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The potential effectiveness of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*¹

Abstract

I consider the potential effectiveness of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* in achieving its stated goal of effecting far-reaching societal transformation. I do this by identifying 18 criteria of effective legislation, *inter alia* that such a law must be able to be implemented and enforced, that it should be highly visible and popularised, that it must provide for effective remedies, that it should not require substantial adjustments of current *mores*, and that a law set up to protect the economically weak will have limited impact. I then compare these criteria to the Act and conclude that the Act may well be able to assist individual claimants, but that far-reaching societal changes will not follow from the Act's implementation.

Opsomming

Die potensiele doeltreffendheid van die *Promotion of Equality and Prevention of Unfair Discrimination Act 4 van 2000*

Ek oorweeg die potensiele doeltreffendheid van die *Promotion of Equality and Prevention of Unfair Discrimination Act 4 van 2000* om die gestelde doel van grootskaalse sosiale verandering of "transformasie", te weeg te bring. Ek identifiseer 18 eienskappe van doeltreffende wetgewing, wat die volgende insluit: 'n Wet moet toegepas en afgedwing kan word, dit moet baie sigbaar wees en gepopulariseer word, dit moet voorsiening maak vir effektiewe remedies, dit moet nie ingrypende aanpassings in kontemporêre *mores* voorveronderstel nie, en 'n wet wat daargestel word om ekonomies weerlose lede van die gemeenskap te beskerm sal beperkte impak toon. Ek vergelyk dan hierdie eienskappe met die Wet en maak die gevolgtrekking dat die Wet wel van tyd tot tyd individuele eisers tot nut sal wees, maar dat grootskaalse maatskaplike veranderinge nie sal voortvloei uit die toepassing van die Wet nie.

1 This article is based on relevant parts of chapters from my doctoral thesis entitled "A socio-legal analysis of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*" (University of Pretoria 2007).

1. Introduction

In this article, I will aim at ascertaining the (potential) effectiveness of the *Promotion of Equality and Prevention of Unfair Discrimination Act*.² To do that, I will consider to what extent the Act will reach its stated goals.

In general, anti-discrimination legislation could have a number of purposes:

- (a) The legislature may wish to send a strong moral message that it views discrimination as an evil. Nothing more necessarily flows from the enactment of the law; the legislature may feel that its symbolic commitment to combating discrimination is sufficient.³
- (b) The goal of an anti-discrimination Act could be to establish forums where discrimination complaints may be aired and resolved.⁴ This goal need not move much beyond a symbolic commitment: Such tribunals may not be properly resourced, or little publicity may be given to its existence, or to favourable outcomes for plaintiffs.⁵ At its most idealistic, the legislature may envisage that these forums will hear a large number of (individual) discrimination complaints and will resolve the complaints in favour of the plaintiffs.⁶
- (c) The goal could be to achieve a thorough-going readjustment in income distribution and unemployment rates of various disadvantaged groups, identified by, for example, race, sex/gender, sexual orientation and HIV status, so that these figures become proportionately equivalent to the most privileged group (usually white, heterosexual males).⁷
- (d) At its most ambitious and idealistic, the legislature may wish to reach into the hearts, minds and homes of its subjects, and affect fundamental changes in basic social relationships.⁸

I would argue that the Act aims to achieve all these goals,⁹ but that the Act is primarily aimed at *transforming* South African society in terms of the Preamble,

2 Act 4 of 2000, hereafter “the Act”.

3 Lustgarten 1986:84-85; Lacey 1987:419-420.

4 Cf Joachim 1999:52.

5 Bailey and Devereux 1998:303.

6 Lustgarten 1992:455-457 describes this goal as the “just treatment of individuals”.

7 Lustgarten 1992:455-457.

8 Gutto 2001:7.

9 Albertyn *et al* 2001:3 seem to argue that the Act aims at providing a legal mechanism with which to address and remedy discrimination, and to address structural or systemic discrimination. These authors do not seem to read the fourth possible purpose of anti-discrimination legislation into the Act. Gutto 2001:7 defines “social legislation” as “laws directed at (a) normalising the abnormalities of the past and/or (b) extending the boundaries of policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are reduced to a minimum and democratic values permeate all social relations” (my emphasis). At 8 he refers to the Act as “one of the most important pieces of social legislation in the new democratic South Africa”. Gutto clearly reads the fourth possible purpose of anti-discrimination legislation into the Act.

section 2 and section 4(2) of the Act.¹⁰ Two distinct “types” of transformation may be identified from these sections in the Act: One, what could very broadly be termed “socio-economic transformation”,¹¹ in other words the eradication or softening of socio-economic disparities between different communities in South Africa and two, what one could idealistically term a “changing of hearts”.¹²

2. “Legal effectiveness” research

To consider whether a particular Act has been or will be effective, that Act’s goals or objectives first have to be established.¹³ Establishing these goals is not necessarily an easy task. Allott uses the following example:¹⁴ Suppose the conviction rates of burglaries and murder dramatically increase, are the laws prohibiting burglaries and murder effective or ineffective? If the aim of these laws is to punish transgressors, they may be seen as effective. The more likely aim is however to prevent burglaries and murders from occurring in the first place, and then high conviction rates may be seen as a symptom of the *failure* of these laws. Kidder points out that it must always be considered *why* a particular law was put in place and refers to a stop sign in an absurd position — such a traffic sign was probably put in place to generate income for the local authority and has little, if anything, to do with traffic safety.¹⁵ Similarly, an anti-discrimination law may be put in place merely for its symbolic value and it is feasible that the drafters of such an Act never intended it to have any measurable effect, despite what they may have said in public when the Act was promulgated. An assessment of a specific Act’s effectiveness is also further contingent upon the framing of the goal of that specific Act. For example, Chemerinsky refers to Rabkin who argued that anti-discrimination legislation has not succeeded in the United States because income disparities based on race have continued.¹⁶ Chemerinsky asks why it must be assumed that income is the only measure of success. He argues that anti-discrimination legislation would have succeeded if it resulted in less discrimination and more jobs being available for blacks, even if the black-white wealth gap remains.¹⁷ It is clear that Rabkin and Chemerinsky have radically different goals in mind for anti-discrimination legislation and as a result have different views on the (in) effectiveness of such laws.

