

South African Human Rights Commission



Enquiry into Racism and Racial Discrimination
in the



Department of Justice
and Constitutional Development

February 2002

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Enquiry into Racism and Racial Discrimination in the Department of Justice and Constitutional Development

Preface

This report was generated as the result of a request from the Minister of Justice, in response to his concerns regarding allegations of racism in the Department of Justice and Constitutional Development. The South African Human Rights Commission hopes that this report will both inform and add to the current debates around justice, racism and accountability to the communities served. Recent legislative developments support the process of transformation and in this regard, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act warrant mention. In essence, the South African Human Rights Commission has endeavoured to place this debate firmly within the framework of our constitution, with particular reference to the values, which underlie our constitution.

This report must also be read in the context of the recently concluded World Conference Against Racism (WCAR) held in Durban in September 2001. One strong theme, which emerged from the WCAR was the manifestation of racism in the criminal justice system. Many recommendations in this report are consistent with those emerging from the Durban Declaration.

The South African Human Rights Commission would like to take this opportunity to thank those centres, which assisted us with our enquiry. Special mention must be made of the personnel at the Justice College, Pretoria Magistrate's Court, Johannesburg Magistrate's Court, Springs Magistrate's Court, Randburg Magistrate's Court, Director of Public Prosecution's office and the Master's office in Cape Town. This report would not have been possible without the support and encouragement received from the Department of Justice and Constitutional Development.

1. Background

a. *The nature and place of the justice system in a democratic society*

South Africans take great pride and justifiably so in the strides that we have made in establishing a democratic society underpinned by the values of equality, human dignity and the advancement of human rights and freedoms. However we are constantly reminded that such values cannot only resonate from the words of our Constitution and the laws that have been enacted in support of the Constitution. For our young democracy to succeed those values have to become a part of the ordinary business of South Africans and also have to be reflected in the cultures of the various institutions that exist and are necessary to support and sustain democracy. Many such institutions exist; some have been newly created while others have existed for a long time. Whatever their genesis or their history may be, what is required is that all of them display a loyalty to the values that the Constitution seeks to advance. While the articulation of this premise is not problematic, in practise it has proved a struggle in many areas to make the vision of the Constitution a reality. The administration of justice is one such area.

Any cursory examination of the apartheid era will reveal that its 'success' was in no small measure due to the manner in which the administration of justice often responded with great loyalty and enthusiasm to the demands of the apartheid state. - demands that were in the main unreasonable, unethical and improper. With a few notable exceptions the administration of justice was seen by the majority of South Africans as so aligned, ideologically and politically with the ruling order that it was impossible to expect from it the delivery of fair and equal justice. The laws that were required to be applied, the manner in which the system was staffed and its modus operandi all reinforced the notion of the superiority of one group and the inferiority of another located largely on biological factors. In this regard the courts and the judicial officers who staffed them often went beyond the call of duty by introducing into the system their own personal assumptions about value, excellence and human worth elevating them to legal principles. The following examples illustrate the point quite effectively: -

- (a) In *Sv Xhego* 1964 (1) P.H.Van der Riet J.P. (at the time the most senior judge in the province of Natal) said "the native (*vis* the European) in giving evidence is so prone to exaggeration that it is often impossible to distinguish the truth from fiction...There are other factors which militate strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character." This credibility finding did not only apply to the witness in question but to all who had the misfortune of being Bantu.
- (b) In *SvM* 1965(4) S.A. p577 the court took judicial notice that Black women submit to rape without protest while in *Sv Tusini* the court accepted the fact that Black people can recognize people they know in comparative darkness.
- (c) In 1980 in the matter of *S v Augustine* 1980(1) p503 at p506 Rumpf C.J., the then Chief Justice of South Africa remarked "apparently the advocate for the defence in the court a quo has not gained the necessary appreciation viz. that Coloureds and Blacks will sometimes stab without any reason other than an apparent lust for stabbing." (English translation from the original Afrikaans).

- (d) The fact that not a single White person was sentenced to death for the rape a black woman while numerous blacks were executed for the rape of white women is indicative of how the courts, acting as their own regulators of social conduct made telling judgement calls on the worth and value of the citizens of this country. Thus many judicial officers far from being independent and impartial adjudicators of disputes brought into the judicial arena and gave the legal stamp of approval to assumptions about value, excellence, self worth and dignity that was based on a hierarchy of values with Whites at the very top and Blacks at the bottom. It will be difficult to argue that coming as it did from senior judges it did not find it's way into the rest of the system and still finds a resonance in that system even today. The law was applied in the context of and an acceptance of a warped value system that became ingrained into the day to day business of those charged with the administration of justice. Changing the laws and indeed the personnel was not a guarantee that the value system that underpinned it would automatically change.

