of persons".
[16] S 5: "No person shall (a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or (b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling unit, because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status of that

membership in a trade union.[18] The Act recognises the following grounds of discrimination: race, religious beliefs,[19] colour, gender,[20] physical disability,[21] mental disability,[22] ancestry, place of origin, marital status,[23] lawful source of income and family status[24] of the complainant or a class of persons or of any other person or class of persons. Age[25] is recognised as a prohibited grounds relating to membership in a trade union. The Canadian Supreme Court has held that sexual orientation must be read into the Act.[26]

The Act contains a very brief general defence:

> 11. A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

The Act also prohibits discriminatory publications and notices,[27] retaliation,[28] and frivolous or vexatious complaints.[29]

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person or class of persons or of any other person or class of persons". "Commercial unit" is defined as "a building or other structure or part of it that is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property, or a space that is used or occupied or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in a building or other structure or in a part of it".

[17] Ss 6-8.

[18] S 9: "No trade union, employers' organization or occupational association shall (a) exclude any person from membership in it, (b) expel or suspend any member of it, or (c) discriminate against any person or member, because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or member".

[19] "Religious beliefs" include native spirituality.

[20] "Gender" includes pregnancy. S 44(2) somewhat clumsily states that "whenever this Act protects a person from being adversely dealt with on the basis of gender, the protection includes, without limitation, protection of a female from being adversely dealt with on the basis of pregnancy".

[21] "Physical disability" is defined as "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device".

[22] "Mental disability" is defined as "any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder".

[23] "Marital status" is defined as "the status of being married, single, widowed, divorced, separated or living with a person of the opposite sex in a conjugal relationship outside marriage".

[24] "Family status" is defined as "the status of being related to another person by blood, marriage or adoption".

[25] "Age" means 18 years of age or older.

[26] *Vriend v Alberta* [1998] 1 SCR 493.

[27] S 3.

[28] S 10(1).

C.3 British Columbia

The British Columbia *Human Rights Code*[30] prohibits discrimination in accommodation, services and facilities;[31] the purchase of property;[32] tenancy premises;[33] employment advertisements;[34] wages;[35] employment[36] and discrimination by unions and associations.[37] The following grounds of discrimination are recognised: race, colour, ancestry, place of origin, religion, marital status, family status,[38] physical or mental disability, sex, sexual orientation and age.[39] Intention is not required to found a claim.[40]

The Code contains exemptions relating to discrimination in accommodation, services and facilities[41] and tenancy premises[42] and two general exemptions – the first relates to not-for-profit organisations[43] and the second to special programmes.[44]

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[29] S 10(2).
[30] RSBC 1996, c210.
[31] S 8(1): "A person must not, without a bona fide and reasonable justification, (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons".
[32] S 9: "A person must not (a) deny to a person or class of persons the opportunity to purchase a commercial unit or dwelling unit that is in any way represented as being available for sale, (b) deny to a person or class of persons the opportunity to acquire land or an interest in land, or (c) discriminate against a person or class of persons regarding a term or condition of the purchase or other acquisition of a commercial unit, dwelling unit, land or interest in land because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability, sexual orientation or sex of that person or class of persons".
[33] S 10(1): "A person must not (a) deny to a person or class of persons the right to occupy, as a tenant, space that is represented as being available for occupancy by a tenant, or (b) discriminate against a person or class of persons regarding a term or condition of the tenancy of the space, because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons, or of any other person or class of persons".
[34] S 11.
[35] S 12.
[36] S 13.
[37] S 14: "A trade union, employers' organization or occupational association must not (a) exclude any person from membership, (b) expel or suspend any member, or (c) discriminate against any person or member because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the membership or intended membership".
[38] Family status is not recognised relating to discrimination in the purchase of property.
[39] "Age" means an age of 19 years or more and less than 65 years. Age is recognised relating to discriminatory publications, discrimination in tenancy premises and discrimination by unions and associations.
[40] S 2.
[41] S 8(2): "A person does not contravene this section by discriminating (a) on the basis of sex, if the discrimination relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of life or health insurance, or (b) on the basis of physical or mental disability, if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance".

The Code prohibits discriminatory publications[45] and retaliation.[46]

The Code contains a supremacy clause.[47]

C.4 Manitoba

The *Manitoba Human Rights Code* contains a rather convoluted definition of "discrimination:

> (a) 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; or
>
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
>
> (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
>
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).[48]

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[42] S 10(2): "Subsection (1) does not apply in the following circumstances: (a) if the space is to be occupied by another person who is to share, with the person making the representation, the use of any sleeping, bathroom or cooking facilities in the space; (b) as it relates to family status or age, (i) if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age, or (ii) a rental unit in a prescribed class of residential premises; (c) as it relates to physical or mental disability, if (i) the space is a rental unit in residential premises, (ii) the rental unit and the residential premises of which the rental unit forms part, (A) are designed to accommodate persons with disabilities, and (B) conform to the prescribed standards, and (iii) the rental unit is offered for rent exclusively to a person with a disability or to 2 or more persons, at least one of whom has a physical or mental disability".

[43] S 41: "If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons".

[44] S 42: "(1) It is not discrimination or a contravention of this Code to plan, advertise, adopt or implement an employment equity program that (a) has as its objective the amelioration of conditions of disadvantaged individuals or groups who are disadvantaged because of race, colour, ancestry, place of origin, physical or mental disability, or sex, and (b) achieves or is reasonably likely to achieve that objective. (2) [Repealed 2002-62-23.] (3) On application by any person, with or without notice to any other person, the chair, or a member or panel designated by the chair, may approve any program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups. (4) Any program or activity approved under subsection (3) is deemed not to be in contravention of this Code".

[45] S 7.

[46] S 43.

[47] S 4.

Section 9(2) contains the following prohibited grounds: ancestry, including colour and perceived race; nationality or national origin; ethnic background or origin; religion or creed, or religious belief, religious association or religious activity; age; sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy; gender-determined characteristics or circumstances other than those included under "sex"; sexual orientation; marital or family status; source of income; political belief, political association or political activity; physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

Section 9(3) is headed "systemic discrimination" but does not seem to include it in the definition:[49]

> In this Code, 'discrimination' includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.

The Code prohibits discrimination in services and accommodation;[50] employment;[51] contracts;[52] rental of premises; [53] and in the purchase of immovable property.[54]

The Code also prohibits discriminatory signs and statements,[55] harassment[56] and reprisals.[57]

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[48] S 9(1).
[49] In South African legal parlance, this definition would approximate that of "indirect" discrimination. "Indirect" discrimination is not a synonym for "systemic" discrimination.
[50] S 13(1): "No person shall discriminate with respect to any service, accommodation, facility, good, right, license, benefit, program or privilege available or accessible to the public or to a section of the public, unless *bona fide* and reasonable cause exists for the discrimination".
[51] S 14.
[52] S 15(1): "No person shall discriminate with respect to (a) entering into any contract that is offered or held out to the public generally or to a section of the public; or (b) any term or condition of such a contract; unless *bona fide* and reasonable cause exists for the discrimination".
[53] S 16(1): "No person shall discriminate with respect to (a) the leasing or other lawful occupancy of, or the opportunity to lease or otherwise lawfully occupy, any residence or commercial premises or any part thereof; or (b) any term or condition of the leasing or other lawful occupancy of any residence or commercial premises or any part thereof; unless *bona fide* and reasonable cause exists for the discrimination.
[54] S 17: "No person shall discriminate with respect to (a) the purchase or other lawful acquisition of, or the opportunity to purchase or otherwise lawfully acquire, any residence, commercial premises, or other real property or interest therein that has been advertised or otherwise publicly represented as being available for purchase or acquisition; or (b) any term or condition of the purchase or other lawful acquisition of any such property or interest; unless *bona fide* and reasonable cause exists for the discrimination".

Section 10 introduces vicarious liability:

> For the purposes of this Code, where an officer, employee, director or agent of a person contravenes this Code while acting in the course of employment or the scope of actual or apparent authority, the person is also responsible for the contravention unless the person (a)did not consent to the contravention and took all reasonable steps to prevent it; and (b)subsequently took all reasonable steps to mitigate or avoid the effect of the contravention.

The Code contains a number of defences to a claim of discrimination:

- A general "*bona fide* and reasonable cause" defence;[58]
- An "affirmative action" defence;[59] and
- A number of sector-specific defences.[60]

The general defence does not apply where the discrimination exists in the failure to make reasonable accommodation as set out in section 9(1)(d) above. The sector-specific defences are as follows:[61]

- Services, accommodation, facilities, goods, rights, benefits, programs and privileges may be denied to a person who has not yet reached the age of majority of such denial is required or authorised by an Act in force in Manitoba;[62]
- The Lieutenant Governor in Council may make regulations that prescribes certain distinctions made for life insurance, accident and sickness insurance purposes to be *bona fide* and reasonable;

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[55] S 18.
[56] S 19.
[57] S 20.
[58] See the definitions quoted in fn 50-54 above.
[59] S 11: "Notwithstanding any other provision of this Code, it is not discrimination… (a) to make reasonable accommodation for the special needs of an individual or group, if those special needs are based upon any characteristic referred to in subsection 9(2) ..."
[60] Ss 13(2), 14(8), 14(10), 14(11), 15(2) and 16(2).
[61] I do not deal with the employment-related defences.
[62] S 13(2).

- An occupier of a residence may discriminate in the choice of a boarder or tenant if the occupier and the boarder of tenant will share the same residence, or the other unit in a duplex.[63]

The Code contains a supremacy clause.[64]

C.5 New Brunswick

The New Brunswick *Human Rights Act*[65] prohibits employment-related discrimination,[66] discrimination relating to the right to occupy a commercial or residential property,[67] discrimination in offering to sell or considering an offer to purchase property,[68] discrimination relating to accommodation, services or facilities available to the public,[69] discrimination in imposing or enforcing a contractual term relating to property,[70] or discrimination by a professional association or business or trade association.[71] The New Brunswick Act recognises the following grounds of discrimination: race, colour, religion, national origin, ancestry, place of origin, age, physical

[63] S 16(2).
[64] S 58.
[65] 1985 c 30.
[66] S 3.
[67] S 4(1): "No person directly or indirectly, alone or with another, by himself or by the interposition of another, shall (a) deny to any person or class of persons the right to occupy any commercial unit or dwelling unit, or (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any commercial unit or dwelling unit, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex".
[68] S 4(2): "No person who offers to sell property or any interest in property shall (a) refuse an offer to purchase the property or interest made by a person or class of persons, (b) discriminate against any person or class of persons with respect to any term or condition of the sale of any property or interest in property, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex".
[69] S 5(1): "No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall (a) deny to any person or class of persons any accommodation, services or facilities available to the public, or (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex".
[70] S 4(3): "No person shall impose, enforce or endeavour to impose or enforce, any term or condition on any conveyance, instrument or contract, whether written or oral, that restricts the right of any person or class of persons, with respect to property because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, sexual orientation or sex". It is not clear why "marital status" was excluded from the list in s 4(3).
[71] S 7(1): "No professional association or business or trade association shall exclude any persons from full membership or expel or suspend or otherwise discriminate against any of its members because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex".

disability,[72] mental disability,[73] marital status, sexual orientation and sex.[74] The Act also prohibits discriminatory notices,[75] sexual harassment[76] and retaliation.[77]

Employment-related discrimination generally allows for a defence of "*bona fide* occupational qualification" as determined by the Commission.[78]

Non-employment forms of discrimination may be met by a defence that "such limitation, specification, exclusion, denial or preference is based upon a *bona fide* qualification as determined by the Commission" if the ground of discrimination relates to sex, physical disability, mental disability, marital status or sexual orientation.[79] It appears that this defence is therefore not available if the discrimination occurs on any of the other grounds.

If discrimination occurs based on age against person who has not yet reached the age of majority, a defence may be raised that the "limitation, specification, exclusion, denial or preference is required or authorised by an Act of the Legislature or a regulation made under that Act".[80]

A specific defence is available in cases of discrimination by a professional, business or trade association:

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[72] The Act defines it as "any degree of disability, infirmity, malformation or disfigurement of a physical nature caused by bodily injury, illness or birth defect and, without limiting the generality of the foregoing, includes any disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance".

[73] The Act defines it as "(a) any condition of mental retardation or impairment; (b) any learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language; or (c) any mental disorder".

[74] "Sex" includes pregnancy, the possibility of pregnancy or circumstances related to pregnancy in terms of s 1.

[75] S 6.

[76] S 7. "Sexually harass" is defined as to "engage in vexatious comment or conduct of a sexual nature that is known or ought reasonably to be known to be unwelcome".

[77] See s 8: "No person shall discharge, refuse to employ, exclude, expel, suspend, deny, evict or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act".

[78] S 3(5).

[79] S 4(4) and 5(2).

[80] S 4(5) and 5(3).

7(2) Nothing in this section affects the application of any statutory provision restricting membership in a professional association or business or trade association to Canadian citizens or British subjects.

The Act allows for vicarious liability in cases of sexual harassment.[81]

C.6 Newfoundland and Labrador

The Newfoundland *Human Rights Code*[82] prohibits discrimination relating to accommodation, services, facilities or goods;[83] occupancy of a commercial unit or a self-contained dwelling unit;[84] and employment[85] on the grounds of race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, physical disability and mental disability.[86]

The Code contains a number of defences and exceptions:[87]

The rights and privileges of denominational schools, common or amalgamated schools, or denominational colleges are not prejudicially affected by the Code.[88]

Preference may be given workers whose usual place of residence is Newfoundland.[89]

Preference may be given to material, equipment or other things produced, originating, manufactured or distributed and serviced in Newfoundland.[90]

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[81] S 7.1(6).
[82] RSNL1990 Chapter H-14.
[83] S 6(1).
[84] S 7(1).
[85] Ss 9-11.
[86] Employment discrimination based on age is prohibited if the person has reached the age of 19 and has not yet reached the age of 65. In other sectors age discrimination is apparently acceptable.
[87] I do not refer to employment-related defences.
[88] S 4(2).
[89] S 4(3)(a).
[90] S 4(3)(b).

Discrimination relating to accommodation, services, facilities and goods based on a physical or mental disability is permitted if the "limitation, exclusion, denial or preference is based upon a good faith qualification".[91]

Discrimination relating to accommodation, services, facilities and goods is acceptable in the following circumstances:

- accommodation in a private residence;[92] but not if that private residence offers a bed and breakfast accommodation for pay;[93]
- exclusion from accommodation, services or facilities because of that person's sex on the ground of public decency;[94]
- exclusion from accommodation where sex is a reasonable criterion for admission to the accommodation;[95]
- restriction of membership in a religious, philanthropic, educational, fraternal, sororal or social organisation that is primarily engaged in serving the interests of a group of people identified by a ground of discrimination;[96] and
- other situations where a good faith reason exists for the discrimination.[97]

Discrimination relating to occupancy of a commercial unit or a self-contained dwelling unit on the basis of physical or mental disability may be defended by establishing a good faith qualification.[98]

The Code contains a supremacy clause.[99]

C.7 North West Territories

The relevant North West Territories legislation is relatively narrow in its scope.

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[91] S 6(2).
[92] S 6(3)(a).
[93] S 6(4).
[94] S 6(3)(b).
[95] S 6(3)(c).
[96] S 6(3)(d).
[97] S 6(3)(e).
[98] S 7(2).
[99] S 5.

The *Consolidation of Fair Practices Act*[100] prohibits discrimination in employment[101] and accommodation, services and facilities[102] on the grounds of race, creed, colour, sex, marital status, nationality, ancestry, place of origin, disability, age or family status of a person or because of a conviction of a person for which a pardon has been granted.

The Act contains a number of employment-related exceptions,[103] as well as a "*bona fide* occupational qualification" defence.[104]

The Act prohibits discriminatory publications.[105]

C.8 Nova Scotia

The *Human Rights Act*[106] prohibits discrimination against individuals or a class of individuals in the provision of or access to services and facilities; accommodation; the purchase or sale of property; employment; volunteer public service; a publication, broadcast or advertisement; or membership in a professional association, business or trade association, employers organisation or employees organisation. The recognised prohibited grounds are age; race; colour; religion; creed; sex;[107] sexual orientation; physical disability or mental disability;[108] an irrational fear of contracting an

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[100] RSNWT 1988 c F-2.
[101] S 3 and 6.
[102] S 4(1): "No person shall, because of the [the prohibited grounds are listed] deny to that person the accommodation, services or facilities available in any place to which the public is customarily admitted". S 4(2): "No person shall, directly or indirectly, (a) deny to any person or class of persons occupancy of any apartment in any building that contains self-contained dwelling units, or (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any apartment in any building that contains self-contained dwelling units, because of the [prohibited grounds]".
[103] S 2(1) and 2(2).
[104] S 2(3).
[105] S 5.
[106] RS, c 214, s 1, chapter 214 of the Revised Statutes 1989, revised 1991, c 12.
[107] "Sex" includes pregnancy, possibility of pregnancy and pregnancy-related illness.
[108] "Physical disability or mental disability" is defined as "an actual or perceived (i) loss or abnormality of psychological, physiological or anatomical structure or function, (ii) restriction or lack of ability to perform an activity, (iii) physical disability, infirmity, malformation or disfigurement, including, but not limited to, epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device, (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (v) condition of being mentally handicapped or impaired, (vi) mental disorder, or (vii) previous dependency on drugs or alcohol".

illness or disease; ethnic, national or aboriginal origin; family status;[109] marital status;[110] source of income; political belief, affiliation or activity; or an individual's association with another individual or class of individuals having characteristics with reference to these grounds.

"Discrimination" is somewhat clumsily defined as follows:

> For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.[111]

The Act contains a relatively lengthy list of defences:[112]

> 6 Subsection (1) of Section 5 does not apply
>
> (a) in respect of the provision of or access to services or facilities, to the conferring of a benefit on or the providing of a protection to youth or senior citizens;
>
> (b) in respect of accommodation, where the only premises rented consist of one room in a dwelling house the rest of which is occupied by the landlord or the landlords family and the landlord does not advertise the room for rental by sign, through any news media or listing with any housing, rental or tenants agency;
>
> (c) …
>
> (d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;
>
> (e) where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;
>
> (f) where a denial, refusal or other form of alleged discrimination is
>
> (i) based upon a *bona fide* qualification, or
>
> (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

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[109] "Family status" is defined as "the status of being in a parent-child relationship".
[110] "Marital status" is defined as "the status of being single, engaged to be married, married, separated, divorced, widowed or a man and woman living in the same household as if they were married".
[111] S 4.
[112] I excluded the employment-related defences from the quotation.

(g) to prevent, on account of age, the operation of a *bona fide* retirement or pension plan or the terms or conditions of a *bona fide* group or employee insurance plan;

(h) to preclude a *bona fide* plan, scheme or practice of mandatory retirement; or

(i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

The Act prohibits discriminatory publications[113] and retaliation.[114]

C.9 Nunavut

The Nunavut *Consolidation of Fair Practices Act*[115] prohibits discrimination in employment[116] and accommodation, services or facilities,[117] and prohibits discriminatory notices.[118] The grounds of discrimination recognised in the Act are race, creed, colour, sex, marital status, nationality, ancestry, place of origin, disability, age or family status of that person or class of persons or because of a conviction for which a pardon has been granted.

The Act contains a number of employment-specific defences but does not contain a "catch-all" general defence against a complaint of discrimination.

C.10 Ontario

The Ontario legislature approached discrimination rather haphazardly. The Ontario *Racial Discrimination Act*[119] targeted the use of "Whites Only" signs put up by shopkeepers and other service providers. The *Fair Employment Practices Act*[120] prohibited discrimination in employment

[113] S 7.
[114] S 11.
[115] RSNWT 1988, c F-2.
[116] S 3 and 6.
[117] S 4(1): "No person shall, because of the [prohibited grounds] deny to that person the accommodation, services or facilities available in any place to which the public is customarily admitted". S 4(2): "No person shall, directly or indirectly, (a) deny to any person or class of persons occupancy of any apartment in any building that contains self-contained dwelling units, or (b) discriminate against any person or class of persons with respect to any term or condition of occupancy of any apart ment in any building that contains self-contained dwelling units, because of the [prohibited grounds]".
[118] S 5.
[119] SO 1944 c51.
[120] SO 1951 c24.

and the *Females Employees Fair Remuneration Act*[121] prohibited women being paid less for the same work performed by a male employee. The *Fair Accommodation Practices Act*[122] prohibited the denial on discriminatory grounds of "accommodation, services or facilities available in any place to which the public is customarily admitted". This Act was later amended to include the denial of rental accommodation in any building containing more than six units.[123] A later legislative expansion prohibited discrimination in the provision of *all* goods, services and facilities.[124] The first consolidation took place with the Ontario Code of 1962.[125] Periodic consolidations have taken place since then. The prohibited grounds have also grown over the years. Réaume[126] mentions that the growth in prohibited grounds "looks less like the result of the legislature's attempts to work out a general theory about who deserves the law's protection, than the *ad hoc* application of band-aids as the Ontario Human Rights Commission has publicized the plight of groups of people left out of the Code's protection". The first attempt at prohibiting discrimination only related to race and religion. Employment discrimination legislation thereafter added colour, nationality, ancestry or place of origin. A separate 1966 Act added age and sex; marital status was included in 1972; 1981 saw the inclusion of family status and handicap; and sexual orientation was added in 1986.[127]

Réaume's analysis is very apt:[128]

> 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.

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[121] SO 1951 c26.
[122] SO 1954 c28.
[123] Fair Accommodation Practices Amendment Act SO 1960-61 c28.
[124] Fair Accommodation Practices Act SO 1981 c53 s 1.
[125] SO 1961-62 c93.
[126] Réaume (2002) 40 *Osgoode Hall LJ* 127.
[127] See Réaume (2002) 40 *Osgoode Hall LJ* 127.
[128] Réaume (2002) 40 *Osgoode Hall LJ* 127-128.

The Ontario *Human Rights Code* prohibits discrimination in services,[129] accommodation,[130] contracts,[131] employment[132] and vocational associations.[133] The prohibited grounds differ somewhat according to the particular sector. The prohibited grounds common to all the sectors are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex,[134] sexual orientation, age, marital status,[135] same-sex partnership status,[136] family status[137] and disability.[138] "Receipt of public assistance" is an additional ground in accommodation discrimination and "record of offences" is listed under employment discrimination. The Code explicitly prohibits discrimination because of association.[139]

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[129] S 1: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability".

[130] S 2(1): "Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance".

[131] S 3: "Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability".

[132] S 5(1).

[133] S 6: "Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability".

[134] S 10(2) states that "The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant".

[135] "Marital status" is defined as "the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage".

[136] Defined as "the status of living with a person of the same sex in a conjugal relationship outside marriage".

[137] "Family status" is defined as "the status of being in a parent and child relationship".

[138] Defined as "(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device, (b) a condition of mental impairment or a developmental disability, (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language, (d) a mental disorder, or (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*". S 10(3) states that "[T]he right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability".

[139] S 12: "A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination".

The Code also prohibits harassment in accommodation,[140] harassment in employment,[141] harassment because of sex in accommodation,[142] harassment because of sex in workplaces,[143] sexual solicitation,[144] reprisals[145] and discriminatory notices.[146]

The Code seemingly only allows a general defence based on reasonableness and good faith / undue hardship in cases of *indirect* discrimination. Section 11 is headed "constructive discrimination" and reads as follows:

> (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground *but that results in the exclusion, restriction or preference of a group of persons* who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.[147]
>
> (2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

The Code also contains a number of more specific defences:

- a "special programs" defence;[148]
- preferential treatment based on age of sixty-five years or over;[149]

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[140] S 2(2).
[141] S 5(2).
[142] S 7(1).
[143] S 7(2).
[144] S 7(3).
[145] S 8.
[146] S 13(1).
[147] S 11(1); my emphasis.
[148] S 14: "A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I"..
[149] S 15.

- discrimination based on citizenship where Canadian citizenship is a requirement, qualification or consideration imposed or authorised by law;[150]
- discrimination based on disability where the disabled person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right;[151]
- a defence favouring special interest organisations;[152]
- a "public decency" defence in cases of sex discrimination relating to services and facilities;[153]
- a statutory minimum drinking age of 19 years[154] and a similar prohibition relating to tobacco does not contravene the Code;[155]
- a defence favouring recreational clubs;[156]
- a defence against accommodation discrimination based on intimacy;[157]
- a defence against accommodation discrimination based on same-sex ocupancy;[158]
- a defence favouring insurance companies;[159] and
- a number of employment-related defences.[160]

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[150] S 16(1).
[151] S 17(1). S 17(2) states that a disabled person may not be found to be incapable unless the needs of the disabled person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, taking into account the cost, sources of funding and health and safety requirements.
[152] S 18: "The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified".
[153] S 20(1).
[154] S 20(2).
[155] S 20(4).
[156] S 20(3): "The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preference with respect to membership dues and other fees because of age, sex, marital status, same-sex partnership status or family status".
[157] S 21(1): "The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner of his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner".
[158] S 21(2): "The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex".
[159] S 22: "The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, same-sex partnership status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, same-sex partnership status, family status or disability".

The Code contains a supremacy clause.[161]

C.11 Prince Edwards Islands

The Prince Edward Islands *Human Rights Act* prohibits discrimination in the enjoyment of accommodation, services and facilities to which members of the public have access; [162] occupancy of any commercial unit or self-contained dwelling unit or accommodation in a housing unit that is used to provide rental accommodation,[163] the purchase or sale of property,[164] title conditions,[165] employment[166] and membership of business, professional or trade association.[167] The Act prohibits discrimination on the grounds of race, religion, creed, colour, sex, marital status,[168] ethnic or national origin, age, physical or mental handicap[169] or political belief[170] of any person with whom the individual or class of individuals associates.[171]

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[160] Ss 23-26.
[161] S 47(2).
[162] S 2(1): "No person shall discriminate (a) against any individual or class of individuals with respect to enjoyment of accommodation, services and facilities to which members of the public have access; or (b) with respect to the manner in which accommodations, services and facilities, to which members of the public have access, are provided to any individual or class of individuals.
[163] S 3(1): "No person shall (a) deny to any individual or class of individuals, on a discriminatory basis, occupancy of any commercial unit or self-contained dwelling unit or accommodation in a housing unit that is used to provide rental accommodation; or (b) discriminate against any individual or class of individuals with respect to any term or condition of occupancy of any commercial unit or self-contained dwelling unit, or accommodation in a housing unit that is used to provide rental accommodation".
[164] S 4: "No person who offers to sell property or any interest in property shall (a) refuse an offer to purchase the property or interest made by an individual or class of individuals on a discriminatory basis; or (b) discriminate against any individual or class of individuals with respect to any term or condition of sale of any property or interest".
[165] S 5: "Where in an instrument transferring an interest in real property a covenant or condition restricts the sale, ownership, occupation, or use of the property on a discriminatory basis, the covenant or condition is void".
[166] Ss 6-8.
[167] S 9: "No business, professional or trade association shall exclude any individual from full membership or expel or suspend any of its members on a discriminatory basis".
[168] "Marital status" is defined as "the status of being married, single, widowed, divorced, separated, or living with a person of the opposite sex in a conjugal relationship outside marriage".
[169] "Physical or mental handicap" is defined as "a previous or existing disability, infirmity, malformation or disfigurement, whether of a physical or mental nature, that is caused by injury, birth defect or illness, and includes but is not limited to epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guidedog, wheelchair or other remedial device".
[170] "Political belief" is defined as "belief in the tenets of a political party that is at the relevant time registered under section 24 of the *Election Act* R.S.P.E.I. 1988, Cap. E-1 as evidenced by (i) membership of or contribution to that party, or (ii) open and active participation in the affairs of that party.
[171] S 13.

The Act contains a few sector-specific defences:

- A defence against age discrimination relating to accommodation, services or facilities;[172]
- A defence against sex discrimination relating to accommodation in a dwelling;[173]
- A number of employment-related defences;[174]
- A defence relating to exclusively religious or ethnic not-for-profit organisations;[175]
- A defence against age and disability discrimination relating to retirement and pensions plans and group or employee insurance plans;[176] and
- A defence relating to the recipients of welfare assistance benefits.[177]

The Act also contains the following general defences:

> 14.(1) Sections 2 to 13 do not apply
> (a) to the display of a notice, sign, symbol, emblem, or other representation displayed to identify facilities customarily used by one sex;
> (b) to display or publication by or on behalf of an organization that
> (i) is composed exclusively or primarily of persons having the same political or religious beliefs, nationality, ancestry, or place of origin, and
> (ii) is operated as a non-profit organization, of a notice, sign, symbol, emblem, or other representation indicating a purpose or membership qualification of the organization;
> (c) to philanthropic, fraternal or service groups, associations or organizations, to the extent that they discriminate on the basis of sex in their qualifications for membership;
> (d) to a refusal, limitation, specification, or preference based on a genuine qualification; or

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[172] S 2(2): "Subsection (1) does not prevent the denial or refusal of accommodation, services or facilities to a person on the basis of age if the accommodation, services or facilities are not available to that person by virtue of any enactment in force in the province".
[173] S 3(2): "This section does not apply to the barring of any person because of the sex of such person (a) from accommodation in a housing unit where the housing unit is in a structure having two or more housing units; (b) from a self-contained dwelling unit, where the dwelling unit is in a structure having two or more self-contained dwelling units, where occupancy of all the housing units or dwelling units, except that of the owner or the agent of the owner, is restricted to individuals of the same sex.
[174] S 6(4).
[175] S 10(2): "This section does not apply to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be".
[176] S 11: "The provisions of this Act relating to discrimination in relation to age or physical or mental handicap do not affect the operation of any genuine retirement or pension plan or any genuine group or employee insurance plan".
[177] S 15.1: "Nothing in this Act prevents the Government of Prince Edward Island, an agency of the Crown, or a regional authority established pursuant to the *Health and Community Services Act* R.S.P.E.I. 1988, Cap. H-1.1 from requiring that persons be in receipt of, or eligible for, welfare assistance benefits in order to qualify for access to accommodations, services, programs, or facilities directed at assisting persons in receipt of, or eligible for, welfare assistance benefits".

(e) to trusts, deeds, contracts, agreements or other instruments entered into before this Act comes into force.

The burden of proof of establishing the "genuine qualification" defence is on the party asserting it.[178]

The Act also prohibits discriminatory publications[179] and reprisals.[180]

The Act contains a supremacy clause.[181]

C.12 Saskatchewan

The Saskatchewan *Human Rights Code*[182] protects the right to to engage in and carry on any occupation, business or enterprise under the law without discrimination,[183] and prohibits discrimination in the purchase of property;[184] housing occupancy (including commercial units);[185] accommodation, services or facilities to which the public is customarily admitted or that are offered to the public;[186] education;[187] contracts;[188] employment[189] and in professional and trade

[178] S 14(2).
[179] S 12.
[180] S 15.
[181] S 1(2).
[182] Chapter S-24.1 of the *Statutes of Saskatchewan, 1979* (effective August 7, 1979) as amended by the *Statutes of Saskatchewan,* 1980-81, c 41 and 81; 1989-90, c 23; 1989-90, 1993, c 55 and 61; and 2000, c 26.
[183] S 9.
[184] S 10(1): "No person shall, on the basis of a prohibited ground: (a) deny to any person or class of persons the opportunity to purchase any commercial unit or any place of dwelling that is advertised or in any way represented as being available for sale; (b) deny to any person or class of persons the opportunity to purchase or otherwise acquire land or an interest in land; or (c) discriminate against any person or class of persons with respect to any term of the purchase or other acquisition of any commercial unit or any place of dwelling, land or any interest in land".
[185] S 11(1): "No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground: (a) deny to any person or class of persons occupancy of any commercial unit or any housing accommodation; or (b) discriminate against any person or class of persons with respect to any term of occupancy of any commercial unit or any housing accommodation".
[186] S 12(1): "No person, directly or indirectly, alone or with another, or by the interposition of another shall, on the basis of a prohibited ground: (a) deny to any person or class of persons the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public; or (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities to which the public is customarily admitted or that are offered to the public".
[187] S 13(1): "Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination on the basis of a prohibited ground other than age".
[188] S 15(1): "No person shall, in making available to any person a contract that is offered to the public: (a) discriminate against any person or class of persons on the basis of a prohibited ground; or (b) include terms in the contract that discriminate against a person or class of persons on the basis of a prohibited ground".

associations.[190] The prohibited grounds recognised in the Act are religion,[191] creed,[192] marital status,[193] family status,[194] sex,[195] sexual orientation, disability,[196] age,[197] colour, ancestry, nationality, place of origin, race or perceived race, and receipt of public assistance.

The Code contains a relatively large number of defences:

Discrimination in housing accommodation is not prohibited where the place of dwelling "is part of a building in which the owner or the owner's family resides and where the occupant of the place of dwelling is required to share a bathroom or kitchen facility with the owner or the owner's family".[198]

Discrimination in the purchase of property based on age is permitted where such discrimination "is permitted or required by law or regulation in force" in Saskatchewan.[199]

Discrimination in the purchase of property based on age is permitted in the "offering for sale or the advertising for sale of a place of dwelling for occupancy by persons over 55 years of age exclusively".[200]

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[189] S 16.
[190] S 17: "Every person and every class of persons shall enjoy the right to membership, and all the benefits appertaining to membership, in any professional society or other occupational association without discrimination on the basis of a prohibited ground".
[191] "Religion" is defined as including "all aspects of religious observance and practice as well as beliefs".
[192] "Creed" is defined as "religious creed".
[193] "Marital status" is defined as "that state of being engaged to be married, married, single, separated, divorced, widowed or living in a common-law relationship, but discrimination on the basis of a relationship with a particular person is not discrimination on the basis of marital status".
[194] "Family status" is defined as "the status of being in a parent and child relationship and, for the purposes of this clause: (i) "child" means son, daughter, stepson, stepdaughter, adopted child and person to whom another person stands in place of a parent; (ii) "parent" means father, mother, stepfather, stepmother, adoptive parent and person who stands in place of a parent to another person".
[195] "Sex" is defined as "gender, and, unless otherwise provided in this Act, discrimination on the basis of pregnancy or pregnancy-related illnesses is deemed to be discrimination on the basis of sex".
[196] "Disability" is defined as "(i) any degree of physical disability, infirmity, malformation or disfigurement and, without limiting the generality of the foregoing, includes: (A) epilepsy; (B) any degree of paralysis; (C) amputation; (D) lack of physical co-ordination; (E) blindness or visual impediment; (F) deafness or hearing impediment; (G) muteness or speech impediment; or (H) physical reliance on a service animal, wheelchair or other remedial appliance or device; or (ii) any of: (A) an intellectual disability or impairment; (B) a learning disability or a dysfunction in one or more of the processes involved in the comprehension or use of symbols or spoken language; or (C) a mental disorder". "Mental disorder" is defined as "a disorder of thought, perception, feelings or behaviour that impairs a person's: (i) judgment; (ii) capacity to recognize reality; (iii) ability to associate with others; or (iv) ability to meet the ordinary demands of life".
[197] "Age" is defined as "any age of eighteen years or more but less than sixty-five years".
[198] This exclusion is contained in the definition of "housing accommodation".
[199] S 10(2).

Three defences are available relating to discrimination in occupancy of a commercial unit or housing accommodation: Same sex accommodation;[201] a defence based on the sharing of the dwelling;[202] and occupancy aimed at people older than 55.[203]

Three defences are available relating to discrimination in places to which the public is admitted: Sex discrimination based on public decency;[204] age discrimination where it is allowed by law;[205] and the preferential treatment of people based on marital status and family status.[206]

Discrimination in education based on sex, creed, religion and disability is allowed in certain circumstances.[207]

The Code contains a defence favourable to insurers:[208]

> The right pursuant to subsection (1) is not infringed where:
>
> (a) a contract of automobile, life, accident or sickness or disability insurance;
>
> (b) a contract of group insurance between an insurer and an association or person;
>
> (c) a life annuity;
>
> (d) a pension contract; or

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[200] S 10(3).
[201] S 11(2): "Subsection (1) does not apply to discrimination on the basis of the sex of a person with respect to housing accommodation, where the occupancy of all the housing accommodation in a building, except that of the owner or the owner's family, is restricted to individuals who are of the same sex".
[202] S 11(3): "Subsection (1) does not apply to discrimination on the basis of the sex or sexual orientation of a person with respect to the renting or leasing of any dwelling unit in any housing accommodation that is composed of not more than two dwelling units, where the owner of the housing accommodation or the owner's family resides in one of the two dwelling units".
[203] S 11(4): "Nothing in subsection (1) prohibits the renting or leasing, the offering for rent or lease or the advertising for rent or lease, of any housing accommodation for occupancy by persons over 55 years of age exclusively".
[204] S 12(2): "Subsection (1) does not apply to prevent the barring of any person because of the sex of that person from any accommodation, services or facilities upon the ground of public decency".
[205] S 12(3): "Subsection (1) does not apply to prevent the denial or refusal of any accommodation, services or facilities to a person on the basis of age, if the accommodation, services or facilities are not available to that person by virtue of any law or regulation in force in the province".
[206] S 12(4): "Subsection (1) does not apply to prevent the giving of preference because of marital status or family status with respect to membership dues, fees or other charges for services or facilities".
[207] S 13(2): "Nothing in subsection (1) prevents a school, college, university or other institution or place of learning from following a restrictive policy with respect to enrolment on the basis of sex, creed, religion or disability, where it enrols persons of a particular sex, creed or religion exclusively, or is conducted by a religious order or society, or where it enrols persons who are disabled".
[208] S 15(1.2).

(e) any contract other than one mentioned in clauses (a) to (d);
is prescribed in the regulations as a contract or one of a category of contracts that differentiates or makes a distinction, exclusion or preference on reasonable and bona fide grounds because of disability, age or family status.

The Code also contains a number of employment-specific defences.[209]

Where discrimination on the ground of disability related to premises, facilities or services consists in the impediment of physical access or the lack of proper amenities, a defence may be raised that an order to measures be taken to improve physical access or to provide proper amenities would cause undue hardship to the respondent.[210] "Undue hardship" is defined as follows:

… intolerable financial cost or disruption to business having regard to the effect on:
(i) the financial stability and profitability of the business undertaking;
(ii) the value of existing amenities, structures and premises as compared to the cost of providing proper amenities or physical access;
(iii) the essence or purpose of the business undertaking; and
(iv) the employees, customers or clients of the business undertaking, disregarding personal preferences;
but does not include the cost or business inconvenience of providing washroom facilities, living quarters or other facilities for persons with physical disabilities where those facilities must be provided by law for persons of both sexes.

C.13 Yukon

The Yukon *Human Rights Act*[211] states that it is discrimination to treat any individual or any group unfavourably on grounds of ancestry, including colour and race; national origin; ethnic or linguistic background or origin; religion or creed, or religious belief, religious association, or religious activity; age; sex, including pregnancy, and pregnancy related conditions; sexual orientation; physical or mental disability; criminal charges or criminal record; political belief, political association or political activity; marital or family status; or actual or presumed association with other individuals or groups whose identity or membership is determined by any of the listed grounds.[212]

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[209] S 16(4) to 16(11).
[210] Ss 31.2(b) and 31.3(e).
[211] SY 1987, c.3, assented to on 12 February 1987.
[212] S 6.

No person may discriminate when offering or providing services, goods, or facilities to the public; in connection with any aspect of employment or application for employment; in connection with any aspect of membership in or representation by any trade union, trade association, occupational association, or professional association; in connection with any aspect of the occupancy, possession, lease, or sale of property offered to the public; or in the negotiation or performance of any contract that is offered to or for which offers are invited from the public.[213]

The Act prohibits indirect discrimination as well.[214]

The Act contains a number of sector-specific defences:

- sex discrimination is permitted relating to accommodation, services and facilities in order to respect the privacy of the people to whom the accommodation, service or facility is offered;[215]
- religious, charitable, educational, social, cultural or athletic organisations may give preference to its members or to people the organisation exists to serve;[216]
- people may give preference to family members;[217]
- an occupant of a private home may discriminate in choosing the boarder or tenant who will share part of the home;[218]
- "special programs"[219] and "affirmative action programs";[220] and
- a number of employment-specific defences.[221]

The Act also contains a general "reasonable cause" defence:

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[213] S 8.
[214] S 11 is headed "systemic discrimination" and reads "any conduct that results in discrimination is discrimination".
[215] S 9(c).
[216] S 10(1).
[217] S 10(2).
[218] S 10(3).
[219] Defined as "programs designed to prevent disadvantages that are likely to be suffered by any group identified by reference to a prohibited ground of discrimination". S 12(1).
[220] Defined as "programs designed to reduce disadvantages resulting from discrimination suffered by a group identified by reference to a prohibited ground of discrimination". S 12(1).
[221] S 9(a); 9(b) and 10(3)(a).

> 9. It is not discrimination if treatment is based on
>
> …
>
> (d) other factors establishing reasonable cause for the discrimination.

Individuals have a duty in terms of the Act to reasonably provide for the special needs of people with physical disabilities, unless making such provisions would cause undue hardship. "Undue hardship" is determined "by balancing the advantages and disadvantages of the provisions by reference to factors such as (i) safety; (ii) disruption to the public; (iii) effect on contractual obligations; (iv) financial cost; (v) business efficiency".[222]

The Act also prohibits harassment[223] and retaliation.[224]

[222] S 7.
[223] S 13(1)(a) and 13(2).
[224] S 13(1)(b).

Annexure D: Profile of decisions – Canadian anti-discrimination tribunals 1996 – 2003

D.1 Canadian Human Rights Tribunal

Bader v Department of National Health and Welfare TD 1/96 1996/01/12

Profile of complainant:	White male.
Profile of respondent:	Government agency with a mandate to protect the health of the general public.
Prohibited ground:	(Caucasian) race and ethnic origin.
Brief description of merits:	The respondent treated Chinese herb and botanical dealers more favourably than white dealers in the enforcement of the Food and Drugs Act.
Outcome:	Complaint dismissed but reversed on appeal (*Bader v Department of National Health and Welfare* TD 2/98 1998/03/11).

Baptiste v Correctional Service Canada TD 12/01 2001/11/06

Profile of complainant:	Black female.
Profile of respondent:	Government agency.
Prohibited ground:	Race
Brief description of merits:	Employment discrimination; complainant alleged that her job performance was unfairly evaluated.
Outcome:	Complaint dismissed but respondent's management advised not to tolerate the use of racially derogatory epithets.

Bernard v Waycobah Board of Education TD 2/99 1999/06/11

Profile of complainant:	First Nation female.
Profile of respondent:	Committee composed of the chief of the Wycobah First Nation, six Band Councillors and a few people elected from the community at large.

Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment discrimination; complainant's employment terminated based on her (perceived) mental disability.
Outcome:	Complaint upheld and a wide range of remedies ordered.

Butler v Nenqayni Treatment Centre Society TD 12/02 2002/10/28

Profile of complainant:	Female (ethnic origin unknown).
Profile of respondent:	Day care centre.
Prohibited ground:	Disability.
Brief description of merits:	Employment discrimination; the complainant was fired because of her disability – she was injured in a dirt bike accident and crushed two vertebrae.
Outcome:	Complaint dismissed; the ability to lift children being found a *bona fide* occupational requirement.

Canadian Union of Public Employees (Airline Division) v Canadian Airlines International Limited and Air Canada TD 9/98 1998/12/15

Profile of complainant:	Employee's union on behalf of female flight attendants
Profile of respondent:	Airline company
Prohibited ground:	Sex
Brief description of merits:	Employment-related discrimination; lower wages paid to female flight attendants than male First Officers and Second Officers; salary structure different for females in that it takes longer to reach the maximum; pension benefits differ as well.
Outcome:	Complaint did not succeed on technical grounds.

Carter v Canadian Armed Forces TD 2/00 2000/03/02

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Age.

Brief description of merits:	Employment discrimination relating to a compulsory retirement requirement.
Outcome:	Complaint upheld on technical grounds.

Chander and Joshi v Department of National Health and Welfare TD 5/96 1996/04/09

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Unclear.
Brief description of merits:	Employment discrimination relating to denied promotion.
Outcome:	Complaint upheld; respondent ordered to pay lost wages.

Chilliwack Anti-Racism Project Society v Pastor Charles Scott and the Church of Christ in Israel TD 6/96 1996/04/30

Profile of complainant:	Non-governmental organisation. ("A corporation established with the stated purpose of developing informed and collective action against prejudice and discrimination on the basis of race and ethnicity within the community".)
Profile of respondent:	White male; private religious institution.
Prohibited ground:	Colour, national or ethnic origin, race and religion.
Brief description of merits:	Hate speech complaint; the respondent's telephone message *inter alia* claimed that "the Church of Christ in Israel is laying the groundwork for a revolution which will return power to the white race".
Outcome:	Complaint upheld; respondent ordered to cease communicating the message.

Chopra v Department of National Health and Welfare TD 3/96 1996/03/08

Profile of complainant:	Male, born in India.
Profile of respondent:	Government agency.
Prohibited ground:	Race, colour, national or ethnic origin.

Brief description of merits:	Employment discrimination; the complainant alleged that he was treated in an adverse manner relating to his performance appraisals.
Outcome:	Complaint initially dismissed; the complainant applied to the Federal Court of Canada which ruled that the tribunal had erred in not allowing the complainant to adduce evidence of a systemic problem of discrimination at the specific hospital, and referred the matter back to the original tribunal. On rehearing the matter the complaint was upheld (*Chopra v Department of National Health and Welfare* TD 10/01 2001/08/13.)

Cizungu v Human Resources Development Canada TD 9/01 2001/07/31

Profile of complainant:	Black male originally from Zaire.
Profile of respondent:	Corporation.
Prohibited ground:	Race, colour, national or ethnic origin.
Brief description of merits:	Employment discrimination; the complainant alleged that he was discriminated against when the respondent refused to extend his contract of employment. On the complainant's version, his accent was the reason he was not rehired.
Outcome:	Complaint dismissed.

Conte v Rogers Cablesystems Ltd TD 4/99 1999/11/10

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment discrimination; the complainant was employed as a telephone consultant but had a persistent voice problem and her employment was terminated a week before the end of her probationary period.
Outcome:	Complaint upheld based on the respondent's failure to reasonably accommodate the complainant.

Cramm v Canadian National Railway Company (Terra Transport) and Brotherhood of Maintenance of Way Employees TD 97 1997/10/16

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment discrimination; the complainant argued that the respondents had formulated a policy that discriminated against temporary disabled individuals in the calculation of "continuous cumulative service" which determined rights to employment security on retrenchment.
Outcome:	Complaint originally upheld but dismissed on appeal (*Canadian National Railway (Terra Transport) v Cramm* TD 5/98 1998/06/23.)

Cranston et al *v Her Majesty the Queen in right of Canada* TD 1/97 1997/01/10

Profile of complainants:	20 pilots and six flight attendants (sex and ethnic origin unknown).
Profile of respondent:	Government.
Prohibited ground:	Age.
Brief description of merits:	Employment discrimination; the complainants alleged that the respondent pursued a policy that deprived them of an employment opportunity.
Outcome:	Complaint upheld.

Crouse v Canadian Steamship Lines Inc TD 7/01 2001/06/18

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment discrimination; the claimant alleged that the respondent refused to hire the complainant as a permanent relief electrician based on his alcohol dependence.

Outcome:	Complaint dismissed.

Daniels v Myron TD 08/01 2001/07/16

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male (ethnic origin unknown.)
Prohibited ground:	Sex.
Brief description of merits:	Harassment; the complainant alleged that the respondent discriminated against her based on sex as he did not provide her with an environment free of harassment. The respondent did not appear at the hearing.
Outcome:	Complaint upheld.

Dhanjal v Air Canada TD 4/96 1996/04/04

Profile of complainant:	Male Sikh.
Profile of respondent:	Corporation.
Prohibited ground:	Race and religion.
Brief description of merits:	Employment-related discrimination; the complainant alleged that his immediate supervisor harassed him and differentiated adversely against him in such a way that he was forced to resign.
Outcome:	Complaint dismissed.