10 Eg section 2(b)(ii), (iii) and (iv); (c) and (g) and section 4(2)(a) and (b). For a more detailed analysis of the transformatory ideals contained in the Act, see Kok 2008: 123-126.

11 Cf Albertyn and Goldblatt 1998:249; Pieterse 2005:159 and Moseneke 2002:316-318.

12 Cf Brand 2000:13; Moseneke 2002:319; Hocking 1995:21; Dror 1958:788; Klare 1998:150. This kind of transformation would for example include issues such as the eradication of “unjust joking” as referred to by Verwoerd and Verwoerd 1994:67.

13 Pollitt 2003:9; Zammuto 1982:17; 28-29.

14 Allot 1980:30.

15 Kidder 1983:193.

16 Chemerinsky 1998:193.

17 Chemerinsky 1998:193.

Once a particular Act's goals have been established, it is possible to consider the Act's weaknesses and its potential in effecting change. Assuming that it is possible to reach agreement on a particular Act's aims, I will use the phrase "effective legislation" in the sense of legislation that broadly speaking seems able to, or have met, its ostensible goal(s).

3. Requirements of effective legislation

As set out in the introduction, the Act seems to aim at two main objectives; socio-economic transformation, and a transformation of the "hearts and minds" of South Africans. With this in mind, I suggest below the characteristics of effective (transformative) legislation.

It is possible to extract the following characteristics of effective legislation from the available literature. Authors do not necessarily refer to "transformative" legislation when they discuss criteria of "effective" legislation. If one accepts that transformative legislation entails Acts that attempt far-reaching changes in the socio-economic structure of a particular country or attempt to change deeply-held value systems or customs, it would seem that roughly 18 criteria may be identified according to which a particular (transformative) Act may be measured to gauge its effectiveness. There may well be some overlap between these criteria.

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

1.1 The goal of the lawmaker must be realisable through law.¹⁸ This seems to be a somewhat circular requirement because one will only know if the goal is realisable by measuring it against criteria for effective legislation, and if the criterion is simply "the goal must be realisable", it leaves the legislature stranded. Pound suggests a way out. He argues that the following goals will not be realisable:¹⁹

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

18 Morison 1990:9.

19 Pound 1917:66-67.

1.2 The required change must be able to be implemented and to be strongly enforced.²⁰

1.2.1 Rules will be enforced that are highly visible, cost little and do not affect competition.²¹ Handler suggests that based on this criterion, a law obliging warning labels on cigarette packages would be enforceable.²² Meat inspection however is of low visibility because consumers cannot easily detect violations and profits are to be made if substandard meat is sold and therefore requires a major effort to ensure compliance.²³ Handler provides additional reasons why enforcing meat inspection laws are difficult: “a large number of inspectors making hundreds of decisions each day ... throughout the country; it is extremely difficult to monitor their actions, let alone change their behaviour”.²⁴ For the same reason laws targeting the police, welfare agencies, hospitals, mental institutions or prisons would also face serious implementation challenges.²⁵ Friedman argues that enforcement depends on “ease of detection and enforcement”.²⁶ He argues that for some laws there are many potential violators who can violate that law in many places, such as a law against “jaywalking”.²⁷ A South African example bears this out. Legislation protecting farm workers is not easily enforceable as many farm owners are potential violators of these laws, and it is not in the farm owners’ interests to adhere to the formal and drawn out eviction proceedings. In an empirical study completed in 2005; it was shown that from 1994 to 2004, approximately 930 275 farm labourers and their dependents were illegally evicted from farms.²⁸ It is not surprising that the study concluded that only about 1% of evictions that occurred after 1997 were performed in terms of the relevant legislation.²⁹ In six out of seven cases, the farm workers had no legal representation when their eviction case was heard in court.³⁰ On the other hand, coal mine safety laws can only be violated by (a few) coal mines and such laws are more likely to be effective.³¹

1.2.2 Enforcement agents must be committed to the behaviour required by the law, even if not to the values implicit in it.³²

20 Morison 1990:9; Ehrlich 1922:138; Coussey 1992:46-47.

21 Handler 1978:16-17.

22 Handler 1978:16-17.

23 Handler 1978:19.

24 Handler 1978:19.

25 Handler 1978:19.

26 Friedman 1975:86-87.

27 Friedman 1975:86-87.

28 *Sake24 (Beeld)* (2007-03-19) 12.

29 *Sake24 (Beeld)* (2007-03-19) 12.

30 *Sake24 (Beeld)* (2007-03-19) 12.

31 Friedman 1975:86-87.

32 Evan 1980:557-560; Packer 2002:169.

- 1.2.3 If laws are to be enforced by state agencies, “a high degree of clarity is important”,³³ and objectively measurable results should be put in place.³⁴ A law that does not establish a clear standard or that is ambiguous or too flexible, will facilitate avoidance.³⁵
- 1.2.4 The source of the new law must be authoritative and prestigious.³⁶ Evan utilises this criterion to argue that legislation is the most effective way of effecting change, when for example compared to court decisions.³⁷
- 1.3 The change-inducing law must provide for effective remedies.³⁸ In Chemerinsky’s opinion, for example, school desegregation efforts failed largely because courts failed to formulate effective remedies for segregated schools.³⁹ American cities are largely segregated: Blacks live in the inner cities; whites live in the suburbs. To effectively desegregate schools, courts would have had to include suburban white schools in the desegregation interdicts that they issued.⁴⁰ However, in *Milliken v Bradley*,⁴¹ the Burger Supreme Court held that an interdistrict interdict would only be granted in the exceptional cases where proof existed of interdistrict constitutional violations. In effect, *Milliken* prevented the desegregation of black inner city schools and white suburban schools.⁴² Chemerinsky also refers to *Keyes v Denver*.⁴³ In this decision the Supreme Court held that proof of school segregation was not sufficient to establish a constitutional violation; proof had to exist that segregation occurred because of intentionally discriminatory policies. Chemerinsky argues that school segregation usually has many interlocking reasons and that by requiring discriminatory intent instead of discriminatory impact, the Supreme Court radically limited courts’ ability to order desegregation of *de facto* segregated northern schools.⁴⁴ Also in the context of school desegregation, Evan argues that it is *not* an effective remedy to allow parents of a black child who was prohibited from admission to a white school to appear before a board of education; these parents should have the support of a government-funded agency or an NGO.⁴⁵ Brand and Heyns illustrate how the Constitutional Court in *Government of the Republic of South Africa v Grootboom*⁴⁶ and in *Minister of Health and others*

33 Cotterrell 1992:51.

34 Cousse 1992:46-47. In the United States a presumption of unfair discrimination exists when a 20% or more difference in impact on different groups occur — Hepple 1997:607.

