

**A SUMMARY OF THE REPORT OF THE EQUAL EDUCATION APPOINTED PANEL OF ENQUIRY TO
INVESTIGATE ALLEGATIONS AGAINST DORON ISAACS AND OTHERS AND REVIEW THE
PROCEEDINGS AND OUTCOME OF THE EQUAL EDUCATION HUMAN RESOURCES
SUBCOMMITTEE HEARING OF 2011**

REPORT COMPILED BY PROFESSOR RASHIDA MANJOO, 10 DECEMBER 2018.

INTRODUCTION

- 1 This document serves as a summary of an independent report ("**Manjoo Report**") released by Professor Rashida Manjoo ("**Professor Manjoo**") on 10 December 2018. The report is thirty (30) pages long.

THE MANJOO REPORT

- 2 A preliminary outline is necessary regarding the circumstances in which the Manjoo Report arose. Professor Manjoo states in her report that it is not a response to the report released by Judge Kathleen Satchwell ("**Judge Satchwell**") and Professor Malose Langa ("**Professor Langa**") on 27 November 2018 ("**Satchwell/Langa Report**"). Instead, the report is framed to address the concerns in a way that is beneficial to the client, Equal Education ("**EE**"). Professor Manjoo further noted that she has not accepted any payment for her services as a Panel member.
- 3 Professor Manjoo acknowledged the work done by Judge Satchwell and Professor Langa and appreciated their work despite their difference of opinion in the final analysis and findings. She also noted her own shortcomings in participating in a process that became overly legalistic, rendered invisible the people who provided statements and her inability to protect the complainants against further pain and trauma.

- 4 In hindsight, Professor Manjoo felt that she should have directly contacted EE, earlier on in the process, to highlight her concerns. This would have enabled her to ascertain more substantively what EE hoped to achieve from the process. It was further felt that the process was not fully reflective of what was written in the organisation's media statements around the enquiry, including the need for an investigative enquiry that was responsive to complainants.

- 5 The following reasons were given for why, unfortunately, consensus could not be reached on the final report:
 - 5.1 there was a difference in interpretation and analysis of the information received;
 - 5.2 the judicialized and lawyer-driven process;
 - 5.3 time constraints on the Panel; and,
 - 5.4 the timeline set by Judge Satchwell for the release of the final report.

- 6 The circumstances leading up to Professor Manjoo's decision to resign are now summarised.

- 7 After receiving the draft report on 28 October 2019, Professor Manjoo offered to edit the report to include her own analysis, subject to a more reasonable timeframe being negotiated. Judge Satchwell did not accept this. Professor Langa and Professor Manjoo then discussed their dissatisfaction concerning the limited time the Panel had spent together, with Professor Langa sending an email to suggest that the Panel convene a Skype discussion on their concerns with the draft report. Judge Satchwell did not respond to this email and reinforced her timeline in a subsequent email. Professor Manjoo stated that her decision to resign was not taken lightly and that her report is not the appropriate place to highlight the concerns that led to that decision.

- 8 The focus of the Manjoo Report was not to provide findings of guilt or innocence. Professor Manjoo believed the Terms of Reference governing the enquiry did not mandate them to make such findings. Instead they allowed for a report that focused on broader issues of institutional culture, power and victimisation. Professor Manjoo believed this was reflected by the inclusion of the 2011 enquiry review in paragraph 12.2 of the Terms of Reference.
- 9 The Manjoo Report takes a victim-centred approach that adopts a contextual lens to the allegations that were reflected in the complainants' statements shared with the Panel. Professor Manjoo finds that despite the laudable policy documents developed by EE to deal with sexual offences, concerns still remain on a number of issues. Including, amongst others, allegations of sexual offences, cover-up, silencing, intimidations and importantly the need for the organisation to review its practices.
- 10 It was Professor Manjoo's understanding that the intention of the 2018 enquiry was premised on fairness in a truth-telling process which was to be underpinned by a victim responsive approach. In line with this, the Manjoo Report sought to provide a picture of the allegations regarding the organisational culture at EE, the patterns of conduct that were not addressed and an environment where impunity became the norm.
- 11 Professor Manjoo was granted permission to use confidential information that the Panel received from the complainants, including the submissions made by the Women's Legal Centre ("WLC"). An excerpt of each statement made by complainants are detailed in the Manjoo Report. These were shared with Professor Manjoo by the WLC. The excerpts do not fully reflect the substantive contents of the statements that were submitted. **They have not been summarised here due to confidentiality concerns.** Professor Manjoo recommends that EE engage with the complainants to fully understand the scale of the allegations in the statements.