Dumont v Transport Jeannot Gagnon Inc TD 2/02 2002/02/01

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent refused to employ him any further after he suffered a pneumothorax of the left lung.
Outcome:	Complaint upheld; the respondent did not base his defence on a *bona fide* occupational requirement.

Dumont-Ferlatte et al and Gauthier et al v Canada Employment and Immigration Commission, Department of National Revenue (Taxation), Treasury Board and Public Service Alliance of Canada TD 9/96 1996/07/16

Profile of complainants:	105 women.
Profile of respondent:	Government agencies.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination. The complainants alleged that they were discriminated against by the respondents as they were not credited with annual leave and sick leave while they were on maternity leave; and by negotiating a collective agreement under which they could not receive annual and sick leave credits while absent on maternity leave.
Outcome:	Complaints dismissed.

Eyerley v Seaspan International Limited TD 10/02 2002/07/11

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination. The complainant was employed as a cook/deckhand. He developed work-related carpal tunnel syndrome. He was absent from work 83% of the time, mainly as a result of his injury. He was dismissed due to non-culpable absenteeism.
Outcome:	Complaint upheld; the respondent did not accommodate the complainant to the point of undue hardship. In a subsequent hearing (*Eyerley v Seaspan International Limited* TD 18/01 2001/12/21) the tribunal urged the parties to cooperate in giving effect to the tribunal's order.

Franke v Canadian Armed Forces TD 4/98 1998/05/15

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Government agency.
Prohibited ground:	Sex.
Brief description of merits:	Harassment complaint.
Outcome:	Complaint upheld.

Gagnon v Canadian Armed Forces TD 04/02 2002/02/14

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Marital status.
Brief description of merits:	Harassment; the complainant alleged that because of a sexual and personal harassment complaint lodged by his wife, also a member of the Canadian Armed Forces, he was the victim of several incidents of discrimination by his superiors.
Outcome:	Complaint partly upheld.

Goyette and Tourville v Voyageur Colonial Limitée TD 8/97 1997/10/14

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Employee's Union.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination; the complainant argued that the departmental seniority regime set up by collective agreements signed in 1981 and 1989 systemically discriminated against a particular group of employees – telephone operators, of whom the majority were women. The collective agreement prevented them from becoming eligible for a ticketing office position; a position that offered better working conditions.
Outcome:	Complaint upheld and confirmed in *Goyette v Syndicat Des Employé(es) De Terminus De Voyageur Colonial Limitée (CSN)* TD 14/01 2001/11/16.

Green v Public Service Commission of Canada, Treasury Board and Human Resources Development Canada TD 6/98 1998/06/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent had discriminated against her by putting a policy in place that deprived people in her situation of employment opportunities. She suffered from dyslexia in auditory processes.
Outcome:	Complaint upheld; the respondent did not meet its duty to accommodate.

Hewstan v Auchinleck TD 7/97 1997/09/27

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male co-employee and co-host (ethnic origin unknown.)
Prohibited ground:	Sex.
Brief description of merits:	Harassment complaint. The complainant alleged that the respondent sexually harassed her and thereafter sabotaged her work as a result of her complaint. The radio station for which they worked dismissed both the complainant and respondent.
Outcome:	Complaint dismissed.

Irvine v Canadian Armed Forces TD 15/01 2001/11/23

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment-related discrimination; the complainant was an air force aviation technician when he suffered a heart attack. The respondent reviewed his medical condition and ruled that he was no longer fit to be employed.

Outcome: Complaint upheld; the respondent failed to establish a *bona fide* occupational requirement.

Jacobs and Jacobs v Mohawk Council of Kahnawake TD 3/98 1998/03/11

Profile of complainants: Peter Jacobs, of black and Jewish descent, was adopted by two Mohawks as a baby. His wife, Trudy Jabobs, was a Mohawk from Kahnawake who lost her Kahnawake status after marrying Peter.

Profile of respondent: First Nations Council.

Prohibited ground: Race, colour, national or ethnic origin, and family status.

Brief description of merits: Discrimination in the provision of services; the complainants alleged that the respondent refused them residency, land allotment and land rights, housing, medication and dental privileges. Peter and Judy were not on the Mohawk List of Kahnawake and were not considered members of the community as they did not satisfy the membership criteria.

Outcome: Complaint upheld; declaratory order furnished. (The respondent had indicated during the hearing that it would ignore an adverse order. The complainants asked for an order that the respondent recognise that they are Mohawks.)

Kavanagh v Attorney General of Canada TD 11/01 2001/08/31

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Government agency.

Prohibited ground: Disability.

Brief description of merits: The complainant suffered from Gender Identity Disorder. She was born as a male but had a subjective identity of herself as a woman. She was convicted of second degree murder. At the time she was living as a woman, had been taking female hormones and had been conditionally approved for sex reassignment surgery. She was held in a male prison. Her initial complaint against the respondent was settled; what remained was

	a challenge against the respondent's policy relating to the placement of pre-operative transsexual inmates and its policy relating to the availability of sex reassignment surgery to imprisoned individuals.
Outcome:	Complaint upheld; respondent ordered to formulate an appropriate policy in consultation with the Canadian Human Rights Commission.

Koeppel v Department of National Defence TD 5/97 1997/06/04

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the claimant alleged that the respondent could have accommodated her hearing disability by having co-workers answer all telephone calls. She was employed as a central registry clerk whose main duties entailed mail sorting and filing, and telephone answering.
Outcome:	Complaint upheld; respondent's defences based on *bona fide* occupational requirement and reasonable accommodation having failed.

Laessoe v Air Canada and Airline Division, Canadian Union of Public Employees TD 10/96 1996/09/13

Profile of complainant:	Homosexual male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Family status, marital status and sexual orientation.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent pursued a policy which limited spousal benefit coverage to heterosexual married and common law couples.
Outcome:	Complaint dismissed; at that time sexual orientation was not a prohibited ground under the Canadian Human Rights Act; marital

status and family status are inextricably linked to the complainant's sexual orientation and no discrimination exists unless discrimination on the basis of sexual orientation was found.

Lagacé v Canadian Armed Forces TD 11/96 1996/10/17

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Marital status and family status.
Brief description of merits:	Employment-related discrimination; the complainant alleged that he was discriminated against when he applied for officer candidate training, when his application was not supported by his superior nor forwarded to higher authority for consideration, as he was living in a common law relationship. He had made a previous complaint to the Human Rights Commission when he was denied permanent married quarters. He alleged that he was thereafter seen as a "troublemaker" and his career adversely affected.
Outcome:	Complaint upheld; an act of complaining to the Human Rights Commission on a prohibited ground is in itself a prohibited ground of discrimination.

Larente v Canadian Broadcasting Corporation TD 08/02 2002/04/23

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Age.
Brief description of merits:	Employment-related discrimination; the complainant's employment was terminated.
Outcome:	Complaint upheld; on the evidence the tribunal found it more probable that the respondent based its decision on the complainant's age rather than her alleged inability to fill the position.

Laslo v The Gordon Band Council TD 12/96 1996/12/04

Profile of complainant:	First Nations female.
Profile of respondent:	First Nations council.
Prohibited ground:	Sex, marital status and race.
Brief description of merits:	The complainant alleged that the respondent denied her residential accommodation on the reserve. She married a non-Native and lost her status as member of the band.
Outcome:	The tribunal held that the complainant established a *prima facie* case of discrimination; however the respondent could show that its decision was made in terms of section 20 of the Indian Act, which excluded the case from the application of the Canadian Human Rights Act (via section 67 of the latter Act.) The complaint was consequently dismissed.

Lawrence v Department of National Revenue (Customs and Excise) TD 2/97 1997/02/17

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Not stated; presumably disability.
Brief description of merits:	On alighting from an airplane after an overseas visit the complainant was asked to submit himself to an inspection. The complainant alleged that after he was forced to admit that he had AIDS, the customs officer put on latex gloves before proceeding to body search him.
Outcome:	Complaint dismissed; the tribunal held that the officer put on the latex gloves before learning of the complainant's AIDS status and acted in the performance of his duties as required of him when searching a traveler entering Canada.

Levac v Canadian Armed Forces TD 13/96 1996/12/13

Profile of complainant:	Male (ethnic origin unknown.)

Profile of respondent:	Government agency.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant was released from the Canadian Armed Forces on medical grounds nine years before his contract of employment would have expired.
Outcome:	Complaint upheld.

Lincoln v Bay Ferries Ltd TD 05/02 2002/02/20

Profile of complainant:	Male, born in Trinidad.
Profile of respondent:	Corporation.
Prohibited ground:	Race and colour.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent refused to employ him because of his colour and West Indian origin.
Outcome:	Complaint dismissed; the complainant could not establish a *prima facie* case.

Marinaki v Human Resources Development Canada TD 3/00 2000/06/29

Profile of complainant:	Female of Greek origin.
Profile of respondent:	Government agency.
Prohibited ground:	Sex, national or ethnic origin.
Brief description of merits:	Employment-related discrimination; the complainant alleged that her manager sexually and ethnically harassed her and that the respondent did not respond to her complaints appropriately and retaliated against her for raising the complaint. The complainant started to suffer from depression during her employment and during the hearing she was suffering from major depression.
Outcome:	Complaint dismissed. The tribunal noted that had the case been brought as a complaint of discrimination based on disability the result may well have been different.

Martin v Saulteux Band Government TD 07/02 2002/04/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	First Nations Council.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent did not renew her school teaching contract for the following year upon learning that she was pregnant and intended taking maternity leave.
Outcome:	Complaint upheld and a wide range of remedies ordered.

McAllister-Windsor v Human Resources Development Canada TD 2/01 2001/03/09

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Sex and disability.
Brief description of merits:	The complainant argued that Federal Employment Insurance legislation had a discriminatory effect on her. The legislation limited to 30 weeks for which an individual may receive maternity, sickness and parental benefits. She suffered from an incompetent cervix which made it difficult for her to carry a child to term. After she had suffered two miscarriages she was advised to remain in bed for the duration of her third pregnancy. Because of the legislative limit she did not receive parental benefits.
Outcome:	Complaint upheld; the respondent was ordered to stop applying the relevant provision in the Unemployment Insurance Act. The order was suspended for 12 months to allow the respondent to consult with the Canadian Human Rights Commission to put appropriate measures in place to prevent similar problems from occurring again.

McAvinn v Strait Crossing Bridge Limited TD 13/01 2001/11/15

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination; the complainant alleged that she was discriminated against because she was hired as a bridge patroller by the respondent.
Outcome:	Complaint upheld; the respondent was ordered to provide the complainant at the first available opportunity a position as bridge controller and in the mean time to pay her the difference between what she is currently earning and what she would have been earning had she been employed as a bridge controller.

Mills v Via Rail Canada Inc TD 7/96 1996/05/16

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent refused to continue to employ him because of a back injury.
Outcome:	Complaint upheld.

Moore & Akerstrom v Treasury Board, Department of Foreign Affairs & International Trade, Canada Employment and Immigration Commission, Public Service Alliance of Canada and Professional Association of Foreign Service Officers and Professional Institute of the Public Service of Canada TD 8/96 1996/06/13

Profile of complainants:	Homosexual males (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Marital status, family status and sexual orientation.
Brief description of merits:	Employment-related discrimination; the complainants alleged that the respondents pursued a policy or practice that tended to deprive a class of individuals (gay members) of employment

	opportunities. The complaint focused on the denial of employment benefits to same-sex spouses.
Outcome:	Complaint upheld on the basis of sexual orientation.

Morris v Canadian Armed Forces TD 17/01 2001/12/20

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Age.
Brief description of merits:	Employment-related discrimination; the complainant alleged that he was not promoted from the rank of warrant officer to master warrant officer because of his age. When he completed the prerequisite course for the promotion he was 46 years old.
Outcome:	Complaint upheld; the respondent did not provide a reasonable explanation for the discriminatory acts.

National Capital Alliance on Race Relations v Her Majesty the Queen as represented by Health and Welfare Canada, the Public Service Commission and the Treasury Board and Professional Institute of the Public Service of Canada TD 3/97 1997/03/19

Profile of complainant:	Non-profit organisation with the mandate to fight discrimination and racism through political action, education and, where appropriate, legal action.
Profile of respondent:	Government.
Prohibited ground:	Race, colour and ethnic origin.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent discriminated against visible minorities as evidenced by the extremely low number of permanent visible minority employees in senior management positions, in the Administration and in the Foreign Service category, and the concentration of visible minorities in lower level positions, and the failure to promote them on an equitable basis.

Outcome:	Complaint upheld; the tribunal ordered the respondent to adopt and implement a special corrective measures programme.

Nijjar v Canada 3000 Airlines Limited TD 3/99 1999/07/09

Profile of complainant:	Male; initiated member of the Khalsa order of the Sikh faith.
Profile of defendant:	Corporation.
Prohibited ground:	Religion.
Brief description of merits:	Discrimination in the provision of a service; the complainant was denied permission to board an airplane because he carried a ceremonial dagger. (Such a dagger is carried by initiated members of the Sikh faith.)
Outcome:	Complaint dismissed; the respondent could establish that the presence of ceremonial daggers with a greater offensive capacity than the airline's dinner knives would present a sufficient risk to passenger safety so as to constitute an undue hardship on the side of the respondent. The tribunal urged Transport Canada to consult with the airline industry, the Sikh community and experts to develop a uniform standard that would meet the needs of the Sikh community and meet airline passenger safety standards.

Nkwazi v Correctional Service Canada TD 1/01 2001/02/05

Profile of complainant:	Black female born in Zimbabwe and emigrated to Canada in 1983.
Profile of respondent:	Government agency.
Prohibited ground:	Race and colour.
Brief description of merits:	Employment-related discrimination; the complainant alleged that she was subjected to discrimination in the course of her employment with the respondent.
Outcome:	Complaint upheld; the respondent failed to mitigate or avoid the effect of the actions of the complainant's supervisor.

Oster v International Longshoremen's & Warehousemen's Union, Local 400 TD 4/00 2000/08/09

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination; the complaint related to an incident where the complainant was advised that she would not be acceptable as a cook/deckhand on a shipping vessel as separate sleeping accommodation was not available on the vessel.
Outcome:	Complaint upheld. On the evidence the tribunal accepted that she would not have been appointed as she lacked the necessary experience; lost wages were therefore not awarded. The tribunal awarded special compensation of $3000,00 and interest.

Pelletier and Dorais v Canadian Armed Forces TD 10/97 1997/10/24

Profile of complainants:	Males (ethnic origin unknown.)
Profile of respondent:	Government agency,
Prohibited ground:	Age.
Brief description of merits:	Employment-related discrimination; the complainants alleged that their contracts were not renewed because the respondent thought they were too old.
Outcome:	Complaints dismissed.

Popaleni and Janssen v Human Resources Development Canada TD 3/01 2001/03/09

Profile of complainants:	Female (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Sex (pregnancy) and family status.
Brief description of merits:	Discrimination in the provision of benefits. Ms Popaleni argued that her award of regular benefits under federal employment insurance legislation would have been 36 weeks instead of 11 weeks had she not been pregnant. Ms Janssen argued that the

	respondent discriminated against her by requiring that she had to combine her regular employment insurance benefits with her maternity and parental benefits.
Outcome:	Complaints dismissed.

Premakumar v Air Canada TD 03/02 2002/02/04

Profile of complainant:	Male Tamil, originally from Sri Lanka.
Profile of respondent:	Government agency.
Prohibited ground:	Race, colour, national or ethnic origin.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent discriminated against him in their decision not to hire him. The respondent alleged that he did not have the "soft skills" necessary to fill the position.
Outcome:	Complaint upheld.

Public Service Alliance of Canada v Government of the Northwest Territories File No T470/1097

Profile of complainant:	Union for government employees.
Profile of respondent:	Government.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination; government employees in female dominated occupational groups received lower wages than employees in male dominated occupational groups performing work of equal value.
Outcome:	The matter was settled between the parties; they agreed on a wage and payment calculation method to provide redress to the affected employees. The settlement was made an order of the tribunal. (See *Public Service Alliance of Canada v Government of the Northwest Territories* Memorandum of Agreement 2002/06/25.) (Also see *Public Service Alliance of Canada v Treasury Board* TD 2/96 1996/02/15 and *Public Service Alliance of Canada v Treasury Board* TD 7/98 1998/07/29.)

Quigley v Ocean Construction Supplies TD 06/02 2002/04/03

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent discriminated against him based on his thoratic outlet syndrome, when it refused his request for a work trial as a deckhand. The complainant suffered from various disabilities that prevented him from working regularly. Between 1991 and 1996 he took five disability leaves.
Outcome:	Complaint dismissed; the complainant established a *prima facie* case of discrimination but the respondent had accommodated the complainant to the point of undue hardship.

Rampersadsingh v Wignall TD 13/02 2002/11/26

Profile of complainant:	Black female originally from Trinidad and East Indian extraction.
Profile of respondent:	Black male originally from Jamaica.
Prohibited ground:	National or ethnic origin and sex.
Brief description of merits:	The complainant alleged that the respondent, a co-worker, had harassed her. He *inter alia* referred to her as a "paki-coolie", Boy-George look-alike" and "bitch".
Outcome:	Complaint dismissed. Although the respondent's remarks were offensive, the conduct was not repetitive enough nor of sufficient severity to fall within the Act.

Randhawa v Government of the Yukon Territory TD 11/97 1997/10/31

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Race.

Brief description of merits:	Employment-related discrimination; the complainant alleged that he was racially harassed and denied promotion thrice based on his race.
Outcome:	Complaint upheld.

Schnell v Machiavelli and Associates Emprize Inc and Micka TD 11/02 2002/08/20

Profile of complainant:	Homosexual male (ethnic origin unknown.)
Profile of respondents:	Corporation; male.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant argued that the respondents discriminated against him by communicating hate messages on a website, targeted at gays.
Outcome:	The tribunal ordered the respondents to stop communicating messages on the website that associate homosexuality with pedophilia, bestiality and the sexual predation of children and that associate gays and lesbians with having an agenda to lure and sexually abuse children and having an agenda to legalise pedophilia.

Singh v Statistics Canada TD 8/98 1998/11/06

Profile of complainant:	Male born in India.
Profile of respondent:	Government agency.
Prohibited ground:	Age, national or ethnic origin.
Brief description of merits:	Employment-related discrimination; the complainant argued that his efforts at advancement had been adversely affected.
Outcome:	Complaint upheld.

Stevenson v Canadian Security Intelligence Service TD 16/01 2001/12/05

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.

Brief description of merits:	Employment-related discrimination; the complainant argued that the respondent discriminated against him because of his mental disability. He requested stress leave which led to his discharge on medical grounds.
Outcome:	Complaint upheld; the respondent's policy not adequately addressing the issue of accommodation when an employee suffers from a health related disability.

Vlug v Canadian Broadcasting Corporation TD 6/00 2000/11/15

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Disability.
Brief description of merits:	The complainant asked for an order that the respondent make all of its English language network and Newsworld television programmes accessible to the deaf and hard-of-hearing.
Outcome:	Complaint upheld; the respondent was ordered to caption all of their television programming at the first reasonable occasion and was strongly encouraged to consult with representatives of the deaf and hard-of-hearing community on an ongoing basis relating to the provision of captioning services. The respondent was ordered to pay $10 000,00 to the complainant for pain and suffering for the sense of exclusion and marginalisation that he felt as a result of being unable to access the television programming.

Vollant v Health Canada and Parenteau and Bouchard TD 4/01 2001/04/06

Profile of complainant:	Female, native Innu.
Profile of respondent:	Government agency.
Prohibited ground:	National or native ethnic origin.
Brief description of merits:	Employment-related discrimination; the complainant alleged that her employer tolerated harassment towards her.

Outcome:	Complaint dismissed; the respondent acted promptly to resolve the dispute.

Wachal v Manitoba Pool Elevators TD 5/00 2000/09/27

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that she was fired because the respondent failed to accommodate her disability (allergies and asthmatic reactions caused by renovations to the offices). She was absent from work for 11 days on six separate occasions during four months.
Outcome:	Complaint dismissed; the complainant could not prove that her absences were due to her disability.

Wall v Kitigan Zibi Education Council TD 6/97 1997/07/11

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	First Nations Council.
Prohibited ground:	Sex and family status.
Brief description of merits:	Employment-related discrimination; the complainant alleged that her employment teaching contract was not extended when she informed the respondent that she fell pregnant and would require maternity leave.
Outcome:	Complaint dismissed; the respondent offered a reasonable, non-discriminatory explanation of the events.

Wignall v Department of National Revenue (Taxation) TD 5/01 2001/06/08

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government agency.
Prohibited ground:	Disability.

Brief description of merits:	The complainant was a deaf student that attended classes at the University of Manitoba. The university agreed to provide him with sign language interpreters for lectures free of charge but also requested him to explore funding opportunities. He applied for and received a Special Opportunities Grant for Students with Permanent Disabilities of $3000, which he turned over to the university to cover part of the costs of the interpreter services. He received an advice from the respondent that the grant was seen as a bursary and was subject to taxation. The complainant argued that the respondent discriminated against him.
Outcome:	Complaint dismissed.

Wilson v Canadian National Railways Company TD 1/00 2000/01/31

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Family status.
Brief description of merits:	Employment-related complaint. No further details available.
Outcome:	Complaint dismissed.

Woiden, Falk, Yeary and Curle v Lynn TD 09/02 2002/06/17

Profile of complainants:	Females (ethnic origin unknown.)
Profile of respondent:	Male (ethnic origin unknown.)
Prohibited ground:	Sex, family status.
Brief description of merits:	The complainants alleged that the respondent, the senior manager at their previous place of employment, harassed them on the basis of sex. The respondent did not participate in the hearing. The respondent was apparently a foul-mouthed bad-tempered man who did not treat his employees with dignity or respect. He regularly addressed the staff as “fucking bitches”, “fucking idiots”, “sluts”, “cunts” and “fags”.
Outcome:	Complaint upheld and a wide range of remedies ordered.

Wong v Royal Bank of Canada TD 06/01 2001/06/15

Profile of complainant:	Female of Chinese origin.
Profile of respondent:	Corporation.
Prohibited ground:	Race, national or ethnic origin and disability.
Brief description of merits:	Employment-related complaint; the complainant applied for a training programme with her employer (the respondent) but was not accepted. She returned to a previous employer. She was diagnosed as suffering from depression and went on short term disability with the respondent. When the respondent learnt that the complainant had been working for a previous employer while collecting disability benefits from the respondent, it terminated the complainant's employment. The complainant argued that the respondent refused her job opportunities and refused to accommodate her disability (stress and depression).
Outcome:	Complaint dismissed.

D.2 Alberta

Al-Saidi v Bio Beverages Inc Complaint File No N9811290

Profile of complainant:	Male of Arab descent.
Profile of respondent:	Corporation.
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related discrimination; the complainant was employed as a general ground worker. He was involved in a motor vehicle accident that led him to being absent from work for seven months. His employment was terminated some time after he returned to work when he again fell ill.
Outcome:	Complaint dismissed.

Anderson et al v Alberta Health and Wellness 2002/12/04

Profile of complainants:	Gay men and lesbian women.

Profile of respondent:	Government agency.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complaint related to discrimination in the provision of health care services; Alberta Health Care did not cover same-sex partnerships in terms of the definition of "dependants" in the relevant legislation.
Outcome:	Complaint upheld.

Berry v Farm Meats Canada Ltd Complaint File No S9712178

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint; the complainant was employed as sales manager for western Canada. He suffered a mild heart attack that required hospitalisation. He believed that his employment was terminated on the basis of his heart condition.
Outcome:	Complaint upheld.

Bingham v Magnum Cat Contractors Ltd 2000/11/17

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that his employment was terminated because of his speech impediment.
Outcome:	Complaint dismissed; the tribunal held that the complainant was dismissed because of his work habits.

Browne v Dan Dekort and Temple Hair Design Complaint S95030236

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; business.

Prohibited ground:	Sex.
Brief description of merits:	Sexual harassment; the complainant alleged that she was sexually harassed by the respondent and when she reported it, her employment was terminated. The Commission dismissed the complaint and the complainant requested a review.
Outcome:	On review the complaint was dismissed again.

Cazeley v Intercare Corporate Group Inc Complaints File No S9707093, S9707094, S9707095

Profile of complainant:	Female black.
Profile of respondent:	Corporation.
Prohibited ground:	Race, colour, age, ancestry and place of origin.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent's staff discriminated against her.
Outcome:	Complaint dismissed.

Chartrand v Vanderwell Contractors (1971) Ltd Complaint N9806077

Profile of complainant:	Female mother of two (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The complainant alleged that her shift supervisor harassed her.
Outcome:	Complaint upheld. The tribunal found that the supervisor's conduct was not welcomed at all times and that his conduct was sexual in nature on many occasions. The work environment at the respondent was somewhat hostile to a female employee desiring to lay a sexual harassment complaint. The respondent knew or should have known about the harassment and did not take action to stop the harassment.

Chase v Condic Complaint S0009145

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Male (ethnic origin unknown.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related sexual harassment. The complainant commenced employment with the respondent as babysitter and on the same day the incidents complained of occurred.
Outcome:	Complaint upheld; the respondent sexually harassed the complainant through a number of persistent comments and behaviours.

Chow v Mobil Oil Canada Complaint S9607103

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant alleged that her pregnancy and subsequent maternity leave had a large influence on the respondent's decision to terminate her employment.
Outcome:	Complaint dismissed; the tribunal did note that the ranking, validation, leveling and selection process could have been applied more fairly and objectively but nothing in the process discriminated against the complainant on the ground of pregnancy.

Elliot v Auto Stop Car Wash (1996) Ltd Complaint S9707091

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant's employment was terminated ten days after she informed her supervisor that she was pregnant.

Outcome:	Complaint dismissed; on the evidence the tribunal held that the complainant was fired because she could not manage staff and labour costs at a time when the respondent was facing an increase in costs due to the start of lease payments.

Ensign v The Board of Trustees of Clearview Regional School Division #24; Hanrahan and LaValley v Larson and Northern Gateway Regional Division 1999/02/19

Profile of complainants:	Male (ethnic origin unknown.)
Profile of respondent:	School board.
Prohibited ground:	Age.
Brief description of merits:	Employment-related discrimination; the complainants alleged that the school board's policy that required bus drivers to retire at 65 years was discriminatory.
Outcome:	Complaint dismissed; the respondent could show that the age requirement was reasonably necessary to ensure the efficient and economical performance of the job without endangering the employee, co-workers or the public; that it was impossible to screen 65+ drivers to remove unsafe drivers; and that the policy was reasonably necessary to eliminate a real risk of serious damage to the public.

Fiddler (Loyer) v Grant MacEwan Community College Complaint N9504007

Profile of complainant:	Female First Nations.
Profile of respondent:	Training college.
Prohibited ground:	Race, gender and ancestry.
Brief description of merits:	The complainant registered for a Life Management Skills Leader training programme at the respondent. She did not receive a certificate at the conclusion of the programme. She alleged that she failed because of the hostile environment.

Outcome:	Complaint upheld; the tribunal found it encouraging that the respondent had suspended the programme until changes could be made to take the First Nations perspective into account.

Ganser v Rosewood Estates Condominium Corporation Complaint S9908179

Profile of complainant:	Eighty-seven year old disabled woman suffering from several ailments.
Profile of respondent:	Building management.
Prohibited ground:	Disability.
Brief description of merits:	When the complainant bought a flat in a building she was allocated a parking bay. She did not use the bay but her caretakers did which offered convenient, safe and assured parking close to the complainant's home. The respondent amended its rule relating to parking to the effect that a resident owner must hold a driver's license. The complainant consequently lost her bay. She did receive notice of the proposed vote on the rule but as she was blind she did not become aware of the proposal until after it was adopted.
Outcome:	Complaint upheld; the respondent could not show that accommodating the complaint would be impossible because of undue hardship. The respondent was ordered to provide a parking space to the complainant forthwith.

Gwinner et al v The Crown in right of Alberta as represented by The Minister responsible for Alberta Human Resources and Employment (Formerly Alberta Family and Social Services) 2001/01/31

Profile of complainants:	Females; divorced or single parents.
Profile of respondent:	Government.
Prohibited ground:	Marital status.
Brief description of merits:	The complainants argued that the Widow's Pension Act was discriminatory towards divorced and single people as the pension

	provided for in the Act provided substantial benefits to widows and widowers in the 55-64 age group.
Outcome:	The tribunal held that a *prima facie* case of discrimination had been made out but that the discrimination was reasonable and justifiable in the circumstances. The purpose of the Act was to provide a temporary bridge for disrupted dependency resulting from the death of a spouse until the age when benefits under a seniors benefit programme start to pay out. The tribunal did however request the Alberta government to review the Act with a view to expanding the programme and to more closely and accurately tie disrupted dependency to eligibility.

Hudec v Larko and The Big Muffin 1997/11

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that her employment as counter helper was terminated because of her hearing impairment.
Outcome:	Complaint upheld.

Husien v OPSCO Energy Industries Ltd Complaint S0005042

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent did not accommodate his injury.
Outcome:	Complaint dismissed; the tribunal held that on the evidence the respondent accommodated the complainant to the point of undue hardship. It took the complainant's complaints seriously, assigned him light duties on several occasions, let him rest in the

lunchroom and regularly monitored his progress. Other employees performed the complainant's regular duties.

Jahelka v Fort McMurray Catholic Board of Education Complaint No N9904004

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Board of education.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant applied for the position of vice principal but was not interviewed or considered. The complainant argued that this happened because of her pregnancy.
Outcome:	Complaint upheld.

Joshi v Borys Professional Corporation Complaint N9509155

Profile of complainant:	Female of East Indian origin.
Profile of respondent:	Clinic.
Prohibited ground:	Race and colour.
Brief description of merits:	Employment-related discrimination; the complainant alleged that her employer repeatedly subjected her to discrimination.
Outcome:	On the evidence the tribunal accepted that racial discrimination of an insidious and concealed nature occurred. The tribunal referred to incidents where fun was made of the complainant about the way in which the pronounced patients' surnames; co-workers used the word "Paki" behind her back and her direct supervisor said to her "I never liked people like you". The employer had sufficient reason to discriminate against her on performance grounds but racial discrimination contributed to the complainant's decision to leave. The respondent was ordered to pay $1000 to the complainant for injury to her dignity, and was ordered to pursue discussions with employee and put in place a policy that

emphasised the importance of recognising and respecting human rights.

JR and SS v Kamaleddine and 288508 Alberta Ltd operating as Burger Baron Complaints N9409094 & N9410103

Profile of complainants:	Underage females.
Profile of respondent:	Male of Lebanese origin.
Prohibited ground:	Sex.
Brief description of merits:	The complainants filed complaints that their employer sexually harassed them. As a result of the harassment they were forced to quit.
Outcome:	Complaint upheld. The respondent was ordered to pay $5000 to JR and $3000 to SS for injury to their dignity and self respect. The respondent also had to attend a session on gender harassment as approved by the Alberta Human Rights and Citizenship Commission.

Kane and The Jewish Defence League of Canada v Alberta Report, Byfield et al Complaint No S9805008

Profile of complainant:	Organisation founded to promote the interests of Jewish people.
Profile of respondent:	Magazine.
Prohibited ground:	Not explicitly stated in the judgment.
Brief description of merits:	The complaint related to an article about an American promoter and a Canadian builder, two Jews, that reflected a negative stereotype about Jewish people.
Outcome:	The tribunal held that the caricature contained in the article invited discrimination against Jewish people. The stereotype was not a continuous or repetitive type of message and the respondent offered space in the magazine to the complainant in which the impact of the article could be addressed. The tribunal did not make an additional order.

Kane and The Jewish Defence League of Canada v Papez et al and The Silver Bullet Complaint File No S9509094

Profile of complainant:	Organisation founded to promote the interests of Jewish people.
Profile of respondent:	Individuals who published and distributed pamphlets under the name of the "Silver Bullet".
Prohibited ground:	Race and religion.
Brief description of merits:	The complaint related to material contained in the "Silver Bullet" that *inter alia* referred to a "Jewish Mafia", "Jewish gang" and contained a superimposed swastika over the Canadian flag.
Outcome:	The tribunal held the "Silver Bullet" to indicate discrimination or an intention to discriminate and ordered the respondents to pay $2500,00 in general damages for pain and suffering.

Kennedy v Save-On-Auto Limited and First Class Limo Service Limited Complaint N0003267

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that the managing director and owner of the respondent sexually harassed her. When she complained her wages were decreased and her hours lengthened. She resigned.
Outcome:	Complaint upheld; $4000 awarded as compensation for pain, anguish and suffering.

King v Rick St Denis and Universal Maps of Canada Inc 1999/10/04

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; Corporation.
Prohibited ground:	Gender.
Brief description of merits:	The complainant's complaint related to sexual harassment. After she called the perpetrator "a pig" on a few occasions she was fired.

Outcome:	Complaint upheld. When the respondent is in a position of authority, the burden rests with him to demonstrate that the conduct was welcome. As the perpetrator was the president and owner of the business, the business was also held liable.

L'Archeveque v City of Calgary Complaint S9904039

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Municipality.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant alleged that the respondent did not accommodate her repetitive strain injury in both arms and neck.
Outcome:	Complaint upheld; the tribunal held that the respondent did not meet its duty to accommodate the complainant to the point of undue hardship.

Lalonde v Hamid, Al Sultan Restaurant, 576013 Alberta Ltd and Albacha Restaurant Ltd Complaint N9403265

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male (ethnic origin unknown.)
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that she was sexually harassed and was consequently forced to quit her job. The respondent did not appear at the hearing.
Outcome:	Complaint upheld; $2500 awarded for injury to the complainant's dignity and self-respect.

Lavimizadeh v Factotum Steel Industries Inc Complaint File No N9709210

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.

Brief description of merits:	Employment-related complaint; the complainant argued that he was discriminated against based on a back condition that he re-injured.
Outcome:	Complaint dismissed.

Lays v Daryl Remus Professional Corporation File #N9812334

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Optometrist's practice.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that the office manager sexually harassed her. When she complained to her employer he advised that he could not fire the office manager as he had no verification or proof of the allegations. She then quit. Her employer testified that he put the office manager on probation the next day.
Outcome:	Complaint upheld.

Masters v Willow Butte Cattle Co Ltd Complaint S9904017

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination. The complainant was employed as a pen-rider. While working her horse tripped, felled and roller on her and she sustained a lower back injury. The complainant's employment was terminated some time later.
Outcome:	Complaint upheld; it would not have been beyond undue hardship to reinstate the complainant. Her replacement was still on his three-month trial period when she returned from hospital and his employment could have been terminated with a minimum or no severance payable.

Mattern and Russell v Spruce Bay Resort Complaints S9808102 and S9907174

Profile of complainants:	Unmarried males.
Profile of defendant:	Resort.
Prohibited ground:	Family status.
Brief description of merits:	The complainants were refused accommodation at the resort as they did not fall under the respondent's definition of family. (It was a so-called "family resort".)
Outcome:	Complaint dismissed; the panel held that a *prima facie* case of discrimination was made out but that the discrimination was reasonable and justifiable based on sound business practice.

McDonald v Don Logan and Audit and Special Investigations, Student Finance, Alberta Learning
Complaint N0002235

Profile of complainant:	First Nations female.
Profile of respondent:	Male; private chartered accountants firm.
Prohibited ground:	Race.
Brief description of merits:	The complainant never saw white people as a child, did not understand white society and spoke no English. Only in 1996 did she start to attend a vocational institute. By 1998 she could read and write English stories at grade 4-5 level. She received financial assistance from the government. An audit programme was developed for such skill development programmes. The government contracted the respondent to do the audit. Ten students were interviewed to verify information the student had put on their application forms for financial assistance. These students were either audited previously or students whom the government had received complaints about. The complainant argued that her cultural background and linguistic ability were not taken into account in the interviews.
Outcome:	Complaint dismissed. It appeared that the complainant wanted the hearing to establish who was responsible for the closure of the school and that what she wanted to accomplish was different

from the case advanced on her behalf. The panel found the interview style to have been considerate and respectful.

McLeod v Bronzart Casting Ltd Complaint S9501222

Profile of complainant:	Female.
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related sexual harassment; the complainant's working hours were reduced from 40 to four after she objected to a poster of a scantily clad, seductive female displayed in the workplace and asked that it be removed.
Outcome:	Complaint upheld.

Miller v 409205 Alberta Ltd & VOCO Property Group Complaint No N9911159

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Disability.
Brief description of merits:	The complainant suffered from bipolar affective disorder that prevented him from pursuing employment. He received a rental subsidy from the Capital Region Housing Corporation. As a consequence of a number of run-ins with the landlord mainly relating to the number of cats in the complainant's flat, the landlord did not apply for the subsidy again (it had to be renewed annually), which meant that the complainant had to pay the difference from his own pocket.
Outcome:	Complaint upheld and the respondent was ordered to *inter alia* take the necessary steps to have the subsidy reinstated.

Orth v Diner's Spot Restaurant and Kourletis File N9503238

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)

Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant worked as a waitress. She informed her supervisor that she was pregnant. A few months later she was laid off due to a shortage of hours.
Outcome:	Complaint upheld; her pregnancy was a causative factor in her dismissal.

Paul v PowerComm Inc Complaint N9712301

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant argued that the respondent failed to pay her at a rate equal to a male employee performing substantially similar work.
Outcome:	Complaint dismissed.

Starzynski et al v Canada Safeway Limited and United Food & Commercial Workers Local 401 Complaint File N9401218

Profile of complainants:	Males and females.
Profile of respondent:	Corporation; Employees' union.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainants complained that the eligibility terms of a Buyout Programme with the employer ("full and part time employees in all Alberta locations excluding Lloydminster and Hinton, whose base rate of pay as of January 30 1993 is at or exceeds $10/hour, and who have worked some hours over the past 52 weeks") had the effect of excluding disabled employees.
Outcome:	Complaint upheld; not all reasonable ways of accommodating the group was considered.

Timleck v Habib Monaghi, Radio Guide Complaint File N9705053

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; small business.
Prohibited ground:	Gender, marital status.
Brief description of merits:	The complaint related to workplace sexual harassment. The respondent only employed single females who did not have children and sexually harassed the complainant on a continual basis over a period of ten days.
Outcome:	Complaint upheld.

Weitmann v City of Calgary Electric System Complaint S9610182

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Municipality.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination. The complainant suffered from dysthymia, seasonal affective disorder, major depressive episodes and obsessive-compulsive personality traits.
Outcome:	Complaint upheld; the panel held that the respondent could have accommodated him without undue hardship.

Woo v Fort McMurray Catholic Board of Education Complaint N9810230

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Board of education.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination. When the complainant fell pregnant her probationary contract was ended on her last day of work and she was offered maternity leave.
Outcome:	Complaint upheld.

Yurkowski v MJT Food Service Ltd and Garden Court Restaurant Complaint N9907080

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Restaurant.
Prohibited ground:	Marital status.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was denied a raise and earned less money than the other waitresses, who were married.
Outcome:	Complaint dismissed; the panel held that the wage differantial was based on the employer's perception of her job performance and work ethic.

D.3 British Columbia

Abrams v North Shore Free Press Ltd doing business as "North Shore News" & Collins 1999/02/02

Profile of complainant:	Jewish male.
Profile of respondent:	Newspaper.
Prohibited ground:	Race, religion and ancestry.
Brief description of merits:	The complainant argued that a number of articles that appeared in the "North Shore News" written by Collins, were likely to expose Jewish people to hatred or contempt.
Outcome:	Complaint upheld. The tribunal held that one their own and taken out of context the articles would not have reached the *Code*'s high threshold, but that they did collectively.

Akiyama v Judo BC 2002 BCHRT 27

Profile of complainant:	Female born and raised in Japan who did not raise her children to any particular religious belief.
Profile of respondent:	Organisation for judo in British Columbia.
Prohibited ground:	Religion.
Brief description of merits:	The complainant argued that the respondent required participants in competitions to perform certain bows, which contravened the *Code*'s prohibition against religion-based discrimination.
Outcome:	Complaint dismissed; the tribunal held that no religious dimension to the bow in judo exists.

Alguire v Warnaar Steel-Tech Ltd 2002 BCHRT 34

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Age and physical disability.
Brief description of merits:	The complainant injured himself while at work. He alleged that the respondent refused to continue to employ him.
Outcome:	Complaint dismissed; the respondent could not in any way accommodate the complainant.

Armstrong, Chapman, Haywood and Streeter v Liu doing business as 'Casa Lucinda' and/or Zucchini Restaurant Ltd doing business as 'Casa Lucinda' and/or Liu and/or Liu 1998/02/17

Profile of complainants:	Females (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainants alleged that the restaurant's owner sexually harassed them.
Outcome:	Complaint upheld.

Atkin v Mogul Ventures Corp doing business as "Pemberton Hotel" and Harman 1997/06/23

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that her supervisor sexually harassed her.
Outcome:	Complaint upheld.

Avery v Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Transportation and Highways, Motor Vehicle Branch 1999/10/08

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.

Prohibited ground:	Physical disability.
Brief description of merits:	The complainant argued that the respondent discriminated against him by requiring a yearly medical exam to have his class three or class five licence renewed. He suffered from cardiovascular disease.
Outcome:	Complaint dismissed; the requirement is a *bona fide* and reasonable justification in the interests of public safety.

Baeza v Blenz Coffee and Gardner 2000 BCHRT 29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that her supervisor sexually harassed her at work and at social events and that her rebuffing of his advances caused the termination of her employment.
Outcome:	Complaint upheld.

Barrett et al v Cominco et al 2001 BCHRT 46

Profile of complainants:	Representative claim of all of the respondent's employees between 46 and 55 years of age with more than 20 years of service.
Profile of respondent:	Corporation; employees' union.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint (retrenchment). The severance benefits were calculated according to age at date of retrenchment and years of service.
Outcome:	Complaint dismissed; the agreement had no adverse impact on the complainants.

Beale v Gambell and Gambell, registered owners of 11908 Bond Road, Winfeld BC 1998/10/08

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Mental disability.
Brief description of merits:	The complainant alleged that her son was discriminated against when the respondents refused him as a tenant.
Outcome:	Complaint upheld; the son's mental disability was one of the reasons taken into account in not renting out the mobile home to him.

Bellefleur v District of Campbell River Fire Department 2002 BCHRT 12

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	City fire department.
Prohibited ground:	Family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that he was not hired as a full-time firefighter because the fire station's chief disliked his father and that the respondent had an unwritten policy of not hiring the sons of firefighters.
Outcome:	Complaint upheld.

Bennett v Classy Car Care Inc 1998/12/23

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint; the complainant alleged that when he applied for a position as car cleaner, he was told that he was too old.
Outcome:	Complaint upheld; $1600 awarded.

Beznochuk v Spruceland Terminals Limited 1999/08/05

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.

Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant's employment was terminated because he could not perform his duties any longer as a result of chronic back pain.
Outcome:	Complaint dismissed; despite the respondent's reasonable efforts to accommodate the complainant, it was not able to do so.

Birchall v Guardian Properties Ltd 2000 BCHRT 36

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Marital status, family status.
Brief description of merits:	The complainant, a single mother, was denied tenancy after the landlord enquired whether she had a boyfriend and after being informed that she received governmental disability benefits.
Outcome:	Complaint upheld.

Bitonti et al v College of Physicians & Surgeons et al 1999/12/08

Profile of complainants:	Graduates from foreign medical schools.
Profile of respondent:	Government.
Prohibited ground:	Place of origin.
Brief description of merits:	Foreign-trained doctors may practise in British Columbia pending on where they graduated; graduates from "Category II" countries had to comply with a number of additional requirements.
Outcome:	Complaint upheld against the College; complaints against other respondents dismissed.

Boire v Beant Logging & Investments Ltd doing business as MacKenzie Place 1999/07/07

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (sports bar.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint (sexual harassment.)

Outcome:	Complaint upheld.

Breau v ARA Manufacturing Company Ltd doing business as "ARA Sales", Marzara and Goodarzi 1998/11/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation; two males.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint (sexual harassment.)
Outcome:	Complaint dismissed (on the evidence presented.)

Briggs v BC (Min of Water, Land & Air Protection) 2002 BCHRT 17

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that she was forced to accept a lower-paying position in 1993/4 and was not offered a position in 1995 because of her sex.
Outcome:	Complaint upheld relating to 1993/4; dismissed relating to 1995.

Brimacombe v Northland Road Services Ltd 1998/06/17

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related complaint. The complainant suffered from easy fatigue, dizziness, headaches and unsteadiness.
Outcome:	Complaint dismissed; the tribunal held that the respondent took reasonable efforts to the point of undue hardship to accommodate the complainant.

Buck v Honda Centre 2001 BCHRT 31

Profile of complainant:	Male (ethnic origin unknown.)

Profile of respondent:	Corporation.
Prohibited ground:	Family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that he requested leave after the birth of his child, which was denied. He then took the time off without permission. His employment was terminated on his return to work. The respondent alleged that he was fired for insubordination.
Outcome:	Complaint dismissed; on the evidence the respondent did not unreasonably deny parental leave.

Bushek et al v Registered Owners of Lot SL1, Plan LMS13, District Lot 384A, New Westminster Land District at 1180 Pinetree Way in Coquitlam and NRS Quay Pacific Management Ltd 1997/02/07

Profile of complainants:	A family (father; mother; two teenage children.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The complainants alleged that the respondents did not want children in the building and put most families on the lower floors in the building; that they were restricted to two entrance keys; that they were followed and questioned; that they were denied use of the billiard room unfairly and that they had their kitchen hot water turned off.
Outcome:	Complaint dismissed on the evidence.

C v Dr A, Dr B and Dr C 2002 BCHRT 23

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Medical practice.
Prohibited ground:	Religion.
Brief description of merits:	Employment-related complaint. The complainant alleged that her employment was terminated because Dr A was uncomfortable

	with her pro-life views. The respondents alleged that she was fired because she was uncooperative, and to control costs.
Outcome:	Complaint dismissed; the tribunal held that her pro-life views did not play a role in the termination of her employment.

C L v Mohinder Badyal doing business as Amrit Investments & Bob 1998/12/11

Profile of complainant:	Lesbian female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant complained about the treatment she and her partner received, *inter alia* being told "these fucking dykes don't belong here".
Outcome:	Complaint upheld; $1200 awarded for injury to dignity.

Cajee v St Leonard's Youth and Family Services Society 1997/01/21

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Youth centre.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint (sexual harassment.)
Outcome:	Complaint upheld. However, the tribunal found no link between the sexual harassment and the termination of employment, and consequently did not award damages for lost income.

Campbell v Fereidoun Shahrestani 2001 BCHRT 36

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex (pregnancy) and family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent discontinued her employment based on her pregnancy. The respondent argued that she was fired because of her work performance.

Outcome:	Complaint upheld. The tribunal held that the complainant was entitled to be allowed to return to the position she filled prior to her maternity leave.

Canadian Jewish Congress v North Shore Free Press Ltd operating as North Shore News and Collins 1998/12/11

Profile of complainant:	Non-governmental organisation.
Profile of respondent:	Newspaper; journalist.
Prohibited ground:	Race, religion, ancestry.
Brief description of merits:	The complainant alleged that an opinion column in the "North Shore News" written by Collins was likely to expose Jewish persons to hatred or contempt.
Outcome:	Complaint dismissed; the tribunal held that the article itself did not express hatred or contempt, although the article would likely make it more acceptable for others to express hatred or contempt against Jewish persons.

Carpenter (now Jack) v Limelight Entertainment Ltd doing business as "Limit Night Club" 1999/09/07

Profile of complainant:	First Nations female.
Profile of respondent:	Business (night club.)
Prohibited ground:	Race, colour, ancestry.
Brief description of merits:	The complainant argued that she was refused entry into the club because of her ancestry, and that the owner made a racially offensive remark to her. The respondent alleged that she was refused entry because she asked the respondent's employees for protection against her violent ex-boyfriend.
Outcome:	Complaint upheld; $3500 awarded.