35 Friedman 1975:59; Hepple 1997:606-607.

36 Cousse 1992:46-47.

37 Evan 1980:557-560.

38 Evan 1980:560; Chemerinsky 1998:199; Hepple 1997:606-607; Allott 1980:287.

39 Chemerinsky 1998:199.

40 Chemerinsky 1998:200.

41 484 F 2d 215, 245 (6th Cir 1973) rev'd 418 US 717 (1974).

42 Chemerinsky 1998:200.

43 413 US 189 (1973).

44 Chemerinsky 1998:200.

45 Evan 1980:560.

46 2001 (1) SA 46 (CC).

v Treatment Action Campaign and others (No 2)⁴⁷ failed to retain supervisory jurisdiction over the implementation of its orders and how, as a result of this omission, the practical impact of these decisions remain uncertain.⁴⁸

- 1.4 As resistance to a new law increases, positive sanctions are probably as important as negative sanctions.⁴⁹ Evan argues that Anglo-American legal systems generally do not award positive sanctions and that the likely instrument for compliance to be utilised by courts are fines or imprisonment (“negative sanctions”).⁵⁰ However, more severe fines do not necessarily lead to higher compliance.⁵¹ If anything, Evan argues, very severe fines provide violators the chance to neutralise their feelings of guilt with what they feel are justified resentment against the excessive punishment.⁵² Evan therefore argues that to assist in the learning of new behaviour and attitude, positive reinforcement is required. In the context of school desegregation, Evan suggests that subsidies for teachers’ salaries and classroom construction and rebates on income tax (“positive sanctions”) could have been provided to desegregated schools, in accordance with the length of time that a particular school had complied with desegregation directives.⁵³ In similar vein, Hepple argues that respondents (potential violators) must be better off if they voluntarily comply with the particular legislation, by for example offering government contracts, if they formulate plans and undertake positive monitoring and systematic reviews of their practices.⁵⁴
- 1.5 To have any hope of effective enforcement, the state driving social change must be relatively powerful,⁵⁵ and must have significant technological surveillance facilities available.⁵⁶
- 1.6 The enforcement mechanism should consist of specialised bodies and the presiding officers of these enforcement mechanisms must receive training to acquire expertise.⁵⁷ Mahomed sets out the following reasons why training of judicial officers in general had become necessary: The immense quantitative

47 2002 (5) SA 721 (CC).

48 Brand and Heyns 2004:36.

49 Evan 1980:559; Gutto 2001:221.

50 Evan 1980:559.

51 Evan 1980:559. This was of course one of the reasons why the death penalty was found unconstitutional in *S v Makwanyane* 1995 (3) SA 391 (CC); the State could not provide sufficient proof that the death penalty was a deterring factor.

52 Evan 1980:559.

53 Evan 1980:559.

54 Hepple 1997:606-607. Also see Coussey 1992:46-47 and Lustgarten 1992:468.

55 Cotterrell 1992:44. Ehrlich 1936:372-373 states that “the effectiveness of the law of the state is in direct ratio to the force which the state provides for its enforcement, and in inverse ratio to the resistance which the state must overcome”.

56 Bennington and Wein 2000:21; Cotterrell 1992:44.

57 Cf Bawa 1999:30; Hepple 1997:606-607; Gutto 2001:192. Section 180 of the Constitution states that national legislation may provide for training programmes for judicial officers. Regulation 3 of the Regulations for Judicial Officers in the Lower Courts 1993 (GR 361 11 March 1994) published in terms of section 16 of the *Magistrates Act* 90 of 1993 states that no person may be appointed as magistrate unless he/she has successfully completed a requisite course at Justice College.

and qualitative changes in the law; litigation has become more complex; conflicts have become more complex that may be linked to industrial, social and economic development; the potential areas of jurisdiction of judges have expanded; a proper judicial insight in the lives of the disadvantaged had to be inculcated and a potentially massive expansion in the power of the judiciary had taken place.⁵⁸ He points out that training for judges had become commonplace in the United States, Canada, Australia, New Zealand, Malaysia, Pakistan and Sri Lanka, among other countries.

2. Any new law should not run too far ahead of society's *mores*.

2.1 The purpose behind the legislation must at least to a degree be compatible with existing values.⁶⁰ Evan states that "the rationale of the new law must clarify its continuity and compatibility with existing institutionalised values"⁶¹ Jeffrey argues that changes in legal rules will only lead to social change to the extent that people believe in, agree with or accept the legal changes and then decide to model their behaviour in accordance with the new rules.⁶² Lundstedt states that penalties prescribed by law must "appeal to the moral consciousness of the public" or else it will not be effective, or could undermine public confidence in the legal system.⁶³ Savigny's concept of *volksgeist* is in a similar vein. He states that law is an expression of the "spirit of the people" and that law "reflects and expresses a whole cultural outlook".⁶⁴ Savigny would of course have frowned upon the idea of "changing" society via legislation; a law would only come into existence if it reflected the *volksgeist*. Anecdotal evidence tends to suggest that South Africa's smoking legislation is quite effective, even without being enforced. One reason may be that the vast majority of South Africans have come to accept that smoking is harmful.⁶⁵

2.2 Laws set up in opposition to powerful economic values and interests may also (eventually) fail.⁶⁶ MacDonald illustrates how the interests of the (white) business class in South Africa were no longer served by Apartheid by the 1980s.⁶⁷ Because of a falling birth rate, whites could no longer fill