Many would correctly argue that we attempted to make a clean break from that past with the establishment of a new democratic society. The Truth and Reconciliation Commission was one of the institutions that would assist South Africa in making that break. However in order to do that it was necessary to examine that past and in the context of the administration of justice examine and attempt to understand how and why the system was able to function the way in which it did, extract from that process lessons for the present and the future and indeed to contribute to the development of a system of justice that above all was independent and able to deliver justice 'impartially and without fear , favour or prejudice'. Given the manner in which negotiations were conducted, it was evident that many civil servants and judicial officers who served the previous government would continue in service to the current government. This political and social reality rendered it even more crucial that there be an effective process that could serve as an informed basis to assist in the transformation that was required.

Unfortunately and despite the best efforts on the part of the Truth and Reconciliation Commission it's examination of the legal system was incomplete largely as a result of the refusal and or failure by judicial officers to share their experiences with the Commission. Notwithstanding this the Commission in it's final report reflects on this process and makes a series of observations and findings, that in the main bemoans the connivance of the courts and the legal profession in the legislative and executive pursuit of injustice.

b. Developments since 1994

There has been much activity and indeed much progress made in the attempt to transform the administration of justice in the past few years. Appointments in key and senior positions have assisted in changing the physical face of the system while work around changing the value base of the system both at a personal as well as an institutional level remains ongoing. Implicit in all of these initiatives was an understanding that transformation had both a quantitative and a qualitative component, both requiring almost simultaneous attention. Many argue that the progress that has been made, while welcome, has been rather slow and that it has adversely impacted on the image and integrity of the administration of justice. Cited are the numerous examples of many South Africans who continue to have negative experiences within the system. At one level these complaints have emanated from those who work within the system, while at another level the public has consistently aired their grievances.

Many of the complaints have sought to suggest that the root cause of the unsatisfactory treatment has been the issue of race. It is argued that racism, endemic as it was in the South Africa of pre 1994, did not simply up and disappear. To the extent that it very often formed a part of the personal value system (knowingly or unknowingly) of individuals, who then invariably brought those very prejudices and biases into the workplace leading to an institutional culture that was difficult to distinguish from the personal views of those who staffed it.

It has become thus important in dealing with racism to separate (even though they are inextricably linked) its operation at the personal level as opposed to its manifestation at the institutional level. At the personal level racism is frequently defined as an ideology, which holds that one race is innately superior or inferior to another. Institutional racism consists of policies that appear to be race-neutral or colour blind and that are usually not the result of intentional efforts to discriminate but nevertheless have the effect of limiting the opportunities of certain groups.

Given our own history and development the allegations of racism in the justice department should not be seen in isolation. While it should be a matter of deep concern it must be viewed and approached on the basis that it is symptomatic of a broader problem within the society rather than as something unique and germane to this department only. The Human Rights Commission has since its inception had to investigate and deal with issue of racism in areas ranging from local government to educational institutions, from the police to the media, from universities to the private sector. The one enduring lesson that has emerged from all of these investigations is that there is hardly any area of common life in South Africa that has not been affected by racism and that the first step in any process of seeking to combat and challenge racism must be in the honest recognition of its wide and damaging impact on individual and institutional life and a sincere willingness to challenge it.

c. The genesis of this enquiry

Over the past few years numerous complaints have been received from personnel within the Department of Justice and Constitutional Development complaining about their work conditions and environment and alleging the existence of racism in various forms. There were various internal processes put in place to attempt to deal with the problem. Notwithstanding these initiatives the problems persisted and the Minister decided to refer the matter to the Human Rights Commission for investigation.

2. Methodology

Attached is a copy of the Terms of Reference published by the SAHRC. On further investigation of the Minister's request, the SAHRC established, in consultation with the Department of Justice and Constitutional Development that the investigation should focus on the following centres:

1. Pretoria Magistrate's Court
2. Johannesburg Magistrate's Court
3. Springs Magistrate's Court
4. Randburg Magistrate's Court
5. Justice College
6. Director of Public Prosecution's office
7. Master's office in Cape Town

The SAHRC embarked on visits to each of these centres¹, where we publicised the fact of our enquiry and invited submissions. The visit included a commissioner and staff members of the Commission. A public meeting was held at each centre specifically for the personnel from each centre. The SAHRC engaged each centre at these public meetings, invited questions and submissions within the time periods determined by the Terms of Reference. The SAHRC further displayed notices advertising the enquiry, which notices included an invitation to personnel to make submissions. In addressing staff, the SAHRC made it clear that the SAHRC had no intention of following an adversarial procedure, but favoured a problem solving solution. The meetings, it was emphasised, were to invite submissions from complainants, and to explain the procedure for the investigation.