Chipperfield v Her Majesty in Right of the Province of British Columbia, as represented by the Ministry of Social Services and The Deputy Chief Commissioner of the BC Human Rights Commission 1997/02/20

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability.
Brief description of merits:	The complainant was injured and disabled in a motor accident. She was designated as "handicapped" under the *Guaranteed Available Income for Need Act (GAIN)*. In terms of this legislation, she claimed the repair costs of a vehicle she had bought after she became disabled. The respondent declined, on the basis that car repairs are not a "medical benefit" in terms of the Act.
Outcome:	Complaint upheld; the tribunal held that "the Ministry has discriminated against Ms Chipperfield by failing to provide her with a level of general transportation subsidy for the ongoing costs of operating her personal vehicle that is equivalent to the level of general transportation subsidy that is provided to GAIN recipients whose disabilities permit the use of taxis and public transit".

Collins v Suleman Meats et al 2001 BCHRT 41

Profile of complainant:	White female.
Profile of respondent:	Business.
Prohibited ground:	Race, colour, sex.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was discriminated against and eventually fired based on her race and sex. (She referred to being called "the white woman", "the blonde", "white Punjab", "stupid white girl" and "little white Punjab".)
Outcome:	Complaint as to use of racial pejoratives dismissed; the tribunal did hold however that her employment was terminated because

she filed a complaint with the Human Rights Commission and awarded $5040 in lost income and $1500 as compensation for loss of dignity.

Cooke v Vancouver Island Aids Society owners and/or operators of Aids Vancouver Island 1999/02/10

Profile of complainant:	Male (ethnic origin unknown.)
Prohibited ground:	Perceived disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that his employment was terminated because he was perceived as an intravenous drug user, while in reality he was a Hepatitis C sufferer.
Outcome:	Complaint dismissed; the tribunal held that the symptoms were sufficiently indeterminate that it was unlikely that the respondent would be aware of them. His Hepatitis C status could therefore not be linked to his dismissal

Critch and Mitten v Lone Star Energy Corp and Johansen 1999/04/14

Profile of complainants:	Two females.
Profile of respondent:	Corporation; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The harassment consisted of verbal remarks and physical touching.
Outcome:	Complaint upheld; $1300 awarded to Critch and $1500 to Mitten.

Dame v South Fraser Health Region 2002 BCHRT 22

Profile of complainant:	Homosexual male (ethnic origin unknown.)
Profile of respondent:	Mental health clinic.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant suffered from fibromyalgia and bi-polar disorder. After a suicide attempt his treating psychiatrist referred him to

	group therapy at the respondent clinic. He had to attend an entry interview with the group's facilitator. The facilitator then held a "barometer reading" with the group. One member of the group objected to a gay man joining the group. The facilitator informed the complainant. He became angry and refused further treatment.
Outcome:	Complaint dismissed.

Davis v Western Star Trucks Inc et al 2001 BCHRT 29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal comments.)
Outcome:	Complaint dismissed.

Day v Cruickshank and Cruickshank 1999/05/27

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The complainant argued that she was denied the opportunity to rent a flat because she had a child. She was told that the building was a "heritage" site and not available to families with children.
Outcome:	Complaint upheld; $2000 awarded.

Day v Poon 2000 BCHRT 4

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Restaurant owner.
Prohibited ground:	Retaliation.
Brief description of merits:	The complainant saw the kitchen manager harassing a co-worker for being gay. The complainant intervened and later filed a

	complaint with the Human Rights Commission. The respondent allegedly sent faxes to the complainant to the effect that if he wished to keep his job, he would drop the complaint.
Outcome:	Complaint upheld; $1000 awarded.

DeGuerre v Pony's Holdings Ltd doing business as "Pony's Cabaret" & Cox 1999/07/12

Profile of complainant:	Homosexual male.
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sexual orientation.
Brief description of merits:	Employment-related complaint. The complainant alleged that his employer made crude jokes relating to the complainant's sexual orientation. When the complainant told his employer that he was going to file a complaint, his employment was terminated.
Outcome:	Complaint upheld; $1200 awarded.

De Leon v Teachers Qualification Service 2000 BCHRT 35

Profile of complainant:	Female educated in the Philippines.
Profile of respondent:	Government.
Prohibited ground:	Place of origin.
Brief description of merits:	Employment-related complaint. The complainant argued that she had been underpaid for 20 years because of the application of a scheme under which educational credentials were assessed.
Outcome:	Complaint dismissed.

Denison v Badacki Holding Ltd doing business as "Heritage Millwork" 1999/10/27

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (touching of the complainant with a broom handle; lewd and rude gestures; profane language.)

Outcome:	Complaint upheld; $6000 awarded.

Denison v Woolworth Canada Inc also known as "The Bargain Shop" doing business as Northern Reflections 1999/09/02

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that she was demoted to assistant manager because of her pregnancy. The respondent alleged that she was demoted because she was not performing at a level expected of a manager.
Outcome:	Complaint dismissed.

DesRosiers v Manhas 2000 BCHRT 23

Profile of complainant:	First Nations female.
Profile of respondent:	Property owner.
Prohibited ground:	Race, colour, ancestry, place of origin, lawful source of income.
Brief description of merits:	The complainant argued that she was denied tenancy because she was not white. She alleged that the respondent said "I don't rent to Indians" and "all you people are drunks" and "all you do is drink beer and pass out on the lawn".
Outcome:	Complaint upheld; $2000 awarded.

Dhillon v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways, Motor Vehicle Branch 1999/05/11

Profile of complainant:	Male of Sikh religion.
Profile of respondent:	Government.
Prohibited ground:	Religion.
Brief description of merits:	Section 218 of the *Motor Vehicle Act* made it an offence for a passenger on a motorcycle to not wear a safety helmet. The Act did not exempt Sikhs who wear turbans.

Outcome: Complaint upheld.

Drobot v Royal Diamond Casinos et al 2000 BCHRT 44

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Business.

Prohibited ground: Sex (pregnancy.)

Brief description of merits: Employment-related complaint; the complainant alleged that after she returned from maternity leave she as offered a lower position than the position she held prior to her leave.

Outcome: Complaint dismissed.

Dyke v Circa Industries Ltd 2000 BCHRT 14

Profile of complainant: Male (ethnic origin unknown.)

Profile of respondent: Business.

Prohibited ground: Sex.

Brief description of merits: Employment-related complaint. The complainant's homosexual supervisor harassed the complainant. He alleged that his employment was terminated because he filed a complaint.

Outcome: Complaint relating to harassment upheld and $800 awarded. Complaint relating to retaliatory dismissal rejected.

Earle v Vernon and District Women's Centre Society 1998/11/25

Profile of complainant: First Nations female.

Profile of respondent: Government.

Prohibited ground: Race, colour, ancestry.

Brief description of merits: Employment-related complaint. The complainant alleged that she was discriminated against in the workplace, and that her employment was terminated based on prohibited grounds.

Outcome: Complaint dismissed.

Eleason v Wanke Developments Ltd operating Lakewood Park Mall 1997/05/07

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination. The complainant injured his left shoulder while at work. His employment was terminated 6 months later.
Outcome:	Complaint upheld.

Ellis v Interstate Security Patrol Ltd 1997/07/24

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy) and family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent did not employ her because of her pregnancy.
Outcome:	Complaint dismissed.

English v Sihota 2000 BCHRT 19

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint. The complainant alleged that his employment was terminated because of his age. (The complainant alleged that the respondent made a comment that he was “going for a younger look”.)
Outcome:	Complaint upheld; the tribunal held that the complainant had proved that it was more likely than not that age was a factor in the termination of his employment.

Ericson v Collagen Canada Ltd 1999/02/25

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.

Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant injured her back while unloading supplies. She was absent from work for a month. She was fired a few days later.
Outcome:	Complaint dismissed. On the evidence the tribunal held that the complainant was fired for a longstanding failure to meet her sales budget.

Farina v Old Caboose Restaurant Ltd 1999/03/12

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint; the complainant alleged that after he was hospitalised when he had an epileptic seizure, the respondent terminated his employment. The respondent alleged that the complainant was still on probation and had not performed to satisfaction.
Outcome:	The tribunal found the timing of the hospitalisation and dismissal suspicious but dismissed the complaint.

Feldman v Westfair Foods Ltd doing business as "The Real Canadian Superstore" 1997/06/11

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (grocery store.)
Prohibited ground:	Disability.
Brief description of merits:	The complainant was blind and used a guide dog. The respondent's employee refused to allow the dog into the store.
Outcome:	Complaint upheld; $2500 awarded.

Ferguson v Muench Works Ltd and Northwest Diesel Guard Ltd and 330656 British Columbia Ltd doing business as "Cummins British Columbia" 1997/08/27

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld.

Ferguson v Turner, Meakin & Co Limited 1999/02/11

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that her employment was terminated because she fell pregnant.
Outcome:	Complaint dismissed; the tribunal held that the person who made the decision to terminate her employment did not know she was pregnant; and that she was dismissed because of her work performance.

Fernandes v Multisun Movies Ltd and/or Suresh Jogia 1998/09/02

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld; $3500 awarded.

Ferris v Office and Technical Employees Union, Local 15, and Deputy Chief Commissioner, B.C. Human Rights Commission 1999/10/15

Profile of complainant:	Transsexual female.
Profile of respondent:	Business.
Prohibited ground:	Sex, disability.
Brief description of merits:	Employment-related complaint. A complaint was lodged when the complainant used the women's washrooms, which led to further adverse treatment.

Outcome:	Complaint upheld; $5000 awarded.

Fianza v Ladco Investments Inc doing business as "Combo Restaurant" 1999/05/27

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that his employment was terminated because the respondent was angry with his brother.
Outcome:	Complaint upheld.

Fiebelkom v Poly-Con Industries Ltd and Cowderoy 2000 BCHRT 54

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (comments of a sexual nature; sexual jokes.)
Outcome:	Complaint upheld.

Forgues v Stinka & Moxies Restaurant 2001 BCHRT 07

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (gestures; comments.)
Outcome:	Complaint upheld.

Fraser v The Keg Restaurant 2000 BCHRT 12

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)

Brief description of merits:	Employment-related complaint. The complainant argued that she was dismissed because of her pregnancy.
Outcome:	Complaint upheld; the tribunal found that the complainant's pregnancy played a part in the termination of hr employment.

Garand v KE Gostlin Enterprises Ltd 2002 BCHRT 8

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that she was discriminated against relating to her terms of employment.
Outcome:	Complaint upheld; the tribunal found that the respondent had treated the complainant poorly throughout her employment, and that this treatment was related at least in part to her sex.

Gareau v Sandpiper Pub et al 2001 BCHRT 11

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that when she fell pregnant she was requested to work as bartender instead of server and when she refused, she was asked to sign a disclaimer. When she refused to sign, her shift schedule was changed.
Outcome:	Complaint upheld.

Geyer v Young 1997/06/12

Profile of complainant:	Unmarried female with two children (ethnic origin unknown)
Profile of respondent:	Property owner.
Prohibited ground:	Marital status.

Brief description of merits:	The complainant alleged that when she informed her prospective landlord that she was not married, she was refused tenancy.
Outcome:	Complaint upheld.

Gill and Maher, Murray and Popoff v Ministry of Health 2001 BCHRT 34

Profile of complainants:	Lesbian females.
Profile of respondent:	Government.
Prohibited ground:	Sex, sexual orientation, family status.
Brief description of merits:	The complainants were not allowed to register the same sex partner of the birth mother on the birth registration form as she had no biological relationship to the child.
Outcome:	Complaint upheld; the respondent had not shown that it would cause undue hardship for the birth registration process to be amended.

Gill v Satnam Education Society of BC 2002 BCHRT 13

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Education society.
Prohibited ground:	Sex, marital status, family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that her refusal to perform *langar sewar* (voluntary work) and the fact that her husband was not a baptised Sikh led to her dismissal.
Outcome:	Complaint dismissed; the tribunal held that she was dismissed because she complained about her working conditions and other aspects of her employment.

Glass v Green River Log Sales Ltd 2000 BCHRT 50

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Physical disability.

Brief description of merits:	Employment-related complaint. The complainant hurt his back while working and to take leave of absence intermittently. He returned to work but the respondent thought he would be able to work again by December 1996. The complainant alleged that he had not heard from the respondent since then. The respondent alleged that it attempted to contact the respondent but couldn't.
Outcome:	Complaint dismissed. The tribunal held that the respondent was not legally obliged to attempt to get hold of the complainant in any other way but by telephone (which it did try to do.)

Godin v Kledo Construction Ltd 2001 BCHRT 14

Profile of complainant:	Female raised in Quebec; French being her primary language.
Profile of respondent:	Business.
Prohibited ground:	Place of origin, ancestry.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent discriminated against her in the workplace, and ultimately dismissed her.
Outcome:	Complaint dismissed; the tribunal held that she was dismissed because of her work performance.

Gordy v Painter's Lodge 2000 BCHRT 16

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Physical or mental disability.
Brief description of merits:	Employment-related complaint. The complainant developed bi-polar affective disorder and was hospitalised. The complainant alleged that the respondent said it would not accept him back as fishing guide; the respondent alleged that it was willing to accept him back by 17 July 1995 but that the complainant wanted to return immediately and therefore walked away from the offer.
Outcome:	Complaint upheld.

Guthrie v Levitt 1999/08/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male (doctor.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (allegations of "lingering looks", inappropriate behaviour, physical touching.)
Outcome:	Complaint upheld; $4000 awarded.

Guzman v Dr and Mrs T 1997/01/14

Profile of complainant:	Female Fillipino who emigrated to Canada in 1991.
Profile of respondent:	Korean family.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The respondents employed the complainant as a live-in nanny. At the time Dr T lived in Korea and Mrs T would visit him from time to time. On such a visit their teenage son behaved inappropriately towards the complainant. She resigned. The respondents argued that they were not liable for their son's conduct and that they took appropriate, sufficient and effective action to prevent further harassment.
Outcome:	Complaint upheld; the tribunal held the parents liable for their child's conduct and awarded $6500.

Gyger v AA Ecologica Ltd 1998/08/13)

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The respondent did not attend the hearing.
Outcome:	Complaint upheld; $3000 awarded.

Hadzic v Pizza Hut Canada, a division of Pepsi-Cola Canada Ltd doing business as Pizza Hut 1999/07/29

Profile of complainant:	Male Bosnian Muslim.
Profile of respondent:	Business (fast food outlet.)
Prohibited ground:	Race, ancestry, place of origin, religion.
Brief description of merits:	Employment-related complaint. The complainant alleged that a Serbian co-worker threatened him and used offensive words. He also alleged that his employment was terminated on prohibited grounds.
Outcome:	Complaint upheld.

Hallam (formerly Kilshaw) and Kilshaw v Insurance Corporation of British Columbia 1999/05/25

Profile of complainants:	Married couple.
Profile of respondent:	Government.
Prohibited ground:	Family status.
Brief description of merits:	The complainants were seriously injured in a motorcycle accident. Both complainants purchased Underinsured Motorist Protection (UMP) coverage. They sued the underinsured motorist. When Mrs Kilshaw claimed UMP benefits, she was denied cover. An arbitrator ruled that in terms of Regulation 110 of the *Insurance (Motor Vehicle) Act*, she could not access her own UMP cover because she was a passenger on a vehicle owned by her spouse with whom she was living.
Outcome:	Complaint dismissed; family status was not a protected ground in human rights legislation when the collision occurred.

Hannaford v Douglas College 2000 BCHRT 25

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Educational facility.
Prohibited ground:	Disability.

Brief description of merits:	The complainant, who suffered from Graves' disease, had limited field of vision, had double vision and was light-sensitive. She took medicine on a daily basis. The disease and medicine caused her to have a decreased reading speed. She also had a cognitive learning disability. She alleged that the respondent did not accommodate her disability.
Outcome:	Complaint dismissed. The respondent did accommodate her relating to her decreased reading speed. As to the learning disability, the symptoms were not apparent and the respondent was not informed of this disability.

Harris v Camosun College 2000 BCHRT 51

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Educational facility.
Prohibited ground:	Disability.
Brief description of merits:	The complainant suffered from sensitivity to various chemicals in the environment such as oil-based paints, varnishes, chip boards, gas fumes, desk materials, plastics and carpets. This made it difficult for her to attend lectures in some lecture rooms. She alleged that she was not accommodated with respect to three of her courses. The respondent alleged that the complainant did not provide adequate or timeous medical reports to support her requests for assistance.
Outcome:	Complaint dismissed.

Harrison v School District #48 (Kamloops) 1999/01/07

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School.
Prohibited ground:	Age and sex.

Brief description of merits:	Employment-related complaint. The complainant alleged that she was refused employment on more than 100 occasions and that it was not possible to apply for so many positions without success.
Outcome:	Complaint dismissed. The tribunal accepted that in more than 90% of the positions the complainant applied for, more senior personnel, in accordance with a collective agreement, filled the posts.

Hart v Coast Tractor 2001 BCHRT 5

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The respondent knew that the complainant had a disability (injury to his right wrist) when they appointed him. The complainant alleged that his employment was terminated because of the disability. The respondent said he was dismissed for reasons unrelated to the disability.
Outcome:	Complaint dismissed.

Haynes v Coltart 1998/10/19

Profile of complainant:	Female caregiver (ethnic origin unknown.)
Profile of respondent:	Male quadriplegic.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal remarks; physical touching.)
Outcome:	Complaint upheld; $5911,64 awarded in lost wages and $4000 for loss of dignity.

Hayward v Stinka & Moxies Restaurant 2001 BCHRT 09

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; business (restaurant.)

Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The respondents did not appear at the hearing.
Outcome:	Complaint upheld; $5000 awarded.

Hill v Dan Barclay Enterprises Ltd doing business as The Tool Palace 1999/10/27

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex, sexual orientation.
Brief description of merits:	Employment-related complaint of sexual harassment. The complainant alleged that his employer sexually harassed him and caused him to resign.
Outcome:	Complaint upheld; $16500 awarded in lost wages and $2500 for loss of dignity.

Hill v Luykx and Mortgage Network of Canada Ltd 1998/04/06

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that she had to undergo surgery for ovarian cancer. While recuperating she was dismissed. The respondent did not appear at the hearing.
Outcome:	Complaint upheld.

Holness (previously Dreidger) v South Alder Farms & Mann 1999/01/25

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal comments and physical touching.)

Outcome:	Complaint upheld; $2000 awarded for loss of dignity.

Honey v Board of School Trustees, School District #43 (Coquitlam) and Deputy Chief Commissioner, BC Human Rights Commission 1999/03/30

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School governing body.
Prohibited ground:	Retaliation.
Brief description of merits:	The complainant rented space from the respondent for a fitness class. She experienced problems with a soccer class that rented the same space and filed a complaint with the Human Rights Commission. The complaint was dismissed. Some time afterwards she received a letter from the respondent's attorneys demanding reimbursement of expenses, failing which legal proceedings would be commenced. She filed a new complaint with the Human Rights Commission.
Outcome:	Complaint upheld; $2000 awarded.

Hooper v City of Victoria 2001 BCHRT 22

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	City.
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent failed to accommodate him after December 1995. He fractured the radial head of his right elbow in 1991 and developed osteo-arthritis.
Outcome:	Complaint dismissed; the tribunal held that the respondent had acted reasonably.

Hopkins v Jakes Turtles Bar and Grill Inc 1999/01/12

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)

Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal and physical conduct.) The respondent did not attend the hearing.
Outcome:	Complaint upheld; $3500 awarded for loss of dignity.

Huhn v Joey's Only Seafood Restaurant 2002 BCHRT 18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld; $900 awarded.

Hussey v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways 1999/12/03

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability.
Brief description of merits:	The complainant applied for a class 4 license but was informed that as he was profoundly deaf, he did not meet the required hearing standard.
Outcome:	The tribunal held that the evidence of risk was sufficient to justify a hearing guideline for class 4 licenses, but that the complainant could have been accommodated without undue hardship.

Ikeda v FTI Magna Lighting Ltd 1997/08/12

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that she was paid less than male employees doing similar or substantially similar work.

Outcome:	Complaint upheld; $2984 awarded in lost income.

J v London Life Insurance Company 1999/06/21

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Life insurance company.
Prohibited ground:	Physical disability and marital status.
Brief description of merits:	The complainant's wife was HIV positive and as a result his application for life insurance was turned down. He subsequently obtained life insurance from another company.
Outcome:	Complaint upheld; $3000 awarded.

Jack v Nichol 1999/06/04

Profile of complainant:	First Nations female.
Profile of respondent:	Male.
Prohibited ground:	Ancestry, colour, race.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent told her she did not need an education as he could get pregnant, find a boyfriend, and live on the reserve for the rest of her life. He also referred to her as a "little native girl" and "little Indian girl".
Outcome:	Complaint upheld; $2000 awarded.

Jacob v Reed and Mingles Holdings Ltd 2002 BCHRT 37

Profile of complainant:	Full-time bartender and waitress.
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The respondents did not appear at the hearing.
Outcome:	Complaint upheld; $37272.24 awarded in lost income and $4000 for loss of dignity.

Johnman v Chilliwack Furniture World Ltd 1999/02/22

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related complaint. The complainant suffered from a work-related back injury with a L5/S1 nerve irritation.
Outcome:	Complaint upheld; the tribunal held that the respondent did not offer a *bona fide* occupational requirement for failing to offer an alternative position to the complainant.

Johnson v Haverland Installations Ltd 1998/02/02

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was paid less than a male apprentice electrician and that she was dismissed and replaced with a less-qualified male.
Outcome:	Complaint upheld.

Johnson v Super Valu 2002 BCHRT 7

Profile of complainant:	First Nations female.
Profile of respondent:	Grocery store.
Prohibited ground:	Race, colour, ancestry.
Brief description of merits:	The complainant alleged that she was asked to leave the store. The respondent alleged that the complainant's son behaved in a mischievous and inappropriate manner and that was the reason she was asked to leave.
Outcome:	Complaint dismissed.

Jones v CHE Pharmacy Inc et al 2001 BCHRT 1

Profile of complainant:	Male Jehovah's Witness.

Profile of respondent:	Business.
Prohibited ground:	Religion.
Brief description of merits:	The complainant does not celebrate Christmas. His supervisor requested him to put up poinsettias as part of Christmas decorations. He refused and was dismissed. The respondent alleged that he was dismissed because he showed disrespect for his superiors.
Outcome:	Complaint upheld; $3500 awarded for loss of dignity and $4710 in lost income.

Jubran v Board of Trustees 2002 BCHRT 10

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	School governing body.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant does not identify himself as homosexual but during his five years at the respondent school, he was taunted with homophobic remarks and physically assaulted. The complainant alleged that the school board knew about other students' behaviour but failed to provide a safe learning environment.
Outcome:	Complaint upheld; $4000 awarded for loss of dignity.

Jusiak v Mr Cool Ice Cream Ltd 1997/11/13

Profile of complainant:	Male of Polish descent.
Profile of respondent:	Business.
Prohibited ground:	Race, ancestry, place of origin.
Brief description of merits:	Employment-related complaint relating to non-payment of a bonus.
Outcome:	Complaint dismissed.

Kawaguchi v Ingledew's Kelowna Ltd doing business as Ingledew's 1998/06/29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that her employment was terminated based on her pregnancy.
Outcome:	Complaint dismissed.

Kayle v T & V Enterprises et al 2000 BCHRT 57

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld.

Keeping v Royal City Jewellers & Loans Ltd 1997/03/27

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that he could not continue working, as the respondent did not accommodate her chronic back pain. The respondent alleged that she was dismissed because she did not accept the authority of her supervisor.
Outcome:	Complaint partly upheld; $1000 awarded for loss of dignity but the tribunal did not award damages for lost income as it found that the complainant would have been dismissed for cause within a matter of weeks in any event.

Kennedy v British Columbia (Ministry of Energy and Mines) (No 4) 2000 BCHRT 60

Profile of complainant:	Male of Italian/Jordanian ancestry.
Profile of respondent:	Government.

Prohibited ground:	Race, colour, ancestry.
Brief description of merits:	Employment-related complaints (staffing, classification of his position, severe disciplinary measures and dismissal.)
Outcome:	Complaint dismissed.

Kennedy v Design Sportswear Ltd 2002 BCHRT 15

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Family status, disability.
Brief description of merits:	Employment-related complaint. The complainant's daughter, also an employee of the respondent, went on leave and committed suicide (she suffered from seasonal affective disorder.) The complainant became depressed that led to difficulties at work and her eventual dismissal.
Outcome:	Complaint dismissed; the tribunal held that the respondent's owner dismissed her because he believed (unfoundedly) she or her son assaulted him after her daughter's funeral.

Ketabchi v Future Shop Ltd 2002 BCHRT 39

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant suffered from fibromyalgia. She alleged that the respondent did not accommodate her disability.
Outcome:	Complaint dismissed; the tribunal held that the respondent accommodated her to the point of undue hardship.

Kharoud v Valle-Reyes et al 2000 BCHRT 40

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.

Prohibited ground: Sex.

Brief description of merits: Employment-related complaint of sexual harassment (verbal comments; physical conduct.)

Outcome: Complaint upheld; $1800 awarded.

Knight v Vancouver Ticket Centre Ltd doing business as Ticketmaster 1998/09/16

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Business.

Prohibited ground: Physical disability.

Brief description of merits: Employment-related complaint. The complainant alleged that she was dismissed because she was visually impaired, and that the respondent made no attempt to accommodate her disability.

Outcome: Complaint upheld; $22873.80 awarded in lost income and $4000 for loss of dignity.

Korcz v Mr Cool Ice Cream Ltd 1998/01/05

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Business.

Prohibited ground: Ancestry, place of origin, religion.

Brief description of merits: Employment-related complaint. The complainant alleged that when she started working for the respondent, it was agreed that she would not work on Sundays to observe her religion. She was later asked to work on Sundays. She also alleged that her employer made fun of the way she talked.

Outcome: Complaint upheld relating to Sunday work; $1000 awarded.

Korthe v Hillstrom Oil Company Limited 1997/12/22

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Corporation.

Prohibited ground: Alleged conviction on a criminal charge.

Brief description of merits:	Employment-related complaint. The complainant alleged that she was dismissed because of an alleged conviction. The respondent alleged that she was dismissed because she had difficulty learning the shift cut-off procedure performed by cashiers.
Outcome:	Complaint upheld.

Lanteigne v Sam's Sports Bar Limited doing business as G.G.'s Sports Bar 1998/07/23

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. A regular customer grabbed the complainant's breast when he left the bar. She immediately reported the incident to the manager. At two subsequent staff meetings she raised the issue of sexual harassment and the need for a sexual harassment policy. Three days after the meeting she was dismissed.
Outcome:	Complaint upheld; $3000 awarded.

Larsen v Michel Country Inn 2000 BCHRT 6

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Hotel.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The complainant alleged that the harassment caused her to resign.
Outcome:	Complaint upheld.

Larson v Graham and Phaneuf 1999/04/12

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Physical or mental disability, age, source of income.

Brief description of merits:	The complainant and her boyfriend shared a flat. When their relationship terminated, she looked for a new tenant to share the rent. Neither of the proposed tenants met with the respondents' approval and the complainant was forced to vacate the premises.
Outcome:	Complaint upheld relating to source of income; the respondents denied tenancy because the prospective tenant was a student on social assistance.

Latsos v Levy Enterprises Ltd operating as Trees Organic Coffee 1999/11/29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that she was dismissed because she fell pregnant; the respondent alleged that she was dismissed because of poor job performance and rudeness.
Outcome:	Complaint dismissed; the tribunal held that her pregnancy was not a factor in the decision to dismiss her.

Lavigne v BMC Enterprises Ltd doing business as Subway, 100 Mile House 1999/11/03

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was not appointed because she was pregnant.
Outcome:	Complaint dismissed; the tribunal held that the complainant did not apply for the position; alternatively that her pregnancy was not a factor in the decision.

LeBlanc v Dan's Hardware et al 2001 BCHRT 32

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (repeated sexual comments, sexual questions and sexual touching.)
Outcome:	Complaint upheld; $3500 awarded as compensation and $6286 in lost income.

Leeder v O'Cana Enterprises doing business as "Alisa Japanese Restaurant" 1999/01/05

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was dismissed because she fell pregnant.
Outcome:	Complaint upheld.

Lengert v Samuel and the Port Alberni Native Friendship Centre 1999/08/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; non-governmental organisation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related sexual harassment; the complainant alleged that a co-worker sexually harassed her (physical touching.)
Outcome:	Complaint upheld; $5000 awarded as compensation and $8336 in lost wages.

Lord v Catholic Schools of Victoria Diocese File 940566

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School.
Prohibited ground:	Family status, mental or physical disability.
Brief description of merits:	Employment-related complaint. The complainant's son was arrested for murder whereafter the complainant took leave for post-traumatic stress disorder, anxiety and depression. At the

	trial she gave false evidence; she was not tried for perjury however. As a result, her employment was terminated.
Outcome:	Complaint dismissed.

Luschnat v Kotyk 2002 BCHRT 4

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex and physical disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that after the returned to work from a pregnancy-related illness, her working hours were reduced and her conditions of employment were changed which left her with no alternative but to resign.
Outcome:	Complaint upheld.

Machata v Stewart's Drugs Ltd doing business as "Pharmsave" 1998/08/14

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was dismissed after she became pregnant.
Outcome:	The tribunal held that the respondent could have treated the complainant more fairly but nevertheless dismissed the complaint.

Mager v Louisiana-Pacific Canada Ltd 1998/06/29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Physical and/or mental disability (depression.)
Brief description of merits:	Employment-related complaint.
Outcome:	Complaint upheld. The tribunal held that the respondent "proposed a technological change lay-off to the complainant in circumstances where he ought to have known that she was not

medically fit and without taking any steps to ensure her comprehension" and "by entering into this agreement without ensuring the complainant's comprehension of the consequences of such a lay-off as well as the other options which were available to her to address her need for time away from work, the respondent discriminated against the complainant because of her mental disability".

Mahmoodi v The University of British Columbia, Faculty of Arts, Department of Psychology and Dr Donald Dutton 1999/10/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	University.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that her professor sexually harassed her and that the university did not adequately respond to her concerns about the professor's behaviour.
Outcome:	Complaint upheld; $4000 awarded as compensation, $5200 as counseling expenses, $3200 for lost income and the cost of the complainant's tuition and books.

Maller v "The Keg Restaurant" 2000 BCHRT 8

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant alleged that she was dismissed because she became pregnant.
Outcome:	Complaint upheld; the tribunal found that her pregnancy was a factor in the decision to terminate her employment.

Mamela v Vancouver Lesbian Connection 1999/09/08

Profile of complainant:	Transgendered person who has identified as a lesbian female who is transsexual.
Profile of respondent:	Non-governmental organisation.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that the respondent initially denied her membership because she had been raised as a boy. She was later banned from the respondent's centre and her membership was suspended for a year.
Outcome:	Complaint dismissed relating to employment discrimination; complaint upheld as to the provision of services and $3000 awarded as compensation.

Marc v Fletcher Challenge Canada Limited 2001 BCHRT 3

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex, physical disability, perceived mental disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was discriminated against when her foreman refused to let her "sleep it off" when she reported to work drunk; when he refused to allow her to switch jobs on a shift with another worker; and when an argument ensued between them regarding her failure to take over from another worker who went home ill.
Outcome:	Complaint dismissed.

Martin v Carter Chevrolet Oldsmobile 2001 BCHRT 37

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related complaint; the complainant alleged that she was dismissed because of a hip condition. The respondent

	alleged that she was dismissed because she did not meet the required performance standards.
Outcome:	Complaint upheld; $1000 awarded as compensation and $2219.73 in lost income.

Martin v The Grove Mobile Home Park 2000 BCHRT 45

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (mobile home park.)
Prohibited ground:	Age.
Brief description of merits:	The complainant alleged that the respondent discriminated against him when it attempted to have him ejected from his mother's home in the park. He was 28 at the time and the park ostensibly designated for 55+ seniors.
Outcome:	Complaint upheld; the tribunal held that the complainant's age was a factor in the respondent's demand that the complainant vacate the park. $2500 awarded in compensation.

Mayer v Selkirk Springs (Canada) Corporation 1997/10/07

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint; the complainant alleged that he was dismissed because of his age. He was 52 at the time and assigned to operate a forklift.
Outcome:	Complaint upheld; the tribunal found that the complainant's age was a factor in the decision to dismiss him.

Mazuelos v Clark 2000 BCHRT 1

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex (pregnancy.)

Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent breached his promise that she would be able to remain as a live-in nanny while she was pregnant.
Outcome:	Complaint upheld; the tribunal held that the respondent did not make a serious effort to objectively establish whether the complainant could meet the standard of caring for two active young boys.

McCarthy v Venetis Pizza Ltd 1999/08/10

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (fast food outlet.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent changed her employment status from "regular" to "on-call" after she suffered pregnancy-related complications, and that this forced her to resign.
Outcome:	Complaint dismissed; the tribunal found that no change of conditions of employment took place before and after her pregnancy-related complications.

McDermid v Key Lease Canada 2000 BCHRT 34

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent telephonically advised her that women would not be considered for a salesperson position.
Outcome:	Complaint upheld.

McLaughlan v Fletcher Challenge Canada Limited 1998/12/01

Profile of complainant:	Male (ethnic origin unknown.)

Profile of respondent:	Corporation.
Prohibited ground:	Criminal conviction.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent dismissed him because of a criminal conviction unrelated to his employment. He was convicted of touching a person under 14 for a sexual purpose and sentenced to a year imprisonment. While in prison he was dismissed.
Outcome:	Complaint dismissed; the tribunal held that an employee's inability to report to work because he is in prison renders the complainant's conviction *related* to his employment.

McLean v Hutchinson doing business as The Avalon Hotel 1998/02/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male; business.
Prohibited ground:	Sex and pregnancy.
Brief description of merits:	Employment-related complaints. The complainant alleged that the respondent sexually harassed her and that her work responsibilities and benefits were reduced because of her pregnancy.
Outcome:	The tribunal held that the complainant did not establish her complaints on a balance of probabilities.

McLellan v Lawson 1998/04/23

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex.
Brief description of merits:	The complainant worked for Comcare Ltd, a corporation that provided home care for disabled and elderly people. She was instructed to look after the respondent, a blind man with a severe drinking problem. She alleged that he sexually harassed her on numerous occasions.

Outcome: Complaint upheld; $3500 awarded.

McLoughlin v Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Environment, Lands and Parks 1999/08/24

Profile of complainant: Male.

Profile of respondent: Government.

Prohibited ground: Disability.

Brief description of merits: The complainant suffers from a disability and hunts from an all-terrain vehicle. In terms of the *Wildlife Act* he is prohibited from hunting in this way. He therefore applied for an exemption in terms of the Act and paid the $10 fee. The Ministry allowed him to hunt from his vehicle but denied him access to areas closed off to all-terrain vehicles in order to conserve sensitive terrain or wildlife.

Outcome: Complaint upheld. The tribunal held that the respondent should have advised the complainant to re-apply in a more time- and place-specific manner and that is should have considered a more limited exemption. It also held that the imposition of the $10 fee was discriminatory.

Merchant v Chartwell Construction Ltd 2000 BCHRT 33

Profile of complainant: Indo-Canadian male.

Profile of respondent: Property owner.

Prohibited ground: Race, colour, ancestry, place of origin.

Brief description of merits: The complainant responded to a referral for a vacant flat and inspected the flat in the landlord's presence. He phoned the following day to enquire about the flat's availability and was told that it had been rented. The day after the complainant and a friend were looking for a flat in the vicinity of the other complex when they saw that a flat was still being advertised. The complainant's white friend went inside and was told the flat was

	available. The respondent alleged that the flat had become available again after the complainant's telephonic enquiry.
Outcome:	Complaint dismissed.

Micallef v Glacier Park Lodge 1998/04/21

Profile of complainant:	Male.
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Family status.
Brief description of merits:	The complainant, his wife and three children entered the respondent's dining room when they were told that parents traveling with children were better suited in the cafeteria as dining room patrons did not like being disturbed by children. They inspected the cafeteria, did not like it, and returned to the dining room where they were served. The complainant alleged that the service they received were unsatisfactory.
Outcome:	Complaint dismissed relating to service in the dining room; complaint upheld relating to being directed to the cafeteria. $1200 awarded in compensation.

Middlemiss v Norske Canada Ltd 2002 BCHRT 5

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	(Perceived) physical or mental disability.
Brief description of merits:	The complainant alleged that he was instructed to leave the respondent's property and not to return because he violated its drug and alcohol policy. He argued that he was perceived to be an alcoholic.
Outcome:	Complaint dismissed. The tribunal held that the respondent did not perceive the complainant to have a disability and that the policy itself also did not contain an indication that the respondent

regarded those who contravened its policy, to be addicted to alcohol or drugs and therefore disabled.

Miele v Famous Players Inc 2000 BCHRT 5

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (movie theatre.)
Prohibited ground:	Physical disability.
Brief description of merits:	The complainant complained about the respondent's policy that people in wheelchairs could only gain access to the premises by a locked and unstaffed entrance and that that entrance was used exclusively for people in wheelchairs.
Outcome:	Complaint upheld.

Moni v Ferguson and Bentley Leathers Inc 2002 BCHRT 41

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was dismissed because the respondent knew her brother-in-law had been convicted of theft. The respondent alleged that she was dismissed because she dressed inappropriately despite several verbal warnings.
Outcome:	Complaint dismissed.

Moon and Birston v Sears Canada Inc 1998/04/30

Profile of complainants:	Females (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint. The complainants alleged that they were dismissed because of their age (60 and 55 respectively.)

Outcome:	Complaint dismissed. The tribunal held that the complainants had not made out a *prima facie* case; alternatively the respondent had shown that it had embarked on a national reorganisation for reasons of business necessity.

Nault v Khowutzun Pipeline Constructors Corp 1997/08/15

Profile of complainant:	First Nations male.
Profile of respondent:	Joint venture.
Prohibited ground:	Race, ancestry, place of origin.
Brief description of merits:	Employment-related complaint. The joint venture agreement set out that a progressive percentage of the workforce would be qualified members of the Cowichan Band. The complainant was hired in 1993 but retrenched in 1994. He alleged that this happened because he did not have a native status card; the respondent alleged that he was dismissed because of poor work performance.
Outcome:	Complaint dismissed.

Neale v Princeton Place Apts Ltd 2001 BCHRT 6

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status, source of income.
Brief description of merits:	The complainant alleged that the respondent denied her tenancy when she affirmed that she was on social assistance in response to a question by the respondent.
Outcome:	Complaint upheld; $1500 awarded.

Neufeld (formerly Sabanski) v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Social Services 1999/04/22

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.

Prohibited ground:	Sex, family status.
Brief description of merits:	The complainant argued that the maintenance exemption in section 14(1) of Schedule B of the former *Guaranteed Available Income for Need Regulations BC* Reg 316/92 was discriminatory: (a) The failure to increase the exemption since its introduction in 1976, compared to other exemptions and allowances. (b) The maintenance exemption does not vary according to family size.
Outcome:	Complaint dismissed.

Nixon v Vancouver Rape Relief Society 2002 BCHRT 1

Profile of complainant:	Post-operative male to female transsexual.
Profile of respondent:	Non-governmental organisation.
Prohibited ground:	Sex.
Brief description of merits:	The complainant argued that the respondent's policy of not allowing transgendered women to become volunteer rape counselors was discriminatory.
Outcome:	Complaint upheld; $7500 awarded.

O'Connor v Town Taxi 2000 BCHRT 9

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint; the complainant alleged that he was dismissed because of a slight speech impediment.
Outcome:	Complaint upheld; the tribunal held that it was more probable than not that the disability was a factor in the decision to dismiss the complainant.

O'Lane v Rossnagel doing business as "Tradewind Construction" 1999/08/10

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.

Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant argued that she was discriminated against in that she was told not to swear, while male workers were permitted to do so; she was not allowed to do carpentry work while less-qualified male workers were allowed to do carpentry; and she was dismissed because she complained of differential treatment.
Outcome:	Complaint dismissed; the tribunal held that on the evidence the respondent would have dismissed a male employee in the same situation as well. The tribunal hinted at an unfair dismissal, but not on prohibited grounds.

Okanagan Rainbow Coalition v City of Kelowna 2000 BCHRT 21

Profile of complainant:	Non-governmental organisation.
Profile of respondent:	City.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The current mayor's predecessor proclaimed 30 June 1996 as "lesbian and gay pride day". The complainant asked that the new mayor similarly proclaim 28 June 1997 but he proclaimed it as "lesbian and gay day". The respondent alleged that had he proclaimed it as "lesbian and gay pride day", it would have sent a message that he endorsed homosexuality and that his decision not to send a false message was *bona fide* and reasonable.
Outcome:	Complaint upheld; the tribunal ordered the mayor to "treat requests for proclamations from the coalition the same way he treats requests from proclamations from all other groups".

Oxley v British Columbia Institute of Technology doing business as BCIT 2002 BCHRT 33

Profile of complainant:	First Nations male.
Profile of respondent:	Business.
Prohibited ground:	Race, colour, ancestry.

Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent discriminated against him in not appointing him as an iron worker instructor.
Outcome:	Complaint dismissed. The tribunal found that the successful candidates were better qualified and that the complainant's race did not influence the respondent's decision.

Paisley v 392011 BC Ltd operating as "Newhaven Construction" and Cyril Morrison 1999/05/13

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent refused to employ her because of her sex; the respondent alleged that she did not formally apply for a position; alternatively that she was not interested in the positions for which she qualified, as they did not pay enough.
Outcome:	Complaint upheld.

Pannu v Skeena Cellulose 2000 BCHRT 56

Profile of complainant:	Male Sikh.
Profile of respondent:	Business.
Prohibited ground:	Religion.
Brief description of merits:	Employment-related complaint. The Workers' Compensation Board (WCB) found out that the complainant was responsible for performing an emergency shut down after a gas leak but that he was contravening the WCB's safety regulations regarding the wearing of a beard and the use of a self-contained breathing apparatus. The WCB ordered the respondent to comply with its regulations and the respondent removed the complainant from his position.

Outcome:	Complaint upheld; the tribunal held that it was likely than not that to have accommodated the complainant would have caused undue hardship.

Parnell v 4 Seasons Electrical et al 2001 BCHRT 35

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that after she told her employer of her pregnancy, their work relationship worsened. Prior to this, she was promised to be promoted.
Outcome:	Complaint dismissed.

Pastoral v Phoenix Catering Ltd doing business as Kowloon Restaurant and Bruce Alistair Cameron 1999/12/10

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment; the co-owner and manager allegedly grabbed the complainant's buttocks. Comments of a sexual nature were also made.
Outcome:	Complaint upheld; $2000 awarded.

Pastoukh v John Russel, JR Hair Design Ltd 1999/07/14

Profile of complainant:	Single mother originally from the Ukraine.
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal remarks; physical conduct.)

Outcome:	Complaint upheld; $750 awarded in lost income and $3750 in compensation.

Peebles v Tri Spike Cedar Ltd doing business as Data Secured Limited and Wayne Sequin 1998/10/29

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld; $13600 awarded in lost income and $4500 in compensation.

Poirier v Her Majesty the Queen in right of the Province of British Columbia as represented by the Ministry of Municipal Affairs, Recreation and Housing 1997/07/30

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent did not allow her to continue to breast-feed her child at work or at seminars presented by the respondent.
Outcome:	Complaint upheld but no remedy was provided as the respondent had already taken steps to ensure that it accommodate the needs of lactating mothers.

Poonja-Jiwany v Bernard Haldane Associates 2002 BCHRT 24

Profile of complainant:	Female of East Indian origin; Ismailia Muslim.
Profile of respondent:	Business.
Prohibited ground:	Race, colour, ancestry, place of origin, religion.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was discriminated against in the workplace and dismissed on prohibited grounds. She alleged that she was paid less than a

	Caucasian woman who previously performed the same job but had fewer duties and worked fewer hours, and that the general manager discriminated against her during two arguments.
Outcome:	Complaint dismissed regarding pay differential; complaint upheld relating to two arguments and $800 awarded.

Potter and Benson v College of Physicians and Surgeons of British Columbia 1999/06/03

Profile of complainants:	A lesbian couple.
Profile of respondent:	Overseeing body of medical profession.
Prohibited ground:	Sexual orientation, political belief.
Brief description of merits:	Dr Korn refused artificial insemination to the complainants. The complainants complained to the respondent, who found that he had the right to refuse to accept them as patients. The former British Columbia Council of Human Rights found that Dr Korn had discriminated against the complainants based on sexual orientation. This complaint related to the respondent's decision to dispose of the complaint against Dr Korn.
Outcome:	Complaint dismissed.

Poulin v Quintette Operating Corporation 2000 BCHRT 48

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Work-related complaint. The complainant injured his left arm, elbow, shoulder and neck at work. He argued that the respondent did not accommodate him to the extent required by the *Code*.
Outcome:	Complaint upheld.

Pressney v Parkside Bridal Boutique Ltd 1997/11/17

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.

Prohibited ground:	Disability.
Brief description of merits:	The complainant suffered a spinal cord injury and wears leg braces. She visited a bridal shop with friends, where everybody was requested to take off their shoes. She has extreme difficulty in removing her shoes and the respondent asked her to remain on the mat at the entrance.
Outcome:	Complaint dismissed; the tribunal held that the respondent did not know that the complainant was disabled until after they had left the shop.

Prpich v Pacific Shores Nature Resort Ltd 2001 BCHRT 26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant argued that she was paid less than males who performed the same or substantially the same work.
Outcome:	Complaint dismissed.

Quigley v Wolfie's Restaurant Limited doing business as "Cielo Restaurant" (unreported; file 941205)

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent did not want to employ her as he wanted a younger image for the restaurant. She was 49 years old at that time.
Outcome:	Complaint dismissed on the available evidence.

Radloff v Stox Broadcast Corporation 1999/06/21

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (verbal comments, marriage proposal, continued efforts to contact her while absent due to illness).
Outcome:	Complaint upheld; $1500 awarded in compensation and $3000 in lost income.

Rafuse v British Columbia (Ministry of Tourism) 2000 BCHRT 42

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability (respiratory difficulties caused by exposure to asbestos.)
Brief description of merits:	Employment-related complaint; the complainant argued that the respondent discriminated against him relating to his conditions of employment.
Outcome:	Complaint upheld.

Rainbow Committee of Terrace v City of Terrace 2002 BCHRT 26

Profile of complainant:	Non-governmental organisation.
Profile of respondent:	City.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant argued that the respondent discriminated against its membership by not proclaiming “Gay Pride” day.
Outcome:	Complaint upheld.

Reid et al v Vancouver (City) et al (No 5) 2000 BCHRT 30

Profile of complainants:	Female communications operators within the Vancouver Police Department.
Profile of respondent:	City.
Prohibited ground:	Sex.

Brief description of merits:	Employment-related discrimination; the complainants alleged that the communication operators, almost exclusively female, perform the same or similar duties as the fire dispatchers (all male) but are paid less.
Outcome:	Complaint dismissed; the tribunal held that the fire dispatchers and complainants did not have the same employer.

Rogal v Dalgliesh 2000 BCHRT 22

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (amusement park.)
Prohibited ground:	Physical disability.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent refused to employ him because he was "too big and too heavy" for the carnival's "fast-paced lifestyle" and there were no uniforms large enough to fit him.
Outcome:	Complaint upheld; $3500 awarded in compensation and $7749.31 in lost wages.

Romaine v E & B Cheung Restaurant 2000 BCHRT 31

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent did not employ him as a waiter as they wanted a woman.
Outcome:	Complaint upheld; $2500 awarded in compensation and $1019 in lost income.

Rozon v Barry Marine 2000 BCHRT 15

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.

