

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 Fukuyama² and Scott³ 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 Brasilia,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

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:

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. Borat and Kanbur in Borat 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, Aye 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 Borat 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 led 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 than 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

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 Borat 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

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

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 objectives⁵²

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

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 relationships⁶²

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 authority⁶⁴ 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

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 enthusiastically⁶⁸

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

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 plans⁸⁰

“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,

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,

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

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

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 Gciba, 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 heads¹⁰⁹ 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

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.

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

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

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

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 2004~~ 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 2004~~ 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 2004~~. 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 curriculum¹³² 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.)

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 Mukhahuli 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

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

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 judicial 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

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

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 committee¹⁴⁷ 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

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 experiential 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 aim 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

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 to 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

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

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.

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

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 Hetsane 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

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/registrar". 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.

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

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

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 personnel 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

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 Cape, 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

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 were 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

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.

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 –

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

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 million²³⁶ had been asked for and for 2003/4, an amount of R43 million²³⁷ 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

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

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

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 led 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.

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.

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 the 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

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

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 empathetic judgments based on the circumstances of the individuals who convey their suffering to the court” and that “a wise judge would 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 court²⁶⁹ 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

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 listed 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.

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

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

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

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

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 initiatives 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 occurred 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 occurred 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?

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 of 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

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 implementation 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

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 outset 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.