These visits were not intended to discuss individual or systemic complaints, but rather to inform, clarify and generally explain the inquiry. While we were in the main courteously received we could not but sense in many of the centres visited an unwillingness to talk openly about the inquiry, an objective which we had set out to achieve. Perhaps this was due in part to people not wanting to be identified with one position or the other. The fact that concerned us, however, was that there was clearly not an environment in most of the centres visited that supported open and robust discussion of such a matter. This observation is not intended as an indictment of the staff and management of such centres but rather as a general reflection of indeed how few spaces exist in our society where we can openly talk about and strategise about the problem of racism. In retrospect it may be that the unwillingness of many complainants to proceed with the complaints they submitted to us are due in part to this phenomenon.

After publication of the Terms of Reference, the SAHRC met with the National Director of Public Prosecutions (NDPP). At this meeting the NDPP advised us that his office was in the process of conducting workshops on issues of diversity, difference and conflict resolution. Through negotiation with the NDPP, it was agreed that the process under way in the NDPP's office was complementary to that being followed by the SAHRC. To this end, it is hoped that the matters raised in this report, insofar as they relate to the prosecutorial service, will be taken cognisance of by the NDPP, in conjunction with the other process currently underway in his office.

¹ The SAHRC did not visit the Director of Public Prosecution's office

The SAHRC received approximately 35 written submissions from the various centres. These submissions related to both systemic concerns as well as more specific concerns, based on an individual's own experience in their environment. The submissions received by the SAHRC, broadly speaking, fell into three distinct categories:

- 1.those which made general observations regarding the working environment;
- 2.those that made allegations of a general nature against other individuals and systems and procedures, yet lacked substantiation and
- 3.submissions which were of a distinctly personal nature- setting out a complainant's personal experiences of racism.

As part of its process, the SAHRC approached the complainants and reduced their complaints to affidavit form, in consultation with the complainant, in compliance with the SAHRC's regulations. This process further served to seek clarity on issues raised. The SAHRC determined to investigate the individual complaints, by putting allegations to people cited in complaints, in order to ensure we received the benefit of the views of the people cited in complaints. The SAHRC recognised the close proximity in which complainants and people cited in complaints worked. To this end the SAHRC was of the view that it was essential to obtain permission from complainants to put their allegations to the people cited. We addressed letters to the complainants, which included a draft letter, putting the complainants allegations to the people cited in complaints. The SAHRC sought permission from complainants to distribute these letters. The complainants did not furnish us with the necessary authority and accordingly the allegations were not put to the people cited.

Under the circumstances, it must be noted that the submissions received remain untested and unverified insofar as they pertain to personal complaints. The SAHRC did conduct further enquiries in order to obtain evidence of objectively ascertainable information, such as the racial make-up of court personnel and other statistics, which information assists to contextualise the complaints. It is therefore essential to hold this caveat in mind, when approaching this report.

Regarding systemic issues, the SAHRC sent letters to all the affected centres requesting an organogram reflecting the racial and gender composition of administrative staff, lay assessors and interpreters. Copies of these organograms are attached. The SAHRC also requested information regarding people with disabilities and court allocations of magistrates. The racial and gender composition of the management staff was also requested.

Part of the process and ambition of this report is to consider the systemic issues raised, having recourse to the organograms and subsequent visits undertaken to certain of the centres during October 2001. This report will accordingly make an assessment of the organograms in the context of some of the allegations and also identify systemic issues in the centres. Issues that relate to mismanagement or poor administration will be referred to the Department of Justice and Constitutional Development for investigation. Insofar as these issues impact on discrimination and racism, they will be referred to in this report, to indicate the possible causes of problems in these centres.

Once we had collated the aforementioned information, the SAHRC determined that it was necessary to make further visits to a number of the centres, in order to ascertain whether the circumstances raised in the complaints, still applied. During October 2001, visits were made to Pretoria, Johannesburg and Randburg Magistrate's courts.

Our recent visits were certainly informed by an optimism that the centres have embraced some form of a consciousness that racist behaviour, job reservation and other forms of indirect discrimination are not acceptable, and that transformation is essential. To this end, the SAHRC report, as defined by the attached Terms of Reference, can serve as a benchmark to determine whether, over the period of time under review, transformation has become part of the daily routine of the centres.

The SAHRC will not make any findings in respect of individual complaints, as the people cited in complaints were not given the opportunity to counter the allegations. We will consider them in assessing patterns that have developed and give recommendations on identified systemic issues.