Prohibited ground:	Disability (back injury.)
Brief description of merits:	Employment-related complaint; the complainant alleged that he was discriminated against in his conditions of employment and that he was dismissed because of his disability.
Outcome:	Complaint partly upheld; $800 awarded in compensation but no award made for lost income as the tribunal held that the respondent would not have been able to accommodate the complainant as all positions at the respondent entailed hard physical labour.

Ryane v Krieger and Microzip Data 2000 BCHRT 41

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (sexual jokes, comments about the complainant's appearance and requests for a sexual relationship.) The complainant alleged that she was eventually dismissed after raising a complaint.
Outcome:	Complaint upheld; $4000 awarded for loss of dignity and $9000 awarded in lost income.

Schellenberg v Abbotsford Vitamin Centre 1999/10/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Marital status.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent's behaviour towards her changed for the worse after her marriage.
Outcome:	Complaint dismissed.

Segin v Chung 2002 BCHRT 42

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Sex (pregnancy), family status.
Brief description of merits:	The complainant alleged that she was refused tenancy after the respondent found out that she was pregnant.
Outcome:	Complaint upheld; $850 awarded in compensation.

Seignoret v British Columbia Rehabilitation Society Operating GF Strong Centre 1999/03/18

Profile of complainant:	Black male born in Trinidad who immigrated to Canada in 1958.
Profile of respondent:	Business.
Prohibited ground:	Race, colour, ancestry, place of origin.
Brief description of merits:	Employment-related complaint. The complainant alleged that the respondent's termination of his employment and the union's refusal to proceed to arbitration on the dismissal was based on his race.
Outcome:	Complaint dismissed.

Sharp v BC School Sports 2000 BCHRT 49

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Religion.
Brief description of merits:	The complainant, a devout Christian, changed schools and started to attend a Christian school as his values were different from students and teachers at the previous school. Because of the respondent's transfer policy, he was not allowed to train with his selected track and field club.
Outcome:	Complaint dismissed.

Sheridan v Sanctuary Investments Ltd doing business as "BJ's Lounge" 1999/01/08

Profile of complainant:	Transsexual who had sexual reassignment surgery.
Profile of respondent:	A nightclub that catered for the gay and lesbian community.

Prohibited ground:	Sex, gender, physical or mental disability.
Brief description of merits:	The complainant alleged that she was not allowed to use the women's washrooms in the club and on a second occasion was refused admission to the club because her photo in her identification book differed from her current appearance.
Outcome:	Complaint upheld relating to the use of the washrooms and $200 awarded in compensation. The tribunal held that she had ample time to obtain a new identification book and could not reasonably have expected to have been accommodated by the nightclub.

Shouldice (now Dickinson) v Stevens doing business as "Just Repairs" and Just Repairs Ltd 1999/05/20

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment that led to the complainant's dismissal.
Outcome:	Complaint upheld; $1000 awarded in compensation and $1000 in lost income.

Sidhu v Broadway Gallery 2002 BCHRT 9

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that she was dismissed because she became pregnant.
Outcome:	Complaint upheld; the tribunal held that the respondent did not meet its duty to accommodate the complainant to the point of undue hardship.

Simon v Paul Simpson and Med Grill Ltd 2001 BCHRT 24

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld; $5000 awarded for loss of dignity and $16084.62 in lost income.

Singleton v Chrysler Canada Ltd 2001 BCHRT 10

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Disability (poor vision in the left eye making it impossible to undertake quick repetitive eye movements with accuracy beyond a certain point.)
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent did not accommodate his disability.
Outcome:	Complaint dismissed. The tribunal held that the respondent could not accommodate the respondent without undue hardship.

Skytte v Danroth 2000 BCHRT 61

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Male.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was dismissed when the respondent learnt that she was pregnant.
Outcome:	Complaint upheld; the tribunal held that it was reasonable to infer that the complainant's pregnancy was a factor in the decision to dismiss her.

Slim v Gold Holdings Ltd 2000 BCHRT 20

Profile of complainant:	Male (ethnic origin unknown.)

Profile of respondent:	Property owner.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that the respondent refused to rent a one bedroom flat to him because it preferred a female.
Outcome:	Complaint upheld; monitoring order issued.

Smith v Zenith Security 2002 BCHRT 25

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The complainant also alleged that she was dismissed when she complained about the harassment.
Outcome:	Complaint upheld; $10838 awarded in lost income and $3000 for loss of dignity.

Stacey v Kenneth Campbell et al 2002 BCHRT 35

Profile of complainant:	Homosexual male.
Profile of respondent:	Evangelist.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant argued that a newspaper advertisement written and paid for by the respondent indicated discrimination or an intention to discriminate against the complainant or a group of persons because of their sexual orientation.
Outcome:	Complaint dismissed; the tribunal held that the advertisement no doubt offended many readers but that it did not fall within section 7(1)(a) of the *Code*. The tribunal did not consider whether the advertisement was likely to expose the complainant to hatred, as it was not properly argued.

Stewart v Sameuls et al 2001 BCHRT 18

Profile of complainant:	White male.
Profile of respondent:	First Nations male.
Prohibited ground:	Race, colour, ancestry.
Brief description of merits:	Employment-related complaint of harassment; the complainant alleged that he was racially harassed by a co-worker. (He was allegedly referred to as a "fucking white dog".)
Outcome:	Complaint upheld; $1000 awarded.

Sullivan v Prince Rupert Fisherman's Co-operative Association 1999/01/22

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability (deafness.)
Brief description of merits:	Employment-related complaint. The complainant alleged that his application for employment was not accepted because of his disability.
Outcome:	Complaint upheld; the tribunal held that the complainant's deafness was at least one of the factors considered by the respondent when it decided not to hire him.

Sylvester v BC Society of Male Survivors of Sexual Abuse 2002 BCHRT 14

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Non-governmental organisation.
Prohibited ground:	Disability (depression.)
Brief description of merits:	Employment-related discrimination; the complainant alleged that she was dismissed because of her disability. The respondent alleged that it was not aware of the complainant's disability.
Outcome:	Complaint upheld; $1200 awarded in compensation and one month's lost wages.

Tanchak v Locke Property Management Ltd 1997/12/03

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Business.
Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondent perceived her to be an alcoholic and therefore terminated her employment.
Outcome:	Complaint dismissed.

Tannis et al v Calvary Publishing Corp and Robbins 2000 BCHRT 47

Profile of complainants:	Female employees.
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaints of sexual harassment. The complainants alleged that they were dismissed pursuant to the harassment. The respondents did not appear at the hearing.
Outcome:	Complaints upheld; $4500 awarded to three of the complainants and $5000 to the fourth complainant for loss of dignity.

Tasker v Beneficial Canada Inc 1998/08/08

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related discrimination. The complainant alleged that she was discriminated against when she was hired, when she went on maternity leave and when she was dismissed.
Outcome:	Complaint dismissed.

Thomson v Eurocan Pulp & Paper Company 2002 BCHRT 32

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Family status.

Brief description of merits:	Employment-related complaint. The respondent had a summer vacation employment programme in place that gave preference to children of the respondent's employees. The complainant unsuccessfully applied for summer employment.
Outcome:	Complaint upheld. The tribunal held that the hiring policy did not constitute a *bona fide* occupational requirement.

Tilsley v Subway Sandwiches & Salads 2001 BCHRT 2

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant had a miscarriage and did not report for work, whereafter she was fired.
Outcome:	Complaint upheld; the tribunal held that pregnancy was one of the reasons why the complainant was dismissed.

Tozer v British Columbia (Motor Vehicle Branch) 2000 BCHRT 3

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. After the complainant suffered a brain aneurysm and stroke, the respondent put her on medical leave and prohibited her from returning to work until she was pronounced fit. She was never allowed to return to work. She filed a human rights complaint based on disability.
Outcome:	Complaint upheld; the respondent could not show that the complainant could not be accommodated without undue hardship.

Turmel v Slocan Forest Products Ltd 1999/05/17

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.

Prohibited ground:	Sex, family status.
Brief description of merits:	Employment-related complaint. The complainant alleged that she was not hired "because she did not need the job". (The implication being that her husband made enough money.)
Outcome:	Complaint dismissed.

Vandenberg v Tony Frustaci doing business as "Sharkey's Bar & Grill" 1998/10/08

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. (References to the kitchen as the "Boys' Zone"; jokes with sexual innuendo.)
Outcome:	Complaint dismissed.

Varga v Bentley's Sandwich Heaven 2001 BCHRT 08

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (fast food outlet.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. (Inappropriate questions of a sexual nature; physical contact.) No one appeared on behalf of the respondent.
Outcome:	Complaint upheld; $4500 awarded in compensation.

Vestad v Seashell Ventures Inc 2001 BCHRT 38

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was forced to resign based on pregnancy-related discrimination.

Outcome:	Complaint upheld; the tribunal found that a link existed between her pregnancy and the change in employment duties.

Watkins v Cypihot 2000 BCHRT 13

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The complainant alleged that her lease was not renewed when she informed the respondent that her two stepsons would be moving in with her.
Outcome:	Complaint upheld; the tribunal held that it was more likely than not that the complainant's stepsons was a factor in the decision not to renew the lease; $1500 awarded in compensation.

Willis v Blencoe 2001 BCHRT 12

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government (Minister of Government Services and Minister responsible for Commonwealth Games.)
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment. The respondent did not appear.
Outcome:	Complaint upheld; $5000 awarded in compensation.

Windover v High Output Sports 2000 BCHRT 39

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant alleged that she was being paid less than male employees doing similar or substantially similar work.
Outcome:	Complaint dismissed.

Wollstonecroft v Crellin et al 2000 BCHRT 37

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment (explicit comments about the respondent's and his wife's sexual conduct and needs.)
Outcome:	Complaint upheld; $2000 awarded in compensation and $1800 in lost income.

Worrall (Madsen) v Boca Homes Ltd doing business as Monogram Building and Design and Michael Brealy 1998/07/03

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint of sexual harassment.
Outcome:	Complaint upheld; $3000 awarded as compensation and $12000 in lost income.

Wu v Ellery Manufacturing 2000 BCHRT 53

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant suffered a workplace-related injury was and was permanently disabled. He was dismissed two months later.
Outcome:	Complaint upheld; the tribunal held that the respondent did not determine whether it could reasonably accommodate the complainant; $1500 awarded for loss of dignity.

Wust v Lai's Chinese Restaurant (1990) Ltd, doing business as TJ's Chinese Restaurant 2002 BCHRT 36

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; the complainant alleged that she was dismissed after becoming pregnant.
Outcome:	Complaint upheld; the tribunal held that the complainant established a *prima facie* case and that the respondent did not make any attempt to show a *bona fide* occupational requirement related to the complainant's job or the pregnancy.

D.4 Manitoba

Advisory opinion issued to Health Sciences Centre

Profile of applicant:	Health care business.
Profile of respondent:	NA.
Prohibited ground:	Sex.
Brief description of merits:	The applicant wished to put in place a preferential hiring system for males in its in-patient unit of child and adolescent mental health programme; it wanted to accomplish a 30-70 ratio of male to female nurses. The applicant argued that such a gender balance would better reflect the gender distribution of patients in the unit. It had explored alternatives but these strategies had not been cost effective and had not been effective in meeting therapeutic goals.
Outcome:	The commission advised the applicant that such a preferential hiring policy would not contravene the Human Rights Code.

Advisory opinion issued to Manitoba Liquor Control Commission File 99-AD-07

Profile of complainant:	Statutory corporation regulating the sale of alcohol in Manitoba.
Profile of respondent:	NA.

Prohibited ground:	Age.
Brief description of merits:	The applicant enquired whether liquor stores may deny entry based on age of majority, may ask for identification verifying age, may deny entry to minors not accompanied by a parent, spouse or guardian and may evict a minor not so accompanied.
Outcome:	The commission advised that the proposed action would not amount to unreasonable discrimination. Such a policy complies with the strong public policy established in the Liquor Control Act.

Bourier v Phil-Can Services Limited and Caron 1999/01/08

Profile of complainant:	Female.
Profile of respondent:	Business; Male.
Prohibited ground:	Sex.
Brief description of merits:	Sexual harassment in the course of an employment interview; the interviewer asked the complainant if she would sleep with him for the job offered.
Outcome:	Complaint upheld.

Budge v Thorvaldson Care Homes Ltd 2002/03/19

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Sexual harassment; the complainant alleged that the maintenance man had on an ongoing basis acted objectionably. She reported the problem, to no avail.
Outcome:	Complaint upheld. The respondent was ordered to adopt a written company policy on sexual harassment. The commission also issued a monitoring order, and awarded compensation for lost income and general damages.

Morriseau v Wall and Wall operating as Paisley Park 2000/12/12

Profile of complainant:	Female.
Profile of respondent:	Antique store.
Prohibited ground:	Family status and gender.
Brief description of merits:	Alleged discrimination in the provision of a service. The complainant breastfed her child in the shop but was asked to go to into the courtyard.
Outcome:	Complaint dismissed; the accommodation offered was reasonable.

Schroen v Steinbach Bible College

Profile of complainant:	Female (ethnic origin unknown) of the Mormon faith.
Profile of respondent:	Institution of religious instruction.
Prohibited ground:	Religion.
Brief description of merits:	Employment discrimination; the respondent hired the complainant as accounting clerk but when it found out that the respondent was not of the Anabaptist Evangelical faith, terminated her employment.
Outcome:	The commission held that a *prima facie* case of discrimination was made out but that the impugned requirement constituted a *bona fide* and reasonable requirement for employment. Complaint dismissed.

Vogel and North v Government of Manitoba 1997/11/21

Profile of complainants:	Two gay males.
Profile of respondent:	Government.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainants had been in a longtime relationship since 1972. Vogel brought an earlier complaint but at that time the complaint was dismissed because sexual orientation had not been added to the list of prohibited grounds. Vogel argued that he and North

were entitled to certain employment benefits, being in a same-sex spousal relationship.

Outcome: Complaint upheld relating to the Government's employees dental plan; ambulance, hospital and semi-private plan; the extended health care plan and the group life insurance plan.

Werestiuk v Small Business Services Inc et al 1998/10/30

Profile of complainant: Female (ethnic origin unknown.)

Profile of respondent: Business.

Prohibited ground: Sex.

Brief description of merits: Sexual harassment complaint. The respondents did not attend.

Outcome: Complaint upheld.

D.5 Nova Scotia

Blanchard v Labourers' International Union, Local 1115 and Serroul and MacMaster 2002/06/29

Profile of complainant: Male (ethnic origin unknown.)

Profile of respondent: Employees' Union.

Prohibited ground: Disability (multiple sclerosis.)

Brief description of merits: Employment-related discrimination; the complainant argued that the union failed to facilitate employment at a construction site.

Outcome: Complaint dismissed. The commission held that the nature and extent of the complainant's disability reasonably precluded the performance of jobs to which the complainant sought referrals; the respondent's denial of a referral was based on *bona fide* occupational qualifications primarily related to safety; and the respondent accommodated the complainant to the point of undue hardship.

Christie v Halifax Student Housing Society 1999/11/01

Profile of complainant: Male (ethnic origin unknown.)

Profile of respondent: Student housing society.

Prohibited ground:	Not explicitly stated.
Brief description of merits:	The complainant and his common law companion were evicted as they violated the respondent's housing rules that prohibited unmarried adults from living together.
Outcome:	Complaint upheld; $12058.87 awarded in total (general damages, rent differential, electrical power, cable television and moving costs.)

Coleman v Manto Holdings Ltd (Pizza Delight) 1999/05

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (fast food outlet.)
Prohibited ground:	Disability.
Brief description of merits:	Employment-related discrimination; the complainant injured her leg when she pulled a heavy table in June 1994. Her condition worsened gradually. Her doctor put her off work from July 1995 indefinitely. By October 1995 she informed the respondent that she was ready to return to work. The respondent gave her notice and terminated her employment.
Outcome:	Complaint dismissed. The respondent's financial situation was such that to hire back the complainant at the relevant time would have constituted an undue hardship.

Daniels v Annapolis Valley Regional School Board 2002/09

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School governing body.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination; the complainant argued that she applied for a position as maintenance foreman but was not interviewed. The respondent argued that she was not qualified for the position.

Outcome:	Complaint upheld. The commission held that candidates with the same or fewer qualifications were short listed and interviewed and the complainant should have been interviewed. The commission did not award lost wages as a better qualified applicant obtained the position, but did award general damages of $5000.

Ibrahim v Dartmouth Volkswagen 04-98-0118

Profile of complainant:	Male of East Indian ancestry who had resided in Nova Scotia for 35 years.
Profile of respondent:	Corporation.
Prohibited ground:	Ethnic and/or social origin.
Brief description of merits:	Employment-related discrimination; the complainant alleged that he was harassed and eventually fired because of his ethnic and/or social origin.
Outcome:	Complaint upheld. The commission found that the offered reasons for firing the complainant were a pretext.

Patterson v Gladburg Holdings Limited and/or Gladwin 4/12/2000

Profile of complainant:	Female (race not stated)
Profile of respondent:	Business
Prohibited ground:	Sex (pregnancy)
Brief description of merits:	Very little information provided. The complainant alleged sex discrimination on the basis that the respondent terminated her employment because she missed time because of complications relating to her pregnancy.
Outcome:	The matter was settled prior to the hearing. No further particulars provided.

Redden v Saberi and Atlantic Construction Services Management Ltd 1999/11/22

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.

Prohibited ground:	Sex and/or family status (pregnancy.)
Brief description of merits:	Employment-related discrimination; the complainant alleged that her employment was terminated after 13 months because she fell pregnant.
Outcome:	Complaint upheld. The commission also noted that a "significant cluster" of pregnancy-related complaints have been brought in the real estate business in Canada and suggested that Real Estate Boards educate their members about their responsibilities as employers under the *Human Rights Act*.

Thibodeau v Tusket Sales and Service Limited and Hubert 16/6/2000

Profile of complainant:	Male (race not stated)
Profile of respondent:	Business
Prohibited ground:	Disability
Brief description of merits:	Very little information provided. The complainant alleged that the respondent terminated his employment because of a mental disability.
Outcome:	The parties settled the matter on the basis that the respondent paid $4500 general damages to the complainant without admitting liability, as well provide a positive reference letter to the complainant.

Wigg v Harrison and/or Art Pro Litho 16/8/1999

Profile of complainant:	Female (race not stated)
Profile of respondent:	Business and business owner
Prohibited ground:	Sex (sexual harassment)
Brief description of merits:	The complainant alleged that the respondent propositioned and requested sex from her. She clearly rejected the offer. The respondent repeated a similar request a week later.
Outcome:	The tribunal held that the complaint was proved and ordered the respondents to apologise. It ordered Harrison to undergo

sensitivity training. It also ordered the respondents to file a sexual harassment policy within six months of the date of the order with the Nova Scotia Human Rights Commission. It also awarded $3800 general damages and $1200 in lost wages.

D.6 Ontario

Abdolalipour and Murad v Allied Chemical 1996/09/18

Profile of complainant:	The first complainant was a male of Arab ancestry and born in Iraq; the second complainant was a female originally from Iran.
Profile of respondent:	Corporation.
Prohibited ground:	Race and sex.
Brief description of merits:	Employment-related complaints. The complainants were not made aware of vacancies in career opportunities they were interested in. The second complainant also complained of a poisoned work environment; *inter alia* being exposed to pornographic pictures.
Outcome:	Complaints upheld.

Abouchar v Metropolitan Toronto School Board et al 1998/03/27, 1999/04/23, 1999/05/11

Profile of complainant:	Male francophone born in Egypt of Lebanese origin.
Profile of respondent:	School governing body.
Prohibited ground:	Race, place of origin, ethnic origin.
Brief description of merits:	Employment-related complaint; the complainant alleged that the respondents failed to employ him as manager on two occasions because of their preference for Franco-Ontarions over immigrants.
Outcome:	Complaint upheld relating to the first occasion; dismissed relating to the second occasion.

Anderson and O'Neill v The YMCA of Barrie 2000/12/06

Profile of complainants:	Two females.

Profile of respondent:	Members' club.
Prohibited ground:	Sex.
Brief description of merits:	The complainants complained that while they could become regular members of the respondent, they could not buy premium memberships. Men in the premium category used a separate change facility with many amenities not available to regular members.
Outcome:	Complaint upheld. The board ordered the respondent to build a women's facility of comparable size and with comparable facilities within eight months, and awarded $18000 in general damages.

Andrews v Ptasznyk 1998/03/05

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The complainant argued that she, her husband and child had been denied a flat in a building. The respondent informed them that the building was cramped and in an area unsafe for children.
Outcome:	Complaint upheld; the board held that the comments were intended to discourage applications from prospective tenants with children.

Belford & Grace v Mercedes Homes Inc 1995/06/07

Profile of complainants:	Homosexual males.
Profile of respondent:	Property owner.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainants alleged that they were the victims of a "gay bashing". They argued that the respondent should have evicted the alleged assaulter's girlfriend, who rented a flat in the same apartment as the complainants. They also alleged discriminated when they were evicted.

Outcome:	Complaint dismissed on the evidence.

Brady v City of Toronto Fire Department 2001/08/09

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	City fire department.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant lacked stereopsis (a form of depth perception). Because of this, he failed the fitness part of his application for a position as firefighter. He was however capable of operating a crane as he used other methods to gauge depth.
Outcome:	Settled; the respondent agreed to use a more accurate test of depth perception where the ordinary test indicates a lack of stereopsis.

Brillinger and the Canadian Lesbian and Gay Archives v Imaging Excellence Inc et al 1999/09/29, 2000/02/24

Profile of complainant:	Homosexual male.
Profile of respondent:	Business.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant requested the respondent to print envelopes, letterheads and business cards for the Canadian Lesbian and Gay Archives. The respondent's president denied the service because of his religious belief that homosexuality is contrary to Christian teaching.
Outcome:	Complaint upheld. The board directed the respondent to provide the requested printing services.

Brock v Tarrant Film Factory Ltd 2000/04/04

Profile of complainant:	Male (teenage boy.)
Profile of respondent:	Movie theatre.

Prohibited ground:	Disability (muscular atrophy.)
Brief description of merits:	The complainant often visited a movie theatre where he would be carried into the theatre by staff. As his condition worsened he started to use a wheelchair and he could no longer be carried. At this time staff directed him to the back door where they would let him in, after waiting for some time. In the theatre he had to sit at an angle. His wheelchair was in the path of other patrons and they would frequently bump into him.
Outcome:	Complaint upheld; the respondent had not shown that making the premises accessible would cause undue hardship.

Chandan v Emix Ltd (The Furniture Mall) et al 1996/02/20

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Race.
Brief description of merits:	Employment-related complaint of racial harassment.
Outcome:	Settled in complainant's favour.

Collins v The Etobicoke Board of Education et al 1996/07/03

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School governing body.
Prohibited ground:	Race and ethnic origin.
Brief description of merits:	Employment-related complaints of harassment and differential treatment. The respondent did its own internal investigation and came to the conclusion that the complainant would have to be transferred.
Outcome:	Complaint settled in complainant's favour.

Crabtree v Econoprint and Price 1996/11/06

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.

Prohibited ground:	Disability (muscular atrophy.)
Brief description of merits:	Employment-related discrimination; the interviewer at the job interview repeatedly asked questions to the complainant about her disability. She was not hired.
Outcome:	Complaint upheld; the respondent could have accommodated the complainant without undue hardship.

Croal v Pembroke Civic Hospital and Mae Ziebell 1996/05/21

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Hospital.
Prohibited ground:	Age, (perceived) disability.
Brief description of merits:	Employment-related complaint. The head nurse told the complainant that she would be losing her job because of her alleged hearing difficulties. The complainant was offered retirement at an early age or accepting an alternate, less attractive job than the one she then filled. She chose retirement and was adversely affected.
Outcome:	Complaint upheld; $20 000 awarded in general damages; $18500 legal fees; and the respondent agreed to pay $47556 into the complainant's retirement fund.

Crook v Ontario Treatment and Research Foundation and Regional Cancer Centre 1996/08/26; 1997/12/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint; the complainant was denied sick leave benefits during the period immediately prior to and after the birth of her child.
Outcome:	Complaint upheld and confirmed on appeal to the Divisional Court.

Curling v The Victoria Tea Company Ltd., Torimiro and The Torimiro Corporation 1999/12/22; 2000/10/03

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business; male.
Prohibited ground:	Sex.
Brief description of merits:	Complaint of sexual harassment; the respondent persistently pursued a relationship with the complainant.
Outcome:	Complaint upheld.

Drummond v Tempo Paint and Varnish Co et al 1998/06/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	The complainant alleged that she was subjected to sexual harassment and sexual solicitation.
Outcome:	Complaint upheld.

Duong v Garai carrying on business as Langstaff Auto Repairs 2000/09/26

Profile of complainant:	Male of Asian origin.
Profile of respondent:	Business.
Prohibited ground:	Race, place of origin, ethnic origin.
Brief description of merits:	The complainant said that the respondent failed to repair his car, threatened him, and used racial pejoratives.
Outcome:	Complaint partly upheld. The board found that the respondent did meet his obligations as service provider. The board held that the *Code* did not guarantee the right to be free from harassment in the provision of services. The board ordered $2000 in damages.

Dwyer and Sims v The Municipality of Metropolitan Toronto and The Attorney General for Ontario 1996/09/27

Profile of complainants:	Homosexual man and woman.
Profile of respondent:	City.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainants challenged their employers' pension benefits, insured health benefits and uninsured employmenr benefit plans for excluding same sex spousal relationships.
Outcome:	Complaint upheld.

Entrop v Imperial Oil 1998/02/11

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	(Perceived) disability.
Brief description of merits:	Employment-related complaint. The complainant had an alcohol abuse problem but had overcome it. The respondent forced him to disclose it. He was then reassigned and out through a reinstatement process.
Outcome:	Complaint upheld; the treatment was not reasonably necessary considering the period (7 years) since the complainant had conquered his previous problem.

Fuller v Daoud and Desquilbet 2001/08/17

Profile of complainant:	Black male.
Profile of respondent:	Property owner.
Prohibited ground:	Race.
Brief description of merits:	After the complainant rented a flat in a building, he was subjected to unauthorised entries into his flat, racial pejoratives and his ceiling stomped upon. When one of the respondents shouted "you will see white power", the complainant phoned the police. The police arrived and the respondent accused the complainant of threatening rape and death. The police arrested the complainant, strip-searched him and left him naked in a jail cell.

	The charges were dropped but in the meantime the respondents had him evicted.
Outcome:	Complaint upheld and $29719,82 awarded. A monitoring order was also made and the respondents were also ordered to attend a training programme.

Gallagher v The Regional Municipality of Hamilton-Wentworth et al 1996/06/17

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	City.
Prohibited ground:	Marital status.
Brief description of merits:	Employment-related complaint. The complainant developed a relationship with, and then married, a co-employee. The respondents applied their "nepotism policy" and transferred the complainant to another department.
Outcome:	Complaint dismissed because of the definition of "marital status".

Garbett v Fisher 1996/04/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Age.
Brief description of merits:	The complainant applied for a flat. She was refused because she was in receipt of public assistance. The respondent argued that he did this because she would not have been able to pre-pay the last month's rent.
Outcome:	Complaint upheld.

Geiger v Barboutsis v London Monenco Consultants Limited 1996/11/29

Profile of complainant:	Unknown.
Profile of respondent:	Corporation.
Prohibited ground:	Marital status.

Brief description of merits:	Employment-related complaint; the respondent flew married employees home every three weeks at the respondent's expense but did not do the same for unmarried staff.
Outcome:	The board dismissed the complaint but it was upheld by the Ontario Court of Appeal.

Harold & Johnston v Levin & Midtown Hotel Ltd carrying on business as Gord's Shooters et al 1996/01/31

Profile of complainant:	Male.
Profile of respondent:	Business.
Prohibited ground:	Disability.
Brief description of merits:	The complainant had an unstable gait and had to wear a leg brace as a result of polio. He also had a severe speech impediment. When he and his wife entered the hotel to have coffee, the proprietor advised that they would not be served as he believed the complainant was drunk.
Outcome:	Complaint upheld; $250 awarded to the complainant.

Hazlett v York Region Board of Education 1997/03/24

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability.
Brief description of merits:	The complainant suffered from Parkinson's disease. She alleged that she was capable of working during the time that the respondent did not allow her to work.
Outcome:	Settled. The respondent paid $11000 in general damages and agreed to arrange a workshop for its administrators on accommodating the rights of disabled employees. The complainant's position was kept open for a further three years to allow for the possibility of returning to work, and allowed her to purchase group insurance.

Henderson/Pirri v Peel Condominium Corp No 291 et al 1996/04/02

Profile of complainant:	Unknown.
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The respondents' rules prohibited children from using the whirlpool, sauna or exercise room facilities, and only allowed children in the billiard room if accompanied by an adult.
Outcome:	Complaint upheld.

Hudler v City of London & Mayor Dianne Haskett 1997/10/07

Profile of complainant:	Homosexual male.
Profile of respondent:	City.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant brought a claim against the respondent after the mayor refused to grant a municipal proclamation of Pride Weekend, alleging discrimination based on sexual orientation.
Outcome:	Complaint upheld. $10000 awarded. The city was also ordered to proclaim any future requests for Pride Day/Weekend and to commit to the investigation of ways to improve relationships with the gay, lesbian and bisexual communities of the city.

Jeppesen v Corporation of the Town of Ancaster, Fire and Emergency Services et al 2001/01/02

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	City fire department.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint. The complainant, a part time firefighter, was diagnosed with histoplasmosis, a fungal disease that lead to the complainant losing central vision in his left eye. The respondent advertised for full-time firefighters and insisted on the ability to drive an ambulance, for which one needs a class F

	license. The complainant could not obtain a class F license because of his vision impairment and asked to be accommodated through the provision of straight firefighting duties. His request was refused.
Outcome:	Complaint upheld. The boars held that the complainant could have been accommodated short of undue hardship.

Jerez & Rivera v Cando Property Management Limited 1996/01/24

Profile of complainants:	Two females of Philippine origin.
Profile of respondent:	Property owner.
Prohibited ground:	Race.
Brief description of merits:	The superintendent of a building treated the complainants discourteously when they tried to sublet a flat from a friend of theirs. They alleged that the respondent enforced a discriminatory rental policy.
Outcome:	Settled in favour of complainants.

Jodoin v CIRO's Jewellers (Mayfair) Inc et al 1996/01/04

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy) and family status.
Brief description of merits:	Employment-related discrimination. The complainant was fired as store manager. She argued that it was because she fell pregnant; the respondent argued that she was fired because of incompetence.
Outcome:	Complaint upheld; on the evidence she was at least in part fired because of her pregnancy and no efforts were made to accommodate the complainant.

LaRush v York Professional Fire Fighters Association, Local 411 1997/05/02

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Employees' union.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant was the first female fire fighter in the city's fire department. She alleged that she was sexually harassed by the male staff, and treated differentially. Her employment was eventually terminated. The complainant alleged that the union did not properly represent her interests in her dealings with management.
Outcome:	Settled; the union agreed to implement a non-discrimination and anti-harassment policy.

Lavender v Cochrane Station Inn Restaurant & Polizogopoulos 1998/09/01

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint; two months after she commenced employment the complainant was informed that she was pregnant and told to take complete bed rest for a week. She then had a miscarriage and asked a further ten days off work. When she returned to work, her employment was terminated.
Outcome:	Complaint upheld; the board held that but for the pregnancy the complainant's employment would not have been terminated.

Leonis v Metropolitan Toronto Condominium Corporations 1998/06/10

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status.
Brief description of merits:	The body corporate's rules prohibited children under 16 from using some of the facilities and restricted access to other facilities. The complainant argued that the rules prohibited him from using

	the whirlpool and fitness room with his daughter and could only use the swimming pool at the times set out in the rules.
Outcome:	Complaint upheld; the board held that the rules had an adverse impact on people in parent-child relationships. However, unrestricted access to all amenities would have placed an undue hardship on the respondent. The board ordered the respondent to make available on its recreation committee at least one owner with a child under 16.

Lewis and Steiner v Leeds and Grenville Board of Education

Profile of complainant:	Unknown.
Profile of respondent:	School governing body.
Prohibited ground:	Religion.
Brief description of merits:	Employment related complaint; non-Christian employees did not get paid when absent on days of religious observance, compared to Christian employees.
Outcome:	Complaint settled in favour of the complainants.

McCallum v Toronto Transit Commission and the Attorney General of Ontario 1997/09/16

Profile of complainant:	Homosexual male.
Profile of respondent:	Government.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The case was adjourned pending a decision in *Dwyer & Sims v Municipality of Metropolitan Toronto & Attorney General of Ontario*. After that decision, the respondent extended its employment benefits to same-sex couples.
Outcome:	The board awarded $2500 in general damages.

McKinnon v Ministry of Correctional Services et al 1998/04/28; 1999/05/07

Profile of complainant:	First Nations male.
Profile of respondent:	Government.

Prohibited ground:	Race.
Brief description of merits:	Employment-related harassment and poisoned work environment. The complainant alleged that officers used racial pejoratives, posted caricatured pictures of the complainant on the bulletin board, and that management singled him out for severer treatment.
Outcome:	Complaint upheld against individual perpetrators and the ministry. (The complainant subsequently made further allegations of harassment and retaliation.)

Medeiros v Hornepayne Community Hospital and Morley 1996/05/16

Profile of complainant:	First Nations female.
Profile of respondent:	Hospital; male nurse.
Prohibited ground:	Race, ancestry.
Brief description of merits:	While in hospital the complainant felt a nurse did not treat her with respect. When she complained, the nurse told her that the hospital "did not give any special treatment to natives".
Outcome:	Complaint upheld.

Mendelson v Canadian Friends of Bar-Ilan University et al 1996/01/05

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporate.
Prohibited ground:	Sex.
Brief description of merits:	Complaint relating to sexual harassment and solicitation in the workplace. When the complainant complained to the second respondent, a member of the board of directors of the first respondent, no action was taken.
Outcome:	Settled in favour of complainant; $12000 paid.

Metsala v Falconbridge Ltd, Kidd Creek Division 2001/02/15

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Corporation.
Prohibited ground:	Disability (depression and chronic fatigue.)
Brief description of merits:	Employment-related complaint. The complainant was promoted to payroll clerk after spending some 16 years with the respondent. The new position involved significant overtime work and more pressure. She asked for a transfer because of the stress. A year after the request was denied she went on sick leave, being diagnosed with reactive depression and chronic fatigue. For a while she received disability benefits but this eventually terminated. She did not seek other employment as she did not want to forfeit her significant service recognition credits.
Outcome:	Complaint upheld. The board held that the respondent did not take any steps to find out the true nature of the complainant's medical condition and did not offer her contract positions based on assumptions and stereotypes.

Moffatt v Kinark Child and Family Services 1999/11/02; 2000/05/26

Profile of complainant:	Homosexual male.
Profile of respondent:	Children's agency.
Prohibited ground:	Sexual orientation.
Brief description of merits:	Employment-related complaint. The complainant disclosed that he was gay and sometime thereafter entered into a fostering relationship with a child. When his employment was terminated, the complainant alleged that this happened because of his sexual orientation and because of his employer's belief that he had AIDS.
Outcome:	Complaint upheld. The board found that the ultimate decision to fire the complainant was not based on discriminatory reasons. However, the complainant's work environment was poisoned because of rumours about his sexual orientation and speculation about a sexually exploitative relationship with his foster son. The

board also found that the respondent did not take adequate steps to investigate and address the complainant's concerns.

Naraine v Ford Motor Company of Canada Ltd et al 1996/07/25; 1996/12/09; 1997/03/11; 1999/06/23; 1999/10/08

Profile of complainant:	Male East Indian originally from Guyana.
Profile of respondent:	Corporation.
Prohibited ground:	Race, colour, place of origin, ethnic origin.
Brief description of merits:	Employment-related discrimination. The complainant alleged that during his work environment was poisoned by racist graffiti, racist verbal comments, inferior work assignments and training. He was also subjected to progressive disciplinary measures, eventually resulting in his employment being terminated.
Outcome:	Complaint upheld. The board ordered reemployment and awarded $30000 in general damages. The Divisional Court dismissed an appeal, and so did the Court of Appeal.

Nelson v Durham Board of Education & Peel 1998/08/28

Profile of complainant:	Black male.
Profile of respondent:	School governing body.
Prohibited ground:	Race, colour.
Brief description of merits:	Employment-related complaint. The complainant, the first black vice-principal in the school board, was not successful in his applications for the position as principal.
Outcome:	Complaint upheld; the board found discrimination in a number of instances during his employment.

Ontario Human Rights Commission v A 2000/11/14

Profile of complainant:	The complainant (A) was an employee of a company of which B was vice-president and manager. B was A's brother-in-law and

	direct supervisor. C was the company's owner, also a brother of A's wife.
Profile of respondent:	Corporation.
Prohibited ground:	Family status; marital status.
Brief description of merits:	Employment-related complaint. A had been working for the company for 26 years without incident. His daughter uncovered a memory in therapy that she had been molested as a child by B. A's wife and daughter confronted B over a weekend. The next Monday A's employment was terminated.
Outcome:	The board held that these facts constituted discrimination based on marital or family status. The Divisional Court disagreed. The Court of Appeal allowed the appeal and confirmed the board's initial finding.

Pollard v Condie Napanee Limited 1996/01/18

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business (car dealers.)
Prohibited ground:	Sex and marital status.
Brief description of merits:	The complainant was the respondent's receptionist. When her husband, who had been working for a car dealership in a different town, changed jobs and became the manager of a used car dealership in the same town where the complainant worked, the respondent fired the complainant, as it feared that she would send customers to her husband.
Outcome:	Settled in favour of the complainant.

Redden et al v Bryant Press Ltd et al & Graphic Comm. Int'l Union et al 1996/01/04

Profile of complainant:	Unknown.
Profile of respondent:	Business.
Prohibited ground:	Sex.

Brief description of merits:	Employment-related complaints as to unequal practices (promotions, training, duties.)
Outcome:	Settled in favour of the complainants.

Reed v Cattolica Investments Ltd et al 1996/03/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	The complainant was the respondent's owner's employee and tenant. The owner sexually harassed her whereafter she quit, but remained a tenant. He then initiated a campaign to have her evicted from the building.
Outcome:	Complaint upheld; $1500 awarded in special damages and $7000 in general damages.

Rheaume v Leroux & Rencar Construction Ltd

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Receipt of public assistance.
Brief description of merits:	The respondent did not consider the complainant as a tenant because she was on "mother's allowance.
Outcome:	The board upheld the complaint; an appeal to the Divisional Court was dismissed (2-1)

Roosma & Weller v Ford Motor Company of Canada and the CAW Local 707 1995/07/14

Profile of complainants:	Unknown.
Profile of respondent:	Corporation.
Prohibited ground:	Religion.
Brief description of merits:	Employment-related discrimination; the complainants were members of the Wordwide Church of God which prohibited work

	from Friday at sunset to Saturday at sunset. The complainants were progressively disciplined from missing Friday night shifts.
Outcome:	The board found a *prima facie* case of discrimination had been established, but that the respondent could not accommodate the complainants without undue hardship.

Rubio v A Voz-Portuguese Canadian Newspaper Ltd et al 1997/03/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Sexual harassment in the workplace.
Outcome:	Complaint upheld; the board held that the complainant was constructively dismissed and awarded $3000 in general damages.

Thomson v Fleetwood Ambulance Service and OPSEU 1996/10/09

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business; employees' union.
Prohibited ground:	Disability.
Brief description of merits:	Employment-related complaint; the collective agreement between the respondents reduced an employee's vacation for each full month that an employee was absent from work. The complainant was absent due to an injury (for which he received compensation).
Outcome:	Complaint upheld; the employer was ordered to stop applying the impugned provision.

Turnbull v 539821 Ontario Ltd, Andre's Restaurant et al 1996/06/21

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex (pregnancy.)

Brief description of merits:	Employment-related complaint; the complainant alleged that her working hours were reduced and then fired because she told her employer she was pregnant.
Outcome:	Complaint upheld.

Vander Schaaf v M & R Property Management Ltd 2000/09/06

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Marital status.
Brief description of merits:	The complainant alleged that she and her roommate were repeatedly discouraged from applying for a flat and that the landlord said the flat was better suited for a couple. The respondent argued that they were rejected because neither of them satisfied the rent-to-income ratio of 25%.
Outcome:	Complaint upheld. The board held that landlords may use "income information" but may not apply rent-to-income ratios. The board ordered the respondent to stop preferring tenants based on marital status.

Watson v Antunes 1998/04/08

Profile of complainants:	Two black females, mother and daughter.
Profile of respondent:	Landlord.
Prohibited ground:	Race.
Brief description of merits:	After seeing a flat, the mother telephoned to accept it for rent. She was told that the flat was no longer available. She suspected race discrimination and asked a friend to telephone as well. The friend was told that the flat was still available.
Outcome:	Complaint upheld.

Wight v Office of the Legislative Assembly 1998/07/13

Profile of complainant:	Female (ethnic origin unknown.)

Profile of respondent:	Government.
Prohibited ground:	Family status, sex (pregnancy), disability.
Brief description of merits:	Employment-related complaints. The complainant alleged that she was fired because she refused to return to work until she had secured adequate day care arrangements for her child; her probationary period was extended by the six months that she was away from work due to her pregnancy; short-term illness benefits were denied; and maternity and extended leave were denied.
Outcome:	Most of the complaints were dismissed; the complaint relating to the extension of her probationary period was upheld.

Wilcox v Belmont Properties, Brenda Joergensen 1996/06/19

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Property owner.
Prohibited ground:	Family status, marital status and sex.
Brief description of merits:	The respondents allegedly refused to rent a flat to the complainant because she was a single mother that received family benefits assistance.
Outcome:	Resolved at mediation in complainant's favour.

D.7 Prince Edward Island

Craig v Prince Edward Island 1983/03/15

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Political belief.
Brief description of merits:	Employment-related complaint; the complainant alleged that, being a Liberal, his employment was terminated by the new Conservative government when it came to power.
Outcome:	Complaint dismissed.

Deighan v Prince Edward Island Unit 2 School Board 1978/11/20

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	School governing body.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint; the complaint was allegedly retrenched because of her age.
Outcome:	Complaint dismissed.

Gaudet v Government of Prince Edward Island File #1057-99

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	Disability.
Brief description of merits:	Accessibility of the Prince County courthouse to wheelchairs.
Outcome:	Complaint upheld; the respondent was ordered to "cease discriminating" (apparently ordering the respondent to ensure wheelchair accessibility).

Kickham v Charlottetown (City) 1986/03/26

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	City.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related discrimination. The complainant was the only female applicant for the position as a probationary constable. She was granted an interview. The interview committee did not have a set of questions, had no determination of how the successful candidate should be chosen and had no requirement to indicate to the respondent upon which a recommendation for employent should be granted. During the interview she was asked that, if she had a problem at her home, who would she rather have attend, a 200 pound male police officer or a 120 pound female police officer. She was not appointed.

Outcome:	Complaint upheld and the respondent ordered to offer the complainant a position as probationary constable.

MacDonald v Prince Edward Island School Unit No 1 1992/03/02

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	School.
Prohibited ground:	Age.
Brief description of merits:	Employment-related complaint; the respondent did not rehire the complainant as a bus driver as he was then older than 65.
Outcome:	Complaint dismissed. The commission held that the age requirement was reasonably necessary to ensure the efficient and economical performance of the job without endangering the public, that it was not possible to screen employees to remove the unsafe driver, and that the requirement was reasonably necessary to eliminate a real risk of serious damage to the public.

Magill v Atlantic Turbines Inc 1997/01/30

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant referred to a large number of incidents where the female employees were treated in an adverse manner, compared to the male employees. The workforce was overwhelmingly male.
Outcome:	Complaint upheld relating to a single incident of sexual harassment. The respondent was held liable for failing to provide a harassment-free workplace. The commission was not persuaded that the harassment was a factor in the loss of employment but that she was fired because of excessive absenteeism and a disputed refusal to work overtime. The commission awarded $2500 in compensation and ordered the

respondent to develop and implement a sexual harassment policy within 90 days.

Silliphant v Wakim carrying on business as Lunch Bar and Dining Room 1986/03/03

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business (restaurant.)
Prohibited ground:	Sex.
Brief description of merits:	Employment discrimination; the complainant alleged that he was refused employment as a waiter as the respondent "wanted a girl".
Outcome:	Complaint upheld; $250 awarded.

Stevenson v All-Can Travel Inc 1990/07/12

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Business.
Prohibited ground:	Sex.
Brief description of merits:	Employment-related complaint. The complainant applied for a position as travel consultant but was informed that men were not considered, as the public believed that women could better serve the customer. The complainant had no experience in the travel industry trade.
Outcome:	Complaint upheld. The commission held that the complainant would in any event not have been hired but that he had suffered humiliation and a loss of self-respect and awarded $500.

Taylor v Testori Americas Corporation File #1001-99

Profile of complainant:	Female (ethnic origin unknown.)
Profile of respondent:	Corporation.
Prohibited ground:	Sex (pregnancy.)
Brief description of merits:	Employment-related complaint. The complainant alleged that she her employment was terminated during her maternity leave and

	that she did not receive health benefits during her employment leave.
Outcome:	Complaint upheld relating to the failure to provide health benefits.

Trainor v Prince Edward Island (Department of Transportation) 1991/04/30

Profile of complainant:	Male (ethnic origin unknown.)
Profile of respondent:	Government.
Prohibited ground:	(Associated) political belief.
Brief description of merits:	Employment-related complaint. The complainant was laid off in the later half of 1985. A provincial general election was held in 1986 which the Liberal Party won. The applicant submitted a job application to the respondent but received no response. He alleged that at the time he believed in the tenets of the Progressive Conservative Party.
Outcome:	Complaint dismissed.

Annexure E: Australian anti-discrimination legislation

Since its inception in Australia the basic structure of anti-discrimination legislation has remained the same. Specialist bodies were set up with its main focus on conciliation of individual complaints.[1] An individual must lodge a written complaint with the specialist body, usually a commission. A commissioner then undertakes an initial investigation to establish if the commission has jurisdiction and whether the complaint is meritorious. If the ruling is that the matter should proceed, conciliation must be attempted. If conciliation fails the matter may be referred to a tribunal hearing. It is possible to appeal from a tribunal to a court.[2]

E.1 Australian Capital Territories

The Australian Capital Territories *Discrimination Act 1991* prohibits discrimination on the grounds of sex; sexuality;[3] transsexuality; marital status;[4] status as a parent or carer; pregnancy; race;[5] religious or political conviction; impairment;[6] membership or non-membership of an association or organisation of employers or employees; age; profession, trade, occupation or calling; and association (whether as a relative or otherwise) with a person identified by reference to the prohibited grounds.[7]

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[1] Bailey and Devereux in Kinley (ed) (1998) 292.
[2] Bailey and Devereux in Kinley (ed) (1998) 300.
[3] "Sexuality" is defined as "heterosexuality, homosexuality (including lesbianism) or bisexuality".
[4] "Marital status" is defined as "the status or condition of being (a) single; (b) married; (c) married but living separately and apart from one's spouse; (d) divorced; (e) widowed; or (f) the *de facto* spouse of another person". "*De facto* spouse" is defined as "in relation to a person, means a person of the opposite sex to the firstmentioned person who lives with the firstmentioned person as the husband or wife of that person on a *bona fide* domestic basis although not legally married to that person".
[5] "Race" is defined as including "(a) colour, descent, ethnic and national origin and nationality; and (b) any 2 or more distinct races which are collectively referred to or known as race".
[6] "Impairment" is defined as "(a) total or partial loss of a bodily function; (b) total or partial loss of a part of the body; (c) malfunction of a part of the body; (d) malformation or disfigurement of a part of the body; (e) the presence in the body of organisms that cause or are capable of causing disease; (f) an illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour; or (g) an intellectual disability or developmental delay".
[7] S 7(1). S 7(2) states that "A reference in this Act to an attribute that is referred to in subsection (1) shall be read as including a reference to— (a) a characteristic that persons with that attribute generally have; (b) a characteristic that persons with that attribute are generally presumed to have; (c) such an attribute that a person is presumed to have; and (d) such an attribute that the person had in the past but no longer has".