58 Mahomed 1998:108-109.

59 Mahomed 1998:107.

60 Macfarlane 2006:105; Morison 1990:9.

61 Evan 1980:557-560.

62 Jeffrey 1979:38.

63 Lundstedt as translated and interpreted by Aubert 1983:13 (from the original Swedish).

64 Cotterrell 1992:21.

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

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

67 MacDonald 2006:73.

all the middle and upper rungs of employment and businesses had to start looking at the black population to fill previously “white” jobs, bringing their interests in conflict with those of the Apartheid state. Business’s interests ultimately prevailed with the advent of the post-1994 democratic South Africa and the adoption over time of pro-business economic policies.⁶⁸

2.3 Laws that facilitate action that people want to take or that encourage voluntary change is likely to be more effective than compulsory change.⁶⁹ Allott distinguishes between “model laws” and “programmatic laws”.⁷⁰ A model law sets up a model that the populace may adopt if they so choose. The legislature encourages the use of the model but it remains voluntarily. Should the model be adopted by society it will radically alter the content of legal relationships. It is a slow, cautious and less assertive way of achieving transformation but in Allott’s view more likely to succeed than programmatic laws.⁷¹ An example of a “model law” would be where the legislature wishes to discourage polygamous marriages but instead of an outright ban on such marriages, introduces the option of a monogamous marriage, with the hope that over time there would be a move to the more “progressive” option.⁷² In Allott’s terms a “programmatic law” imposes a programme of compulsory change.⁷³ An example would be (mandatory) anti-discrimination laws, in Allott’s words laws aimed at overriding “the way people live; the social arrangements which they have in their homes; the attitudes and practices of employers at work; the prejudices of the people”.⁷⁴

2.4 Models or reference groups must be used for compliance.⁷⁵ Evan provides the following examples of what he has in mind: The United States could have motivated its school desegregation efforts by referring to countries with which the United States identified with politically where desegregation had been in place for years without any negative effects.⁷⁶ It could also have referred to successful desegregation in the United States army.⁷⁷ What must be aimed at is providing admirable models to overcome resistance by potential recalcitrants.⁷⁸

68 MacDonal 2006:88; 128; 143; 169; 173; 178. Contra Saul 2005:5 who states, without analysis, that Apartheid would not have disappeared of its own accord and that it was the liberation forces’ armed struggle that brought the Apartheid state to its knees. At 177 he states, again without analysis, that “mass action ... was the key factor forcing the apartheid government onto the path of ‘reform’”.

69 Allott 1980:xii; Griffiths 1999:318; Hepple 1997:604.

70 Allott 1980:xii; 168-236.

71 See Allott 1980:168-174 for a detailed discussion of “model laws”.

72 Allott 1980:171.

73 See Allott 1980:174-236 for a detailed discussion of “programmatic laws”.

74 Allott 1980:194.

75 Evan 1980:557-560.

76 Evan 1980:558.

77 Evan 1980:558.

78 Evan 1980:559.

2.5 Laws are more effective when introduced to change emotionally neutral and instrumental areas of human activity.⁷⁹ Morison puts it as follows:⁸⁰

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

Likewise, Luhmann refers to legal-sociological theories which postulate that “areas of life based on emotion” is more difficult to direct via legislation than “emotionally neutralised” areas such as the economy and communications.⁸¹

Cotterrell refers to research on the transplantation of laws from one country to another.⁸² These studies seem to indicate that such “transplants” may be successful where the new laws concern instrumental matters and where a strong incentive to accept change may exist, such as in the commercial arena.⁸³ Family relations, however, are extremely resistant to change.⁸⁴ It is then, for example, not surprising that a legislative attempt in Tanzania to outlaw female genital mutilation, has not been particularly effective. In 1998 the practice was criminalised and made punishable by imprisonment of up to 15 years. However, no one has been found guilty of violating this law yet. Those prosecuted under this law are usually acquitted because the daughters involved have been unwilling to testify against their parents.⁸⁵

2.6 Law must make conscious use of the element of time in introducing a new pattern of behaviour.⁸⁶ Evan argues that the shorter the transition time between the “old” and the “new” or “expected” pattern of behaviour, the easier the adaptation to the change, because it lessens the chance for the establishment of organised or unorganised resistance to the enacted change.⁸⁷ Evan then argues that this will only be true if enforcement agencies are committed to the behaviour required by the new law, and if positive sanctions are introduced when resistance starts to increase.⁸⁸ (I have dealt with these last-mentioned requirements above.) Allott takes an opposite view. He argues that transformation using law(s) is possible if the social transformer is willing to be patient, is willing to use persuasion, is responsive to people’s feelings and desires and is prepared to accommodate different views.⁸⁹ Allott seems to suggest that change-inducing laws are more likely to be effective over the longer term and seems to imply that change should

79 Dror 1958:800-801; Packer 2002:170.

80 Morison 1990:8.

81 Luhmann 1985:243.

82 Cotterrell 1992:24.

83 Cotterrell 1992:24.

84 Cotterrell 1992:24.

85 <http://www.ippmedia.com/cgi-bin/ipp/print.pl?id=72766> (accessed 23 August 2006).

86 Evan 1980:559.

87 Evan 1980:559.

88 Evan 1980:559.

89 Allott 1980:196.

be phased in over time, instead of suddenly confronting the populace with a new required way of doing things, as Evan seems to argue.⁹⁰

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

3.1 Large organisations with specialised personnel that is well-equipped to interpret rules will probably be committed to implementing new laws, but small businesses, individual home-owners, small landlords and individuals will probably not have sufficient knowledge and implementation on this level will be very difficult to achieve.⁹¹ Griffiths argues that law only has a measurable effect if people use the law. This means that the specific legal rule must be known and people must understand what it means; they must be aware of the relevant facts; they must have a sufficient motive for using the rule and must consider doing so feasible and appropriate; and they must not have an overriding motive for not using it. Crucially, he believes that people's interpretation of what happened to them depends on their social surroundings, not the law. Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations. Each of these institutions has limited knowledge and resources. Therefore (well-resourced) large organisations with specialised personnel are more likely to be committed to implementing new laws.⁹²