- 12 The Manjoo Report highlights that the social justice sector has lost the opportunity to substantively address issues of power, privilege, patriarchy, racism, sexism, classism and social status. This was due to a process that overwhelmingly sought vindication, which was not necessarily in the best interests of women and/or EE. This was also seen in the named parties desire for a definitive outcome. This missed the fact that the process was not a criminal trial but an investigative enquiry that sought to gather information which would be of assistance to EE moving forward. Professor Manjoo called on all parties to reflect on their contributions and questions whether they effectively exercised a duty of care, whilst working within an ethic of 'do no harm', in uncovering facts that would provide prima facie evidence of patterns of behaviour.
- 13 Professor Manjoo acknowledged that she had seen media reports, including unsolicited communications that were shared with her, on the Report compiled by Professor Satchwell and Professor Langa. In her mind there is no doubt that the objectivity of the Manjoo Report will be questioned on numerous grounds. On 2 December 2018 Advocate Harvey, acting on behalf of her client Mr. Isaacs, released a statement that potentially impugned the objectivity and integrity of Professor Manjoo.
- 14 Professor Manjoo found this unfortunate as she had no control over the 'distorted' media reports and other statements made by people. It is further added that the Manjoo Report relied on documentation that was received by Professor Manjoo during her participation on the panel.

THE FUNCTIONING OF THE PANEL OF ENQUIRY

- 15 The Manjoo Report noted a number of aims and functions of an enquiry. An enquiry is aimed at truth finding and restoring confidence in an institution. The procedures adopted have to be inquisitorial so as to generate facts for EE in their

effort to reflect on organisational policies, cultures and practices. Professor Manjoo noted the submission by the WLC that 'any findings that were made would effectively have no weight in law' as Mr Isaacs had resigned from EE. The enquiry therefore became a fact-finding exercise.

- 16 The function of an enquiry that is set up to seek information on sexual violence broadly will by necessity have to be victim-responsive. Professor Manjoo highlighted that respecting the rights of all parties, including those whom are accused, does not preclude a greater focus on protecting the interests of victims. The Terms of Reference of the 2018 enquiry are criticised for not 'being explicitly reflective of an awareness of the nature of sexual harassment proceedings and the need to be victim-centred.'
- 17 An appropriate approach would include addressing issues of access, responsiveness, fear, stereotyping of victims, the stigma attached to complainants and the need for confidentiality and anonymity. As noted in Satchwell/Langa Report, the Panel used its discretionary powers in an attempt to make provisions to address some of these issues.
- 18 Professor Manjoo outlined how the Panel acknowledged its responsibility to address the vulnerability of complainants at the early stage of its work. Though in her view this position shifted due to 'subsequent overly legalistic processes'.

19 On 13 August 2018 correspondence was sent by Cheadle, Thompson & Haysom Inc (“CTH”) to the WLC.¹ This confirmed the Terms of Reference and envisaged that complainants could come forward in one of four ways:

19.1 a written complaint;

19.2 by providing testimony to the Panel without a written complaint,

19.3 providing a written complaint and oral testimony to the Panel; and,

19.4 submission of a written complaint with the assistance of CTH.

20 This was noted as an appropriate victim responsive approach. Various issues were then later raised in response to what Professor Manjoo found to be a shift in this approach. Professor Manjoo listed a number of issues that were raised by the WLC in their submission to the Panel on 19 October 2018. These included:

20.1 That the correspondence between CTH and WLC did not indicate that should the WLC’s clients elect to make anonymous and confidential written submissions, that they would be required to justify their inclusion or consideration and need to indicate the weight to be attached thereto by the Panel.

20.2 That the current emphasis in this matter on the rights of parties who believe they have an interest in these proceedings cannot be at the centre of a process that seeks to uncover the facts.

¹ The use by the Panel of CTH and the WLC is discussed in the Satchwell/Langa Report and the summary thereof.

20.3 An insistence on due process and turning the investigation into an adversarial trial only frustrates the investigation of the Panel.

20.4 There should be no strict application of the law of evidence and any associated rules. The issue of weighing up evidence is not appropriate or necessary in a preliminary investigative process.