"Discrimination" is defined as follows in section 8(1):

> For the purposes of this Act, a person discriminates against another person if—
>
> (a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or
>
> (b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7.[8]

Section 8(2) and 8(3) contain a general defence based on "reasonableness":

> (2) Paragraph (1) (b) does not apply to a condition or requirement that is reasonable in the circumstances.
>
> (3) In determining whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—
>
> (a) the nature and extent of the resultant disadvantage;
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is disproportionate to the result sought by the person who imposes or proposes to impose the condition or requirement.

The Act prohibits discrimination in the following sectors: work (including applicants for employment and employees,[9] commission agents,[10] contract workers,[11] partnerships,[12] professional or trade organizations,[13] qualifying bodies[14] and employment agencies[15]); education;[16] access to premises;[17] goods, services and facilities;[18] accommodation[19] and clubs.[20]

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[8] S 7 contains the list of prohibited grounds.
[9] Ss 10 and 11.
[10] S 12.
[11] S 13.
[12] S 14: "(1) It is unlawful for any persons who are proposing to form themselves into a partnership to discriminate against a person— (a) in determining who should be invited to become a partner in the partnership; or (b) in the terms or conditions on which the person is invited to become a partner in the partnership. (2) It is unlawful for a partner in a partnership to discriminate against a person— (a) in determining who should be invited to become a partner in the partnership; or (b) in the terms or conditions on which the person is invited to become a partner in the partnership. (3) It is unlawful for a partner in a partnership to discriminate against another partner in the partnership— (a) by denying the partner access, or limiting the partner's access, to any benefit arising from being a partner in the partnership; (b) by expelling the partner from the partnership; or (c) by subjecting the partner to any other detriment".
[13] S 15: "(1) In this section— "organisation" means an association or organisation of employers or employees. (2) It is unlawful for an organisation, the committee of management of an organisation or a member of the committee of management of an organisation to discriminate against a person who is not a member of the organisation— (a) by refusing or failing to accept the person's application for membership; or (b) in the terms or conditions on which the organisation is prepared to admit the person to membership. (3) It is unlawful for an organisation, the committee of management of an organisation or a member of the committee of management of an organisation to discriminate

against a member of the organisation— (a) by denying the member access, or limiting the member's access, to any benefit provided by the organisation; (b) by depriving the member of membership or varying the terms of membership; or (c) by subjecting the member to any other detriment".

[14] S 16: "It is unlawful for an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation to discriminate against a person— (a) by refusing or failing to confer, renew or extend the authorisation or qualification; (b) in the terms or conditions on which it is prepared to confer, renew or extend the authorisation or qualification; (c) by revoking or withdrawing the authorisation or qualification or varying the terms or conditions on which it is held; or (d) by subjecting the person to any other detriment".

[15] S 17.

[16] S 18: "(1) It is unlawful for an educational authority to discriminate against a person— (a) by refusing or failing to accept the person's application for admission as a student; or (b) in the terms or conditions on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student— (a) by denying the student access, or limiting the student's access, to any benefit provided by the authority; (b) by expelling the student; or (c) by subjecting the student to any other detriment".

[17] S 19: "It is unlawful for a person to discriminate against another person— (a) by refusing to allow the other person access to, or the use of, any premises that the public or a section of the public is entitled or allowed to enter or use (whether for payment or not); (b) in the terms or conditions on which the discriminator is prepared to allow the other person access to, or the use of, any such premises; (c) in relation to the provision of means of access to such premises; (d) by refusing to allow the other person the use of any facilities in such premises that the public or a section of the public is entitled or allowed to use (whether for payment or not); (e) in the terms or conditions on which the discriminator is prepared to allow the other person the use of any such facilities; or (f) by requiring the other person to leave such premises or cease to use such facilities".

[18] S 20: "It is unlawful for a person who (whether for payment or not) provides goods or services, or makes facilities available, to discriminate against another person— (a) by refusing to provide those goods or services or make those facilities available to the other person; (b) in the terms or conditions on which the firstmentioned person provides those goods or services or makes those facilities available to the other person; or (c) in the manner in which the firstmentioned person provides those goods or services or makes those facilities available to the other person". "Services" are defined as including "(a) services relating to banking, insurance or the provision of grants, loans, credit or finance; (b) services relating to entertainment, recreation or refreshment; (c) services relating to transport or travel; (d) services of any profession, trade or business; (e) services provided by a government, a government authority, a local government body or a company or other body corporate in which a government has a controlling interest; and (f) the provision of scholarships, prizes or awards".

[19] S 21: "(1) It is unlawful for a person (whether as principal or agent) to discriminate against another person— (a) by refusing the other person's application for accommodation; (b) in the terms or conditions on which accommodation is offered to the other person; or (c) by deferring the other person's application for accommodation or according to the other person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person (whether as principal or agent) to discriminate against another person— (a) by denying the other person access, or limiting the other person's access, to any benefit associated with accommodation occupied by the other person; (b) by evicting the other person from accommodation occupied by the other person; or (c) by subjecting the other person to any other detriment in relation to accommodation occupied by the other person".

[20] S 22: "(1) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a person who is not a member of the club— (a) by refusing or failing to accept the person's application for membership; or (b) in the terms or conditions on which the club is prepared to admit the person to membership. (2) It is unlawful for a club, the committee of management of a club or a member of the committee of management of a club to discriminate against a member of the club— (a) in the terms or conditions of membership that are afforded to the member; (b) by refusing or failing to accept the member's application for a particular class or type of membership; (c) by denying the member access, or limiting the member's access, to any benefit provided by the club; (d) by depriving the member of membership or varying the terms of membership; or (e) by subjecting the member to any other detriment".

The Act contains a bewildering array of exceptions to unlawful discrimination. Division 1 contains a number of general exceptions; division 2 deals with exceptions relating to sex, marital status or pregnancy, division 3 with race; division 4 with religious or political convictions, division 5 with impairment, division 6 with age and division 7 with exceptions relating to profession, trade, occupation or calling. I only deal with those defences not related to employment:

General exceptions relate to adoption,[21] domestic accommodation,[22] measures intended to achieve equality,[23] insurance,[24] superannuation,[25] acts done under statutory authority,[26] voluntary bodies,[27] religious bodies[28] and educational institutions conducted for religious purposes.[29]

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[21] S 25A: "Nothing in this Act prevents the Director of Family Services from discriminating against a person in making a decision— (a) under paragraph 16 (1) (a) of the *Adoption Act 1993* in relation to the inclusion of the person's name in the register of persons seeking the placement of a child for the purposes of adoption; (b) under paragraph 16 (1) (b) of the *Adoption Act 1993* in relation to the placement of a child in the custody of that person; or (c) under subsection 17 (4) of the *Adoption Act 1993* confirming or varying a decision under paragraph 16 (1) (a) of that Act".

[22] S 26: "Nothing in section 21 renders unlawful discrimination in relation to— (a) the provision of accommodation if— (i) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises; and (ii) the accommodation provided in those premises is for no more than 6 persons other than the person referred to in subparagraph (i) or near relatives of such a person; (b) the provision of accommodation by a religious body for members of a relevant class of persons; or (c) the provision of accommodation by a charitable or voluntary body for members of a relevant class of persons".

[23] S 27: "Nothing in Part III renders it unlawful to do an act a purpose of which is— (a) to ensure that members of a relevant class of persons have equal opportunities with other persons; or (b) to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs".

[24] S 28: "Nothing in Part III renders it unlawful for a person to discriminate against another person with respect to the terms on which an annuity or a policy of insurance is offered to, or may be obtained by, the other person, if the discrimination is reasonable in the circumstances, having regard to any actuarial or statistical data on which it is reasonable for the firstmentioned person to rely".

[25] S 29: "(1) Nothing in Part III renders it unlawful for a person to discriminate against another person in the terms or conditions relating to a superannuation or provident fund or scheme. (2) In the case of discrimination on the ground of age, subsection (1) only applies where— (a) the discrimination is due to the application of a standard in force under the *Superannuation (Excluded Funds) Taxation Act 1987* of the Commonwealth; (b) the discrimination is for the purpose of— (i) complying with; (ii) avoiding a penalty under; or (iii) obtaining a benefit under; any other Act of the Commonwealth; (c) the discrimination is— (i) based on actuarial or statistical data on which it is reasonable to rely; and (ii) reasonable having regard to the data and any other relevant factors; (d) if there are no actuarial or statistical data on which it is reasonable to rely—the discrimination is— (i) based on other data on which it is reasonable to rely; and (ii) reasonable having regard to that data and any other relevant factors; or (e) if there are no data at all on which it is reasonable to rely—the discrimination is reasonable having regard to any other relevant factors. (3) Subsection (2) applies in relation to a new superannuation fund condition irrespective of— (a) whether the fund was in existence immediately before the commencement date; and (b) when the person to whom the discrimination relates became a member of the fund. (4) Subsection (2) does not apply in relation to an existing superannuation fund condition where the person to whom the discrimination relates became a member of the fund before, or not later than 12 months after, the commencement date. (5) In this section— "commencement date" means the date of commencement of the *Discrimination (Amendment) Act 1994*; "existing superannuation fund condition" means a superannuation fund condition in existence immediately before the commencement date; "new superannuation fund condition" means— (a) a superannuation fund condition that came into existence on or after the commencement date; or (b) an alteration made on or after the commencement date to an existing superannuation fund condition".

Exceptions dealing with sex, marital status and pregnancy relate to educational institutions for members of one sex,[30] rights and privileges in connection with pregnancy or childbirth,[31] services

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[26] S 30: '(1) Nothing in this Act renders unlawful anything done necessarily for the purpose of complying with a requirement of— (a) a law of the Territory; (b) a determination or direction made under a law of the Territory; (c) an order of a court; or (d) an order made by the Tribunal under Division 4 of Part VIII. (2) Paragraphs (1) (a) and (b) cease to have effect on a day (not earlier than 2 years after the commencement of this section) fixed by the Minister by notice in the *Gazette*".

[27] S 31: "Nothing in Part III renders it unlawful for a voluntary body to discriminate against a person in connection with— (a) the admission of persons as members of the body; or (b) the provision of benefits, facilities or services to persons, whether those persons are members of the body or otherwise".

[28] S 32: "Nothing in Part III applies in relation to— (a) the ordination or appointment of priests, ministers of religion or members of any religious order; (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; (c) the selection or appointment of persons to perform duties or functions for the purposes of, or in connection with, any religious observance or practice; or (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion".

[29] S 33: "(1) Nothing in section 10 or 13 renders it unlawful for a person to discriminate against another person in connection with— (a) employment as a member of the staff of an educational institution; or (b) a position as a contract worker that involves the doing of work in an educational institution; being an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the firstmentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. (2) Nothing in section 18 renders it unlawful for a person to discriminate against another person in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the firstmentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".

[30] S 36: "Nothing in section 18 renders unlawful discrimination on the ground of sex in relation to a refusal or failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students of the opposite sex to that of the applicant".

[31] S 37: "Nothing in Part III renders it unlawful for a person to discriminate against a man on the ground of sex by reason only of the fact that the firstmentioned person grants to a woman rights or privileges in connection with pregnancy or childbirth".

for members of one sex,[32] students at an educational institution,[33] clubs for members of one sex[34] and sport.[35]

Clubs for members of one race are allowed under particular circumstances:[36]

> (1) Nothing in section 22 renders unlawful discrimination on the ground of race in relation to a club that has as its principal object the provision of benefits for persons of a specified race if those persons are described otherwise than—
>
> (a) by reference to colour; or
>
> (b) in a manner which has the effect of excluding some members of that race on the basis of colour.
>
> (2) In determining whether the principal object of a club is as referred to in subsection (1), regard shall be had to—
>
> (a) the essential character of the club;
>
> (b) whether the persons primarily enjoying the benefits of membership are of the race specified in the principal object; and
>
> (c) any other relevant circumstance.

The Act also contains an exception relating to religious educational institutions.[37]

"Unjustifiable hardship" is a disability-specific defence. It is defined as follows:[38]

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[32] S 38: "Nothing in Part III renders unlawful discrimination on the ground of sex in relation to the provision of services the nature of which is such that they can only be provided to members of one sex".

[33] S 39(2): "Nothing in Part III renders unlawful discrimination on the ground of sex in relation to the provision of accommodation where the accommodation is provided solely for persons of one sex who are students at an educational institution".

[34] S 40: "(1) Nothing in section 22 renders it unlawful to discriminate against a person on the ground of that person's sex if membership of the relevant club is available only to persons of the opposite sex. (2) Nothing in paragraph 22 (1) (b) or subsection 22 (2) renders it unlawful to discriminate against a person on the ground of sex if the discrimination occurs in relation to the use or enjoyment of any benefit provided by the relevant club where— (a) it is not practicable for the benefit to be used or enjoyed, either simultaneously or to the same extent, by both men and women; and (b) either— (i) the same, or an equivalent, benefit is provided for the use of men and women separately from each other; or (ii) men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit. (3) In determining any matter relating to the application of subsection (2), regard shall be had to— (a) the purposes for which the club is established; (b) the membership of the club, including any class or type of membership; (c) the nature of the benefits provided by the club; (d) the opportunities for the use and enjoyment of those benefits by men and women; and (e) any other relevant circumstances".

[35] S 41: "(1) Nothing in Part III renders unlawful discrimination on the ground of sex in relation to the exclusion of persons of one sex from participation in any competitive sporting activity in which the strength, stamina or physique of competitors is relevant. (2) Subsection (1) does not apply in relation to the exclusion of persons from participation in— (a) the coaching of persons engaged in any sporting activity; (b) the umpiring or refereeing of any sporting activity; (c) the administration of any sporting activity; or (d) any prescribed sporting activity".

[36] S 43.

[37] S 46: "Nothing in section 18 renders unlawful discrimination on the ground of religious conviction in relation to a refusal or failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students having a religious conviction other than that of the applicant".

> In determining what constitutes unjustifiable hardship for the purposes of this Division, all relevant circumstances of the particular case shall be taken into account, including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances of, and the estimated amount of expenditure required to be made by, the person claiming unjustifiable hardship.

This defence applies to discrimination by educational institutions,[39] in access to premises,[40] in the provision of goods and services,[41] concerning accommodation[42] and by clubs.[43]

The Act also contains a number of other impairment-related exceptions relating to discrimination by qualifying bodies,[44] by educational institutions,[45] by clubs,[46] in public health[47] and in sport.[48]

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[38] S 47.

[39] S 51(2): "Nothing in section 18 renders unlawful discrimination on the ground of impairment in relation to a refusal or failure to accept an application by a person who has an impairment for admission as a student at an educational institution where the person, if so admitted, would require services or facilities that are not required by students who do not have an impairment, the provision of which would impose unjustifiable hardship on the relevant educational authority".

[40] S 52: "(1) Nothing in section 19 renders unlawful discrimination on the ground of impairment in relation to the provision of access to premises if— (a) the premises are so designed or constructed as to be inaccessible to a person who has an impairment; and (b) any alteration of the premises to provide such access would impose unjustifiable hardship on the person who would have to provide that access. (2) Subsection (1) does not apply in relation to a building the construction of which commences on or after a date fixed by the Minister for the purposes of this section by notice published in the *Gazette*. (3) For the purposes of this section, the construction of a building shall be taken to commence on the day on which a building approval in respect of the erection of the building is granted under the *Building Act 1972*".

[41] S 53: "(1) Nothing in section 20 renders unlawful discrimination on the ground of impairment in relation to the provision of goods, services or facilities where— (a) because of a person's impairment, the goods, services or facilities would have to be provided in a special manner; and (b) their provision in that manner would impose unjustifiable hardship on the person providing, or proposing to provide, the goods, services or facilities. (2) In subsection (1), a reference to services shall be taken to include a reference to services provided by an employment agency".

[42] S 54: "Nothing in section 21 renders unlawful discrimination on the ground of impairment in relation to the provision of accommodation to a person who has an impairment if special services or facilities are, or would be, required by the person and their provision would impose unjustifiable hardship on the person providing or proposing to provide the accommodation".

[43] S 55(3): "(3) Nothing in section 22 renders it unlawful to discriminate against a person on the ground of impairment if the discrimination occurs in relation to the enjoyment of any benefit provided by a club where— (a) because of the person's impairment, the benefit would have to be provided to the person in a special manner; and (b) the provision of the benefit in that manner would impose unjustifiable hardship on the club".

[44] S 50: "Nothing in section 16 renders unlawful discrimination by an authority or body against a person on the ground of impairment if the authority or body believes on reasonable grounds that, because of an impairment, the person is, or would be, unable to carry out work that is essential to the position concerned".

[45] S 51(1): "(1) Nothing in section 18 renders unlawful discrimination on the ground of impairment in relation to a refusal or failure to accept a person's application for admission as a student at an educational institution that is conducted solely for students who have an impairment which the applicant does not have".

Exemptions dealing with age discrimination relate to minimum age admission requirements to educational institutions,[49] legal capacity,[50] benefits and concessions,[51] health and safety considerations relating to goods and services,[52] recreational tours and accommodation,[53] clubs[54] and sport.[55]

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[46] S 55(1) and (2): "(1) Nothing in section 22 renders unlawful discrimination on the ground of impairment in relation to a club that has as its principal object the provision of benefits to persons who have a particular impairment. (2) In determining whether the principal object of a club is as referred to in subsection (1), regard shall be had to— (a) the essential character of the club; (b) whether the persons primarily enjoying the benefits of membership have the particular impairment; and (c) any other relevant circumstance".

[47] S 56: "Nothing in Part III renders unlawful discrimination against a person on the ground of impairment if the discrimination is necessary and reasonable to protect public health".

[48] S 57: "(1) Nothing in Part III renders unlawful discrimination on the ground of impairment in relation to the exclusion of a person from participation in any competitive sporting activity if— (a) the person has an impairment and the activity requires physical or intellectual attributes that the person does not possess; or (b) where the activity is conducted wholly or mainly for persons who have a particular kind of impairment—the person does not have an impairment of that kind. (2) Subsection (1) does not apply in relation to the exclusion of persons from participation in— (a) the coaching of persons engaged in any sporting activity; (b) the umpiring or refereeing of any sporting activity; (c) the administration of any sporting activity; or (d) any prescribed sporting activity".

[49] S 57E: "(1) Nothing in section 18 renders it unlawful to discriminate against a person on the ground of age in respect of the admission of the person to an educational institution where the level of education or training sought is provided only for students older than a particular age. (2) Nothing in section 18 renders it unlawful to refuse or fail to accept an application for admission as a student at an educational institution under a mature age admission scheme, where the application is made by a person whose age is below the minimum age fixed under that scheme for admission".

[50] S 57G: "Nothing in Part III renders it unlawful to discriminate against a person on the ground of age in relation to any transaction where the person is subject to a legal incapacity due to his or her age which is relevant to that transaction".

[51] S 57H: "Nothing in Division 2 of Part III renders it unlawful to discriminate against a person in relation to the provision of bona fide benefits, including concessions, to another person by reason of his or her age".

[52] S 57J: "(1) Nothing in section 19 or 20 renders it unlawful to discriminate against a person on the ground of age in relation to the provision of goods, services or facilities where that discrimination is practised in order to comply with reasonable health and safety requirements relevant to such provision. (2) In determining for the purposes of subsection (1) what health and safety requirements are reasonable, regard shall be had to all the relevant circumstances of the particular case, including the effects of the discrimination on the person discriminated against".

[53] S 57K: "Nothing in section 20 or 21 renders it unlawful to discriminate against a person on the ground of age in relation to the provision of a recreational tour or recreational accommodation".

[54] S 57L: "(1) Nothing in section 20 or 22 renders it unlawful for a club to discriminate against a person on the ground of age where the club's principal object is the provision of benefits for persons belonging to a particular age group. (2) In determining whether the principal object of a club is as referred to in subsection (1), regard shall be had to— (a) the essential character of the club; (b) whether the persons primarily enjoying the benefits of membership belong to the particular age group specified in the club's objects; and (c) any other relevant circumstance".

[55] S 57M: "(1) Nothing in Part III renders it unlawful to discriminate against a person on the ground of age by his or her exclusion from participation in any competitive sporting activity where competition is only permitted between persons belonging to a particular age group. (2) Subsection (1) does not apply in relation to the exclusion of persons from participation in— (a) the coaching of persons engaged in any sporting activity; (b) the umpiring or refereeing of any sporting activity; (c) the administration of any sporting activity; or (d) any sporting activity prescribed by the Regulations".

The Act contains a "relevant and reasonable" exception relating to discrimination in profession, trade, occupation or calling.[56]

It is also possible to apply to the Discrimination Commissioner to be exempted from a particular provision of the Act.[57]

The burden of establishing the exception, excuse, qualification or exemption rests on the person who relies on it.[58]

The Act prohibits sexual harassment,[59] racial vilification,[60] victimization[61] and unlawful advertising.[62]

E.2 New South Wales

The New South Wales *Anti-Discrimination Act 1977* follows a somewhat jumbled approach. The Act does not contain a general definition of discrimination and does not contain a single list of prohibited grounds. Instead the Act is divided into a number of parts, each dealing with a singular ground, and each of the parts are divided into a number of divisions. Part 2 deals with racial discrimination. Division 1 contains a definition of discrimination based on race,[63] division 2 relates

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[56] S 57N: "Nothing in Part III renders it unlawful to discriminate against a person on the ground of the profession, trade, occupation or calling of the person in relation to any transaction where profession, trade, occupation or calling is relevant to that transaction and the discrimination is reasonable in those circumstances".
[57] S 109.
[58] S 71(2).
[59] Ss 58-64.
[60] Ss 65-67.
[61] S 68.
[62] S 69.
[63] S 7: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of race if, on the ground of the aggrieved person's race or the race of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race, or (b) segregates the aggrieved person from persons of a different race or from persons who have such a relative or associate of a different race, or (c) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons not of that race, or who have such a relative or associate not of that race, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (2) For the purposes of subsection (1) (a) and (b), something is done on the ground of a person's race if it is done on the ground of the person's race, a characteristic that appertains generally to persons of that race or a characteristic that is generally imputed to persons of that race".

to discrimination in work,[64] division 3 deals with discrimination in education,[65] the provision of goods and services,[66] accommodation[67] and registered clubs.[68] Division 3A prohibits racial vilification and division 4 contains two exceptions. Part 2A prohibits sexual harassment. Part 3 prohibits sex discrimination. Division 1 contains a general definition of sex discrimination;[69] division

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[64] This division relates to applicants for employment and employees, commission agents, contract workers, partnerships consisting of 6 or more partners, local government councillors, industrial organisations, qualifying bodies and employment agencies. Ss 8-16.

[65] S 17: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of race: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of race: (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of a prescribed educational authority in relation to such circumstances, if any, as may be prescribed".

[66] S 19: "It is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against another person on the ground of race: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which the other person is provided with those goods or services".

[67] S 20: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of race: (a) by refusing the person's application for accommodation, (b) in the terms on which the person offers the person accommodation, or (c) by deferring the person's application for accommodation or according the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of race: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises, and (b) the accommodation provided in those premises is for no more than 6 persons".

[68] S 20A: "(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of race: (a) by refusing or failing to accept the person's application for membership, or (b) in the terms on which it is prepared to admit the person to membership. (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of race: (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, (b) by depriving the person of membership or varying the terms of the person's membership, or (c) by subjecting the person to any other detriment. (3) Nothing in subsection (1) or (2) applies to or in respect of a registered club if the principal object of the registered club is to provide benefits for persons of a specified race defined otherwise than by reference to: (a) colour, or (b) a description which has the effect of excluding persons of that race who are of a different colour from those persons, or the majority of those persons, who do not come within that description. (4) In determining whether the principal object of a registered club is as referred to in subsection (3), regard shall be had to: (a) the essential character of the registered club, (b) the extent to which the affairs of the registered club are so conducted that the persons primarily enjoying the benefits of membership are of the race specified in the principal object, and (c) any other relevant circumstance".

[69] S 24: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of sex if, on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have such a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (1A) For the purposes of subsection (1) (a), something is done on the ground of a person's sex if it is done on the ground of the person's sex, a characteristic that appertains generally to persons of that sex or a characteristic that is generally imputed to persons of that sex. (1B) For the purposes of this section, but without limiting the generality of this section,

2 relates to discrimination in work,[70] division 3 relates to discrimination in education,[71] the provision of goods and services,[72] accommodation[73] and registered clubs[74] and division 4 contains a number

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the fact that a woman is or may become pregnant is a characteristic that appertains generally to women. (2) For the purposes of subsection (1), the circumstances in which a person treats or would treat another person of the opposite sex are not materially different by reason of the fact that the persons between whom the discrimination occurs: (a) are a woman who is pregnant and a man, or (b) are not of the same marital status".

[70] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisation, qualifying bodies and employment agencies. Ss 25-30.

[71] S 31A: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of sex: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of sex: (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of: (a) a private educational authority, or (b) a refusal or failure to accept a person's application for admission as a student by an educational authority where the educational authority administers a school, college, university or other institution which is conducted solely for students of the opposite sex to the sex of the applicant. (4) The admission into any such school, college, university or other institution of a transgender person as referred to in Part 3A who identifies with the sex of persons for whom the school, college, university or other institution is conducted does not, for the purposes of subsection (3) (b), affect its status as a school, college, university or other institution conducted solely for students of the same sex".

[72] S 33: "(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the ground of sex: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which he or she provides the person with those goods or services. (2) Where a skill is commonly exercised in a different way in relation to men and women, a person does not contravene subsection (1) by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice".

[73] S 34: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of sex: (a) by refusing the person's application for accommodation, (b) in the terms on which he or she offers the person accommodation, or (c) by deferring the person's application for accommodation or according to the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of sex: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises, and (b) the accommodation provided in those premises is for no more than 6 persons.

[74] S 34A: "(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of sex: (a) by refusing or failing to accept the person's application for membership, or (b) in the terms on which it is prepared to admit the person to membership. (2) It is unlawful for a registered club to discriminate against a person who is a member of a registered club on the ground of sex: (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, (b) by depriving the person of membership or varying the terms of the person's membership, or (c) by subjecting the person to any other detriment. (3) Nothing in subsection (1) or (2) renders unlawful discrimination by a registered club against a person on the ground of sex if membership of the registered club is available to persons of the opposite sex only. (3A) The admission into any such registered club of a transgender person as referred to in Part 3A who identifies with the sex of persons for whom membership of the registered club is available does not, for the purposes of subsection (3), affect its status as a registered club the membership of which is available to persons of the same sex only. (4) Nothing in subsection (1) (paragraph (a) excepted) or subsection (2) renders unlawful discrimination by a registered club against a person on the ground of sex if the discrimination occurs in relation to the use or enjoyment of any benefit provided by the registered club where: (a) it is not practicable for the benefit to be used or enjoyed: (i) simultaneously, or (ii) to the same extent, by both men and women, and (b) either: (i) the same, or an equivalent, benefit is provided for the use of men and women separately from each other, or (ii) men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit. (5) In determining any matter relating to the application of subsection (4), regard

of exceptions relating to benefits in connection with pregnancy or childbirth,[75] superannuation,[76] insurance[77] and sport.[78] Part 3A prohibits discrimination on transgender grounds. Division 1 contains a general definition,[79] division 2 relates to work discrimination,[80] division 3 prohibits discrimination in education,[81] goods and services,[82] accommodation[83] and registered clubs,[84]

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shall be had to: (a) the purposes for which the registered club is established, (b) the membership of the registered club, including any class or type of membership, (c) the nature of the benefits provided by the registered club, (d) the opportunities for the use and enjoyment of those benefits by men and women, and (e) any other relevant circumstance.

[75] S 35: "Nothing in this Part renders unlawful discrimination by a person against a man on the ground of sex by reason only of the fact that that person grants to a woman rights or privileges in connection with pregnancy or childbirth".

[76] S 36: "Nothing in this Part renders unlawful discrimination on the ground of sex in the terms or conditions appertaining to a superannuation or provident fund or scheme, where: (a) the terms or conditions: (i) are based upon actuarial or statistical data on which it is reasonable to rely, and (ii) are reasonable having regard to the data and any other relevant factors, or (b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained--the terms or conditions are reasonable having regard to any other relevant factors, and the source on which any data referred to in paragraph (a) is based is disclosed to the Tribunal, where the Tribunal so requires, and any other relevant factors to which regard has been had as referred to in paragraph (a) or (b) are disclosed to the Tribunal, where the Tribunal so requires".

[77] S 37: "Nothing in this Part renders unlawful discrimination on the ground of sex with respect to the terms on which an annuity, a life assurance policy, an accident or insurance policy or other policy of insurance is offered or may be obtained where: (a) the discrimination is: (i) based upon actuarial or statistical data from a source on which it is reasonable to rely, and (ii) reasonable having regard to the data and any other relevant factors, and (b) the source on which the actuarial or statistical data referred to in paragraph (a) (i) is based is disclosed to the Tribunal, where the Tribunal so requires".

[78] S 38: "Nothing in this Part renders unlawful the exclusion of persons of the one sex from participation in any sporting activity not being the coaching of persons engaged in any sporting activity, the administration of any sporting activity or any prescribed sporting activity".

[79] S 38B: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on transgender grounds if, on the ground of the aggrieved person being transgender or a relative or associate of the aggrieved person being transgender, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances (or in circumstances which are not materially different) the perpetrator treats or would treat a person who he or she did not think was a transgender person or who does not have such a relative or associate who he or she did not think was a transgender person, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply, or (c) treats the aggrieved person, being a recognised transgender person, as being of the person's former sex or requires the aggrieved person, being a recognised transgender person, to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (2) For the purposes of subsection (1) (a), something is done on the ground of a person being transgender if it is done on the ground of the person being transgender, a characteristic that appertains generally to transgender persons or a characteristic that is generally imputed to transgender persons.

[80] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisations, qualifying bodies and employment agencies. Ss 38C-38J.

[81] S 38K: "(1) It is unlawful for an educational authority to discriminate against a person on transgender grounds: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on transgender grounds: (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of a private educational authority".

division 4 contains exceptions relating to sport[85] and superannuation,[86] and division 5 prohibits transgender vilification. Part 4 prohibits discrimination based on marital status. Division 1 contains a general definition,[87] division 2 relates to work discrimination,[88] division 3 prohibits discrimination in education,[89] goods and services,[90] accommodation[91] and registered clubs[92] and division 4

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[82] S 38M: "It is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against another person on transgender grounds: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which the other person is provided with those goods or services".

[83] S 38N: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds: (a) by refusing the person's application for accommodation, or (b) in the terms on which he or she offers the person accommodation, or (c) by deferring the person's application for accommodation or giving the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, in those premises, and (b) the accommodation provided in those premises is for no more than 6 persons".

[84] S 38O: "(1) It is unlawful for a registered club to discriminate on transgender grounds against a person who is not a member of the registered club: (a) by refusing or failing to accept the person's application for membership of the club, or (b) in the terms on which it is prepared to admit the person to membership of the club. (2) It is unlawful for a registered club to discriminate on transgender grounds against a member of the registered club: (a) by denying the member access, or limiting the members' access, to any benefit provided by the club, or (b) by depriving the member of membership or varying the terms of his or her membership, or (c) by subjecting the member to any other detriment".

[85] S 38P: "(1) Nothing in this Part renders unlawful the exclusion of a transgender person from participation in any sporting activity for members of the sex with which the transgender person identifies. (2) Subsection (1) does not apply: (a) to the coaching of persons engaged in any sporting activity, or (b) to the administration of any sporting activity, or (c) to any sporting activity prescribed by the regulations for the purposes of this section".

[86] S 39Q: "A person does not discriminate against a transgender person (whether or not a recognised transgender person) on transgender grounds if, in the administration of a superannuation or provident fund or scheme, the other person treats the transgender person as being of the opposite sex to the sex with which the transgender person identifies.

[87] S 39: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of marital status if, on the ground of the aggrieved person's marital status or the marital status of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different marital status or who does not have such a relative or associate of that marital status, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of a different marital status, or who do not have such a relative or associate of that marital status, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (1A) For the purposes of subsection (1) (a), something is done on the ground of a person's marital status if it is done on the ground of the person's marital status, a characteristic that appertains generally to persons of that marital status or a characteristic that is generally imputed to persons of that marital status. (2) For the purposes of subsection (1), the circumstances in which a person treats or would treat another person of a different marital status are not materially different by reason of the fact that the persons between whom the discrimination occurs are not of the same sex".

[88] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisations, qualifying bodies and employment agencies. Ss 40-46.

[89] S 46A: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of marital status: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a

contains an exception relating to superannuation.[93] Part 4A prohibits disability discrimination. Division 1 contains a general definition.[94] All the other divisions in one or the other way refer to "unjustifiable hardship". The concept is defined as follows:[95]

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student on the ground of marital status: (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of a private educational authority".

[90] S 47: "It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of marital status: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which he or she provides the person with those goods or services".

[91] S 48: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of marital status: (a) by refusing the person's application for accommodation, (b) in the terms on which he or she offers the person accommodation, or (c) by deferring the person's application for accommodation or according the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of marital status: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises, and (b) the accommodation provided in those premises is for no more than 6 persons".

[92] S 48A: "(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of marital status: (a) by refusing or failing to accept the person's application for membership, or (b) in the terms on which it is prepared to admit the person to membership. (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of marital status: (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, (b) by depriving the person of membership or varying the terms of the person's membership, or (c) by subjecting the person to any other detriment".

[93] S 49: "Nothing in this Part renders unlawful discrimination on the ground of marital status in the terms or conditions appertaining to a superannuation or provident fund or scheme, where: (a) the terms or conditions: (i) are based upon actuarial or statistical data on which it is reasonable to rely, and (ii) are reasonable having regard to the data and any other relevant factors, or (b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained--the terms or conditions are reasonable having regard to any other relevant factors, and the source on which any data referred to in paragraph (a) is based is disclosed to the Tribunal, where the Tribunal so requires, and any other relevant factors to which regard has been had as referred to in paragraph (a) or (b) are disclosed to the Tribunal, where the Tribunal so requires".

[94] S 49B: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of disability if, on the ground of the aggrieved person's disability or the disability of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability or who does not have such a relative or associate who has that disability, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have such a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (2) For the purposes of subsection (1) (a), something is done on the ground of a person's disability if it is done on the ground of the person's disability, a characteristic that appertains generally to persons who have that disability or a characteristic that is generally imputed to persons who have that disability. (3) For the purposes of, but without limiting, this section, the fact that a person who has a disability of or relating to vision, hearing or mobility has, or may be accompanied by, a dog which assists the person in respect of that disability, is taken to be a characteristic that appertains generally to persons who have that disability, but nothing in this Act affects the liability of any such person for any injury, loss or damage caused by the dog. (4) A reference in this section to persons who have a disability ("the particular disability") is a reference to persons who have the particular disability or who have a disability that is substantially the same as the particular disability".

[95] S 49C.

> In determining what constitutes unjustifiable hardship for the purposes of this Part, all relevant circumstances of the particular case are to be taken into account including:
>
> (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and
>
> (b) the effect of the disability of a person concerned, and
>
> (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

Division 2 prohibits work discrimination[96] and division 3 relates to discrimination in education,[97] goods and services,[98] accommodation[99] and registered clubs.[100] Division 4 contains a number of

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[96] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisations, qualifying bodies, and employment agencies. Ss 49D-49K.

[97] S 49L: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of disability: (a) by refusing or failing to accept his or her application for admission as a student, or (b) in the terms on which it is prepared to admit him or her as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of disability: (a) by denying him or her access, or limiting his or her access, to any benefit provided by the educational authority, or (b) by expelling him or her, or (c) by subjecting him or her to any other detriment. (3) Nothing in this section applies to or in respect of: (a) a private educational authority, or (b) a refusal or failure to accept a person's application for admission as a student by an educational authority where the educational authority administers a school, college, university or other institution which is conducted solely for students who have a disability which is not the same as that of the applicant. (4) Nothing in subsection (1) (a) or (2) (b) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires services or facilities that are not required by students who do not have a disability and the provision of which would impose unjustifiable hardship on the educational authority. (5) Nothing in subsection (2) (a) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires the benefit to be provided in a special manner and the benefit cannot without unjustifiable hardship be so provided by the educational authority".

[98] S 49M: "(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of disability: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which he or she provides the person with those goods or services. (2) Nothing in this section renders it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services would impose unjustifiable hardship on the person who provides the goods or services".

[99] S 49N: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against a person on the ground of disability: (a) by refusing the person's application for accommodation, or (b) in the terms on which the person is offered accommodation, or (c) by deferring the person's application for accommodation or according the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against a person on the ground of disability: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person, or (c) by subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises, and (b) the accommodation provided in those premises is for no more than 6 persons. (4) Nothing in this section applies to the provision of accommodation in premises where special services or facilities would be required by the person with a disability and the provision of such special services or facilities would impose unjustifiable hardship on the person providing or proposing to provide the accommodation whether as principal or agent. (5) Nothing in this section applies to the provision of accommodation to persons who have a particular disability by a charitable body or other body that does not distribute its profits to members. (6) Nothing in subsection (2) (a) renders it unlawful to discriminate against a

exceptions relating to public health,[101] persons addicted to prohibited drugs,[102] superannuation and insurance,[103] and sport.[104] Part 4B prohibits discrimination on the ground of a person's responsibilities as a carer. This prohibition only applies relating to employment discrimination.[105] Part 4C prohibits discrimination based on homosexuality. Division 1 contains a general definition,[106] division 2 prohibits work discrimination,[107] division 3 prohibits discrimination in

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person on the ground of disability where, because of the person's disability, the person requires the benefit to be provided in a special manner and the benefit cannot without unjustifiable hardship be so provided by the person who provides the accommodation".

[100] S 49O: "(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of disability: (a) by refusing or failing to accept the person's application for membership, or (b) in the terms on which it is prepared to admit the person to membership. (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of disability: (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, or (b) by depriving the person of membership or varying the terms of the person's membership, or (c) by subjecting the person to any other detriment. (3) Nothing in subsection (1) or (2) applies to or in respect of a registered club if the principal object of the registered club is to provide benefits only for persons who have a particular disability specified in the principal object. (4) In determining whether the principal object of a registered club is as referred to in subsection (3), regard is to be had to: (a) the essential character of the registered club, and (b) the extent to which the affairs of the registered club are so conducted that the persons primarily enjoying the benefits of membership are persons who have the particular disability specified in the principal object, and (c) any other relevant circumstance. (5) Nothing in subsection (2) (a) renders it unlawful to discriminate against a person on the ground of disability where, because of the person's disability, the person requires the benefit to be provided in a special manner and the benefit cannot without unjustifiable hardship be so provided by the registered club".

[101] S 49P: "Nothing in this Part renders unlawful discrimination against a person on the ground of disability if the disability concerned is an infectious disease and the discrimination is reasonably necessary to protect public health".

[102] S 49PA. This exeption only applies relating to employment discrimination.

[103] S 49Q: "Nothing in this Part renders unlawful discrimination against a person on the ground of disability in the terms or conditions appertaining to a superannuation or provident fund or scheme or with respect to the terms on which an annuity, a life assurance policy, an accident or insurance policy or other policy of insurance is offered or may be obtained, where: (a) the terms or conditions: (i) are based upon actuarial or statistical data on which it is reasonable to rely, and (ii) are reasonable having regard to the data and any other relevant factors, or (b) in a case where no such actuarial or statistical data is available and cannot reasonably be obtained--the terms or conditions are reasonable having regard to any other relevant factors, and the source on which any data referred to in paragraph (a) is based is disclosed to the Tribunal, where the Tribunal so requires, and any other relevant factors to which regard has been had as referred to in paragraph (a) or (b) are disclosed to the Tribunal, where the Tribunal so requires".

[104] S 49R: "Nothing in this Part renders unlawful discrimination against a person on the ground of disability, being discrimination consisting of the exclusion of the person from a sporting activity: (a) if the person is not reasonably capable of performing the actions reasonably required in relation to the sporting activity, or (b) if the persons who participate or are to participate in the sporting activity are selected by a method which is reasonable on the basis of their skills and abilities relevant to the sporting activity and relative to each other, or (c) if the sporting activity is conducted only for persons who have a particular disability and the person does not have that disability".

[105] Ss 49V-49ZC relate to discrimination against applicants for employment and employees, against commission agents, against contract workers, by partnerships, by local government councillors, industrial organisations, qualifying bodies and employment agencies.

[106] S 49ZG: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of homosexuality if, on the ground of the aggrieved person's homosexuality or the homosexuality of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who he or she did not think was a homosexual person or who does not have such a relative or associate who he or she thinks was a homosexual person, or (b) requires the aggrieved person to comply with a requirement or condition with

education,[108] goods and services,[109] accommodation[110] and registered clubs,[111] and division 4 prohibits homosexual vilification. Part 4E relates to compulsory retirement from employment based on age. Part 4F prohibits HIV/AIDS vilification. Part 4G relates to age discrimination. Division 1 contains a general definition,[112] division 2 prohibits work discrimination,[113] division 3 prohibits

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which a substantially higher proportion of persons who are not homosexual persons, or who do not have such a relative or associate who is a homosexual person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (2) For the purposes of subsection (1) (a), something is done on the ground of a person's homosexuality if it is done on the ground of the person's homosexuality, a characteristic that appertains generally to homosexual persons or a characteristic that is generally imputed to homosexual persons".

[107] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, local government councillors, industrial organisations, qualifying bodies and employment agencies. Ss 49ZH-49ZN".

[108] S 49ZO: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of homosexuality: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of homosexuality: (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of a private educational authority".

[109] S 49ZP: "It is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the ground of homosexuality: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which he or she provides the person with those goods or services".

[110] S 49ZQ: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of homosexuality: (a) by refusing the person's application for accommodation, (b) in the terms on which he or she offers the person accommodation, or (c) by deferring the person's application for accommodation or according the person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of homosexuality: (a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or (b) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises, and (b) the accommodation provided in those premises is for no more than 6 persons".

[111] S 49ZR: "(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of homosexuality: (a) by refusing or failing to accept the person's application for membership, or (b) in the terms on which it is prepared to admit the person to membership. (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of homosexuality: (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, (b) by depriving the person of membership or varying the terms of the person's membership, or (c) by subjecting the person to any other detriment".

[112] S 49ZYA: "(1) A person (the perpetrator) discriminates against another person (the aggrieved person) on the ground of age if, on the ground of the aggrieved person's age or the age of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who is not of that age or age group or who does not have such a relative or associate who is that age or age group, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not of that age or age group, or who do not have such a relative or associate who is that age or age group, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply. (2) For the purposes of subsection (1) (a), something is done on the ground of a person's age if it is done on the ground of the person's age or age group, a characteristic that appertains generally to persons who are that age or age group or a characteristic that is generally imputed to persons who are of that age or age group. (3) In this section: associate of a person means any person with whom he or she

discrimination in education,[114] goods and services,[115] accommodation[116] and registered clubs[117] and division 4 contains a number of exceptions relating to legal capacity and welfare of children,[118]

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associates, whether socially or in business or commerce, or otherwise. relative of a person means: (a) any person to whom the person is related by blood, marriage, affinity or adoption, or (b) any person who is wholly or mainly dependent on, or a member of the household of, the person".

[113] The division relates to applicants for employment and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies and junior employees. Ss 49ZYB-49ZYK.

[114] S 49ZYL: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of age: (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of age: (a) by denying or limiting access to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment. (3) Nothing in this section applies to or in respect of: (a) the admission of, or the refusal of admission to, a person to a school, college, university or other institution if the level of education or training sought by the person is provided only for students above a particular age, or (b) a private educational authority, or (c) an education authority prescribed by the regulations in relation to such circumstances (if any) as may be so prescribed. (4) Nothing in this section applies to or in respect of a refusal by an educational authority to enrol at a government school or registered non-government school a child who is not of or above the age of 6 years. In this subsection, registered non-government school has the same meaning as in the *Education Reform Act 1990*. (5) Nothing in this section applies to or in respect of benefits, including concessions, provided in good faith to a student by reason of his or her age".

[115] S 49ZYN: "(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against another person on the ground of age: (a) by refusing to provide the other person with those goods or services, or (b) in the terms on which the other person is provided with those goods or services. (2) Nothing in subsection (1) applies to or in respect of: (a) benefits, including concessions, provided in good faith to a person by reason of his or her age, or (b) holiday tours offered or provided to persons who are of a particular age or age group. (3) Nothing in this section renders it unlawful for a person to discriminate against a person on the ground of age in disposing of goods, or in providing services, by gift or will or in accordance with the terms of a gift or will".

[116] S 49ZYO: "(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of age: (a) by refusing the person's application for accommodation, or (b) in the terms on which the principal or agent offers the other person accommodation, or (c) by deferring the other person's application for accommodation or according the other person a lower order of precedence in any list of applicants for that accommodation. (2) It is unlawful for a person, whether as principal or agent, to discriminate against a person for whom accommodation has been provided on the ground of age: (a) in the terms or conditions on which accommodation is provided, or (b) by denying or limiting access to any benefit associated with accommodation, or (c) by evicting the person or subjecting the person to any other detriment. (3) Nothing in this section applies to or in respect of the provision of accommodation in premises if: (a) the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, in those premises, and (b) the accommodation provided in those premises is for no more than 6 persons, and (c) the accommodation is provided with a concession provided in good faith to a person by reason of the person's age".

[117] S 49ZYP: "(1) It is unlawful for a registered club to discriminate against a person (not being a person under the age of 18 years) on the ground of age: (a) by refusing or failing to accept the person's application for membership of the club, or (b) in the terms on which it is prepared to admit the person to membership of the club. (2) It is unlawful for a registered club to discriminate against a member of the registered club on the ground of age: (a) by denying or limiting access to any benefit provided by the club, or (b) by depriving the member of membership of the club or varying the terms of that membership, or (c) by subjecting the member to any other detriment. (3) Nothing in subsection (1) or (2) applies to or in respect of a registered club: (a) that has as its principal object the provision of benefits for persons who are of a particular age or age group, or (b) so as to prevent the retention by the club of different categories of membership for members of different ages or age groups. (4) In determining whether the principal object of a registered club is as referred to in subsection (3) (a), regard is to be had to: (a) the essential character of the club, and (b) the extent to which the affairs of the club are so conducted that the persons primarily enjoying the benefits of membership are of the relevant age or age group, and (c) any other relevant circumstance".

special needs programmes,[119] superannuation,[120] insurance,[121] credit applications,[122] safety procedures,[123] sport[124] and prescribed lawful activities.[125] Part 5 prohibits victimization and discriminatory advertisements. Part 6 contains the following general exceptions that relate to more

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[118] S 49ZYQ: "Nothing in this Part: (a) affects the operation of a law that relates to the legal capacity or the legal entitlements, obligations or disqualifications of persons who are under 18 years of age, or (b) affects the operation of a law the object of which is to protect the welfare of those persons, including provisions of the criminal law that are designed to protect them".

[119] S 49ZYR: "Nothing in this Part applies to or in respect of anything done to afford persons who are of a particular age or age group access to facilities, services or opportunities to meet their special needs or to promote equal or improved access for them to facilities, services and opportunities".