3.2 Laws put in place to assist or protect the economically weak will have limited impact. Laws such as these should be complemented by active and effective non-governmental support.⁹³ A provision allowing class actions will give private human rights groups the opportunity to initiate and monitor change.⁹⁴ Hepple is of the view that laws will likely succeed where the aim is to steer action that people want to take and less effective where rights are created to assist weaker parties; that is people who lack social and economic power.⁹⁵ Lustgarten states that the traditional model of single claimants under an Act designed to assist the socially and economically vulnerable will have limited impact and that if much is expected from this model, disappointment will follow.⁹⁶ The author argues that it is important to provide a system that people may use when they have been aggrieved, but the entire project should not be discarded simply because we do not trust law, or as Lustgarten puts it, "we don't deny victims of accidents adequate compensation because we may have different theories about the economic impact of tort law".⁹⁷

90 However at 207 he seems to take no position. He argues that "impatience tends to be self-defeating — it is difficult to sustain the original momentum in the years ahead. Gradualism, on the other hand, runs the risk of being so gradual as to be imperceptible".

91 Griffiths 1999:318.

92 Griffiths 1999:315; 317; 318. A recent South African example bears this out. It has been reported that the South African banking industry will be spending approximately R1.5 billion in implementing the National Credit Act 34 of 2005. <http://www.businessday.co.za/PrintFriendly.aspx?ID=BD4A467927> (accessed 22 May 2007).

93 Coussey 1992:46-47; Gutto 2001:299.

94 Hepple 1997:606-607.

95 Hepple 1992:20.

96 Lustgarten 1992:466-467.

97 Lustgarten 1992:466-467.

4. To have any hope of legislating effective laws, parliament should see to it that its laws are popularised.
- 4.1 The use of law will increase if the educational system is used in a well-directed way as a “nationally inclusive socialising agent”.⁹⁸ Bestbier accepts that the repeal of discriminatory laws do not automatically lead to similar norm changes in society. She believes that these norm changes must also be accomplished via the law. She notes the alienation of individuals from legal processes due to ignorance and an accompanying feeling of incompetence and even impotence.⁹⁹ She advocates utilising the primary and secondary school system as a “nationally inclusive socialising agent”. Dror argues that law could be used to change social institutions which in turn will influence social change, for example the national education system.¹⁰⁰ Griffiths is less optimistic. He argues that people’s interpretation of what happened to them depends on their social surroundings, not the law.¹⁰¹ Knowledge of the content of a legal rule is transmitted by the media, the educational system and social associations and each of these institutions has limited knowledge and resources.¹⁰²
- 4.2 The required change must be communicated to the large majority of the populace.¹⁰³ Public awareness must be maintained over the long term.¹⁰⁴ The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change.¹⁰⁵ Packer argues that the mass media, forming part of popular culture, is capable of competing with traditional beliefs.¹⁰⁶ Evan sees this criterion as part of providing effective remedies; potential beneficiaries of a change-inducing law will only be able to utilise such a law if they are aware of its existence.
- 4.3 Laws that include incentives to encourage lawyers to use the new law and to inform clients of the existence of the new law, are more likely to be effective.¹⁰⁸
- 4.4 The state driving social change must be able to rely on vast mass media communication.

98 Bestbier 1994:108.

99 Bestbier 1994:107.

100 Dror 1959:797.

101 Griffiths 1999:316.

102 Griffiths 1999:316.

103 Morison 1990:9; Ehrlich 1922:138.

104 Packer 2002:173.

105 Packer 2002:189.

106 Packer 2002:189.

107 Evan 1980:560.

108 Macaulay 1979:161, 163, 164; Cotterrell 1992:33.

4. Measuring the Act against the characteristics of effective legislation

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

The burden of proof lies primarily on the respondent, not the complainant.¹¹⁰ Equality courts are not limited in the remedies that they may grant.¹¹¹ Equality courts are presided over by trained (at least in theory) experts and not lay people.¹¹² Complainants may appear before equality courts without obtaining (expensive) legal representation.¹¹³ The Act allows for claims based on discrimination on a wide variety of prohibited grounds and includes a general catch-all test to allow for the recognition of other, not yet recognised grounds.¹¹⁴ The Act does not have an explicitly limited field of application and may even be extended to the most intimate spheres of life.¹¹⁵ The usual problems relating to choosing the correct comparator may possibly be avoided when utilising the Act, as the definition of “equality” and “discrimination” do not necessarily lead to having to compare a complainant’s position to a so-called “neutral” comparator.¹¹⁶ The main enforcement mechanism created in the Act is equality courts which will eventually be available in every magistrate’s district in South Africa.¹¹⁷ This is probably as accessible a forum that could be created in South Africa given current budgetary constraints. Open hearings are held which could in the long term lead to greater awareness of the Act and its powers, if the mass media will play its part in promoting the potential uses of the Act. The Act very explicitly recognises a substantive notion of equality,¹¹⁸ and the examples listed in the Act clearly envisage far-reaching structural adjustments in South African society.¹¹⁹ Through its broad standing provisions,¹²⁰ the Act creates an opportunity for social movements, NGOs, the South African Human

109 Cotterrell 1992:44.

110 Section 13.

111 Section 21(2).

112 Sections 16(2) and 31(4).

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

114 Sections 1(1)(viii) and 1(1)(xxii).

115 See section 6, read with sections 1(1)(vii) and 1(1)(xxii).

116 See sections 1(1)(vii) and 1(1)(ix).

117 Section 16.

118 Section 1(1)(ix).

119 See sections 7-9 and the Schedule to the Act.

120 Section 20(1).

Rights Commission (SAHRC) and the Commission on Gender Equality (CGE) to proactively identify “ideal” cases to litigate and the success of the Act need not depend on individual complainants lodging cases.¹²¹

However, when measuring the Act against the characteristics of effective (transformative) legislation, it fares less well. I analyse the Act below with reference to the requirements of effective (transformative) laws set out above.