21 Professor Manjoo endorsed the submissions made by WLC as they echoed her own concerns with the work of the Panel. The understanding of the accused parties was also criticised as being minimal, particularly in light of the difficulties that complainants generally face when seeking responsive protective and participation measures. Professor Manjoo found this difficult to understand considering that the accused were all activists who had been involved in social justice work over decades.

THE ORGANISATIONAL CULTURE OF EE AS REFLECTED IN STATEMENTS RECEIVED FROM THE COMPLAINANTS

22 Professor Manjoo summarised that the WLC submitted 19 statements in line with the Terms of Reference and the procedures adopted by the Panel. The WLC conveyed to the Panel that none of the complainants expected the Panel to provide justice for them within the formal legal understanding of accountability findings, penalties etc. Instead the need was for a larger transformative justice

process that allowed one to be seen and heard in a safe and responsive space. This could then possibly lead to substantive discussions on the issues raised.

- 23 The Manjoo Report includes excerpts from the complainants' statements which were provided by the WLC. The excerpts were not included in the Manjoo Report as evidence of wrongdoing by any particular individual. They were included to acknowledge the voices of the complainants and to highlight the organisational culture that allowed for certain patterns of conduct linked to sexual harassment, intimidation, bullying, impunity and the silencing of women.
- 24 Professor Manjoo lamented that the Panel fell into the trap of adopting an approach that is expected in an adversarial process. An inquisitorial process could have led to the eliciting of prima facie evidence of wrongdoing by individuals and allowed for the investigation of broader systemic issues around power, privilege and the patriarchy.
- 25 The excerpts raised a number of issues dealing with sexual harassment, sexual offences, organisational culture, racism, bullying, intimidation and silencing, from both men and women within and outside formal EE structures.
- 26 Professor Manjoo also noted a caution raised by Mr Isaacs' attorney to the 2018 Panel. This was that the Panel, by inquiring into allegations against Mr Isaacs, 'was not tasked with fashioning a set of moral standards for EE by considering or pronouncing on what is or is not appropriate or becoming.' The crux of the

communication is that social justice youth organisations are intense environments that cannot be compared to ordinary workplaces, where people may associate only for the purposes of making a living.

27 As such, young activists form strong friendships and intimate relationships that go beyond professional relations. The caution goes on to state that where there is consent and a rule or standard adopted by the social justice organisation has not been violated, an independent panel of enquiry should not interfere. This would be inappropriate as it would impose a standard of sexual morality after that fact, where such a standard is open to contestation.

28 Professor Manjoo refrained from expressing an opinion on this caution, for it may lead to her being accused of imposing outdated views and values on sexual mores and morality, that are not in line with what exists in the social justice sphere. It was noted that the articulations in the statements reflected an organisational culture that is experienced by women as patriarchal, hierarchal and victimising for some.

INVESTIGATING THE ALLEGATIONS AS PER THE TERMS OF REFERENCE

29 The investigation requested by the Terms of Reference included a review of the 2011 enquiry, the Mail and Guardian article regarding the Kalk Bay allegation and other allegations linking sexual misconduct to Mr Isaacs.

The status and value of the complainants' statements

- 30 The statements received by the panel alleged a pattern of abuse of power by some people in leadership positions in EE. Professor Manjoo noted that this in turn created an environment where the human rights of some women were violated with impunity. This negatively impacted the use of internal procedures in the organisation that allowed for incidences of sexual violence, intimidation and bullying to be disclosed.
- 31 Professor Manjoo again noted the numerous challenges that the Panel faced in its investigative work. This included: the deficits highlighted already with the Terms of Reference, the need to be victim-responsive while respecting the due process rights of all, encouraging potential complainants to come forward and the financial and time constraints of EE.
- 32 Procedural fairness was raised as an issue and extensively discussed. On the one hand it was argued that this required the Panel to receive and test evidence in order to establish whether there was prima facie evidence of wrongdoing. On the other hand it was argued that the principles of natural justice may be departed from in cases where public policy or public interest demand.
- 33 Paragraph 13 and 19 of the Terms of Reference allowed for the confidential participation of complainants. They also provided that Mr Isaacs have access to the complaints received by the Panel. The complainants opted for complete confidentiality in terms of their participation, their identity and the sharing of their written submissions. Professor Manjoo noted that the majority of complainants

were open to engaging with questions of clarity that might be needed from the Panel.