[120] S 49ZYS: "(1) Nothing in this Part renders unlawful discrimination against a person on the ground of age in the terms or conditions appertaining to a superannuation or provident fund or scheme if, subject to subsection (2), one or more of the following apply: (a) the discrimination occurs because of the application of a standard in force under the *Occupational Superannuation Standards Act 1987* , or a requirement under the *Superannuation Industry (Supervision) Act 1993* , of the Commonwealth, (b) the discrimination is required in order to comply with, or obtain a benefit of, or avoid a penalty under, any other Act of the Commonwealth, (c) the discrimination is based on actuarial or statistical data from a source on which it is reasonable to rely, (d) if there is no data of a kind referred to in paragraph (c), the discrimination is based on such other data as may be available and on which it is reasonable to rely, (e) if none of the above apply, the discrimination is reasonable having regard to any other relevant factors, (f) the discrimination is based on an existing condition and relates to a person who became a member of the fund or scheme before the commencement of this section or not more than 12 months after that commencement, or happens not more than 12 months after that commencement. (2) An exemption under subsection (1) (c)-(e) is available only if the sources on which the data are based and those relevant factors (if any) are disclosed to the Tribunal, if the Tribunal so requires.
(3) This section has effect despite section 54 (1) (d)".

[121] S 49ZYT: "Nothing in this Part renders unlawful discrimination on the ground of age the terms on which any annuity, life assurance policy or accident or insurance policy or any other kind of insurance is offered or may be obtained if: (a) those terms: (i) are based on actuarial or statistical data from a source on which it is reasonable to rely or, if there are no such data, on such other data as may be available, and (ii) are reasonable having regard to the data and any other relevant factors, and (b) the sources on which the data are based and those relevant factors (if any) are disclosed to the Tribunal, if the Tribunal so requires".

[122] S 49ZYU: "Nothing in this Part renders unlawful discrimination against a person on the ground of age with respect to the criteria on which an application for credit is assessed or the terms on which credit is offered or may be obtained if: (a) those criteria or terms: (i) are based on actuarial or statistical data from a source on which it is reasonable to rely or, if there are no such data, on such other data as may be available, and (ii) are reasonable having regard to the data and any other relevant factors, and (b) the sources on which the data are based and those relevant factors (if any) are disclosed to the Tribunal, if the Tribunal so requires".

[123] S 49ZYV: "Nothing in this Part renders unlawful discrimination against a person on the ground of age with respect to: (a) the manner in which fitness to control a vehicle or a class of vehicle is assessed, or (b) the terms and conditions on which and the length of time during which a licence to drive or ride a vehicle is provided or made available, as the case requires, if that manner is, or those terms and conditions and length of time are, imposed in order to meet safety considerations that are reasonable in the circumstances".

[124] S 49ZYW: "(1) Nothing in this Part renders unlawful the exclusion of persons of particular ages from participation in any sporting activity. (2) Subsection (1) does not apply: (a) to the coaching of persons engaged in any sporting activity, or (b) to the administration of any sporting activity, or (c) to any sporting activity prescribed by the regulations for the purposes of this section".

[125] S 49ZYX: "Nothing in this Part renders unlawful any activity or matter declared to be lawful by regulation made for the purposes of this Part".

than one part of the Act: Acts done under statutory authority,[126] charities,[127] religious bodies,[128] voluntary bodies[129] and establishments providing housing accommodation for aged persons.[130]

The burden of proof relating to the exceptions rests upon the respondent.[131]

E.3 Northern Territory

The Northern Territory *Anti-Discrimination Act* recognises the following prohibited grounds: race;[132] sex; sexuality;[133] age; marital status;[134] pregnancy;[135] parenthood; breastfeeding; impairment;[136] trade

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[126] S 54: "(1) Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of: (a) any other Act, whether passed before or after this Act, (b) any regulation, ordinance, by-law, rule or other instrument made under any such other Act, (c) an order of the Tribunal, (d) an order of any court, not including an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment, or (e) (repealed)".

[127] S 55: "(1) Nothing in this Act affects: (a) a provision of a deed, will or other instrument, whether made before or after the day appointed and notified under section 2 (2), that confers charitable benefits or enables charitable benefits to be conferred on persons of a class identified by reference to any one or more of the grounds of discrimination referred to in this Act, or (b) an act which is done in order to give effect to such a provision. (2) In this section, charitable benefits means benefits for purposes that are exclusively charitable according to the law in force in any part of Australia".

[128] S 56: "Nothing in this Act affects: (a) the ordination or appointment of priests, ministers of religion or members of any religious order, (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order, (c) the appointment of any other person in any capacity by a body established to propagate religion, or (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion".

[129] S 57: "(1) In this section, body means a body, the activities of which are carried on otherwise than for profit and which is not established by an Act, but does not include: (a) a co-operative registered under the *Co-operatives Act 1992* or a society under the *Friendly Societies Act 1989* , or (b) a friendly society registered under the *Friendly Societies Act 1989* , or (c) a building society or credit union registered under the *Financial Institutions (NSW) Code* , or (d) a co-operative housing society registered under the *Co-operative Housing and Starr-Bowkett Societies Act 1998* , or (e) a registered club. (2) Nothing in this Act affects: (a) any rule or practice of a body which restricts admission to membership of that body, or (b) the provision of benefits, facilities or services to members of that body".

[130] S 59: "Nothing in this Act affects any rule or practice of an establishment which provides housing accommodation for aged persons, whether by statute or otherwise, whereby admission to the establishment is restricted to persons of a particular sex, marital status or race".

[131] S 109.

[132] "Race" includes "(a) the nationality, ethnic or national origin, colour, descent or ancestry of a person; and (b) that a person is or has been an immigrant".

[133] "Sexuality" is defined as "the sexual characteristics or imputed sexual characteristics of heterosexuality, homosexuality, bisexuality or transsexuality".

[134] "Marital status" is defined as "whether a person is – (a) single; (b) married; (c) married but living separately and apart from the person's spouse; (d) married, or has been married, to a particular person; (e) divorced; (f) widowed; (g) a de facto partner, or (h) the de facto partner, or was the de facto partner, of a particular person".

[135] Pregnancy includes child bearing capacity.

[136] "Impairment" is defined as including "(a) the total or partial loss of a bodily function; (b) the presence in the body of an organism which has caused or is capable of causing disease; (c) the presence in the body of organisms impeding, capable of impeding or which may impede the capacity of the body to combat disease; (d) total or partial loss of a part of the body; (e) the malfunction or dysfunction of a part of the body; (f) the malformation or disfigurement of a part of the body; (g) reliance on a guide dog, wheelchair or other remedial device; (h) physical or intellectual disability; (j)

union or employer association activity; religious belief or activity;[137] political opinion, affiliation or activity; irrelevant medical record; irrelevant criminal record;[138] association with a person who has, or is believed to have, an attribute referred to in these listed grounds.

The Act defines discrimination as follows:[139]

(1) For the purposes of this Act, discrimination includes–

(a) any distinction, restriction, exclusion or preference made on the basis of an attribute that has the effect of nullifying or impairing equality of opportunity; and

(b) harassment on the basis of an attribute,

in an area of activity referred to in Part 4.

(2) Without limiting the generality of subsection (1), discrimination takes place if a person treats or proposes to treat another person who has or had, or is believed to have or had –

(a) an attribute;

(b) a characteristic imputed to appertain to an attribute; or

(c) a characteristic imputed to appertain generally to persons with an attribute,

less favourably than a person who has not, or is believed not to have, such an attribute.

(3) For discrimination to take place, it is not necessary that –

(a) the attribute is the sole or dominant ground for the less favourable treatment; or

(b) the person who discriminates regards the treatment as less favourable.

(4) The motive of a person alleged to have discriminated against another person is, for the purposes of this Act, irrelevant.

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psychiatric or psychological disease or disorder, whether permanent or temporary; and (k) a condition, malfunction or dysfunction which results in a person learning more slowly than another person without that condition, malfunction or dysfunction".

[137] Religious belief or activity includes Aboriginal spiritual belief or activity.

[138] "Irrelevant criminal record" is defined as "(a) a spent record within the meaning of the *Criminal Records (Spent Convictions) Act*; or (b) a record relating to arrest, interrogation or criminal proceedings where – (i) no further action was taken in relation to the arrest, interrogation or charge of the person; (ii) no charge has been laid; (iii) the charge was dismissed; (iv) the prosecution was withdrawn; (v) the person was discharged, whether or not on conviction; (vi) the person was found not guilty; (vii) the person's finding of guilt was quashed or set aside; (viii) the person was granted a pardon; or (ix) the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises".

[139] S 20.

Part 4 of the Act sets out the following "areas of activity" to which the Act applies: education;[140] work;[141] accommodation;[142] goods, services and facilities;[143] clubs;[144] and insurance and superannuation.[145]

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[140] S 29 sets out the following prohibitions: "(1) An educational authority shall not discriminate – (a) by failing or refusing to accept a person's application for admission as a student; (b) in refusing or rejecting a person's admission as a student; (c) in the way in which a person's application is processed; (d) in the arrangements made for, or the criteria used in, deciding who should be offered admission as a student; or (e) in the terms and conditions on which a person is admitted as a student. (2) An educational authority shall not discriminate – (a) in any variation of the terms and conditions of a student's enrolment; (b) by failing or refusing to grant, or limiting, access to any benefit arising from the enrolment that is supplied by the authority; (c) by excluding a student; or (d) by treating a student less favourably in any way in connection with the student's training or instruction". The following exemptions are listed in s 30: "An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment, may exclude applicants who – (a) are not of the particular sex or religion; or (b) do not have a general or specific impairment".

[141] Ss 31-37 relate to applicants for employment and employees, professional and trade organisations, qualifying bodies, employment agencies, and exemptions relating to age and sexuality.

[142] S 38 and 39 set out the following prohibitions: "38. (1) A person shall not discriminate against another person – (a) by failing or refusing to accept an application for accommodation; (b) by failing or refusing to supply accommodation; (c) by failing or refusing to renew or extend the supply of accommodation; (d) in the way in which an application for accommodation is processed; or (e) in the terms and conditions on which accommodation is offered, renewed or extended. (2) A person shall not discriminate against a person to whom accommodation is supplied – (a) in any variation of the terms and conditions on which the accommodation is supplied; (b) in failing or refusing to grant, or limiting, access to any benefit associated with the accommodation; (c) in evicting the person from the accommodation; or (d) by treating the person less favourably in any way in connection with the accommodation. 39. A person shall not discriminate against a person with an impairment by failing or refusing to allow the person to alter accommodation to meet the person's special needs if – (a) the alteration is at the expense of that person; (b) the alteration does not require an alteration to the accommodation of another person; (c) the restoration of the accommodation to its previous condition is reasonably practicable; and (d) the person undertakes at his or her expense to restore the accommodation to its previous condition before leaving it, and it is reasonably likely that the person will do so". S 40 contains the following exemptions: "(1) A person may discriminate against a person in deciding who is to reside in accommodation that forms part of, and is intended to continue to form part of, the main home of the person or a near relative of the person. (2) An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment, may provide accommodation wholly or mainly for – (a) students of the particular sex or religion; or (b) students who have a general or specific impairment. (3) A person may discriminate against a person with respect to a matter that is otherwise prohibited under this Division if – (a) the accommodation concerned is under the direction or control of a body established for religious purposes; and (b) the discrimination – (i) is in accordance with the doctrine of the religion concerned; and (ii) is necessary to avoid offending the religious sensitivities of people of the religion. (4) A person may discriminate against a person with respect to a matter that is otherwise prohibited under this Division if – (a) the accommodation concerned is under the direction or control of a body established for a charitable purpose; and (b) the discrimination is in accordance with the particular purpose for which the accommodation was established by the body".

[143] S 41 contains the following prohibitions: "(1) A person who supplies goods, services or facilities (whether or not for reward or profit) shall not discriminate against another person – (a) by failing or refusing to supply the goods, services or facilities; (b) in the terms and conditions on which the goods, services or facilities are supplied; (c) in the way in which the goods, services or facilities are supplied; or (d) by treating the other person less favourably in any way in connection with the supply of the goods, services or facilities. (2) Subsection (1) does not apply to a person who supplies goods, services or facilities for or on behalf of an association that – (a) is established for social, literary, cultural, political, sporting, athletic, recreational or community service purposes or other similar lawful purposes; and (b) does not carry out its purposes for the purpose of making a profit". Ss 42-45 contain number of exemptions: "42. Nothing in this Division applies to or in relation to the provision of a service the nature of which is such that it can only be provided to members of one sex. 43. A person may restrict access to land, a building or place of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction – (a) is in

accordance with the culture or the doctrine of the religion; and (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion. 44. A person may supply benefits and concessions on the basis of age with respect to a matter that is otherwise prohibited under this Division. 45. A person may require, as a term of supplying goods, services or facilities to a child, that the child be accompanied by an adult if there is a reasonable risk that a child could cause a disruption or endanger himself or herself, or others, if not accompanied by an adult".

[144] S 46 contains the following prohibitions: "(1) A club, the committee of management of a club or a member of the committee of management shall not discriminate against a person who is not a member of the club – (a) by failing or refusing to accept the person's application for membership of the club; (b) in refusing or rejecting a person's membership of the club; or (c) in the terms and conditions on which the club is prepared to admit the person to membership of the club. (2) A club, the committee of management of a club or a member of the committee of management shall not discriminate against a member of the club – (a) in the terms and conditions of membership that are afforded to the member; (b) by failing or refusing to accept the member's application for a particular class or type of membership of the club; (c) by failing or refusing to grant the member access, or limiting the member's access, to any benefit provided by the club; (d) by depriving the member of membership or varying the terms and conditions of membership of the club; or (e) by treating the member less favourably in any way in connection with membership of the club". S 47 lists the following exemptions: "(1) A club, the committee of management of a club or a member of the committee of management may exclude applicants for membership of the club who are not members of the group of people with an attribute for whom the club was established if the club operates wholly or mainly – (a) to preserve a minority culture; or (b) to prevent or reduce disadvantage suffered by people of that group. (2) A club, the committee of management of a club or a member of the committee of management may discriminate against a person on the ground of age in membership of the club if the club provides association wholly or mainly for people of a specific age or age group. (3) A club, the committee of management of a club or a member of the committee of management may discriminate against a person on the ground of sex – (a) in membership of the club if the club provides association wholly or mainly for people of one sex; or (b) if the discrimination occurs in relation to the use or enjoyment of a benefit provided by the club where – (i) it is not practicable for the benefit to be used or enjoyed simultaneously, or to the same extent, by both men and women; and (ii) either the same or an equivalent benefit is provided for the use of men and women separately from each other, or men and women are each entitled to a fair and reasonable proportion of the use and enjoyment of the benefit. (4) In determining a matter relating to the application of subsection (3)(b) regard shall be had to – (a) the purposes for which the club is established; (b) the membership of the club, including any class or type of membership; (c) the nature of the benefits provided by the club; (d) the opportunities for the use and enjoyment of those benefits by men and women; and (e) any other relevant circumstances".

[145] S 48 lists the following prohibitions: "(1) A person shall not discriminate – (a) by failing or refusing to supply insurance or superannuation; (b) in the terms and conditions on which insurance or superannuation is supplied; or (c) in the way in which insurance or superannuation is supplied. (2) A person shall not discriminate against another person seeking work with the person in the terms and conditions of work that is offered that relate to insurance or superannuation. (3) A person shall not discriminate against a worker employed by the person – (a) in any variation of the terms and conditions of employment of the worker that relate to insurance or superannuation; (b) in failing or refusing to grant the worker access, or limiting the worker's access, to any benefit that relates to insurance or superannuation; or (c) by treating the worker less favourably in any way in connection with insurance or superannuation. S 49 contains a number of exemptions: "(1) A person may discriminate against a person with respect to a matter that is otherwise prohibited under this Division if one or more of the following is applicable – (a) the discrimination happens because of the application of a standard in force under the *Occupational Superannuation Standards Act 1987* of the Commonwealth; (b) the discrimination is permitted under the *Sex Discrimination Act 1984* of the Commonwealth; (c) the discrimination happens in order to comply with or obtain the benefits of, or to avoid penalties under, any other Act of the Commonwealth; (d) the discrimination is based on reasonable actuarial or statistical data from a source on which it is reasonable to rely and the discrimination is reasonable having regard to that data and other relevant factors; (e) if there is no reasonable actuarial or statistical data on which it is reasonable to rely, the discrimination is based on other data on which it is reasonable to rely and the discrimination is reasonable having regard to the data and any other relevant factors; (f) if there is no reasonable actuarial, statistical or other data on which it is reasonable to rely, the discrimination is reasonable having regard to any other relevant factors. (2) A person may discriminate in the area of superannuation to the extent that the discrimination is based on an existing superannuation fund condition and relates to a person who became a member of the fund before the commencement

The Act also contains a number of general exemptions that cut across all the areas of activity, relating to legal incapacity,[146] religious bodies,[147] charities,[148] acts done in compliance with legislation,[149] privileges in connection with pregnancy or childbirth,[150] public health,[151] sport,[152] special measures[153] and an "unreasonableness" defence relating to accommodating special need.[154]

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of this Act or not more than 12 months after that commencement. (3) In this section, "existing superannuation fund condition" means a superannuation fund condition in existence at the commencement of this Act".

[146] S 50: "A person may discriminate against another person who is subject to a legal incapacity if that incapacity is relevant to the transaction in which they are involved".

[147] S 51: "This Act does not apply to or in relation to – (a) the ordination or appointment of priests, ministers of religion or members of a religious order; (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or (d) an act by a body established for religious purposes if the act – (i) is in accordance with the doctrine of the religion concerned; and (ii) is necessary to avoid offending the religious sensitivities of people of the religion".

[148] S 52: "(1) A person – (a) may include in a will, deed or other instrument a discriminatory provision that provides for charitable benefits; and (b) may do an act that is required to give effect to a provision referred to in paragraph (a). (2) In this section, "charitable benefits" means benefits for purposes that are exclusively charitable according to the law in force in any part of Australia".

[149] S 53: "Notwithstanding anything to the contrary in this Act, a person may do an act that is necessary to comply with, or is specifically authorised by – (a) an Act or regulation of the Territory; (b) an Act or regulation of the Commonwealth; (c) an order of a court or tribunal; (d) an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment; (e) an industrial agreement in existence at the commencement of this Act; (f) an order of the Commissioner under this Act; (g) a guideline or code of practice prepared and published by the Commissioner under this Act; or (h) advice given by the Commissioner under this Act".

[150] S 54: "Nothing in this Act makes it unlawful for a person to discriminate against a man on the ground of sex by reason only of the fact that that person grants to a woman rights or privileges in connection with pregnancy or childbirth".

[151] S 55: "A person may discriminate against a person on the ground of impairment if the discrimination is reasonably necessary to protect public health".

[152] S 56: "(1) A person may restrict participation in a competitive sporting activity – (a) to either men or women, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity; (b) to people who can effectively compete; (c) to people of a specified age or age group; or (d) to people with a general or specific impairment. (2) Subsection (1)(a) does not apply to a sporting activity for children who have not attained 12 years of age. (3) In this section, "competitive sporting activity" does not include – (a) the coaching of people engaged in a sporting activity; (b) the umpiring or refereeing of a sporting activity; (c) the administration of a sporting activity; or (d) a prescribed sporting activity".

[153] S 57: "(1) A person may discriminate against a person in a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged or have a special need because of an attribute. (2) Subsection (1) applies only until equality of opportunity has been achieved".

[154] S 58: "(1) A person may discriminate against another person who has a special need with respect to a matter that is otherwise prohibited under this Act if – (a) the other person would require special services or facilities; and (b) it is unreasonable to require the person to supply the special services or facilities. (2) Whether it is unreasonable to require a person to supply special services or facilities depends on the relevant circumstances of the case including, but not limited to – (a) the nature of the special services or facilities; (b) the cost of providing the special services or facilities and the number of people who would benefit or be disadvantaged; (c) the financial circumstances of the person; (d) the disruption that providing the special services or facilities may cause; and (e) the nature of any benefit or detriment to all persons concerned".

It is also possible to apply to the Anti-Discrimination Commissioner to be exempted from the Act.[155]

The Act prohibits sexual harassment,[156] victimisation,[157] discriminatory advertising[158] and the failure to accommodate a special need.[159] The complainant must prove that the prohibited conduct is substantiated and the respondent must prove that an exemption applies.[160]

E.4 Queensland

The Queensland *Anti-Discrimination Act* 1991 prohibits discrimination on the grounds of sex, marital status,[161] pregnancy, breastfeeding,[162] age, race,[163] impairment,[164] religion, political belief or activity, trade union activity, lawful sexual activity and association with or relation to a person identified on the basis of these attributes.[165]

The Act follows a somewhat convoluted approach to defining discrimination:

> Meaning of discrimination on the basis of an attribute
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> 8. 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

[155] S 59.
[156] S 22.
[157] S 23.
[158] S 25.
[159] S 24.
[160] S 91.
[161] "Marital status" is defined as "whether a person is (a) single; or (b) married; or (c) married but living separately and apart from the person's spouse; or (d) divorced; or (e) widowed; or (f) a de facto spouse". "De facto spouse" is defined as "a person who lives with a person of the opposite sex as a husband or wife of the person on a genuine domestic basis, although not legally married to the person".
[162] Breastfeeding is only a prohibited ground in relation to the provision of goods and services. S 7(2).
[163] "Race" includes "(a) colour; and (b) descent or ancestry; and (c) ethnicity or ethnic origin; and (d) nationality or national origin".
[164] "Impairment" is defined as "(a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or (b) the malfunction, malformation or disfigurement of a part of the person's body; or (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or (e) the presence in the body of organisms capable of causing illness or disease; or (f) reliance on a guide dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that (g) presently exists; or (h) previously existed but no longer exists".
[165] S 7(1).

(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 person did not have it at the time of the discrimination.

Discrimination of certain types prohibited

9. The Act prohibits the following types of discrimination

(a) direct discrimination;

(b) indirect discrimination.

Meaning of direct discrimination

10.(1) Direct discrimination on the basis of an attribute happens if a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.

(2) It is not necessary that the person who discriminates considers the treatment is less favourable.

(3) The person's motive for discriminating is irrelevant.

(4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.

(5) In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

Meaning of indirect discrimination

11.(1) Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term

(a) with which a person with an attribute does not or is not able to comply; and

(b) with which a higher proportion of people without the attribute comply or are able to comply; and

(c) that is not reasonable.

(2) Whether a term is reasonable depends on all the relevant circumstances of the case, including, for example

(a) the consequences of failure to comply with the term; and

(b) the cost of alternative terms; and

(c) the financial circumstances of the person who imposes, or proposes to impose, the term.

(3) It is not necessary that the person imposing, or proposing to impose, the term is aware of the indirect discrimination.

(4) In this section

term includes condition, requirement or practice, whether or not written.

The Act prohibits discrimination in the following areas: work and work-related areas;[166] education;[167] goods and services;[168] superannuation (goods and services,[169] prework,[170] work,[171] pre-partnership[172] and partnership[173]); insurance (goods and services,[174] prework,[175] work,[176] pre-partnership[177] and partnership[178]); disposition of land;[179] accommodation (pre-accommodation,[180]

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[166] Ss 13-36 relate to pre-work; work; proposed partnership; partnership; industrial, professional, trade or business organisation in pre-member and member area; qualifying body in pre-qualification and qualification area, and employment agency; and a number of employment-related exemptions.

[167] Ss 38 and 39: "38. An educational authority must not discriminate (a) in failing to accept a person's application for admission as a student; or (b) in the way in which a person's application is processed; or (c) in the arrangements made for, or the criteria used in, deciding who should be offered admission as a student; or (d) in the terms on which a person is admitted as a student. 39. An educational authority must not discriminate (a) in any variation of the terms of a student's enrolment; or (b) by denying or limiting access to any benefit arising from the enrolment that is supplied by the authority; or (c) by excluding a student; or (d) by treating a student unfavourably in any way in connection with the student's training or instruction".

[168] S 46(1): "A person who supplies goods or services (whether or not for reward or profit) must not discriminate against another person (a) by failing to supply the goods or services; or (b) in the terms on which goods or services are supplied; or (c) in the way in which goods or services are supplied; or (d) by treating the other person unfavourably in any way in connection with the supply of goods and services".

[169] S 53: "A person must not discriminate (a) by failing to supply superannuation; or (b) in the terms on which superannuation is supplied; or (c) in the way in which superannuation is supplied".

[170] S 54.

[171] S 55.

[172] S 56: "A person must not discriminate against another person, who is invited to become a partner of the person in a partnership that consists, or will consist, of 6 or more people, in the terms relating to superannuation on which the other person is invited to become a partner".

[173] S 57: "A partner in a partnership that consists of 6 or more people must not discriminate against another partner (a) in any variation of the terms of the partnership that relate to superannuation; or (b) in denying or limiting the other partner's access to any benefit arising from the partnership that relates to superannuation; or (c) by treating the other partner unfavourably in any way in connection with superannuation".

[174] S 67: "A person must not discriminate (a) by failing to supply insurance; or (b) in the terms on which insurance is supplied; or (c) in the way in which insurance is supplied".

[175] S 68.

[176] S 69.

[177] S 70: "A person must not discriminate against another person, who is invited to become a partner of the person in a partnership that consists, or will consist, of 6 or more people, in the terms relating to insurance on which the other person is invited to become a partner".

[178] S 71: "A partner in a partnership that consists of 6 or more people must not discriminate against another partner (a) in any variation of the terms of the partnership that relate to insurance; or (b) in denying or limiting the other partner's access to any benefit arising from the partnership that relates to insurance; or (c) by treating the other partner unfavourably in any way in connection with insurance".

[179] S 77: "A person must not discriminate against another person (a) by failing to dispose of an interest in land to the other person; or (b) in the terms on which an interest in land is offered to the other person".

[180] S 82: "A person must not discriminate against another person (a) by failing to accept an application for accommodation; or (b) by failing to renew or extend the supply of accommodation; or (c) in the way in which an application is processed; or (d) in the terms on which accommodation is offered, renewed or extended".

accommodation,[181] refusing to allow reasonable alterations,[182] refusing to allow guide dog[183]); club membership and affairs;[184] and administration of state laws and programmes.[185]

The Act contains sector-specific exemptions in employment; education (single sex or single religion institutions;[186] non-state school authorities;[187] age-based admission schemes;[188] special services or facilities required[189]); goods and services (particular kinds of associations;[190] sites of cultural or

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[181] S 83: "A person must not discriminate against another person (a) in any variation of the terms on which accommodation is supplied; or (b) in denying or limiting access to any benefit associated with the accommodation; or (c) in evicting the other person from the accommodation; or (d) by treating the other person unfavourably in any way in connection with the accommodation".

[182] S 84: "A person must not discriminate by refusing to allow another person with an impairment to alter accommodation to meet the other person's special needs if (a) the alteration is at the expense of the other person; and (b) the alteration does not require an alteration to the premises of another occupier; and (c) the action required to restore the accommodation to its previous condition is reasonably practicable; and (d) the other person undertakes to restore the accommodation to its previous condition before leaving it, and it is reasonably likely that the other person will do so".

[183] S 85: "(1) A person must not discriminate by doing any of the following (a) refusing to rent accommodation to another person with a visual, hearing or mobility impairment because the other person has a dog to assist the other person in relation to the impairment; (b) requiring the other person to keep the dog elsewhere; (c) requesting or requiring the other person to pay an extra charge because the dog lives at the accommodation. (2) This section does not affect the liability of the person with the dog for any damage caused by the dog".

[184] Ss 94 and 95: "94. A club must not discriminate (a) in determining the terms of a particular category or type of membership of the club; or (b) in failing to accept a person's application for membership of the club; or (c) in the way in which a person's application is processed; or (d) in the arrangements made for deciding who should be offered membership; or (e) in the terms on which a person is admitted as a member. 95. A club must not discriminate (a) in any variation of the terms of membership of the club; or (b) in failing to accept a member's application for a different category or type of membership; or (c) by denying or limiting access to any benefit, arising from membership, that is supplied by the club; or (d) in depriving a member of membership; or (e) by treating a member unfavourably in any way in connection with the membership or the affairs of the club".

[185] Ss 101 and 102: "101. A person who (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or (b) has any other responsibility for the administration of State law or the conduct of a State Government program; must not discriminate in (c) the performance of the function; or (d) the exercise of the power; or (e) the carrying out of the responsibility. 102. (1) A member of a local authority must not discriminate against another member in the performance of official functions. (2) Subsection (1) does not apply to discrimination on the basis of political belief or activity".

[186] S 41: "An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment may exclude (a) applicants who are not of the particular sex or religion; or (b) applicants who do not have a general, or the specific, impairment".

[187] S 42: "(1) It is not unlawful for a non-State school authority to discriminate against a person with respect to a matter that is otherwise prohibited under subdivision 1. (2) Subsection (1) does not apply to discrimination on the basis of race or impairment".

[188] S 43: "An educational authority may select students for an education program on the basis of an admission scheme that has a minimum qualifying age".

[189] S 44: "(1) Subject to the *Education (General Provisions) Act 1989*, it is not unlawful for an educational authority to discriminate on the basis of impairment against a person with respect to a matter that is otherwise prohibited under subdivision 1 if (a) the person would require special services or facilities; and (b) the supply of special services or facilities would impose unjustifiable hardship on the educational authority. (2) Whether the supply of special services or facilities would impose unjustifiable hardship depends on the circumstances set out in section 5".

religious significance;[191] age-based benefits;[192] children to be accompanied by adult;[193] special services or facilities[194]); superannuation (exemption based on sex or marital status,[195] retention of existing superannuation fund conditions based on age or impairment,[196] new superannuation fund conditions based on age or impairment,[197] occupational superannuation standard[198] and

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[190] S 46(2): "In this section, a reference to a person who supplies goods and services does not include an association that (a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and (b) does not carry out its purposes for the purpose of making a profit".

[191] S 48: "A person may restrict access to land or a building of cultural or religious significance by people who are not of a particular sex, age, race or religion if the restriction (a) is in accordance with the culture concerned or the doctrine of the religion concerned; and (b) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion".

[192] S 49: "A person may supply benefits and concessions on the basis of age with respect to a matter that is otherwise prohibited under Subdivision 1".

[193] S 50: "A person may require, as a term of supplying goods and services to a minor, that a minor be accompanied by an adult if there would be a reasonable risk that a minor may cause a disruption or endanger himself or herself or others if not accompanied by an adult".

[194] S 51: "(1) It is not unlawful for a person to discriminate on the basis of impairment against another person with respect to a matter that is otherwise prohibited under Subdivision 1 if (a) the other person would require special services or facilities; and (b) the supply of special services or facilities would impose unjustifiable hardship on the person supplying the goods or services. (2) Whether the supply of special services or facilities would impose unjustifiable hardship depends on the circumstances set out in section 5".

[195] S 59: "It is not unlawful to discriminate on the basis of sex or marital status with respect to a matter that is otherwise prohibited under Subdivision 1 if the discrimination is permitted under the *Sex Discrimination Act 1984* (Cwlth)".

[196] S 60: "(1) It is not unlawful to discriminate on the basis of age or impairment by retaining an existing superannuation fund condition in relation to a person who became a member of the fund before the commencement of section 53. (2) In this section existing superannuation fund condition means a superannuation fund condition in existence at the commencement of section 53".

[197] Ss 61-63: "61. It is not unlawful for a person to discriminate on the basis of age or impairment by imposing a superannuation fund condition after the commencement of section 53 in relation to another person, irrespective of (a) whether the superannuation fund was in existence before the commencement of section 53; and (b) when the other person became, or becomes, a member of the fund; if (c) the condition is based on reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely; and (d) the condition is reasonable having regard to the data and any other relevant factors. 62. It is not unlawful for a person to discriminate on the basis of age or impairment by imposing a superannuation fund condition after the commencement of section 53 in relation to another person, irrespective of (a) whether the superannuation fund was in existence before the commencement of section 53; and (b) when the other person became, or becomes, a member of the fund; if (c) there is no reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely; and (d) the condition is based on other reasonable data from a source on which it is reasonable for the person to rely; and (e) the condition is reasonable having regard to the other data and any other relevant factors. 63. It is not unlawful for a person to discriminate on the basis of age or impairment by imposing a superannuation fund condition after the commencement of section 53 in relation to another person, irrespective of (a) whether the superannuation fund was in existence before the commencement of section 53; and (b) when the other person became, or becomes, a member of the fund; if (c) there is no reasonable actuarial, statistical or other data from a source on which it is reasonable for the person to rely; and (d) the condition is reasonable having regard to any other relevant factors".

[198] S 64: "It is not unlawful to discriminate on the basis of age or impairment with respect to a matter that is otherwise prohibited under subdivision 1 if the discrimination happens because of the application of a standard prescribed under the *Occupational Superannuation Standards Act 1987* (Cwlth) or *Superannuation Industry (Supervision) Act 1993* (Cwlth)".

compliance with commonwealth legislation[199]); insurance (sex,[200] age and impairment[201]) ; disposition of land (disposition by gift or will,[202] sites of cultural or religious significance[203]); accommodation (shared accommodation,[204] accommodation for workers,[205] accommodation for students,[206] accommodation with religious purposes,[207] accommodation with charitable purposes[208] and unjustifiable hardship[209]) and club membership and affairs (minority cultures or disadvantaged

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[199] S 65: "It is not unlawful to discriminate on the basis of age or impairment with respect to a matter that is otherwise prohibited under subdivision 1 if the discrimination happens in order (a) to comply with a Commonwealth Act (other than the *Occupational Superannuation Standards Act 1987* or *Superannuation Industry (Supervision) Act 1993*); or (b) to obtain a benefit or avoid a penalty under such an Act".

[200] S 73: "It is not unlawful to discriminate on the basis of sex with respect to a matter that is otherwise prohibited under subdivision 1 if the discrimination is permitted under the *Sex Discrimination Act 1984* (Cwlth)".

[201] Ss 74 and 75: "74. It is not unlawful for a person to discriminate on the basis of age or impairment with respect to a matter that is otherwise prohibited under subdivision 1 if the discrimination (a) is based on reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely; and (b) is reasonable having regard to the data and any other relevant factors. 75. It is not unlawful for a person to discriminate on the basis of age or impairment with respect to a matter that is otherwise prohibited under subdivision 1 if (a) there is no reasonable actuarial or statistical data from a source on which it is reasonable for the person to rely; and (b) the discrimination is reasonable having regard to any other relevant factors".

[202] S 79: "It is not unlawful to discriminate with respect to a matter that is otherwise prohibited under subdivision 1 if the discrimination is by way of a testamentary disposition or gift".

[203] S 80: "It is not unlawful to discriminate on the basis of sex, age, race or religion with respect to a matter that is otherwise prohibited under subdivision 1 if (a) the relevant interest in land is an interest in land or a building of cultural or religious significance; and (b) the discrimination (i) is in accordance with the culture concerned or the doctrine of the religion concerned; and (ii) is necessary to avoid offending the cultural or religious sensitivities of people of the culture or religion".

[204] S 87: "It is not unlawful for a person to discriminate in deciding who is to reside in accommodation that (a) forms part of, and is intended to continue to form part of, the main home of the person or a near relative; and (b) is for no more than 3 people other than a person mentioned in paragraph (a) or near relatives of such a person".

[205] S 88.

[206] S 89: "An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion, or who have a general or specific impairment, may provide accommodation wholly or mainly for (a) students of the particular sex or religion; or (b) students who have a general, or the specific, impairment".

[207] S 90: "It is not unlawful to discriminate with respect to a matter that is otherwise prohibited under Subdivision 1 if (a) the accommodation concerned is under the direction or control of a body established for religious purposes; and (b) the discrimination (i) is in accordance with the doctrine of the religion concerned; and (ii) is necessary to avoid offending the religious sensitivities of people of the religion".

[208] S 91: "It is not unlawful to discriminate on the basis of sex, marital status or age with respect to a matter that is otherwise prohibited under Subdivision 1 if (a) the accommodation concerned is under the direction or control of a body established for charitable purposes; and (b) the discrimination is in accordance with the particular purposes for which the accommodation was established by the body".

[209] S 92: "(1) A person may discriminate on the basis of impairment against another person with respect to a matter that is otherwise prohibited under Subdivision 1 if (a) the other person would require special services or facilities; and (b) the supply of special services or facilities would impose unjustifiable hardship on the first person. (2) Whether the supply of special services or facilities would impose unjustifiable hardship depends on the circumstances set out in section 5".

people,[210] reasonable sex discrimination,[211] reasonable risk of injury[212] and unjustifiable hardship[213]), as well as general exemptions that applies to all the sectors relating to welfare measures,[214] equal opportunity measures,[215] acts done in compliance with legislation,[216] compulsory retirement age,[217] public health,[218] workplace health and safety,[219] religious bodies,[220] charities, [221]sport[222] and legal incapacity.[223]

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[210] S 97: "A club may exclude applicants for membership of the club who are not members of the group of people with an attribute for whom the club was established if the club operates wholly or mainly (a) to preserve a minority culture; or (b) to prevent or reduce disadvantage suffered by people of that group".

[211] S 98: "It is not unlawful for a club to discriminate on the basis of sex by limiting access to any benefit, arising from membership, that is provided by the club if (a) it is not practicable for males and females to enjoy the benefit at the same time; and (b) either of the following subparagraphs apply (i) access to the same or an equivalent benefit is supplied for the use of males and females separately; or (ii) access arrangements offer males and females a reasonably equivalent opportunity to enjoy the benefit".

[212] S 99: "A club may exclude an applicant for membership who is a minor if there is a reasonable risk of injury to a minor or other people".

[213] S 100: "(1) It is not unlawful for a club to discriminate on the basis of impairment in failing to accept a person's application for membership if (a) the person would require special services or facilities; and (b) the supply of special services or facilities would impose unjustifiable hardship on the club. (2) Whether the supply of special services or facilities would impose unjustifiable hardship depends on the circumstances set out in section 5".

[214] S 104: "A person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act".

[215] S 105: "(1) A person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with this Act. (2) Subsection (1) applies only until the purpose of equal opportunity has been achieved".

[216] S 106: "(1) A person may do an act that is necessary to comply with, or is specifically authorised by (a) an existing provision of another Act; or (b) an order of a court; or (c) an existing provision of an order or award of a court or tribunal having power to fix minimum wages and other terms of employment; or (d) an existing provision of an industrial agreement; or (e) an order of the Anti-Discrimination Tribunal. (2) In this section existing provision means a provision in existence at the commencement of this section".

[217] S 106A.

[218] S 107: "A person may do an act that is reasonably necessary to protect public health".

[219] S 108: "A person may do an act that is reasonably necessary to protect the health and safety of people at a place of work".

[220] S 109: "The Act does not apply in relation to (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or (d) unless section 29 (Educational or health-related institution with religious purposes) or section 90 (Accommodation with religious purposes) applies an act by a body established for religious purposes if the act is (i) in accordance with the doctrine of the religion concerned; and (ii) necessary to avoid offending the religious sensitivities of people of the religion".

[221] S 110: "A person may include a discriminatory provision in a document that provides exclusively for charitable benefits, and may do an act that is required to give effect to such a provision".

[222] S 111: "(1) A person may restrict participation in a competitive sporting activity (a) to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity; or (b) to people who can effectively compete; or (c) to people of a specified age or age group; or (d) to people with a specific or general impairment. (2) Subsection (1)(a) does not apply to a sporting activity for children who are less than 12 years of age. (3) In this section competitive sporting activity does not include (a) the coaching of people engaged in a sporting activity; or (b) the umpiring or refereeing of a sporting activity; or (c) the administration of a sporting activity; or (d) a sporting activity prescribed by regulation".

The complainant must prove that the respondent contravened the Act.[224] In cases of indirect discrimination the respondent must prove that the discrimination was reasonable.[225] The respondent must prove that a particular exemption applies.[226]

The Act prohibits sexual harassment,[227] requesting and encouraging contravention of the Act,[228] unlawful requests for information,[229] incitement to racial or religious hatred,[230] discriminatory advertising[231] and victimisation.[232]

E.5 South Australia

The South Australia *Equal Opportunity Act* 1984 prohibits discrimination on the basis of sex, sexuality,[233] marital status, [234] pregnancy, race,[235] impairment[236] and age. The Act is divided into a number of parts. Part III relates to sex, sexuality, marital status and pregnancy; part IV to race; part V to impairment and part VA to age. Each of the parts contains a number of divisions that relate to the definition of discrimination in that part, the sectors to which the prohibition applies (employment, associations, trade unions, qualifying bodies, educational authorities, disposing of an

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[223] S 112: "A person may discriminate against another person because the other person is subject to a legal incapacity if the incapacity is relevant to the transaction in which they are involved".
[224] S 204.
[225] S 205. A "reasonableness" defence does not seem to exist in cases of direct discrimination.
[226] S 206.
[227] Ss 117-120.
[228] Ss 122 and 123.
[229] S 124.
[230] S 126.
[231] Ss 127 and 128.
[232] S2 129-131.
[233] Sexuality means heterosexuality, homosexuality, bisexuality or transsexuality.
[234] "Marital status" is defined as "the status or condition of (a) being single; (b) being married; (c) being married but living separately and apart from one's spouse; (d) being divorced; (e) being widowed; or (f) cohabiting with a person of the opposite sex as a de facto husband or wife".
[235] "Race" is defined as "the nationality, country of origin, colour or ancestry of the person or of any other person with whom he or she resides or associates".
[236] "Impairment" includes intellectual impairment and physical impairment. "Intellectual impairment" is defined as the "permanent or temporary loss or imperfect development of mental faculties (except where attributable to mental illness) resulting in reduced intellectual capacity". "Physical impairment" is defined as the "(a) the total or partial loss of any function of the body; (b) the total or partial loss of any part of the body; (c) the malfunctioning of any part of the body; or (d) the malformation or disfigurement of any part of the body, whether permanent or temporary, but does not include intellectual impairment or mental illness".

interest in land, goods and services, accommodation and superannuation) and general exemptions from the particular part.

Part III contains separate (and repetitive) definitions of "discriminate" in relation to sex,[237] sexuality,[238] marital status[239] and pregnant women.[240] Division II (employment) prohibits discrimination against applicants for employment and employees, commission agents, contract workers and within partnerships.[241] Division III prohibits discrimination by associations,[242] trade

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[237] S 29(2): " For the purposes of this Act, a person discriminates on the ground of sex- (a) if he or she treats another person unfavourably because of the other's sex; (b) if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of persons of the opposite sex complies, or is able to comply, with the requirement than of those of the other's sex; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other's sex, or on the basis of a presumed characteristic that is generally imputed to persons of that sex".

[238] S 29(3) and (4): "(3) Subject to subsection (4), for the purposes of this Act, a person discriminates on the ground of sexuality- (a) if he or she treats another person unfavourably because of the other's sexuality, or a presumed sexuality; (b) if he or she treats another person unfavourably because the other does not comply, or is not able to comply, with a particular requirement and - (i) the nature of the requirement is such that a substantially higher proportion of persons of a different sexuality complies, or is able to comply, with the requirement than of those of the other's sexuality; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other's sexuality, or presumed sexuality, or on the basis of a presumed characteristic that is generally imputed to persons of that sexuality. (4) Where- (a) a person discriminates against another on the basis of appearance or dress; (b) that appearance or dress is characteristic of, or an expression of, that other person's sexuality; but (c) the discrimination is reasonable in all the circumstances, the discrimination will not, for the purposes of Division II, be taken to be discrimination on the ground of sexuality".

[239] S 29(5): "For the purposes of this Act, a person discriminates on the ground of marital status- (a) if he or she treats another person unfavourably because of the other's marital status; (b) if he or she treats another person unfavourably because the other does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of persons of a different marital status complies, or is able to comply, with the requirement than of those of the other's marital status; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of that marital status, or on the basis of a presumed characteristic that is generally imputed to persons of that marital status".

[240] S 29(6): "For the purposes of this Act, a person discriminates against a pregnant woman- (a) if he or she treats the woman unfavourably because of her pregnancy; (b) if he or she treats the woman unfavourably because she does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of women who are not pregnant complies, or is able to comply, with the requirement than of those who are pregnant; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats the woman unfavourably on the basis of a characteristic that appertains generally to pregnant women, or on the basis of a presumed characteristic that is generally imputed to pregnant women".

[241] S 33: "(1) It is unlawful for a firm, or a person promoting the formation of a firm, to discriminate against a person (otherwise than on the ground of sexuality) in determining, or in the course of determining, who should be offered a position as partner in the firm. (2) It is unlawful for a firm, or a person promoting the formation of a firm, to discriminate against a person on the ground of sexuality in determining, or in the course of determining, who should be offered a position as partner in the firm, unless the firm consists, or is to consist, of less than six members. (3) It is unlawful for a firm, or a person promoting the formation of a firm, to discriminate against a person in the terms or conditions on which that person is offered a position as partner in the firm. (4) It is unlawful for a firm to discriminate against a partner- (a) in the terms or conditions of membership of the firm; (b) by denying or limiting access to any benefit arising from

unions and employer bodies[243] and qualifying bodies.[244] Division IV prohibits discrimination by educational authorities.[245] Division V prohibits discrimination by persons disposing of an interest in land,[246] in the provision of goods and services[247] and in accommodation.[248] Division VI deals with

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membership of the firm; (c) by expelling the partner from the firm; or (d) by subjecting the partner to any other detriment".

[242] S 35(1) and (3): "(1) It is unlawful for an association that has both male and female members to discriminate- (a) against an applicant for membership on the ground of sex, marital status or pregnancy- (i) by refusing or failing to admit the applicant to membership, or to a particular class of membership, of the association; or (ii) in the terms on which the applicant is, or may be, admitted to membership, or a particular class of membership; or (b) against a member of the association on the ground of sex, marital status or pregnancy- (i) by refusing or failing to provide a particular service or benefit to that member; (ii) in the terms on which a particular service or benefit is provided to that member; or (iii) by expelling that member from the association or subjecting him or her to any other detriment. (3) Without limiting the generality of this section, an association discriminates against a member of a particular class in the association if, upon application by that member to join a different class of membership in the association, the association accords the member a lower order of precedence on the list of applicants for that class of membership than that accorded to an applicant who is not a member of the association".

[243] S 35A: "(1) It is unlawful for an association to which this section applies to discriminate- (a) against an applicant for membership on the ground of sexuality- (i) by refusing or failing to admit the applicant to membership, or to a particular class of membership, of the association; or (ii) in the terms on which the applicant is, or may be, admitted to membership or a particular class of membership; or (b) against a member of the association on the ground of sexuality- (i) by refusing or failing to provide a particular service or benefit to that member; (ii) in the terms on which a particular service or benefit is provided to that member; or (iii) by expelling the member from the association or subjecting him or her to any other detriment. (2) Without limiting the generality of subsection (1), an association to which this section applies discriminates against a member of a particular class in the association if, on application by the member to join a different class of membership in the association, the association accords the member a lower order of precedence on the list of applicants for that class of membership than that accorded to an applicant who is not a member of the association. (3) In this section- "association to which this section applies" means- (a) an association registered under Part IX of the Industrial Conciliation and Arbitration Act, 1972; (b) an organization registered under the Industrial Relations Act 1988 of the Commonwealth; (c) any other association formed to promote the interests of employers or employees".

[244] S 36: "It is unlawful for an authority or body empowered to confer an authorization or qualification that is needed for, or facilitates, the practice of a profession, or the carrying on or engaging in of a trade or occupation, to discriminate against a person- (a) by refusing or failing to confer or renew that authorization or qualification; (b) in the terms or conditions on which it confers or renews the authorization or qualification; or (c) by withdrawing the authorization or qualification, or varying the terms or conditions upon which it is held".

[245] S 37(1) and (2): "(1) It is unlawful for an educational authority to discriminate against a person- (a) by refusing or failing to accept an application for admission as a student; or (b) in the terms or conditions on which it offers to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student- (a) in the terms or conditions on which it provides the student with training or education; (b) by denying or limiting access to any benefit provided by the authority; (c) by expelling the student; or (d) by subjecting the student to any other detriment".

[246] S 38(1): "It is unlawful for a person to discriminate against another- (a) by refusing or failing to dispose of an interest in land to the other person; or (b) in the terms or conditions on which an interest in land is offered to the other person".

[247] S 39(1): "It is unlawful for a person who offers or provides- (a) goods; or (b) services to which this Act applies, (whether for payment or not) to discriminate against another- (c) by refusing or failing to supply the goods or perform the services; or (d) in the terms or conditions on which or the manner in which the goods are supplied or the services are performed".