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

If read as an extremely ambitious Act, the Act could be understood as a commandment to “be good”: not only the State but all persons are enjoined to refrain from unfairly discriminating against anyone else, and all persons are asked to promote the value of equality wherever they are. If the preamble is treated as rhetoric and the (potentially) more far-reaching aspects of the Act are ignored, a more modest aim can be identified: the establishment of an inexpensive, accessible, informal enforcement mechanism (the equality courts) to make it as easy as possible for those individuals who are so inclined, to institute court action against transgressors of the Act.¹²² Read in this less expansive way, the Act has achieved its purpose of creating a less formal and potentially less expensive method of enforcing section 9 of the Constitution. On the ambitious reading the Act will fail spectacularly.

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

In principle the Act applies everywhere and to everyone. Handler’s examples of difficult-to-monitor entities are all supposed to adhere to the Act’s provisions: The police, welfare agencies, hospitals, mental institutions and prisons.¹²³ For every equality court dealing with this kind of entity, it may safely be assumed that hundreds of similar situations will go undetected.

Recent evidence suggests that equality court personnel are not necessarily committed to implementing the Act. In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act.¹²⁴ The SAHRC reported that equality courts were underused and as a result personnel were losing knowledge and confidence in dealing with equality court complaints.¹²⁵ During March 2007 an *ad hoc* committee of Parliament reviewed the so-called “Chapter Nine Institutions”.¹²⁶ During these hearings the SAHRC reported that

121 Cf Galanter 1974:141 and further.

122 Cf sections 2(d), 2(f) and 16 of the Act.

123 Handler 1978:19.

124 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> on 15 May 2007.

125 *Cape Argus* (2006-10-17) 10; p3 of the minutes as they appear on the PMG website.

126 For example, the state institutions supporting constitutional democracy and established in terms of chapter nine of the Constitution of the Republic of South Africa, 1996. I accessed the minutes to these proceedings at <http://www.pmg.org.za/viewminute.php?id=8738> on 15 May 2007.

some magistrates were not taking these courts seriously and have developed an “attitude” (*sic*) towards the courts.¹²⁷ It reported that some magistrates thought the Act burdensome and rejected or deferred complaints.¹²⁸

Parliament, as the collective body of democratically elected representatives, is arguably more legitimate than the judicial system but Parliament’s “solution” to the problem of effectively combating discrimination has been to throw the problem back to the courts. It follows logically that if South Africans do not trust the judicial system, the equality courts will be underutilised.

Anti-discrimination legislation from other jurisdictions usually contains very explicit exclusions, which was not included in the South African version. Instead the Act employs the concept of “fair” and “unfair” discrimination. Presiding officers have been given some guidance in section 14 of the Act as to the determination of fairness or unfairness but until a large number of cases have been decided, and until very clear parameters have been laid down by the equality courts, violators of the Act will have ample room to argue that they committed “fair” discrimination. Conversely, complainants will not be able to easily establish whether they have been discriminated against “unfairly”. Almost all of the examples¹²⁹ listed in the Act contain the qualifier “unfairly” or “unreasonably”, which begs the question.

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

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

The Act contains an innovative array of remedies but these remedies obviously mean very little if litigants will not argue in favour of far-reaching remedies or if presiding officers shy away from granting such remedies. Where structural discrimination is the target, courts will have to issue structural interdicts and will have to grant itself supervisory power over the implementation of remedial programmes. To date, based on the author’s limited empirical survey,¹³⁰ equality courts have been mainly granting orthodox remedies.

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

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

127 *Cape Argus* (2007-03-12) 9.

128 *Cape Argus* (2007-03-12) 9.

129 See sections 7-9 and the Schedule to the Act.

130 As part of my doctoral research, I conducted a telephonic survey of the pilot equality courts, and a media survey of reported equality court cases. The results of these surveys are not referred to in any detail in this article.

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

Some authors argue that the South African bureaucracy suffers from a skills deficit.¹³¹ If the evidence from the implementation of the training programme is anything to go by, the Department of Justice is not capacitated to play a meaningful role in enforcing compliance with the Act. It currently does not have an accurate database of trained equality court personnel,¹³² and there are serious discrepancies in the available statistics as to complaints received by the various equality courts.¹³³ In October 2006 a Parliamentary Joint Committee held hearings on the impact of the Act.¹³⁴ 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 2007.¹³⁵ This report records that the Chief Directorate Promotion of the Rights of Vulnerable Groups was officially established in April 2005 and tasked with the administration of the equality courts.¹³⁶ The report also notes that not all posts in the Directorate were filled and that the statistics collated by the Directorate may not be completely accurate, as insufficient capacity existed to follow up with courts that may have been receiving cases but who had not been submitting statistics to the Directorate.¹³⁷

131 Picard 2005; Hughes 2006:164; 169-181; Bhorat and Kanbur 2006:13; Hirsch 2005: 27 and 243; Van der Berg 2006:227; Manning 2006:29-30 and 45; Pillay 2006:3; Calland 2006:66, 68 and 93.

132 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> on 15 May 2007. At these hearings the Department of Justice presented a Microsoft™ Powerpoint presentation in which it recorded that it had a “draft database which gives some indication of the available pool of human capacity for equality courts; the database still needs verification by the provinces”.

133 I telephoned the 47 pilot equality courts listed on the Department of Justice’s website at http://www.doj.gov.za/2004dojsite/eqact/eqc_eqc%20structures.htm (accessed 18 August 2006) during September 2006 to enquire about finalised cases and the profile of complainants and defendants. (60 pilot courts are listed in a booklet entitled “Equality for All” published under the auspices of the Department of Justice and Constitutional Development.) The South African Human Rights Commission conducted a survey of equality courts in 2005 and 2006. The results of this survey were distributed at the “Equality Indaba Two Workshop” held at the SAHRC’s premises on 23 November 2006 and are in my possession. In some cases there are huge discrepancies in my figures and those of the SAHRC, which tends to suggest that record keeping at at least some equality courts is not functioning as it should be.

134 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> on 15 May 2007.

135 <http://www.pmg.org.za/viewminute.php?id=8875> (accessed 15 May 2007).