- 34 The WLC centre argued, in response to a question from the Panel about the legal consequences for the complainants should their submissions not be dealt with confidentially, that it would be an 'unjustifiable breach and violation of...[the complainants]... constitutional right to privacy' if their submissions were not dealt with confidentially. The violation of the constitutional rights of the people accused of wrongdoing was persuasively argued by their respective legal teams.
- 35 As noted in the Satchwell/Langa Report, along with the Manjoo Report, the Panel attempted to find a solution to the wishes of the complainants that was victim responsive. This was challenged on a number of levels.
- 36 The WLC argued that the lack of certainty regarding the procedures in place prior to the commencement, and during the work of the Panel, resulted in the complainants being treated as individuals who had instituted legal proceedings and so bore the burden of proof. Professor Manjoo noted that the changes in the procedures of the Panel, as they related to what could be admitted as evidence, raised concerns about the uncertainty the complainants faced after they had involved themselves in the investigative process.
- 37 This uncertainty resulted in the complainants not knowing the exact nature of the process they were participating in or the procedures that formed part of it.

Professor Manjoo found that this ultimately impacted their ability to make informed decision with regard to their level of participation.

- 38 In respect of what weight or evidentiary value the statements should have received, the submission made by the WLC is quoted. This stated that ‘all evidence that relates to the purpose for the establishment of [the] enquiry is relevant and should be accepted by the Panel. The submission goes on to further state that the Panel has no choice but to admit and assess the submission and questions whether they should be ‘dismissed purely because [the complainants] have opted to remain confidential in a process unfolding in a hostile environment?’
- 39 In the all the panellists concluded that the complainants’ statements did not constitute evidence. This was based on the substantive legal arguments on due process considerations that were raised by the parties. Professor Manjoo stressed that there was however no agreement on how the Panel could have utilised the information contained in the statements. The rejection of the statements in totality was not a consensual decision.

Understanding Sexual Harassment and Similar Misconduct

- 40 Professor Manjoo canvassed a number of legal authorities and academic sources on a contextual understanding of sexual harassment. These were submitted by the WLC. It was also noted that Professor Halley of Harvard Law school had made a submission in this regard to the Panel at the behest of Mr Isaacs. Professor

Manjoo criticised this as being unauthorised by the Panel and indicated that some of the complainants' statements reflected that Isaacs had a habit of soliciting statements of support and to 'engage in inappropriate framing of contact with people who may be beneficial to his cause'.

41 In summary, the WLC submission recorded that:

41.1 the academic Catherine Mackinnon has argued that sexual harassment is an 'expression of dominance laced with interpersonal contempt';

41.2 that according to the academic Carol Sanger it is questionable whether consent can truly be given in a workplace where there are power dynamics and fear present. It is necessary to look behind consent as 'no one in the weaker position ever really consents freely'; and,

41.3 case law has noted that sexual harassment can occur where a consensual relationship existed previously.

42 Professor Manjoo further canvassed the legal framework in place to address harassment in South Africa. This was noted as being excellent and that our courts have been 'proactive in expanding our understanding of factors linked to sexual harassment'. The Labour Appeal Court is praised in particular as being alive to the issues concerning power dynamics and sexual harassment in the workplace.

43 Case law is discussed that shows an understanding that a victim's reluctance to complain must be considered in light of the personal and power dynamics that

exist. These often inhibit a person from taking formal steps against perpetrators of sexual harassment. Further, our courts have acknowledged that victims often choose not to report incidents of sexual harassment when they occur.

- 44 Professor Manjoo concluded that the substance of the WLC submission illustrated how sexual harassment is underpinned by power dynamics. Consent is not devoid of coercion and that a range of factors lead to the silencing of victims. Professor Manjoo recommended that EE examine these issues and proposed a range of factors that need to be taken into account by an investigative enquiry envisioned in the Terms of Reference. This included increasing the understanding of sexual harassment beyond statutory and policy frameworks, whilst understanding the role of power, status and privilege and how this can lead to an abuse of authority.