[248] S 40(1) and (2): "(1) It is unlawful for a person to discriminate against another- (a) in the terms or conditions on which accommodation is offered; (b) by refusing an application for accommodation; or (c) by deferring such an application or according the applicant a lower order of precedence on any list of applicants for that accommodation. (2) It is unlawful for a person to discriminate against a person for whom accommodation has been provided- (a) in the terms or conditions on which accommodation is provided; (b) by denying or limiting access to any benefit connected with the accommodation; (c) by evicting the person; or (d) by subjecting the person to any other detriment".

superannuation.[249] Most of the divisions contain sector-specific exemptions (ie, employment, associations,[250] educational authorities,[251] persons disposing of an interest in land,[252] goods and services,[253] accommodation[254] and superannuation.[255]) Division VII contains general exemptions

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[249] Ss 42(1) and (2); 43: "42. (1) Subject to this Division, it is unlawful for a person who provides an employer subsidized superannuation scheme to discriminate against a person- (a) by providing a scheme that discriminates or, if the other person were to become a member of the scheme, would discriminate, or require or authorize discrimination, against the other person; or (b) in the manner in which the scheme is administered. (2) Subsection (1) is subject to the following qualifications: (a) it applies only in relation to an employer subsidized superannuation scheme under which a greater number of the members (not including members who are no longer employed by an employer who participates in the scheme) reside in this State than in any other single State or Territory; and (b) such other qualifications as may be prescribed. 43. It is unlawful for a person who provides a superannuation scheme or provident fund (not being an employer subsidized superannuation scheme) to discriminate against a person- (a) by providing a scheme or fund that discriminates or, if the other person were to become a member of the scheme or fund, would discriminate, or require or authorize discrimination, against the other person; or (b) in the manner in which the scheme or fund is administered, except where the discrimination- (c) is based upon actuarial or statistical data from a source on which it is reasonable to rely; and (d) is reasonable having regard to that data".

[250] S 35(2): "This section does not apply to discrimination on the ground of sex in relation to the use or enjoyment of a service or benefit provided by an association- (a) where it is not practicable for the service or benefit to be used or enjoyed simultaneously by both men and women, but the same, or an equivalent, service or benefit is provided for the use or enjoyment of men and women separately from each other or at different times; or (b) where it is not practicable for the service or benefit to be used or enjoyed to the same extent by both men and women, but both men and women are entitled to a fair and reasonable proportion of the use or enjoyment of the service or benefit".

[251] S 37(3): "This section does not apply to discrimination on the ground of sex in respect of- (a) admission to a school, college, university or institution established wholly or mainly for students of the one sex; (b) the admission of a person to a school, college or institution (not being a tertiary level school, college or institution) where the level of education or training sought by the person is provided only for students of the one sex; or (c) the provision at a school, college, university or institution of boarding facilities for students of the one sex".

[252] S 38(2): "This section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift".

[253] S 39(2): "Where the nature of a skill varies according to whether it is exercised in relation to men or to women, a person does not contravene this section by exercising the skill in relation to men only, or women only, in accordance with the person's normal practice".

[254] S 40(3) and (4): "(3) This section does not apply to discrimination in relation to the provision of accommodation if- (a) the person who provides, or proposes to provide, the accommodation, or a near relative of that person, resides, and intends to continue to reside, on the premises; and (b) accommodation is provided on the premises for no more than six persons apart from that person and his or her family. (4) This section does not apply to discrimination on the ground of sex or marital status in relation to the provision of accommodation by an organization that does not seek to secure a pecuniary profit for its members, where the accommodation is provided only for persons of the one sex, or of a particular marital status, as the case may be".

[255] Ss 42(3) and (4); 44(1): "42. (3) This section does not render unlawful discrimination on the ground of sex in the rates upon which a pension payable to a member under an employer subsidized superannuation scheme may, at the member's option, be converted to a lump sum or a lump sum payable under the scheme may, at the member's option, be converted to a pension, where the discrimination- (a) is based upon actuarial or statistical data from a source upon which it is reasonable to rely; and (b) is reasonable having regard to that data. (4) This section does not render unlawful discrimination on the ground of sex in the benefits payable under an employer subsidized superannuation scheme, where- (a) the contributions payable by both the employer and the employee are fixed by the terms of the scheme; and (b) the benefits that will accrue to the employee are derived from the accumulation of those contributions less any insurance premiums paid under the scheme in respect of the employee, to the extent only that the discrimination is based upon a lawful difference in those insurance premiums. 44. (1) For the purposes of this Division, a superannuation scheme or provident fund does not discriminate on the ground of marital status by reason only of the fact- (a) that it provides for the payment of benefits to the surviving spouses of members; or (b) that it does not provide

relating to charities,[256] benefits to pregnant women,[257] measures intended to achieve equality,[258] sport,[259] insurance[260] and religious bodies.[261]

Division I of Part IV contains a definition of race discrimination.[262] Division II prohibits discrimination in employment (applicants and employees, commission agents, contract workers and partnerships[263]). Division III prohibits discrimination by associations,[264] and qualifying

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benefits for the surviving de facto spouses of members, or provides less favourable benefits for surviving de facto spouses than it does for the surviving spouses of members".

[256] S 45: "This Part does not- (a) affect a provision in a charitable instrument for conferring benefits wholly or mainly upon- (i) persons of the one sex; (ii) persons of a particular sexuality; (iii) persons of a particular marital status; or (iv) pregnant women; or (b) render unlawful any act done to give effect to such a provision".

[257] S 46: "This Part does not render unlawful the granting to women of rights or privileges in connection with pregnancy or childbirth".

[258] S 47: "This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking intended to ensure that persons of the one sex, or of a particular marital status, have equal opportunities with persons of the other sex, or of another marital status, in any of the circumstances to which this Part applies".

[259] S 48: "This Part does not render unlawful the exclusion of persons of the one sex from participation in a competitive sporting activity in which the strength, stamina or physique of the competitor is relevant".

[260] S 49: "This Part does not render unlawful discrimination on the ground of sex in the terms on which an annuity, life assurance, accident insurance or any other form of insurance is offered or may be obtained, where the discrimination- (a) is based upon actuarial or statistical data from a source on which it is reasonable to rely; and (b) is reasonable having regard to that data".

[261] S 50: "(1) This Part does not render unlawful discrimination in relation to- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion. (2) Where an educational or other institution is administered in accordance with the precepts of a particular religion, discrimination on the ground of sexuality that arises in the course of the administration of that institution and is founded on the precepts of that religion is not rendered unlawful by this Part".

[262] S 51: "For the purposes of this Act, a person discriminates on the ground of race- (a) if he or she treats another person unfavourably by reason of the other's race; (b) if he or she treats another person unfavourably because the other does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of persons of a different race complies, or is able to comply, with the requirement than of those of the other's race; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other's race, or on the basis of a presumed characteristic that is generally imputed to persons of that race".

[263] S 55: "(1) It is unlawful for a firm consisting of one or more members, or for one or more persons promoting the formation of a firm, to discriminate against a person on the ground of race- a) in determining, or in the course of determining, who should be offered a position as partner in the firm; or b) in the terms or conditions on which that person is offered a position as partner in the firm. (2) It is unlawful for a firm consisting of two or more partners to discriminate against a partner on the ground of race- (a) in the terms or conditions of membership of the firm; (b) by denying or limiting access to any benefit arising from membership of the firm; (c) by expelling the partner from the firm; or (d) by subjecting the partner to any other detriment".

[264] S 57(1): "It is unlawful for an association to discriminate- (a) against an applicant for membership on the ground of race- (i) by refusing or failing to admit the applicant to membership, or to a particular class of membership, of the association; or (ii) in the terms on which the applicant is, or may be, admitted to membership, or to a particular class of membership; or (b) against a member of the association on the ground of race- (i) by refusing or failing to provide a

bodies.[265] Division IV targets educational authorities.[266] Division V deals with people disposing of an interest in land,[267] goods and services[268] and accommodation.[269] Division VI prohibits discrimination by superannuation schemes and provident funds.[270] Some of the divisions contain area-specific exemptions (employment, associations,[271] and land[272]) and division VII contains general exemptions relating to charities[273] and benefits for people of a particular race.[274]

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particular service or benefit to that member; (ii) in the terms on which a particular service or benefit is provided to that member; or (iii) by expelling that member from the association or subjecting him or her to any other detriment".

[265] S 58: "(1) It is unlawful for an authority or body empowered to confer an authorization or qualification that is needed for, or facilitates, the practice of a profession, or the carrying on or engaging in of a trade or occupation, to discriminate against a person on the ground of race- (a) by refusing or failing to confer or renew that authorization or qualification; (b) in the terms or conditions on which it confers the authorization or qualification; or (c) by withdrawing the authorization or qualification, or varying the terms or conditions upon which it is held. (2) Without limiting the generality of subsection (1), an authority or body discriminates against a person on the ground of race if the authority or body- (a) fails to take reasonable steps to inform itself sufficiently on the adequacy or appropriateness of qualifications or experience gained outside of Australia by the person; and (b) in consequence of that failure, refuses to confer on the person an authorization or qualification for which the person has applied".

[266] S 59: "(1) It is unlawful for an educational authority to discriminate against a person on the ground of race- (a) by refusing or failing to accept an application for admission as a student; or (b) in the terms or conditions on which it offers to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of race- (a) in the terms or conditions on which it provides the student with education or training; (b) by denying or limiting access to any benefit provided by the authority; (c) by expelling the student; or (d) by subjecting the student to any other detriment".

[267] S 60(1): "It is unlawful for a person to discriminate against another on the ground of race- (a) by refusing or failing to dispose of an interest in land to the other person; or (b) in the terms or conditions on which an interest in land is offered to the other person".

[268] S 61: "It is unlawful for a person who offers or provides- (a) goods; or (b) services to which this Act applies, (whether for payment or not) to discriminate against another on the ground of race- (c) by refusing or failing to supply the goods or perform the services; or (d) in the terms or conditions on which or the manner in which the goods are supplied or the services are performed".

[269] S 62: "(1) It is unlawful for a person to discriminate against another on the ground of race- (a) in the terms or conditions on which accommodation is offered; (b) by refusing an application for accommodation; or (c) by deferring such an application or according the applicant a lower order of precedence on any list of applicants for that accommodation. (2) It is unlawful for a person to discriminate against a person for whom accommodation has been provided on the ground of race- (a) in the terms or conditions on which accommodation is provided; (b) by denying or limiting access to any benefit connected with the accommodation; (c) by evicting the person; or (d) by subjecting the person to any other detriment".

[270] S 63(1): "It is unlawful for a person who provides a superannuation scheme or provident fund to discriminate against a person on the ground of race- (a) by providing a scheme or fund that discriminates or, if the other person were to become a member of the scheme or fund, would discriminate, or require or authorize discrimination, against the other person; or (b) in the manner in which the scheme or fund is administered".

[271] S 57(2): "This section does not apply to a club established principally for the purpose of promoting social intercourse between the members of a particular racial or ethnic group".

[272] S 60(2): "This section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift".

[273] S 64: "This Part does not- (a) affect a provision in a charitable instrument for conferring benefits wholly or mainly upon persons of a particular race; or (b) render unlawful any act done to give effect to such a provision".

[274] S 65: "This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular race".

Division I of Part V contains a definition of discrimination based on impairment.[275] Division II targets employment (applicants and employees, commission agents, contract workers and partnerships[276]). Division II relates to associations[277] and qualifying bodies.[278] Division IV prohibits discrimination in education.[279] Division V deals with land,[280] goods and services[281] and

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[275] S 66: "For the purposes of this Act, a person discriminates on the ground of impairment- (a) if he or she treats another unfavourably because of the other's impairment, or a past or presumed impairment; (b) if he or she treats another unfavourably because the other does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of persons who do not have such an impairment complies, or is able to comply, with the requirement than of those persons who have such an impairment; and (ii) the requirement is not reasonable in the circumstances of the case; (c) if he or she treats another unfavourably on the basis of a characteristic that appertains generally to persons who have such an impairment, or on the basis of a presumed characteristic that is generally imputed to persons who have such an impairment; (d) if, in circumstances where it is unreasonable to do so- (i) he or she fails to provide special assistance or equipment required by a person in consequence of the person's impairment; or (ii) he or she treats another unfavourably because the other requires special assistance or equipment as a consequence of the other's impairment; (e) if he or she treats a person who is blind or deaf, or partially blind or deaf, unfavourably because the person possesses, or is accompanied by, a guide dog, or because of any related matter (whether or not it is his or her normal practice to treat unfavourably any person who possesses, or is accompanied by, a dog)".

[276] S 70: "(1) It is unlawful for a firm consisting of one or more members, or for one or more persons promoting the formation of a firm, to discriminate against a person on the ground of impairment- (a) in determining, or in the course of determining, who should be offered a position as partner in the firm; or (b) in the terms or conditions on which that person is offered a position as partner in the firm. (2) It is unlawful for a firm consisting of two or more partners to discriminate against a partner on the ground of impairment- (a) in the terms or conditions of membership of the firm; (b) by denying or limiting access to any benefit arising from membership of the firm; (c) by expelling the partner from the firm; or (d) by subjecting the partner to any other detriment".

[277] S 72: "(1) It is unlawful for an association to discriminate- (a) against an applicant for membership on the ground of impairment- (i) by refusing or failing to admit the applicant to membership, or to a particular class of membership, of the association; or (ii) in the terms on which the applicant is, or may be, admitted to membership, or to a particular class of membership; or (b) against a member of the association on the ground of impairment- (i) by refusing or failing to provide a particular service or benefit to that member; (ii) in the terms on which a particular service or benefit is provided to that member; or (iii) by expelling that member from the association or subjecting him or her to any other detriment".

[278] S 73(1): "It is unlawful for an authority or body empowered to confer an authorization or qualification that is needed for, or facilitates, the practice of a profession, or the carrying on or engaging in of a trade or occupation, to discriminate against a person on the ground of impairment- (a) by refusing or failing to confer or renew that authorization or qualification; (b) in the terms or conditions on which it confers the authorization or qualification; or (c) by withdrawing the authorization or qualification, or varying the terms or conditions upon which it is held".

[279] S 74(1) and (2): "(1) It is unlawful for an educational authority to discriminate against a person on the ground of impairment- (a) by refusing or failing to accept an application for admission as a student; or (b) in the terms or conditions on which it offers to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of impairment- (a) in the terms or conditions on which it provides the student with education or training; (b) by denying or limiting access to any benefit provided by the authority; (c) by expelling the student; or (d) by subjecting the student to any other detriment".

[280] S 75(1): "It is unlawful for a person to discriminate against another on the ground of impairment- (a) by refusing or failing to dispose of an interest in land to the other person; or (b) in the terms or conditions on which an interest in land is offered to the other person".

[281] S 76(1): "It is unlawful for a person who offers or provides- (a) goods; or (b) services to which this Act applies, (whether for payment or not) to discriminate against another on the ground of impairment- (c) by refusing or failing to supply the goods or perform the services; or (d) in the terms or conditions on which or the manner in which the goods are supplied or the services are performed".

accommodation.[282] Division VI targets superannuation and provident funds.[283] Most of the divisions contain area-specific exemptions (employment, qualifying bodies,[284] education,[285] land,[286] goods and services[287] and superannuation[288]) and division VII contains general exemptions

[282] S 77: "(1) It is unlawful for a person to discriminate against another on the ground of impairment- (a) in terms or conditions on which accommodation is offered; (b) by refusing an application for accommodation; or (c) by deferring such an application or according the applicant a lower order of precedence on any list of applicants for that accommodation. (2) It is unlawful for a person to discriminate against a person for whom accommodation has been provided on the ground of impairment- (a) in the terms or conditions on which accommodation is provided; (b) by denying or limiting access to any benefit connected with the accommodation; (c) by evicting the person; or (d) by subjecting the person to any detriment".

[283] S 78(1): "Subject to subsection (2), it is unlawful for a person who provides a superannuation scheme or provident fund to discriminate against a person on the ground of impairment- (a) by providing a scheme or fund that discriminates or, if the other person were to become a member of the scheme or fund, would discriminate, or require or authorize discrimination, against the other person; or (b) in the manner in which the scheme or fund is administered, except to the extent that- (c) the discrimination- (i) is based upon actuarial or statistical data from a source upon which it is reasonable to rely; and (ii) is reasonable having regard to the data and any other relevant factors; or (d) where no such actuarial or statistical data is available, the discrimination is reasonable having regard to any other relevant factors".

[284] S 73(2): "This section does not apply to discrimination against a person on the ground of impairment where, in consequence of that impairment, the person is not, or would not be, able to practise the profession, or carry on or engage in the trade or occupation, adequately or safely".

[285] S 74(3): "This section does not apply to discrimination on the ground of impairment in respect of admission to a school, college or institution established wholly or mainly for students who have a particular impairment".

[286] S 75(2): "This section does not apply to the disposal of an interest in land by way of, or pursuant to, a testamentary disposition or gift".

[287] S 76(2) and (3): "(2) Where the nature of a skill varies according to whether it is exercised in relation to persons who have a particular impairment or to those who do not have such an impairment, a person does not contravene subsection (1) by exercising the skill in relation to only those persons who have a particular impairment, or only those who do not have such an impairment, in accordance with the person's normal practice. (3) This section does not apply to discrimination against a person on the ground of impairment in relation to the performance of a service where, in consequence of the impairment, that person requires the service to be performed in a special manner and the person performing the service- (a) cannot reasonably be expected to perform the service in that manner; or (b) cannot reasonably be expected to perform the service in that manner except on more onerous terms than would otherwise apply".

[288] S 78(2): "Subsection (1) does not apply in relation to a superannuation scheme or provident fund provided for employees- (a) to which the employer makes contributions; and (b) under which a greater number of the members (not including members who are no longer employed by an employer who participates in the scheme or fund) reside in any one other State or Territory than reside in this State".

relating to salaries,[289] charities,[290] sport,[291] benefits for people with impairments,[292] physical inaccessibility[293] and insurance.[294]

Division I of Part VA contains a definition of discrimination based on age.[295] The focus of Division II is employment (applicants and employees, commission agents, contract workers and partnerships[296]). Division III targets associations[297] and qualifying bodies.[298] Division IV prohibits

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[289] S 79: "This Part does not render unlawful discriminatory rates of salary, wages or other remuneration payable to persons who have impairments".
[290] S 80: "This Part does not- (a) affect a provision in a charitable instrument for conferring benefits wholly or mainly upon persons who have a particular impairment; or (b) render unlawful any act done to give effect to such a provision".
[291] S 81: "This Part does not render unlawful the exclusion of a person who has an impairment from participation in a sporting activity- (a) if the activity requires physical or intellectual attributes that the person does not possess; or (b) if, in the case of a sporting activity conducted wholly or mainly for persons who have a particular impairment, the person's impairment is not of that kind".
[292] S 82: "This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons who have a particular impairment".
[293] S 84: "This Part does not render unlawful discrimination against a person on the ground of physical impairment where the discrimination arises out of the fact- (a) that premises, or a part of premises, is so constructed as to be inaccessible to that person; or (b) that the owner or occupier of premises fails to ensure that every part, or a particular part, of the premises is accessible to that person".
[294] S 85: "This Part does not render unlawful discrimination on the ground of impairment in the terms on which an annuity, life assurance, accident insurance or any other form of insurance is offered or may be obtained, where- (a) the discrimination- (i) is based upon actuarial or statistical data from a source on which it is reasonable to rely; and (ii) is reasonable having regard to that data and any other relevant factors; or (b) where no such actuarial or statistical data is available, the discrimination is reasonable having regard to any other relevant factors".
[295] S 85A: "For the purposes of this Act, a person discriminates on the ground of age- (a) if he or she treats another person unfavourably because of the other's age; (b) if he or she treats another person unfavourably because the other does not comply, or is not able to comply, with a particular requirement and- (i) the nature of the requirement is such that a substantially higher proportion of persons of a different age or age group complies, or is able to comply, with the requirement than of those of the other's age or age group; and (ii) the requirement is not reasonable in the circumstances of the case; or (c) if he or she treats another person unfavourably on the basis of a characteristic that appertains generally to persons of the other's age or age group, or on the basis of a presumed characteristic that is generally imputed to persons of that age or age group".
[296] S 85E: "(1) It is unlawful for a firm consisting of one or more members, or for one or more persons promoting the formation of a firm, to discriminate against a person on the ground of age- (a) in determining, or in the course of determining, who should be offered a position as partner in the firm; or (b) in the terms or conditions on which that person is offered a position as partner in the firm. (2) It is unlawful for a firm consisting of two or more partners to discriminate against a partner on the ground of age- (a) in the terms or conditions of membership of the firm; (b) by denying or limiting access to any benefit arising from membership of the firm; (c) by expelling the partner from the firm; or (d) by subjecting the partner to any other detriment".
[297] S 85G(1): "After the expiration of one year from the commencement of this Part, it will be unlawful for an association to discriminate- (a) against an applicant for membership on the ground of age- (i) by refusing or failing to admit the applicant to membership, or to a particular class of membership, of the association; or (ii) in the terms on which the applicant is, or may be, admitted to membership, or a particular class of membership; or (b) against a member of the association on the ground of age- (i) by refusing or failing to provide a particular service or benefit to that member; (ii) in the terms on which a particular service or benefit is provided to that member; or (iii) by expelling that member from the association or subjecting him or her to any other detriment".
[298] S 85H(1): "It is unlawful for an authority or body empowered to confer an authorization or qualification that is needed for, or facilitates, the practice of a profession, or the carrying on or engaging in of a trade or occupation, to discriminate

discrimination in education.[299] Division V prohibits discrimination in land,[300] goods and services[301] and accommodation.[302] Most of the divisions contain sector-specific exemptions (employment, associations,[303] qualifying bodies,[304] education,[305] goods and services[306] and accommodation,[307])

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against a person on the ground of age- (a) by refusing or failing to confer or renew that authorization or qualification; or (b) by withdrawing the authorization or qualification".

[299] S 85I(1) and (2): "(1) It is unlawful for an educational authority to discriminate against a person on the ground of age- (a) by refusing or failing to accept an application for admission as a student; or (b) in the terms or conditions on which it offers to admit the person as a student. (2) It is unlawful for an educational authority to discriminate against a student on the ground of age- (a) in the terms or conditions on which it provides the student with training or education; (b) by denying or limiting access to any benefit provided by the authority; (c) by expelling the student; or (d) by subjecting the student to any other detriment".

[300] S 85J: "It is unlawful for a person to discriminate against another on the ground of age- (a) by refusing or failing to dispose of an interest in land to the other person; or (b) in the terms or conditions on which an interest in land is offered to the other person".

[301] S 85K(1) and (2): "(1) It is unlawful for a person who offers or provides- (a) goods; or (b) services to which this Act applies, (whether for payment or not) to discriminate against another on the ground of age- (c) by refusing or failing to supply the goods or to perform the services; or (d) in the terms or conditions on which or the manner of which the goods are supplied or the services are performed. (2) It is unlawful for a person who offers or provides- (a) goods; or (b) services to which this Act applies, (whether for payment or not) to refuse or fail to supply the goods or to perform the services to another on the ground that the other person is accompanied by a child".

[302] S 85L(1)-(3): "(1) It is unlawful for a person to discriminate against another on the ground of age- (a) in terms or conditions on which accommodation is offered; (b) by refusing an application for accommodation; or (c) by deferring such an application or according the applicant a later order of precedence on any list of applicants for that accommodation. (2) It is unlawful for a person- (a) to refuse an application for accommodation; or (b) to defer such an application or accord the applicant a late order of precedence on any list of applicants for that accommodation, on the ground that the applicant intends to share that accommodation with a child. (3) It is unlawful for a person to discriminate against a person for whom accommodation has been provided on the ground of age- (a) in the terms or conditions on which accommodation is provided; (b) by denying or limiting access to any benefit connected with the accommodation; (c) by evicting the person; or (d) by subjecting the person to any detriment".

[303] S 85G(2)-(4): "(2) Subsection (1)(a) does not apply to discrimination on the ground of age where the association has, on a genuine and reasonable basis, established different classes of membership for persons of different ages, or age groups. (3) Subsection (1)(b)(i) and (ii) does not apply to discrimination on the ground of age where it is reasonable that the association discriminate in relation to the provision of a particular service or benefit to members of a particular age, or age group. (4) This section does not apply to an association established wholly or mainly for- (a) the promotion of the interests of persons of a particular age group; (b) the organization or provision of services for persons of a particular age group; or (c) the organization or provision of activities for persons of a particular age group".

[304] S 85H(2) and (3): "(2) This section does not apply to discrimination on the ground of age- (a) by or on account of the imposition of a reasonable and appropriate minimum age under which an authorization or qualification will not be conferred; or (b) in respect of the terms or conditions on which an authority or body confers or renews an authorization or qualification. (3) This section does not apply to discrimination against a person on the ground of age where, in consequence of his or her age, the person is not, or would not be, able to practise the profession, or carry on or engage in the trade or occupation, adequately or safely".

[305] S 85I(3): "This section does not apply to discrimination on the ground of age in respect of the admission of a person to a school, college or institution where the level of education or training sought by the person is provided only for students above a particular age".

[306] S 85K(3): "This section does not apply to discrimination on the ground of age in relation to- (a) the charging of a fee or fare; or (b) the terms or conditions on which- (i) a ticket is issued; or (ii) admission is allowed to any place, where those terms or conditions are imposed on a genuine and reasonable basis".

[307] S 85L(4) and (5): '(4) This section does not apply to discrimination on the ground of age in relation to the provision of accommodation by an organization that does not seek to secure a pecuniary profit for its members, where the accommodation is provided only for persons of a particular age group. (5) This section does not apply- (a) in relation to the provision of accommodation for recreational purposes where the use of that accommodation is limited, on a

and division VI contains general exemptions relating to legal capacity,[308] charities,[309] testamentary dispositions,[310] benefits to people of a particular age group,[311] sport[312] and insurance.[313]

The Act prohibits victimisation,[314] sexual harassment,[315] separating blind or deaf persons from their guide dog[316] and aiding unlawful acts.[317]

It is possible to apply to the Tribunal to be exempted from any of the Act's provisions.[318]

E.6 Victoria

The Victoria *Equal Opportunity Act*[319] prohibits discrimination based on age, breastfeeding,[320] gender identity,[321] impairment,[322] industrial activity,[323] lawful sexual activity,[324] marital status,[325]

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genuine and reasonable basis, to persons of a particular age group; (b) in relation to the provision of accommodation in the principal place of residence of the owner of the accommodation; or (c) in relation to the provision of accommodation in premises that adjoin premises where the owner of the accommodation or any person appointed to manage the accommodation resides if the provision of the accommodation would be subject to the Residential Tenancies Act, 1978".

[308] S 85M: "Nothing in this Part derogates from the operation of a law that
relates to the juristic capacity of children".

[309] S 85N: "This Part does not- (a) affect a provision in a charitable instrument for conferring benefits wholly or mainly on persons of a particular age, or age group; or (b) render unlawful any act done to give effect to such a provision".

[310] S 85O: "This Part does not apply to the disposal of an interest in land or goods, or the provision of services, by way of, or pursuant to, a testamentary disposition or gift".

[311] S 85P: "This Part does not render unlawful an act done for the purpose of carrying out a scheme or undertaking for the benefit of persons of a particular age or age group in order to meet a need that arises out of, or that is related to, the age or ages of those persons".

[312] S 85Q: "This Part does not render unlawful the exclusion of persons of particular age groups from participation in a competitive sporting activity".

[313] S 85R: "(1) This Part does not render unlawful discrimination on the ground of age- (a) in the terms on which an annuity or life insurance is offered or may be obtained; or (b) - (i) in the terms on which a person may become a member of a superannuation scheme or provident fund; or (ii) in the manner in which a superannuation scheme or provident fund may be administered. (2) This Part does not render unlawful discrimination on the ground of age in the terms on which accident insurance or any other form of insurance (other than life insurance) is offered or may be obtained where the discrimination- (a) is based on actuarial or statistical data from a source on which it is reasonable to rely; and (b) is reasonable having regard to the data".

[314] S 86.

[315] S 87.

[316] S 88.

[317] S 90.

[318] S 92.

[319] Act 42 of 1995.

[320] Breastfeeding includes the act of expressing milk.

[321] "Gender identity" is defined as "(a) the identification on a bona fide basis by a person of one sex as a member of the other sex (whether or not the person is recognised as such)-- (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification on a bona fide basis by a person of indeterminate sex as a member of a particular

parental status[326] or status as a carer,[327] physical features, political belief or activity,[328] pregnancy, race,[329] religious belief or activity,[330] sex, sexual orientation[331] and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

The Act defines "discrimination" as follows:

> 7. Meaning of discrimination
>
> (1) Discrimination means direct or indirect discrimination on the basis of an attribute.
>
> (2) Discrimination on the basis of an attribute includes discrimination on the basis--
>
> (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
>
> (b) of a characteristic that a person with that attribute generally has;
>
> (c) of a characteristic that is generally imputed to a person with that attribute;
>
> (d) that a person is presumed to have that attribute or to have had it at any time.
>
> 8. Direct discrimination
>
> (1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.

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sex (whether or not the person is recognised as such)-- (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex".

[322] "Impairment" is defined as "(a) total or partial loss of a bodily function; (b) the presence in the body of organisms that may cause disease; (c) total or partial loss of a part of the body; (d) malfunction of a part of the body, including-- (i) a mental or psychological disease or disorder; (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; (e) malformation or disfigurement of a part of the body".

[323] "Industrial activity" is defined as "(a) being or not being a member of, or joining, not joining or refusing to join, an industrial organisation; (b) participating in, not participating in or refusing to participate in a lawful activity organised or promoted by an industrial organisation".

[324] "Lawful sexual activity" is defined as "engaging in, not engaging in or refusing to engage in a lawful sexual activity".

[325] "Marital status" is defined as "a person's status of being-- (a) single; (b) married; (c) a domestic partner; (d) married but living separately and apart from his or her spouse; (e) divorced; (f) widowed".

[326] "Parental status" is defined as "the status of being a parent or not being a parent".

[327] "Carer" is defined as "a person on whom another person is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care and attention wholly or substantially on a commercial basis".

[328] "Political belief or activity" is defined as "(a) holding or not holding a lawful political belief or view; (b) engaging in, not engaging in or refusing to engage in a lawful political activity".

[329] "Race" includes "(a) colour; (b) descent or ancestry; (c) nationality or national origin; (d) ethnicity or ethnic origin; (e) if 2 or more distinct races are collectively referred to as a race-- (i) each of those distinct races; (ii) that collective race".

[330] "Religious belief or activity" is defined as "(a) holding or not holding a lawful religious belief or view; (b) engaging in, not engaging in or refusing to engage in a lawful religious activity".

[331] "Sexual orientation" is defined as "homosexuality (including lesbianism), bisexuality or heterosexuality".

(2) In determining whether a person directly discriminates it is irrelevant--

(a) whether or not that person is aware of the discrimination or considers the treatment less favourable;

(b) whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.

9. Indirect discrimination

(1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice--

(a) that someone with an attribute does not or cannot comply with; and

(b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with; and

(c) that is not reasonable.

(2) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including--

(a) the consequences of failing to comply with the requirement, condition or practice;

(b) the cost of alternative requirements, conditions or practices;

(c) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.

(3) In determining whether a person indirectly discriminates it is irrelevant whether or not that person is aware of the discrimination.

10. Motive is irrelevant to discrimination

In determining whether or not a person discriminates, the person's motive is irrelevant.

11. Discrimination by acting with others and by not acting

It is irrelevant whether discrimination occurs by a person--

(a) acting alone or in association with any other person;

(b) doing an act or omitting to do an act.

The Act prohibits discrimination in the following sectors: employment,[332] employment-related areas,[333] education,[334] the provision of goods and services and disposal of land,[335] accommodation,[336] clubs and club members,[337] sport,[338] and local government.[339]

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[332] Ss 13-28.
[333] Ss 30-36.
[334] Ss 37-41.
[335] Ss 42-48.
[336] Ss 49-58.

The Act contains a vast array of exceptions relating to the same sectors listed above. As to division 3 of the Act (education), the Act contains exceptions related to institutions for particular groups,[340] special services or facilities,[341] standards of dress and behaviour,[342] and age-based admission schemes and age quotas.[343] Division 4 (goods and services and disposal of land) includes exceptions related to insurance,[344] credit providers,[345] supervision of children,[346] special manner of providing a service,[347] and disposal by will or gift.[348] In division 5 (accommodation) the

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[337] Ss 59-63.
[338] Ss 64-66.
[339] Ss 67-68.
[340] S 38: "An educational authority that operates an educational institution or program wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular impairment may exclude-- (a) people who are not of the particular sex, race, religious belief, age or age group; or (b) people who do not have a general, or the particular, impairment-- from that institution or program".
[341] S 39: "An educational authority may discriminate against a person on the basis of impairment if-- (a) in order to participate or continue to participate in, or to derive or continue to derive substantial benefit from, the educational program of the authority-- (i) the person requires or would require special services or facilities; and (ii) it is not reasonable in the circumstances for those special services or facilities to be provided; or (b) the person could not participate or continue to participate in, or derive or continue to derive substantial benefit from, the educational program even after the provision of special services or facilities".
[342] S 40: "(1) An educational authority may set and enforce reasonable standards of dress, appearance and behaviour for students. (2) In relation to a school, without limiting the generality of what constitutes a reasonable standard of dress, appearance or behaviour, a standard must be taken to be reasonable if the educational authority administering the school has taken into account the views of the school community in setting the standard".
[343] S 41: "An educational authority may select students for an educational program on the basis of an admission scheme-- (a) that has a minimum qualifying age; or (b) that imposes quotas in relation to students of different ages or age groups".
[344] S 43: "(1) An insurer may discriminate against another person by refusing to provide an insurance policy to the other person, or in the terms on which an insurance policy is provided, if-- (a) the discrimination is permitted under the Sex Discrimination Act 1984 or the Disability Discrimination Act 1992 of the Commonwealth; or (b) the discrimination is based on-- (i) actuarial or statistical data on which it is reasonable for the insurer to rely; or (ii) if there is no such data, on other data on which it is reasonable to rely-- and is reasonable having regard to that data and any other relevant factors; or (c) if neither of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors. (2) In this section-- "insurance policy" includes an annuity, a life assurance policy, an accident insurance policy and an illness insurance policy; "insurer" means a person who is in the business of providing insurance policies".
[345] S 44: "(1) A credit provider may discriminate against an applicant for credit on the basis of age by refusing to provide credit, or on the terms on which credit is provided, if the criteria for refusal or the terms imposed-- (a) are based on-- (i) actuarial or statistical data on which it is reasonable for the credit provider to rely; or (ii) if there is no such data, on other data on which it is reasonable to rely; and (b) are reasonable having regard to that data and any other relevant factors. (2) In this section "credit provider" means a person who provides credit in the course of a business carried on by that person".
[346] S 45: "A person may require, as a term of providing goods or services to a child, that the child be accompanied or supervised by an adult if there is a reasonable risk that, if unaccompanied or unsupervised, the child may-- (a) cause a disruption; (b) endanger himself or herself or any other person".
[347] S 46: "A person may refuse to provide a service, or set reasonable terms for the provision of a service, to another person if the service would be required to be provided in a special manner because of the other person's impairment or physical features and-- (a) the person cannot reasonably provide the service in that manner; or (b) the person can only reasonably provide the service in that manner on more onerous terms than the person could reasonably provide the service to a person without that impairment or those physical features".

following exceptions may apply: accommodation unsuitable for children,[349] shared accommodation,[350] welfare measures,[351] accommodation for students,[352] and accommodation for commercial sexual services.[353] As to division 6 of the Act (clubs), the Act contains exceptions related to disadvantaged people or minority cultures,[354] particular age group-related clubs and benefits,[355] and separate access to benefits for men and women.[356] Division 7 (sport) contains an exception related to competitive sporting activities.[357] By necessity, section 68 of division 8 (local government) provides that municipal councillors may discriminate against another councillor in the performance of his or her public functions on the basis of political belief or activity.

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[348] S 48: "A person may discriminate against another person in the disposal of land by will or as a gift".
[349] S 53: "A person may refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child".
[350] S 54: "A person may discriminate in deciding who is to occupy residential accommodation-- (a) in which the person or a relative of the person lives and intends to continue to live; and (b) that is for no more than 6 people in addition to the people referred to in paragraph (a)".
[351] S 55: "A person may refuse to provide accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief if the other person is not of that sex, age, race or religious belief".
[352] S 56: "An educational authority that operates an educational institution wholly or mainly for students of a particular sex, race, religious belief, age or age group, or students with a general or particular impairment may provide accommodation wholly or mainly for-- (a) students of that sex, race, religious belief, age or age group; or (b) students with a general, or the particular, impairment".
[353] S 57: "A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis".
[354] S 61: "A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally-- (a) to prevent or reduce disadvantage suffered by people of that group; or (b) to preserve a minority culture".
[355] S 62: "(1) A club, or a member of the committee of management or other governing body of a club, may exclude a person from membership if-- (a) the club exists principally to provide benefits for people of a particular age group; and (b) the person is not in that age group. (2) A club, or a member of the committee of management or other governing body of a club, may restrict a benefit to members who are members of a particular age group, if it is reasonable to do so in the circumstances".
[356] S 63: "A club, or a member of the committee of management or other governing body of a club, may limit a member's access to a benefit on the basis of the member's sex if-- (a) it is not practicable for men and women to enjoy the benefit at the same time; and (b) either-- (i) access to the same or an equivalent benefit is provided for men and women separately; or (ii) men and women are each entitled to a reasonably equivalent opportunity to enjoy the benefit".
[357] S 66: "(1) A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant. (2) A person may restrict participation in a competitive sporting activity-- (a) to people who can effectively compete; (b) to people of a specified age or age group; (c) to people with a general or particular impairment. (3) Sub-section (1) does not apply to a sporting activity for children under the age of 12 years".

Part 4 of the Act contains general (ie, not sector-specific) exceptions from the prohibition of discrimination: things done with statutory authority,[358] things done to comply with orders of courts and tribunals,[359] pensions,[360] superannuation (exististing[361] and new[362] fund conditions), charities,[363] religious bodies,[364] religious schools,[365] religious beliefs or principles,[366] private

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[358] S 69: "(1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by, a provision of-- (a) an Act, other than this Act; (b) an enactment, other than an enactment under this Act. (2) For the purpose of sub-section (1), it is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination. (3) Section 47(3) and 58(1) prevail over this section to the extent of any inconsistency between them".

[359] S 70: "A person may discriminate if the discrimination is necessary to comply with-- (a) an order of the Tribunal; (b) an order of any other tribunal or any court".

[360] S 71: "Nothing in Part 3 affects discriminatory provisions relating to pensions".

[361] S 72: "(1) A person may discriminate by retaining an existing superannuation fund condition in relation to a person who-- (a) is a member of that fund at the commencement of this section; or (b) becomes a member of that fund within a period of 12 months after the commencement of this section. (2) In this section "existing superannuation fund condition" means, in relation to a superannuation fund, a condition of the fund, or of membership of the fund, that is in operation at the commencement of this section".

[362] S 73: "(1) A person may discriminate against another person on the basis of age by imposing conditions in relation to a superannuation fund if-- (a) the discrimination occurs in the application of prescribed standards under the Superannuation Entities (Taxation) Act 1987 or Superannuation Industry (Supervision) Act 1993 of the Commonwealth; or (b) the discrimination is required to comply with, obtain benefits, or avoid penalties under any other Commonwealth Act; or (c) the discrimination is based on-- (i) actuarial or statistical data on which it is reasonable to rely; or (ii) if there is no such data, on other data on which it is reasonable to rely-- and is reasonable having regard to that data and any other relevant factors; or (d) if none of the above paragraphs applies, the discrimination is reasonable having regard to any relevant factors. (2) A person may discriminate against another person-- (a) on the basis of sex or marital status, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Sex Discrimination Act 1984 of the Commonwealth; (b) on the basis of impairment, by imposing conditions in relation to a superannuation fund if the discrimination is permitted under the Disability Discrimination Act 1992 of the Commonwealth".

[363] S 74: "(1) Nothing in Part 3 (including sections 47 and 58)-- (a) affects a provision of a deed, will or other instrument that confers charitable benefits, or enables charitable benefits to be conferred; (b) prohibits anything that is done in order to give effect to such a provision. (2) This section applies to an instrument made before, on or after the commencement of this section. (3) In this section "charitable benefits" means benefits exclusively charitable according to Victorian law".

[364] S 75: "(1) Nothing in Part 3 applies to-- (a) the ordination or appointment of priests, ministers of religion or members of a religious order; (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice. (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that-- (a) conforms with the doctrines of the religion; or (b) is necessary to avoid injury to the religious sensitivities of people of the religion. (3) Without limiting the generality of its application, sub-section (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes".

[365] S 76: "(1) This section applies to a person or body (other than a body established for religious purposes) that-- (a) establishes an educational institution to be conducted in accordance with religious beliefs or principles; or (b) directs, controls or administers an educational institution conducted in accordance with religious beliefs or principles. (2) Nothing in Part 3 applies to anything done by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution (including the employment of people in the institution) that is in accordance with the relevant religious beliefs or principles".

[366] S 77: "Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles".

clubs,[367] legal incapacity and age of majority,[368] protection of health, safety and property,[369] age benefits and concessions,[370] and welfare measures and special needs.[371]

The Victorian Civil and Administrative Tribunal may, on application of a person whose interests, in the opinion of the Tribunal, are or may be affected by the exemption, or on the Tribunal's own initiative, grant, renew or revoke an exemption from any of the provisions in the Act.[372]

The Act also prohibits sexual harassment,[373] victimisation,[374] authorising or assisting discrimination[375] and discriminatory requests for information,[376] and establishes vicarious liability for employers and principals.[377]

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[367] S 78: "(1) Nothing in Part 3 applies to the exclusion of people from a private club or from any part of the activities or premises of a private club. (2) In this section, "private club" means a social, recreational, sporting or community service club or a community service organisation, other than one that-- (a) occupies any Crown land; or (b) directly or indirectly receives any financial assistance from the State or a municipal council".

[368] S 79: "(1) Nothing in this Act is intended to affect the law in relation to the legal capacity or incapacity of any person or the age of majority. (2) A person may discriminate against another person who is subject to a legal incapacity that is relevant to the transaction or activity in which they are involved".

[369] S 80: "(1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary-- (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally; (b) to protect the property of any person (including the person discriminated against) or any public property. (2) A person may discriminate against another person on the basis of pregnancy if the discrimination is reasonably necessary to protect the health or safety of any person (including the person discriminated against)".

[370] S 81: "A person may provide benefits, including concessions, to another person based on age".

[371] S 82: "(1) Nothing in Part 3 applies to anything done in relation to the provision to people with a particular attribute of special services, benefits or facilities that are designed-- (a) to meet the special needs of those people; or (b) to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare. (2) Without limiting the generality of sub-section (1)-- (a) a person may grant a woman any right, privilege or benefit in relation to pregnancy or childbirth; (b) a person may provide, or restrict the offering of, holiday tours to people of a particular age or age group".

[372] Ss 83-84.

[373] Ss 85-95.

[374] Ss 96-97.

[375] Ss 98-99.

[376] Ss 100-101.

[377] Ss 102-103.

Annexure F: Profile of early equality court cases – Telephone survey (60 pilot equality courts); newspaper reports

F.1 The 60 pilot courts as at September 2005[1]

F.1.1 Limpopo

Mapulaneng

TEL: (013) 799 0211

REF: Mr Mthethwa

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[1] 47 pilot courts are listed on the Department of Justice's website at http://www.doj.gov.za/2004dojsite/eqact/eqc_eqc%20structures.htm (accessed 2006-08-18). 60 pilot courts are listed in a booklet entitled "Equality for All" published under the auspices of the Department of Justice and Constitutional Development. I arranged the sequence of courts in this Annexure as they appear in the booklet. The SAHRC conducted a survey of equality courts in 2005 and 2006 and where comparable figures are available I refer to these in footnotes below. (This survey was distributed at the "Equality Indaba Two Workshop" held at the SAHRC's premises on 23 November 2006 and is in my possession. Hereafter I refer to this source as the "SAHRC survey"). In some cases (eg Pretoria and Witbank) there are huge discrepancies in my figures and those of the SAHRC, which tends to suggest that record keeping at at least some equality courts is not functioning as it should be. The relevant official at the Department of Justice admitted as much to me in an email dated 20 July 2004: "I must mention that it is extremely difficult to glean information from magistrates' courts. The Department is required to build capacity substantially by training dedicated, specialist Equality Courts Clerks who will enable the Department to fully comply with the requirements of the Act (see s 25(3)(c) of the Act". A "progress report on the implementation of PEPUDA" (hand delivered to me on 2007-07-07), drafted by the Department of Justice and Constitutional Development, notes at para 3.7 that not all equality courts submitted statistics, that some courts submitted statistics to the regional offices and that these statistics were not forwarded to the head office and that the sub-directorate responsible for the equality courts does not have the capacity to manage the collection of statistics or to follow up on courts that do not submit data. As at 27 July 2004, the Department of Justice reported via email to the author that 75 cases had been brought to the equality courts since 16 May 2003, of which 7 had been finalised. Annexure F ("statistics") of the progress report referred to above contains the following information. For the period January 2006 to January 2007, the following number of cases had been brought to equality courts in the following provinces: Gauteng – 35; Mpumalanga – 54; KwaZulu-Natal – 26; Western Cape – 15; Eastern Cape – 3. The Northern Cape, North West, Free State and Limpopo submitted "nil reports". In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act. Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and Status of Women and Portfolio Committee on Justice and Constitutional Development; 16 October 2006 to 19 October 2006. http://www.pmg.org.za/viewminute.php?id=8330; http://www.pmg.org.za/viewminute.php?id=8349; http://www.pmg.org.za/viewminute.php?id=8373 and http://www.pmg.org.za/viewminute.php?id=8378 (accessed 2007-05-15). During these hearings, the Chief Director: Policy, Research, Coordination and Monitoring reported that at that stage, less than 700 complaints had been lodged with equality courts since the inception of the Act. Gauteng had recorded 146 complaints and KwaZulu-Natal 95. Apparently no complaints had been received in the Free State. 253 of the reported cases related to racism or hate speech.

No cases reported. Reason(s) advanced by clerk: Lack of awareness of the Act; the area is remote and vulnerable; therefore, people don't know they can approach the court for relief; people think that you can't approach the courts for something "as simple as" discrimination or hate speech; discrimination is prevalent in the area because there are different ethnic groups, including foreigners.

Mokerong

TEL: (015) 483 0302

REF: Ms Ledwaba

The clerk of the equality court provided the following information: Nine complaints had been received by June 2005. One case related to disability discrimination (dismissed), one case was referred to the family court (the complainant wished to have access to his child born out of wedlock), four cases related to hate speech and three cases related to harassment. Of the four hate speech cases, one case settled, one was dismissed, one judgment was granted (R10 000) and in the last case the respondent had not yet been located. The harassment cases were either dismissed or referred to alternative fora.

Bela-Bela (Warmbaths)

TEL: (014) 736 2231

REF: Mrs Smith

No cases reported. Reason(s) advanced by clerk: Lack of awareness of the courts.

Ritavi

TEL: (015) 303 1721

REF: Mr Mthetho / Ms Malesa

No cases reported. (Complaints received but "not followed up".[2]) Reason(s) advanced by clerk: Residents don't think hate speech spoken by their superiors qualifies as an offence; lack of information, confusion between domestic violence and the Act.

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[2] The SAHRC survey indicates that three complaints had been received by this court but that all three complaints had been withdrawn.

Makhado (Louis Trichardt)

TEL: (015) 516 0181

REF: Mr Mhlanga

One case reported; no information forthcoming.[3] Reason(s) advanced by clerk: Lack of awareness of the courts.