136 P6 of the “draft equality review report”.

137 P8 of the “draft equality review report”.

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

In theory specialised enforcement bodies — equality courts — have been set up across the country but it is highly questionable whether presiding officers have received adequate and sustained training. It is at least arguable that from an accessibility viewpoint, a “one stop shop” should have been created for discrimination complaints. In terms of section 5(3) of the Act, currently two fora exist for discrimination complaints: almost all workplace-related instances of unfair discrimination will be heard in terms of the Employment Equity Act,¹³⁸ while other discrimination complaints will be heard by the equality courts. The possibility of referring a case to a more appropriate forum allows bureaucratically-minded presiding officers to clear their desks of difficult cases, which makes nonsense of the Act’s promise of the expeditious finalisation of discrimination complaints.

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

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

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

As could be seen when the Promotion of Equality and Prevention of Unfair Discrimination Bill was subjected to public hearings in November 1999 to January 2000, the banking and insurance industries were vociferously opposed to certain of the provisions in the Bill, and managed to obtain a compromise from Parliament in the form of section 14(2)(c) of the Act.¹³⁹ Based on available data, banks and insurance companies have not been dragged to equality courts in many, if any, cases. If this starts to happen, however, further lobbying aimed at facilitating pro-business amendments to the Act may be expected from these quarters. The then Minister of Justice is on record when he said at the second reading debate of the Promotion of Equality and Prevention of Unfair Discrimination Bill on 26 January 2000 that “I have made a personal undertaking to the [then leader of the National Party] that we will monitor the effect of the Bill on business and the economy in general. Indeed, if it turns out that it becomes necessary to review some aspects thereof, nothing will prevent this House from doing so”.¹⁴⁰ Too many business-friendly amendments to the Act may well send the message to equality court presiding officers that

138 Act 55 of 1998.

139 Eg see Gutto 2001:108-109.

140 Reproduced in Gutto 2001:27.

market-generated inequalities are instances of reasonable discrimination, which may seriously harm the transformative potential of the Act.¹⁴¹

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

The Act follows a programme of compulsory change; individuals who ignore section 6 of the Act run the (admittedly rather remote) risk of facing court action. The more extreme step of the *criminalisation* of unfair discrimination has not (yet) taken place.¹⁴² The Act does not for example make provision for tax incentives for those individuals who decide to adhere to the letter and spirit of the Act.

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

Based on the official documentation in my possession relating to the implementation of the Act, it is not envisaged that public awareness campaigns will adopt this approach.

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

Acts attempting to change the emotional areas of life generally succeed to a lesser degree than Acts aimed at instrumental areas of life. This Act attempts to do both: The Schedule to the Act highlights instrumental areas of life, such as insurance and banking, but at the same time the Act aims at creating a society “marked by human relations that are caring and compassionate”.¹⁴³ Courts and equality plans do not create kind, caring people.

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

Had the required training of equality personnel been completed relatively speedily after the promulgation of the Act, the equality courts could have been set up much faster. The drafting of the Act was controversial and led to much publicity in late 1999 and early 2000 in the popular media.¹⁴⁴ Had this momentum been

141 Liebenberg and O’Sullivan 2001:37. Parghi 2001:137 is extremely forthright. The author considers the suggestion that “social condition” be added as a prohibited ground to the Canadian Human Rights Act and concludes at 170 that “adding this new ground would not prevent the market from discriminating against poor people who are truly unable to pay for goods such as housing or food ... Social condition would therefore not effect the degree of social change that some of its proponents expect it to and that some of its opponents fear it will”.

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

143 See the Preamble to the Act.

144 Gutto 2001:114-119.

used, it is at least arguable that more people would have been aware of the existence of the courts and more cases could have been forthcoming.¹⁴⁵ Three years passed before some equality courts were set up, and by then public awareness had arguably waned.¹⁴⁶

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

Many potential users of the equality courts, that is individual victims of discrimination, will not be aware of the courts.¹⁴⁷ Many small-time violators of the Act will not be aware of the anti-discrimination norms contained in the Act and will not be in a position to change their conduct to conform to the Act’s standards.

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

Any anti-discrimination Act will by its very nature aim to protect weaker groups as it is those without power and knowledge who are most easily discriminated against.

However, socio-legal theories and comparative experience tend to suggest that the Act will not achieve this aim.

It is an unpalatable fact that lawyers, and therefore the law, serve the propertied classes. Lawyers, for example, draft contracts and wills and assist in the conveyancing of property. Poor people do not need these services.¹⁴⁸ Law “works” for employed people; for people with resources and who have something to lose. If a potential claimant has already lost everything, or have never had anything, law can do very little. If the economy does not grow and insufficient jobs are available, legal “solutions” such as affirmative action won’t do a thing to resolve the poverty.¹⁴⁹

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

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

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

148 Kidder 1983:74-76.

149 Nyman 1994:82.

In a widely-cited and influential article, Galanter coins the phrases “one-shooter” and “repeat player” and discusses why (well-resourced) repeat players generally come out ahead in litigation.¹⁵⁰ The most obvious kind of case where structural reform could follow a court case is where a discriminated-against one-shooter would have sued a discriminating and powerful repeat player. Cases where “one-shooters” sue “repeat players” are rare however.¹⁵¹

Minority (and arguably vulnerable) groups bring relatively few matters to discrimination tribunals in Canada. Approximately 28% of cases brought to the Canadian Human Rights Tribunal for the period 1997-2003 were brought by minority groups. The respective percentages for Alberta, British Columbia and Ontario are 15%, 16% and 29%.¹⁵²

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

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

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

“The required change must be able to be communicated to the large majority of the populace”.