The review of the 2011 Investigation

- 45 The framing of the 2011 investigation, including the language used and the parameters set, was discussed. This was predominantly done in light of the allegation that the 2011 investigation was fatally flawed for not being impartial. The use of the term 'rumours' is highlighted as leading some to view the 2011 investigation as tainted. Professor Manjoo remarked that this may not be accurate but was nevertheless a view that persisted over the years. It is further stated that the arguments in defence of the terms of reference of the 2011 investigation, such as that there were no complainants, are all valid. Though the process and outcome

reinforced a perception that there was no genuine intention of uncovering the truth through establishing an independent, safe and responsive process.

- 46 Professor Manjoo remarked that she expected, with hindsight, that there would have been a level of acceptance that the 2011 investigation could have been handled differently. The material outcome may have been the same but the findings might have been accepted or viewed as legitimate if the issues had been addressed differently. It is recommended that EE reflect on the mistakes that have been made in handling sexual harassment allegations and the enquiries that have been instigated. This could include reviewing existing policy regarding preliminary investigations and the compositions of such panels.

The Mail & Guardian article regarding the Kalk Bay allegation

- 47 The Panel had in its possession the statement made by 'Jane' which set out her version of the events that occurred during the evening in question. A submission made on behalf of 'Jane' by her legal representative included details of the nature of her relationship with Mr Isaacs, his unwelcome sexual advances and a detailed account of sexual assault and attempted rape. 'Jane' had given the Panel consent to use her statement to test the evidence of Mr Isaacs, though the Panel decided not to do so as it had rejected all statements that had been submitted.
- 48 The Panel provided the opportunity for 'Jane', Mr Isaacs and Mr Achmat to question each other either directly or indirectly through the Panel. Jane's legal

representatives rejected this offer on her behalf on the grounds that the issue should not have been included in the Terms of Reference as these were allegations related to criminal conduct.

49 The evidence produced in written and oral form by Mr Isaacs, Mr Achmat and Mr Geffen formed the basis of the findings given in the Satchwel/Langa Report. Professor Manjoo raised a number of ethical concerns regarding turning an investigative enquiry into a criminal-trial like process. This included the acceptance of prejudicial Facebook messages as ‘evidence’ which had no probative value, reaching a finding of plausibility on untested evidence, the stereotyping of alleged victims of sexual assault and violating the *audi alterem* rule.²

50 Regarding the possible encroachment to principles of natural justice, Professor Manjoo quoted from the Brenco case. There it was stated that the *audi alterem* rule unduly hampers the exercise of an investigating authority. In dismissing a two-step process to the enquiry the Panel unfortunately became both an investigator and adjudicator.

Other allegations linking sexual misconduct and Isaacs

51 Professor Manjoo noted that the decision to reject the statements made it impossible for the Panel to comply with its investigative mandate. She explained that if they undertook to examine the 19 statements, they may have been able to

² This rule, forming part of natural justice, requires that a person be afforded the opportunity to respond to evidence given against them

identify patterns of conduct at EE. The assumption that the statements did not include information from any of the five women named in the 2011 investigation was also stated as a missed opportunity. It was noted that the common practice of sexual harassment reflected in the statements was that of online sexual harassment and she noted that this meets the definition of sexual harassment as per the Amended Code of Good Practice in the Handling of Sexual Harassment in the Workplace.

Recommendations

52 The following recommendations were made in light of the above:

52.1 The need remains for EE to engage in an internal transformative justice process that is about complainants being seen and heard in a safe and responsive space, which could possibly lead to substantive discussions about organisational culture and practices.

52.2 As part of a reflective and educative process on victim-centred approaches in an enquiry, EE is encouraged to engage with the WLC submissions on this aspect.

52.3 EE needs to initiate a process of dialogue to engage with the 19 complainants and their legal representative, in order to fully understand the scope of the allegations made in the statements. This is in line with the transformative approach that the complainants seek, in their quest for

justice, and also in line with EE's commitment to treat all complainants with respect and dignity.

52.4 EE needs to undertake an audit to establish whether their policies are sufficient, whether there is substantive knowledge of such policies, whether implementation measures are in place and also to assess whether they work in practice.

52.5 EE may wish to review its existing policy in respect of the process for preliminary investigations, and also reflect on the composition of such panels as there must be certainty in respect of procedures in place prior to the commencement of an enquiry.

52.6 EE bears the responsibility to understand how the organisational culture contributed to allegations of sexual harassment, intimidation, bullying and silencing.

52.7 There is a continued need to keep the identities and the content of the submissions made by the clients of the WLC confidential.³

³ This recommendation was highlighted by the WLC.