Polokwane (Pietersburg)

TEL: (015) 291 2804

REF: Mr Mangena

Case No 1

Profile of complainant:	Black men and women.
Profile of respondent:	Local government.
Prohibited ground:	Race.
Brief description of merits:	The complainants alleged unfair discrimination based on race because they do not have electricity.[4]

F.1.2 Gauteng

Pretoria

TEL: (012) 319 4001

REF: Ms Ballakistan

Eight cases; no additional information forthcoming.[5]

Wonderboom

TEL: (012) 521 1000

REF: Ms Geyer

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[3] The SAHRC survey seems to indicate that two discrimination complaints had been received, one based on gender and one based on sexual orientation.

[4] The SAHRC survey indicates that the Polokwane equality court had not received any complaints.

[5] The SAHRC survey indicates that the "Pretoria Central" equality court had received 77 cases of which 45 had been referred to alternative forums.

No cases reported. Reason(s) advanced by clerk: The residents are mostly white, therefore they are "more civilised (sic)". There were advertisements and media coverage. Residents respect each other and maybe they are afraid of the consequences of the Act.

Johannesburg

TEL: (011) 491 5000

REF: Mr Mandelstam

No information forthcoming.[6]

Kempton Park

TEL: (011) 975 0313

REF: Ms Madunise

Two complaints received based on sexual harassment and discrimination (no additional information forthcoming).[7]

Germiston

TEL: (011) 873 0500

REF: Ms Ntuli

No information forthcoming.[8]

Randburg

TEL: (011) 789 2600

REF: Mr Rekotze

No cases reported.[9]

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[6] The SAHRC survey indicates that the Johannesburg equality court had received 54 complaints. When my survey was conducted the relevant member of staff refused to provide me with any information and argued that any such request for information should be channeled via the Magistrate Commission.

[7] The SAHRC survey indicates that the Kempton Park equality court had received six cases of which three had been referred to an alternative forum.

[8] The SAHRC survey indicates that the Germiston equality court had received three cases of which one had been referred to an alternative forum.

[9] The SAHRC survey does not list the Randburg court as an equality court.

F.1.3 Mpumalanga

Nsikazi

TEL: (013) 796 0261

REF: Mr Nkosi

No cases reported.[10] Reason(s) advanced by clerk: Lack of awareness of the courts and lack of education.

Eerstehoek

TEL: (017) 883 0090

REF: Mr Thabethe

No cases reported.[11] Reason(s) advanced by clerk: Lack of awareness; lack of education.

Evander

TEL: (017) 632 2204

REF: Mr Scholtz

No cases reported.[12] Reason(s) advanced by clerk: Lack of awareness; discrimination does not occur on wide scale or if it does take place it is of minor nature and therefore unnecessary to bring the complaint to court.

Middelburg

TEL: (013) 282 5345

REF: Ms Rossouw

Two complaints received; one relating to hate speech (no information provided) and one relating to discrimination.[13]

Case No 1

Profile of complainant: Black male.

Profile of respondent: White male shop-owner.

[10] The SAHRC survey does not list this court as an equality court.
[11] The SAHRC survey does not list this court as an equality court.
[12] The SAHRC survey indicates that one complaint had been received that was later withdrawn.
[13] The SAHRC survey indicates that eight complaints had been received of which seven had been withdrawn.

Prohibited ground:	Race.
Brief description of merits:	The complainant wanted to buy various items, but was denied entry because the shops lights were off (apparently because of a power failure). The complainant subsequently withdrew the complaint.

Barberton

TEL: (013) 712 2104

REF: Ms Masuko

Two complaints have been received, one relating to hate speech based on HIV/AIDS and the other relating to discrimination but neither complainants pursued these matters.[14]

Reason(s) advanced by clerk: Lack of education.

Nelspruit

TEL: (013) 753 2574

REF: Ms Nkuna

The clerk of the equality court provided the following information: Six cases had been brought relating to discrimination, six relating to harassment and five relating to hate speech.[15] Of the discrimination cases, three seemed to be related to hate speech as the complaints revolved around the applicants "having been called names" by their employer. The fourth and fifth discrimination cases revolved around the same incident. The applicants were the chairperson and maintenance manager respectively of a body corporate. It seems as if they asked a resident to turn down the volume on his radio which he was apparently playing too loudly and in contravention of the body corporate rules. It seems as if he ignored the request. In the sixth matter the applicant handed her ID document to the respondent so that he could make a photocopy thereof. When he returned her ID document her own photo had been replaced by that of a monkey.

[14] The SAHRC survey indicates that 12 complaints had been received of which two had been withdrawn.
[15] The SAHRC survey indicates that the Nelspruit equality court had not received any complaints.

Witbank

TEL: (013) 656 2221

REF: Ms Fourie

The clerk of the equality court provided the following information: Ten cases had been received of which four related to discrimination, five to hate speech and one to harassment. Of the prohibited grounds implicated, five cases involved race, two cases involved culture (witchcraft), and one involved gender (the harassment case). The clerk did not provide any information relating to the merits of the cases. She volunteered that "few cases have real merits; three cases had been withdrawn by the complainants". Three decisions had been finalised, in one case R2500 was awarded as a "fine" and two decisions were referred to the CCMA.[16]

Mdutjana

TEL: (013) 973 1228

REF: Mr Gama

No cases reported.[17] Reason(s) advanced by clerk: The area is semi-rural and the residents are not aware of such processes.

F.1.4 North West

Potchefstroom

TEL: (018) 293 0701

REF: Ms Masedi

Seven complaints have been received; three relating to harassment (no information provided), one relating to hate speech (the use of the word "kaffir") and three cases relating to discrimination:[18]

Case No 1

Profile of complainant: Black male.

Profile of respondent: White female.

[16] The SAHRC survey indicates that 120 complaints had been received of which eight had been withdrawn and of which 16 had been referred to alternative forums.

[17] The SAHRC survey does not list this court as an equality court.

[18] The SAHRC survey indicates that 37 complaints had been received of which 18 had been withdrawn.

Prohibited ground:	Race.
Brief description of merits:	The complainant wanted to register his daughter at a school for girls. He was "treated badly" by the respondent. The situation deteriorated and the police became involved.

Case No 2

Profile of complainant:	Black male.
Profile of respondent:	White male.
Prohibited ground:	Race.
Brief description of merits:	The complainant wanted to enter an entertainment club, but was denied access.

Case No 3

Profile of complainant:	Male (race not stated).
Profile of respondent:	Male (race not stated).
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant was recruited by an employment agency. On his first day of work the respondent dismissed him because he didn't want the "complainants' kind" at his business.

Bafokeng

TEL: (014) 565 4206

REF: Ms Mokojoa

No information forthcoming.[19]

Vryburg

TEL: (053) 927 3841

REF: Mr Noge

Two complaints had been received, one relating to hate speech and the other to discrimination.[20]

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[19] The SAHRC survey indicates that three cases had been lodged in 2006. The survey notes that the clerk had a new register for 2006 and that no records existed for 2004 and 2005.

[20] The SAHRC survey indicates that no complaints had been received.

Case No 1

Profile of complainant:	Black female.
Profile of respondent:	White male.
Prohibited ground:	Race ("racism").
Brief description of merits:	The respondent called the complainant "kaffir". The parties settled and the matter was withdrawn.

F.1.5 Northern Cape

Fraserburg

TEL: (023) 741 1008

REF: Ms Smith

No cases reported. Reason(s) advanced by clerk: No discrimination, or harassment, or hate speech occurs in the area.

Springbok

TEL: (027) 712 1215 (number does not exist).[21]

Kuruman

TEL: (053) 712 1081

REF: Ms Koekemoer

No cases reported. Reason(s) advanced by clerk: Lack of awareness; "posters all around the court".

De Aar

TEL: (053) 631 2184

REF: Mr Makandula

One complaint was laid:[22]

[21] The SAHRC survey does not list this court as an equality court.
[22] The SAHRC survey indicates that two complaints had been lodged.

Case No 1

Profile of complainant:	African female.
Profile of respondent:	Coloured female (counterclaimed).
Prohibited ground:	Not stated (presumably race).
Brief description of merits:	They parties had accused each other of name calling. The matter was subsequently withdrawn.

Kimberley

TEL: (053) 832 2201

REF: Ms Taljaard

Two pending cases in which (a) payment of damages and (b) unconditional apology were asked for. No additional information provided.[23]

Upington

TEL: (054) 331 1007 (Number does not exist).[24]

F.1.6 Western Cape

Kuils River

TEL: (021) 903 1161

REF: Ms Barker

No information forthcoming.[25]

Worcester

TEL: (023) 342 2325

REF: Ms Pace

Two complaints were received; one relating to housing discrimination and the other with sexual harassment. Both matters were referred to alternative forums.[26]

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[23] The SAHRC survey indicates that four cases had been withdrawn but does not indicate the number of lodged complaints.
[24] The SAHRC survey indicates that 17 complaints had been received of which four had been withdrawn.
[25] The SAHRC survey does not list this court as an equality court.
[26] The SAHRC survey indicates that no complaints had been received.

George

TEL: (044) 802 5800

REF: Ms Mangengelele

Case No 1

Profile of complainant:	Coloured male hawker.
Profile of respondent:	Local government.
Prohibited ground:	Not stated.
Brief description of merits:	The complainant alleged that the police official who arrested him had discriminated against him because a female who had also sold goods without a permit was not arrested. The court dismissed the claim.

Atlantis

TEL: (021) 572 1003

REF: Ms Phillips

Case No 1 (Mkhize / Ferreira and others; Case No 01/03)[27]

Profile of complainant:	Black female.
Profile of respondent:	Local government.
Prohibited ground:	Race.
Brief description of merits:	Racially motivated assault by respondents on complainant.

Case No 2 (Jacobs / Radio Atlantis and Van den Berg)

Profile of complainant:	Coloured male.
Profile of respondent:	Radio station; station manager.
Prohibited ground:	Religion, culture and belief.
Brief description of merits:	The complainant's affidavit was not particularly clear. It seems as if he wished to have a complaint against his employer publicised

[27] See *Mkhize / Ferreira; Shaw; Edgemead High School* under F.2.2 below.

via an interview on Radio Atlantis, but that the station manager refused. The matter was referred to the Broadcasting Complaints Commission of South Africa.

F.1.7 Eastern Cape

Port Elizabeth

TEL: (041) 394 4582

No information forthcoming.[28]

Somerset East

TEL: (042) 243 1107

REF: Mr Van Rooyen

No cases reported.[29]

Zwelitsha

TEL: (040) 654 2255

REF: Mr Veliso

No cases reported; no trained officials available.

Aliwal North

TEL: (051) 633 2224 (Number does not exist).[30]

Umzimkhulu

TEL: (039) 259 0309

REF: Mr Mhlongo

No information forthcoming.[31]

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[28] The SAHRC survey does not list this court as an equality court.
[29] The SAHRC survey does not list this court as an equality court.
[30] The SAHRC survey does not list this court as an equality court.
[31] The SAHRC survey does not list this court as an equality court.

Elliotdale

TEL: (045) 931 1013

REF: Ms Ngwuenye

No cases reported.[32]

Ngqeleni

TEL: (047) 568 0002

REF: Ms Mapoloba

Case No 1

Profile of complainant:	Black female.
Profile of respondent:	Black female.
Prohibited ground:	Not stated.
Brief description of merits:	The respondent (the complainant's stepmother) allegedly refused to associate with the complainant because of "her status".

F.1.8 Free State

Bethlehem

TEL: (058) 303 5386

REF: Ms Knobel

One complaint laid; referred to an alternative forum.[33]

Odendaalsrus

TEL: (057) 354 1294

REF: Mr Huisen

No cases reported despite "vigorous publication and awareness campaigns".[34]

[32] The SAHRC survey does not list this court as an equality court.
[33] The SAHRC survey indicates that no complaints had been laid.
[34] The SAHRC survey does not list this court as an equality court.

Kroonstad

TEL: (056) 212 4161

REF: Mr Makhongoane

No cases reported. Reason(s) advanced by clerk: Lack of awareness.

Jagersfontein

TEL: (051) 724 0002

No information forthcoming.[35]

Bloemfontein

TEL: (051) 506 1389

REF: Mr Khaile

Three complaints were received before the commencement date of the Act (ie 16 June 2003). One case was withdrawn and the other two complainants did not come back.[36]

Reason(s) advanced by clerk: Lack of awareness of the courts.

Botshabelo

TEL: (051) 534 1078

REF: Mr Schmidt

No cases reported.[37] Reason(s) advanced by clerk: Lack of awareness; language barriers; illiteracy.

Edenburg

TEL: (051) 743 1102

REF: Ms Patterton

One complaint was received relating to discrimination. The matter was withdrawn "because it dealt with crimen iniuria".

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[35] The SAHRC survey does not list this court as an equality court.
[36] The SAHRC survey indicates that the Bloemfontein equality court had received 17 complaints.
[37] The SAHRC survey does not list this court as an equality court.

Phuthaditjaba

TEL: (058) 713 0071

REF: Mr Morake

No cases reported. Reason(s) advanced by clerk: The equality court had not been launched yet; trained officials not available.

Ladybrand

TEL: (051) 924 3210

REF: Ms Bezuidenhout

No cases reported.

Thaba Nchu

TEL: (051) 873 2242

REF: Ms Seekoei

One complaint was received but because the clerk had not yet received training, the complainant was asked to return at a latter date. The complainant did not return.

Rouxville

TEL: (051) 663 0003

REF: Ms De Roubaix

No cases reported. Reason(s) advanced by clerk: Insufficient staff; staff not trained.

Harrismith

TEL: (058) 623 0627

REF: Mr Mahlato

No cases reported. Reason(s) advanced by clerk: Lack of awareness of the courts.

Ficksburg

TEL: (051) 933 2201

REF: Ms Mgudlwa

No cases reported. Reason(s) advanced by clerk: Lack of awareness and lack of information.

F.1.9 KwaZulu Natal

Hlanganani

TEL: (039) 832 0016

REF: Ms Mnguni

No cases reported. Reason(s) advanced by clerk: Lack of awareness; pamphlets only available in English.

Newcastle

TEL: (034) 312 1166

REF: Mr Van Staden

No cases reported. Reason(s) advanced by clerk: Equality court had not yet been established.

Pietermaritzburg

TEL: (033) 345 8211

REF: Mr Ngobo

Case No 1[38]

Profile of complainant:	Black male court interpreter.
Profile of respondent:	Three females (two white; one Indian).
Prohibited ground:	Race.
Brief description of merits:	The respondents had allegedly thrown away the jug, from which the complainant had drunk.[39]

Ngutu

TEL: (034) 271 0045

REF: Mr Madonsela

No cases reported. Reason(s) advanced by clerk: Lack of awareness; no information campaigns being planned.

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[38] Also see *Malinga / Chetty, Goosen and Du Toit* under F.2.1 below.

[39] The SAHRC survey indicates that the Pietermaritzburg equality court had received five cases of which one complaint had been withdrawn.

Ladysmith

TEL: (036) 637 6771

REF: Ms Deburam

Case No 1

Profile of complainant:	Coloured male.
Profile of respondent:	Private Security Industrial Regulations Authority.
Prohibited ground:	Race.
Brief description of merits:	The complainant had applied for a position after the respondent had advertised a vacancy in the company, but was refused. The matter was referred to an alternative forum (presumably the Labour Court).[40]

Durban

TEL: (031) 302 4111

REF: Mr Ntombela

The equality court presiding officer emailed four of his typed judgments to me, all of which related to hate speech.

Case No 1 (Khoza / Saeed & Essay; case no 07/05)

Profile of complainant:	Black male.
Profile of respondent:	Indian male; Indian female.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that the second respondent called him a "pig" and a "kaffir" while he alleged that the first respondent telephoned him and asked him whether he still denied that he was a "kaffir". The court dismissed the complaint against the first

[40] The SAHRC survey indicates that no complaints had been lodged.

respondent and held that the complaint against the second respondent was proved. The court awarded R3000 in damages.

Case No 2 (Mdladla / Smith; case no 40/05)

Profile of complainant:	Black female.
Profile of respondent:	White male.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that the respondent had come to her to complain about the noise coming from her home and said "Fikile, you are a kaffir bitch. You must go and stay in Umlazi with the other kaffirs like you". The respondent's version was that he had said "lower your fucking pitch". The court held in favour of the complainant. It took into account that the respondent had been found guilty in criminal court relating to the same incident and was sentenced to "an extremely heavy fine". (The amount was not stated). The court therefore ordered the respondent to make a written apology to the complainant.

Case No 3 (Gumede / Mkhwanazi; case no 58/05)

Profile of complainant:	Black male.
Profile of respondent:	Black male.
Prohibited ground:	(Perceived) sexual orientation.
Brief description of merits:	The complainant alleged that the respondent said that the complainant was a homosexual. The court held that it was not proven that this was said of the complainant and dismissed the case.

Case No 4 (Magubane / Smith, case no 01/06)

Profile of complainant:	Black female.
Profile of respondent:	White male.
Prohibited ground:	Race.

Brief description of merits: The complainant alleged that the respondent told her "kaffir, what are you looking at". The court found in favour of the complainant and ordered the respondent to make a written apology to the complainant. The court seemed to take the respondent's "personal and financial position" into account in deciding not to award damages to the complainant.

Because of the number of complaints lodged with this equality court (approximately 150 cases for the period July 2004 to March 2006), perhaps understandably the clerk of the court could not provide me with detailed information relating to the nature of the merits of each of the cases.[41] He emailed a table of cases to me containing the following headings: "nature of complaint and relief sought", "race, sex and age of respondent", "duration of the case" and "nature of the order in terms of section 21(2) of the Act" for the period July 2004 to March 2006. The following information could be extracted from this table of cases:

Approximately 150 cases have been lodged with this court for the period July 2004 to March 2006. 99 of the cases related to hate speech, 43 to harassment and only 9 to discrimination. 64 of the cases were pending by March 2006. Of the finalised cases (about 81), 29 were dismissed, 13 were withdrawn, six were referred to an alternative forum, five were settled, and one case was referred to the South African Police Service. Judgment was granted in favour of the complainant in 27 of the cases (a "success rate" of 33% for complainants; ie in about a third of the cases that were pursued judgment was granted in favour of the complainant). 52% of the complaints were either dismissed or withdrawn. Of the nine discrimination complaints, one case was withdrawn, one complaint was dismissed, one case was referred to an alternative forum, an interim order was granted in one case and five complaints were pending by March 2006. In 23 of the 99 hate speech complaints (almost a quarter of the complaints), the complainants merely wished for the court to order that the respondent apologise to the complainant.

Nongoma
TEL: (035) 831 0302

[41] The SAHRC survey indicates that no information was available for the Durban equality court.

REF: Mr Gumede

No cases reported although the Act "was successfully publicised".

F.2 Newspaper reports

F.2.1 Discrimination

Bhola / University of KwaZulu-Natal[42]

Profile of complainant:	Indian female.
Profile of respondent:	University.
Prohibited ground:	Not stated (presumably culture).
Brief description of merits:	The complainant alleged that the respondent refused to excuse her from a year-end examination so that she could attend a family ceremony to unveil her mother's tombstone and also refused to allow her to write a make-up examination early in the new year.

Black / Broederstroom Vakansieoord[43]

Profile of complainant:	Family, friends and black friends of first complainant's children.
Profile of respondent:	Holiday resort.
Prohibited ground:	Race.
Brief description of merits:	The respondents were confronted and told to "get out" by the owners of the resort. The SAHRC joined the proceedings and asked the court to order that the resort adopt a non-discriminatory policy, to apologise to Black or have its license revoked and to pay R20 000 to a charity of Black's choice.

Black employees / Durban company[44]

Profile of complainants:	221 black employees.
Profile of respondent:	Large Durban-based company (further detail not provided).

[42] *Legalbrief Today* 7 July 2006.
[43] http://www.sahrc.org.za/sahrc_cms/publish/printer_138.shtml (accessed 2005-08-31); *Sunday Times* (2005-03-13) 6.
[44] *Daily News* (2004-03-15) 5.

Prohibited ground: Race.

Brief description of merits: The complainants alleged that they had been forced into a new pension scheme while workers of other races were given the option to remain with the existing fund.

Bosch / Minister of Safety and Security and Minister of Public Works[45]

Profile of complainant: White male.

Profile of respondent: State.

Prohibited ground: Disability.

Brief description of merits: The complainant asked that the Kabega Park police station be fitted with a lift, that no building under the auspices of public works be built or leased without disability access to all storeys, and all existing buildings owned or leased by public works be renovated within five years to be fully accessible to disabled people.

Charles / Kopanong hospital; Gauteng department of health[46]

Profile of complainant: Theatre nurse.

Profile of respondent: Hospital.

Prohibited ground: Religious belief.

Brief description of merits: The complainant argued that she was constructively dismissed when she refused to further assist in performing abortions. (The matter was referred to the Labour Court after argument).

Disabled man / Block of flats in Smith Street, Durban[47]

Profile of complainant: Disabled male (further detail not provided).

Profile of respondent: Security guards; supervisor (further detail not provided).

Prohibited ground: Disability.

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[45] *Weekend Post* (2005-12-03) 2.
[46] *Beeld* (2005-08-17) 5; *Rapport (Gauteng-Nuus)* (2004-11-07) 3; *Beeld* (2004-12-08) 9; *Sowetan* (2005-03-17) 9; http://www.legalbrief.co.za/article.php?story=20070711153631678 (accessed 2007-07-16).
[47] *Daily News* (2004-03-15) 5.

Brief description of merits: For years the security guards at the block of flats where the complainant lived helped him to open the security gate but after a verbal altercation the supervisor instructed the guards not to help him anymore. The complainant was left stranded. The court ordered the supervisor to instruct the guards to assist the complainant.

Du Preez, Goosen, Herselman & Pretorius / Department of Justice[48]

Profile of complainant: Four white magistrates; three males and one female.

Profile of respondent: State.

Prohibited ground: Race.

Brief description of merits: The complainants challenged the appointment of two female black magistrates as regional magistrates. The complainants applied for the same positions but were not appointed. The High Court held that unfair discrimination had been established.

Gore / Nationwide Airlines[49]

Profile of complainant: Male; Member of Parliament.

Profile of respondent: Airline.

Prohibited ground: Disability.

Brief description of merits: The complainant alleged that he had to pay an additional R658 for his flight from Cape Town to Johannesburg because he had to be assisted on boarding and leaving the plane.

Gweba / Weideman[50]

Profile of complainant: Black female journalist.

Profile of respondent: White female editor.

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48 http://www.epherald.co.za/herald/2005/04/18/news/n07_18042005.htm (accessed 2005-04-21); http://www.epherald.co.za/herald/news/n03_19042006.htm (accessed 2006-04-24); http://www.epherald.co.za/herald/news/n03_13062006.htm (accessed 2006-06-19); *The Herald* (2005-6-21) 6; *Business Day* (2005-06-11) 1; *The Star* (2006-04-20) 5; *The Herald* (2005-04-18) 5.

49 *Beeld* (2004-09-23) 11; *Legalbrief Today* 21 October 2004; *Beeld* (2006-05-18) 21.

50 *Die Burger* (2004-03-20) 4; *Cape Argus* (2005-03-05) 3; *Cape Argus* (2004-03-22) 2.

Prohibited ground: Race.

Brief description of merits: The complainant alleged that the respondent insulted her when her command of English was criticised in a key performance appraisal meeting. The respondent allegedly said that she was sick and tired of people using the excuse of being disadvantaged and allegedly attributed the complainant's unhappiness at the magazine to the fact that the magazine was too sophisticated and that she found white faces so overwhelming. The court referred the matter to the CCMA.

Herselman / Southern Sun Elangeni & Hurricanes Rugby Union[51]

Profile of complainant: White female and her daughter.

Profile of respondent: Hotel; New Zealand-based rugby union.

Prohibited ground: Not stated.

Brief description of merits: The complainants alleged that they were banned from two hotels where the "Hurricanes" rugby players were staying during their tour to South Africa. They alleged that they had been discriminated against and harassed and demanded damages and an apology.

Hopf / Build It (division of Spar)[52]

Profile of complainant: White female.

Profile of respondent: Business.

Prohibited ground: Sex / gender.

Brief description of merits: The complainant argued that she had been systematically discriminated against. She joined the respondent as "national buyer" but was allegedly treated and graded as "buying administration controller". She also alleged that she was the only female in the management team, was patronised and treated "as

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[51] *Legalbrief Today* 29 March 2006; http://www.iol.co.za/general/news/newsprint.php?art_id=vn20060511042705479C45924 (accessed 2006-05-15).

[52] *Legalbrief Today* 2 August 2005.

a girl in a man's environment". (The matter was referred to the Labour Court after argument).

Jenecke[53]

Profile of complainant:	Black ("coloured") male.
Profile of respondent:	Not stated; presumably Law Society of South Africa.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that he was unfairly discriminated against based on race. He had failed the attorneys' admission examination a number of times and asked to be admitted as attorney despite having failed the examination. The application failed.

King / Department of Justice and Constitutional Development[54]

Profile of complainant:	White male.
Profile of respondent:	State.
Prohibited ground:	Race and sex.
Brief description of merits:	The complainant applied for one of 14 advertised posts for regional magistrate but was not shortlisted despite 23 years' experience.

Kok / NUMSA; Chosane[55]

Profile of complainant:	Female; race not stated.
Profile of respondent:	Union.
Prohibited ground:	Not stated.
Brief description of merits:	The complainant argued that the respondents unfairly blocked her from being nominated for a post as one of two national vice presidents. The case was dismissed on technical reasons.

[53] *Beeld* (2006-06-23) 4.
[54] *Beeld* (2006-06-06) 6; http://www.iol.co.za/general/news/newsprint.php?art_id=vn20060606022159568C34124 (accessed 2006-06-07).
[55] *This Day* (2004-09-22) 3.

Kollapen / Manshaarsalon[56]

Profile of complainant:	Indian male (chairperson of the Human Rights Commission).
Profile of respondent:	Hair salon.
Prohibited ground:	Race.
Brief description of merits:	The respondent's staff refused to cut the complainant's hair because they ostensibly "could not cut coloured people's hair". The court ordered that the respondent pay R10 000 to charity and train his staff to cut all types of hair. The training had to be completed within two months and a report submitted to court. The court also ordered the SAHRC to liaise with the Hairdressing Bargaining Council to determine the feasibility of insisting that all hairdressing courses should equip trainees to cut the hair of all South Africans.

Kuypers; Solidariteit / Nedbank[57]

Profile of complainant:	White male.
Profile of respondent:	Bank.
Prohibited ground:	Race.
Brief description of merits:	The complainants considered court action against the respondent when the bank introduced a shares scheme for blacks. The complainants argue that an income-based test should have been devised instead of a race-based test. The bank argued that it limited participation in the scheme to R100 000 to prevent the scheme being abused by the rich.

Language & Malan / Department of Justice[58]

Profile of complainant:	Two white magistrates.

[56] *Sunday Times* (2005-04-03) 18; *Beeld* (2005-03-30) 3; http://www.sahrc.org.za/sahrc_cms/publish/printer_133.shtml (accessed 2005-08-31); *Sunday Independent* (2005-04-03) 2; *Pretoria News* (2005-03-30) 1.
[57] *Rapport* (2005-10-23) 6.
[58] *Legalbrief Today* 26 October 2005; *Legalbrief Today* 15 July 2005; *Legalbrief Today* 17 March 2006.

Profile of respondent:	State (Department of Justice).
Prohibited ground:	Race.
Brief description of merits:	The complainants alleged that they had been consistently overlooked for promotion.

Malinga / Chetty, Goosen and Du Toit[59]

Profile of complainant:	Black male court interpreter.
Profile of respondent:	Three females; two magistrates and a clerk.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that a jug from which he had drunk water had been discarded in a rubbish bin and demanded R300 000 (R100 000 from each respondent) in damages. The respondents argued that the complainant was abusing the equality court process. They argued that the jug was thrown out with another as they were old, stained and unhygienic. The respondents lodged a counterclaim.

Manong and Associates / Gauteng department of transport and public works[60]

Profile of complainant:	Described as "civil engineering company" and "black-owned advertising and marketing company" and "engineering specialists".
Profile of respondent:	State.
Prohibited ground:	Race.
Brief description of merits:	In one report it was said that the complainant argued that the respondent had not adhered to its affirmative procurement policy. Another report mentioned that the complainant argued that the respondent's procurement policy was unfair in that it merely listed consultants' names and awarded work to them in turn, without

[59] *Legalbrief Today* 31 August 2005; *Daily News* (2005-08-31) 2; *Natal Witness* (2005-08-31) 3.
[60] *Mail & Guardian* (2004-06-02) 13; *Mail & Guardian* (2004-06-18) 6; *Legalbrief Today* 19 October 2004.

due regard being given to the advancement of persons disadvantaged by unfair discriminatory practices of the past.

Manong and Associates / City of Cape Town and Futuregrowth Property Development Company[61]

Profile of complainant:	Described as "civil engineering company" and "black-owned advertising and marketing company" and "engineering specialists".
Profile of respondent:	State; private enterprise company.
Prohibited ground:	Race.
Brief description of merits:	The complainant argued that its exclusion from a R87 million Khayelitsha retail development was motivated by racial discrimination. The respondents claimed that the complainant was abusing the court process. The complainant subsequently withdrew the court action and agreed to pay the respondents' legal costs.

Mixed race couple / restaurant owner[62]

Profile of complainant:	Mixed race couple.
Profile of respondent:	Restaurant owner.
Prohibited ground:	Race.
Brief description of merits:	The complainants wished to dine out at the respondent restaurant. The owner assaulted the couple and threw them out of his establishment. The court ordered payment of R10 000 in damages and ordered the respondent to allow the couple to eat at his restaurant if they so wished.

Muller; SAHRC / Department of Public Works and Department of Justice[63]

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[61] *Cape Argus* (2005-06-21) 9; *Cape Argus* (2005-03-17) 7.
[62] *Sowetan* (2005-03-18) 18; further detail not provided in the newspaper report.
[63] *Rapport* (2004-09-19) 23; *Legalbrief Today* 27 November 2003; *Beeld* (2004-02-23) 10; *Beeld* (2004-09-16) 13; http://www.thestar.co.za/general/print_article.php?ArticleId=2216561&fSectionId=1 (accessed 2004-09-15);

Profile of complainant:	White disabled female attorney.
Profile of respondent:	State departments.
Prohibited ground:	Disability.
Brief description of merits:	The complainant argued that she was discriminated against because not all the magistrates' courts she frequented regularly were accessible to disableds. The court made the settlement agreement an order of court. The respondents undertook to alter all courts in South Africa within 3-5 years so as to make the courts accessible to disableds. The respondents had to submit a plan of action to the court and the SAHRC within six months of the order, and progress reports thereafter on a six monthly basis.

Nehal / First National Bank[64]

Profile of complainant:	Indian male.
Profile of respondent:	Bank.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that the respondent bank had acted in a racist manner when it refused to grant his father a long-term loan of R200 000. He alleged that the bank at no point provided reasons for failing to grant a loan.

Ntuli / Tewary[65]

Profile of complainant:	Black male.
Profile of respondent:	Indian male.
Prohibited ground:	Race.
Brief description of merits:	RT, the majority share owner of a building, asked the complainant to take care of the apartment and it was agreed that the complainant would pay his portion of the electricity and water bill.

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http://www.sahrc.org.za/sahrc_cms/publish/printer_150.shtml (accessed 2005-08-31); *The Star* (2003-10-08) 2; *Citizen* (2004-09-17) 6.

[64] http://www.iol.co.za/news/newsprint.php?art_id=vn20050512073034625C89 (accessed 2005-05-16).

[65] *Daily News* (2005-01-24) 3.

The respondent (RT's uncle), who lived next door, had the complainant's electricity and water disconnected. The complainant alleged that the respondent had told him that he "did not want kaffirs living on his property". The complainant secured an interdict against the respondent preventing him from abusing, insulting or harassing the complainant or interfering with his lawful occupation of the premises.

Pickard; Brown / British Airways[66]

Profile of complainants:	Gay male couple.
Profile of respondents:	Airline company.
Prohibited ground:	Sexual orientation.
Brief description of merits:	After having bought two economy tickets to London, on the day of their trip the complainants enquired about using the gentlemen's seats, double seats situated at the front of the aeroplane. The respondent informed them that their tickets were not upgradeable and that should they wish to upgrade they would have to purchase new tickets and forfeit the original tickets. The complainants argue that the respondent was "doing everything in their power not to have us sit alone, together".

Pillay / Durban Girls' High School[67]

Profile of complainant:	Indian female.
Profile of respondent:	Educational facility (high school).
Prohibited ground:	Religion, cultural belief.

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[66] *Sunday Tribune* (2006-11-19) 3.

[67] http://www.witness.co.za/content/2005_09/37602.htm (accessed 2005-10-04); *Beeld* (2006-07-16) 3; http://www.themercury.co.za/general/print_article.php?ArticleId=2952587&fSection (accessed 2005-10-19); http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1821094,00.html (accessed 2005-10-24); *Legalbrief Today* 26 August 2005; *Legalbrief Today* 19 July 2005; *Legalbrief Today* 28 July 2005; *Legalbrief Today* 31 August 2005; *Beeld* (2006-07-07) 3; *Daily News* (2005-08-31) 2. An appeal has been noted to the Constitutional Court - *Beeld* (2006-08-21) 5.

Brief description of merits: The respondent did not allow the complainant to wear a nose stud. The complainant argued that she wore the nose stud in accordance with Hindu custom. The trial court dismissed the claim. On appeal the High Court held that the school's prohibition amounted to unfair discrimination. The complainant represented herself; the school was represented by senior counsel. The trial court found in favour of the respondent; on appeal to the High Court the finding was reversed. The Constutitional Court confirmed the High Court ruling.[68]

Pillay / Sliver Club; Cronjé and Coetzer[69]

Profile of complainant: Male coloured.

Profile of respondent: Night club.

Prohibited ground: Race.

Brief description of merits: Two "bouncers" at the respondent night club refused entry to the complainant but allowed his white partner to enter the club. The ostensible reason for not allowing the complainant to enter was that he was not appropriately dressed. After an exchange of words, the complainant and his partner, a law lecturer, were severely assaulted. The court awarded R10 000 damages (to be paid to Siyazenzela, an organisation established to fight homophobia and racism) and the respondent apologised to the complainant. The two bouncers also donated R1500 each to the NGO. The complainant then withdrew all criminal charges.

Rajah / Merry Pebbles[70]

Profile of complainant: Black female (she described herself as an African of Indian descent).

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[68] *MEC for Education: KwaZulu-Natal and others v Pillay* CCT 51/06 (unreported).
[69] *Die Burger* (2004-02-12) 13; *Daily News* (2004-02-16) 5; *Die Burger* (2004-02-26) 19; *Cape Argus* (2004-02-11) 2; *The Star* (2004-02-11) 3.
[70] *Sunday Times* (2005-04-17) 8; *Sunday Times* (2005-11-20) 5.

Profile of respondent:	Holiday resort.
Prohibited ground:	Race.
Brief description of merits:	The complainant was told that she resort was fully booked. When her white friend called the resort a short while later, he was offered accommodation. The resort agreed to pay R7500 in damages.

Ramkless / Department of Education[71]

Profile of complainant:	Indian male.
Profile of respondent:	State.
Prohibited ground:	Conscience.
Brief description of merits:	The complainant alleged that the respondent has claimed that it had problems with the complainant's "attitude and demeanour" and therefore dismissed him. He argued that the allegation that his attitude was unreasonable implied that the respondent expected him to act in some way contrary to his deeply held convictions. The respondent argued that the complainant had a long and complex history marked by allegations of dissatisfaction, conspiracy theories and victimisation.

Reiners / Western Cape Department of Education[72]

Profile of complainant:	Coloured male (race not stated).
Profile of respondent:	State.
Prohibited ground:	Religious belief.
Brief description of merits:	The complainant alleged that he was dismissed because he continued to perform corporal punishment. The court held that he was dismissed because he refused to apply "curriculum 2005" and did not hand in marks timeously.

[71] *Daily News* (2004-05-28) 1.
[72] *Beeld* (2005-06-15) 19; *Cape Argus* (2005-06-07) 1; *Cape Argus* (2005-06-14) 8.

SAHRC / SANBTS[73]

Profile of complainant:	SAHRC.
Profile of respondent:	SANBTS.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The complainant considered instituting action against the respondent to make the point that the respondent could be asked to explain its blood donation policy to a court. In terms of its policy, gay men may not donate blood.

Strydom / Dutch Reformed Church, Moreleta Park congregation[74]

Profile of complainant:	Gay organist.
Profile of respondent:	Church congregation.
Prohibited ground:	Sexual orientation.
Brief description of merits:	The respondent suspended the complainant's services (provision of music lessons at the congregation's school of music) after it was informed of the complainant's sexual orientation. The respondent argued that it "had to act in line with the Scriptures".

Turino and Nongoma community / Health Department[75]

Profile of complainant:	Cuban male.
Profile of respondent:	State.
Prohibited ground:	Presumably citizenship/nationality.
Brief description of merits:	The complainant brought the action after his contract with the respondent had not been renewed.

Travers / National Prosecuting Authority[76]

Profile of complainant:	White male.
Profile of respondent:	State.

[73] *Die Burger* (2006-01-21) 7.
[74] http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1747855,00.html (accessed 2005-08-03).
[75] *Natal Witness* (2004-04-14) 3.
[76] *Rapport* (2004-03-07) 13.

Prohibited ground: Disability.

Brief description of merits: The complainant considered court action against the respondent after it decided not to place any new cases before the complainant. The complainant suffers from muscle dystrophy and writes very slowly.

Vallie / Woodways Timber Suppliers[77]

Profile of complainant: Coloured male.

Profile of respondent: Business.

Prohibited ground: Religious belief.

Brief description of merits: The respondent's employee asked the complainant to remove his fez before they would assist him. The respondent argued that it was a Christian business and that it was their policy to ask clients to remove their headgear. The court ordered the respondent to provide an unconditional apology and pay the complainant R2000 in damages.

Vosloo / Jan van Riebeeck High School[78]

Profile of complainant: Bisexual art teacher.

Profile of respondent: Educational institution.

Prohibited ground: Sexual orientation.

Brief description of merits: The complainant alleged that he was discriminated against in his interview for a position as teacher at the respondent school.

F.2.2 Hate speech

Concerned Persons Against Racism in the Western Cape / Ngoro[79]

Profile of complainant: Civil society organisation.

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[77] *Naweek-Beeld* (2005-04-16) 5; *Die Burger* (2005-04-16) 11; *Cape Argus* (2006-02-24) 1.

[78] http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1608498,00.html (accessed 2004-10-25).

[79] *Cape Times* (2005-07-22) 1; *Beeld* (2005-05-10) 2; http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_1743801,00.html (accessed 2005-07-27); *Cape Times* (2005-10-05) 1; *Cape Argus* (2005-10-05) 6; *Cape Argus* (2005-08-24) 5.

Profile of respondent:	Media advisor of the mayor of Cape Town.
Prohibited ground:	Race (hate speech).
Brief description of merits:	The respondent used derogatory words relating to the coloured community in an editorial on his website. He said that all coloured people are drunkards; Africans were superior to coloureds; the coloured community required transformation and had not yet realised that the time to be cheerleaders for the white race was long past. The then Cape Town mayor, the city council and the ANC distanced itself from his views and he was dismissed. As part of the settlement agreed to, Ngoro apologised for the racist remarks.

Durban engineering firm (names of parties withheld by order of the court)[80]

Profile of complainant:	Engineering firm supervisor.
Profile of respondent:	Colleague of complainant.
Prohibited ground:	Race.
Brief description of merits:	It was alleged that the respondent had said "Look at your government now. That government is a real monkey government and does not provide anything for you. Thabo Mbeki is the greatest baboon, controlling the other monkeys like Jacob Zuma who is stealing his money". The complainant admitted to having said that the government was a "monkey government". The court ordered the complainant to write an unconditional apology.

Faasen / *Die Burger*[81]

Profile of complainant:	White male, describing himself as an Afrikaner.
Profile of respondent:	A daily Afrikaans newspaper.
Prohibited ground:	Race.

[80] http://www.themercury.co.za/general/print_article.php?fArticleId=2099926&fSection (accessed 2005-04-25).
[81] *Sunday Times* (2007-03-25) 11.

Brief description of merits: The complainant approached the Cape Town equality court, asking for an order to prevent the newspaper from ever publishing the word "boesman" ("bushman") again.

Fishman / Barkhuizen[82]

Profile of complainant: Jewish male.

Profile of respondent: White male.

Prohibited ground: Religion.

Brief description of merits: The respondent painted anti-Semitic graffiti on the complainant's house's walls. He painted a swastika and a phrase which meant "spiteful Jewish bastard". The SAHRC helped the complainant to prepare for his case. The court awarded R2000 in damages and ordered the respondent to apologise to the complainant.

Mkhize / Ferreira; Shaw; Edgemead High School[83]

Profile of complainant: Black female; schoolgirl.

Profile of respondent: White schoolmate; the schoolmate's boyfriend and her mother; school at which the attack occurred.

Prohibited ground: Race.

Brief description of merits: The complainant (assisted by the SAHRC) alleged that the respondents assaulted her and shouted racial insults at her. The court case focused on the alleged use of racially insulting words only. The court ordered that the respondents apologise to the complainant; that they attend a diversity and racial sensitisation course under the SAHRC's auspices and that they donate R10 000 to a township crèche. The school, without admitting liability, agreed to an independent audit of its policies and practices

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82 http://www.iol.co.za/general/news/newsprint.php?art_id=vn20060618091213192C74698 (accessed 2006-06-19); *The Sunday Argus* (2006-07-09) 6; *Sunday Independent* (2005-08-21) 3.

83 http://www.iol.co.za/general/news/newsprint.php?art_id=qw107046324190B263&sf= (accessed 2003-12-05); http://www.sahrc.org.za/sahrc_cms/publish/printer_146.shtml (accessed 2005-08-31); *Rapport* (2004-04-11) 23; *Cape Argus* (2004-07-06) 5; *The Star* (2003-12-04) 2; *This Day* (2004-04-08) 3.

relating to race. The criminal charges against the three respondents were subsequently withdrawn.

Mqadi / Lakhi[84]

Profile of complainant:	Black male; journalist and law student.
Profile of respondent:	Head of ICD, KZN.
Prohibited ground:	Race.
Brief description of merits:	The complainant alleged that the respondent had told him that she was "tired of Africans who invaded her office" and that junior investigators could deal with him. The respondent said that the complainant's appointment was with someone else in the office and when she told him this, the complainant began to shout and became threatening.

Ncusane / Neo[85]

Profile of complainant:	Black female.
Profile of respondent:	White female.
Prohibited ground:	Race.
Brief description of merits:	The complainant was seeking a property to rent. The respondent told her to "go back to the township where you belong". The court ordered the respondent to pay R2000 in compensation and to submit a letter of apology.

Pretorius & Sikakane / Petzer[86]

Profile of complainant:	Not stated.
Profile of respondent:	White male and his daughter.
Prohibited ground:	Race.

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[84] *Legalbrief Today* 25 November 2005; *Legalbrief Today* 23 January 2006; *Natal Witness* (2006-01-21) 5; *Natal Witness* (2006-02-02) 5; *Natal Witness* (2005-11-24) 5.

[85] *Legalbrief Today* 6 May 2005.

[86] http://www.iol.co.za/general/news/newsprint.php?art_id=vn20060223100236575C71 (accessed 2006-02-24); http://www.iol.co.za/general/news/newsprint.php?art_id=vn20060116131233511C46 (accessed 2006-02-03); *Daily News* (2006-01-16) 6.

Brief description of merits:	The complainants alleged that the respondents swore at them and hurled racial abuse at them. (It was alleged that the words used were to the effect that "bushman, you and your kaffir boys will get fuck all".) The respondents denied being racist. The daughter admitted to having said that Pretorius was "the child of the devil". The court ordered the first respondent to pay R4000 in damages and ordered the second respondent to write an apology.

Prince / white neighbours[87]

Profile of complainant:	Coloured male and his son.
Profile of respondent:	White males (the complainants' neighbours).
Prohibited ground:	Race.
Brief description of merits:	The complainants alleged that the respondents racially abused and attacked them. They were allegedly kicked, hit and beaten with a cricket bat while respondents shouted "moer die kaffers". The respondents were also charged with assault with intent to do grievous bodily harm, common assault and crimen iniuria. The SAHRC said that it would be monitoring the case closely. The respondents asked for a order for damages, an order restraining the neighbours from discriminating against them, harassing them or saying anything amounting to hate speech, and an unconditional apology.

Visagie / Roller[88]

Profile of complainant:	Coloured male.
Profile of respondent:	White female.
Prohibited ground:	Race.

[87] *Cape Times* (2005-01-17) 3; *Cape Times* (2005-01-18) 3; *Cape Times* (2005-02-02) 3; *Cape Times* (2005-01-21) 3; *Cape Argus* (2005-01-21) 3.
[88] *Die Burger* (2005-05-10) 6.

Brief description of merits: The complainant alleged that the respondent told him to leave her office and told him “ek sê mos hotnotprokureur, verlaat my kantoor. Ek het lankal genoeg gehad van jou kak”.

Annexure G: Schedule of selected documents pertaining to the drafting history of the Act and the initial training programmes of equality court personnel

This schedule contains a list of documents that I relied on in drafting the thesis. The Schedule refers to the following documents: Submissions to the joint ad hoc committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill during November 1999; Equality Legislation Education and Training Unit documents; and Department of Justice and Constitutional Development Reports.

Aids Law Project Submission on the Promotion of Equality and Prevention of Unfair Discrimination Bill, dated 17 November 1999, drafted by F Hassan

Banking Council Submission on the Promotion of Equality and Prevention of Unfair Discrimination Bill, dated 17 November 1999

"Briefing on the Equality Courts Project and Progress in the Implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000", presented to the Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on Quality of Life and the Status of Women and Portfolio Committee on Justice and Constitutional Development, Impact of the Promotion of Equality and Prevention of Unfair Discrimination Act, 16 October 2006. http://www.pmg.org.za/viewminute.php?id=8330 (accessed 2007-05-15)

Business Plan, "Capacity Building (through training & public education) for effective implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000", undated (presumably finalised during August 2000), drafted by or on behalf of Chief Director: Transformation & Equity

Business South Africa Submission on the Promotion of Equality and Prevention of Unfair Discrimination Bill, dated 17 November 1999

Commission on Gender Equality Submission to the ad hoc Parliamentary Committee on the Promotion of Equality and Prevention of Unfair Discrimination Bill

COSATU Submission on the Equality Bill, dated 26 November 1999

Document, "Budget: National Symposium for Equality Court Judicial Educators", undated, prepared by Equality Legislation Education and Training Unit

Document, "Proposed Immediate Action to be Undertaken by Zulman JA in connection with the Regional Training of Judicial Officers in terms of the Equality Act", dated 20 August 2001, drafted by Judge R Zulman

Document, "Categorised Financial Report as from November 2002 to Mid January 2002 & the Schedule of Activities, Expenditure, Existing & Original Budgets", undated, prepared by Equality Legislation Education and Training Unit

Document, "Schedule of Activities & Budget Feb 2002 – Jan 2003", undated, prepared by Equality Legislation Education and Training Unit

Document, "Schedule of Activities & Budget Feb 2003 – Jan 2004", undated, prepared by Equality Legislation Education and Training Unit

Document, "Seminars Organized under Equality Legislation Education and Training Programme [2001-2002]", undated, prepared by Equality Legislation Education and Training Unit

"Draft Equality Review Report", issued from the office of the chairperson: Portfolio Committee on Justice and Constitutional Development, dated 23 March 2007. http://www.pmg.org.za/docs/2007/070327review.pdf (accessed 2007-05-15)

Draft Policy Directives on Training of Equality Court Presiding Officers, Court Clerks and Auxiliary Personnel, dated 16 October 2000, drafted by Professor S Gutto and Judge R Zulman

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