Public awareness must be maintained over the long term. The mass media (soap operas, advertising, music, news) should ideally become involved in popularising the required change. The public awareness campaigns relating to the Act has been woeful, if not almost entirely absent. Unlike when the Labour Relations Act and the Constitution were drafted,¹⁵³ plain legal language was not a consideration when the Act was drafted, or to put it more accurately, time pressure did not allow the drafters to pay much (if any) attention to plain and accessible English.¹⁵⁴ During the parliamentary hearings process COSATU and NADEL both urged the drafters to write a plain language Act. COSATU argued that the Bill was difficult to follow, that its provisions were long-winded and that it contained a proliferation of definitions and concepts. NADEL submitted that the language of the Bill was confusing and complex and that a Bill of this nature and importance should be drafted in plain language and made accessible to the people. These submissions were not heeded and the end-product was a typical “lawyer’s Act”.¹⁵⁵

150 Galanter 1974.

151 Galanter 1974:110.

152 Kok 2007:434-574.

153 See Viljoen and Nienaber 2001:61-70; 71-77.

154 Interview by the author with Shadrack Gutto, one of the drafters of the Act, 27 March 2003.

155 Bekink and Botha 2007:37; Nienaber 2002:2.

Hunt is not convinced that plain language is the solution.¹⁵⁶ He agrees that legislation should be accessible and understandable to the layman but if the key audience of a particular piece of legislation is lawyers, he states that the arguments for using plain language *in the Act* disappears, what the layman needs is explanations and summaries.¹⁵⁷ Bohler-Muller and Tait have argued, in similar vein, that the media should be involved to make the process more accessible to the public.¹⁵⁸ But even on these authors' more forgiving terms the project has failed: The Department of Justice has made available a booklet explaining the content of the Act,¹⁵⁹ but the booklet follows the legalistic wording used in the Act and does not attempt to simplify the Act.¹⁶⁰ It is unknown to what extent the booklet has been distributed. As to the media's involvement, the Department has acknowledged that the public awareness campaign has not been a success.¹⁶¹

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

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

"The state driving social change must be able to rely on vast mass media communication".

156 Bekink and Botha 2007:63; Hunt 2002:24.

157 Hunt 2002:28.

158 Bohler-Muller and Tait 2000:414.

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

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

161 Eg *Sunday Independent* (2005-4-3) 2; *Pretoria News* (2005-4-14) 8. On page 43 of a document entitled "Project Plan Implementation Report April 2004" provided to the author by Mr Rob Skosana, Department of Justice, it is stated that "to meet our [Department of Justice] marketing objectives an additional amount of R4 m is required to ensure that even people in the rural areas can receive and understand the intended information as contemplated in the act (*sic*). The Department of Justice must promote the act (*sic*) together with the chapter nine institutions by assisting and providing relevant information to the public. *However at this stage due to lack of funds we encounter difficulties in carrying out our mandate*". (My emphasis). Lack of public awareness perhaps (partially) explains the small number of cases that have been brought to the equality courts since their inception.

The Department of Justice has certainly not utilised the mass media in a sustained, vigorous manner and reporting on the equality courts have been sporadic.¹⁶²

5. Conclusion

As should be clear then from the above analysis, the Act is unlikely to achieve its stated purpose of effecting large-scale societal change in South Africa, be that socio-economic transformation or a change in the hearts and minds of South Africans. I state a few of these reasons again: Many breaches of the Act will be very difficult to detect; equality court personnel did not receive adequate and sustained training on the Act and are not necessarily committed to implementing the Act; courts are generally loathe to grant far-reaching remedies; the Act does not contain incentives for compliance; the Department of Justice is not sufficiently capacitated to oversee the effective implementation of the Act; and the South African public is not sufficiently aware of the Act's provisions.

If the "official" legal system is seen through Ehrlich's eyes as something to be turned to to deal with the "abnormalities of life",¹⁶³ this conclusion is not startling. Official state law plays a small and limited role in solving everyday disputes and will usually be of limited assistance in effecting social change. However, to lose complete faith in the ability of the adjudicative process to effect societal changes, would be premature. Important victories are sometimes won in utilising the law.¹⁶⁴

Law only "fails" if a particular question is asked. That question is: "Can law solve the problem of discrimination?" and the answer is "No". If one asks if law can provide effective redress for aggrieved individuals,¹⁶⁵ the answer may well be yes, at least for some individuals some of the time. Where equality courts have been established, complainants may approach these courts and may without legal representation lodge a claim by completing a document at the court, whereafter the clerk of the court will have this document served on the respondent. At the trial, an unrepresented litigant may be assisted by a presiding officer, who is entitled to approach the matter in a quasi-inquisitorial fashion. If a complainant in

162 I have been able to source only ten newspaper reports relating to publicising the existence of the equality courts and how to approach the equality courts: *Star* (2005-3-18) 19; *Sowetan* (2005-3-17) 9; *Star* (2005-3-17) 22; *Burger* (2004-2-26) 19; *Cape Argus* (2004-3-10) 12; *Cape Times* (2003-11-28) 5; *Weekly Mail and Guardian* (2003-11-27) 42; *Sunday Tribune* (2003-7-20) 11; *Beeld* (2005-03-22) 10; *Sunday Times* (2005-03-20) 15.

163 Ehrlich 1936:21.

164 In the context of equality and non-discrimination, two cases may be mentioned. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) in an indirect way may have assisted in alleviating socio-economic inequalities when the Constitutional Court allowed the (then) Pretoria City Council to continue cross-subsidising the water and electricity rates of the under-serviced black townships. *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) alleviated the plight of permanent residents, or at least those permanent residents who are aware of the judgment, in allowing them to apply for social assistance grants.

165 Cf Lustgarten 1992:467.

a discrimination matter establishes a *prima facie* case of discrimination, it falls to the respondent to persuade the court that the discrimination was fair.

I would suggest that legal academics interested in furthering a transformative project, should aim to illustrate problematic provisions in the Act that may hamper a complainant's quest for effective relief, and should point out how the Act may be improved to avoid litigants falling through the cracks, as it were. I would agree with Lacey who says:¹⁶⁶

[W]e simply cannot afford to abandon the legal process ... because in the real world disadvantaged people do not always have a choice about whether or not to defend or advance their needs and interests by legal means. Sometimes they simply have to do so because legal action is initiated by other parties, and on other occasions they have to because no other avenue of redress is available or remains to be explored. *We must try to alter law so as to make it more receptive to the arguments of the powerless ...*

¹⁶⁶ Lacey 1992:121; my emphasis. At 124 n42 she agrees with Crenshaw 1988:1331 that "rights discourse is sometimes the only available point of entry for struggle or reform, and that we need to use liberal legal ideology pragmatically, with our eyes open to its dangers".

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