The SAHRC is of the view that the concerns raised at the particular centres are symptomatic of problems evidenced throughout the justice system. This report does no more than identify broad themes of concern raised by the various centres, which themes may be extrapolated to other centres in South Africa. Although we seek to make recommendations and suggestions, this report is informed by the important consideration that the independence of the judiciary is also a cornerstone of our democracy. To this end, the issues raised by this report must be taken up with bodies such as the Magistrate's Commission and other professional bodies, in order to ascertain constructive ways forward. In order to inculcate a new value system into our justice system, as determined by the constitution, the issue of judicial independence must be respected and upheld, while recognising that accountability to the values of the Constitution is essential. This challenge, to balance these sometimes-competing forces, will inform the success or otherwise of the SAHRC's endeavours.

The SAHRC is aware that there are currently debates, both within civil society and the state, regarding accountability of judicial officers, and how this impacts on judicial independence. Accountability of judicial officers goes to the integrity of judicial independence, and to this end, it is hoped that this report may be utilised to inform these debates.

3. Broad Themes as identified in the submissions received by the SAHRC

a. Transformation

The SAHRC has taken the view that transformation comprises of two distinct but related components; firstly, ensuring representivity, regard being had to the demographics of our population and secondly, the need to promote and inculcate the values found in our constitution throughout our justice system. It is necessary for these two elements to interact in order to promote real transformation. It was evident, throughout both our investigation, as well as our assessment of the submissions received, that the objective of transforming our courts has not succeeded. This was most starkly represented by the numerous complaints relating to the racial and gender composition of both the magistrate's bench as well as prosecutors and other court personnel. The Terms of Reference related to racism alone, and did not include an enquiry into the accessibility of courts to people with disabilities or potential gender related concerns. The SAHRC submits that these areas need to be explored further.

In 1994 there were 229 women magistrates and 977 men. In 1997 the magistracy had 34 male chief magistrates and 2 female chief magistrates. There were 745 white male magistrates, 197 white female magistrates, 489 black male magistrates and 86 black women. By 1998, 46% of all magistrates were white men, 32% black men, 15% white women, and 7% black women. Overall 78% are men and 62% are white.² In those courts that furnished us with organograms there was, broadly speaking, a 50/50 split between the number of appointed black/white magistrates. On the face of it, these courts may well be criticised on the basis of ratios and numbers alone. This, however, belies the concerns raised by complainants that in actual fact there is a distinct pattern, in all centres under review, of placing black magistrates in criminal courts and reserving civil courts as the domain of white magistrates. Inquest, family and maintenance courts also tend to be staffed by black magistrates. This is borne out by the organograms in our possession.

Individual black complainants allege that, although they were of the view that they were suitably qualified, they were rejected for appointments in the civil courts, in favour of white, less qualified colleagues. One complainant alleged that when a black magistrate was appointed to a senior position, many white magistrates resigned citing their dissatisfaction at working under a black magistrate, as their reason. We received complaints from a number of centres where black magistrates had applied to attend courses, which would result in furthering their careers, and were rejected in favour of white colleagues who were afforded permission to attend these training courses.

There appears to be no rational connection between placing black magistrates in criminal courts and reserving the civil courts predominantly for white magistrates. Some submissions proffered the view that white accused/ litigants would not want to have their matter presided over by a black magistrate. The reverse concern was also raised, that black accused/ litigants would not wish to appear before white magistrates. It is patently clear that this view is informed by values in contradistinction to those contained in the constitution, and must not be entertained. In actual fact, the SAHRC is of the view that our courts should both correctly reflect the demographics of our country as well as promote the values of our constitution.

² Jeremy Sarkin *Developing a human rights culture in South Africa* (2000) 15 SAPR/PL 385 at p 406

It was clear from the organograms we received from centres that although there may be a 50/50 ratio of black to white employees, black employees tended to occupy more junior positions. In respect of some of the individual complaints received, it was alleged that black employees tend to be required to be more qualified than their white colleagues when receiving promotions, tend to come up against the notion of 'job reservation' for white employees in respect of certain types of employment and fall foul of nepotism as practiced by their white seniors, in favour of their white colleagues.

The racial constitution and racist practices of the courts, it is submitted, is merely an indication of a more entrenched concern identified by the SAHRC. The actual management structures of courts have tended to either pay lip service to transformation, used the notion of transformation for personal 'political' gain or have ignored the need to address the issue of transformation in its entirety. It would appear as if magistrates may retreat into the notion of judicial independence, when making decisions, for example, regarding whether or not to utilise the services of a lay assessor (see below). In this way, judicial independence may be a shield to hide behind racist practices. It is hoped that these concerns will be addressed during the national debate on judicial independence. Many of the individual complaints went to personal experiences of racism, racial remarks or overt racist acts, which tended to go unpunished, affording the management structures of the centres under scrutiny, an opportunity to associate itself with this unacceptable conduct, by failing to address it.

None of the centres had management structures in place, specifically designed to deal with the forms of day-to-day racist experiences, complained of. In actual fact, the SAHRC gained the impression that many racist incidents pass unpunished, and by implication are sanctioned by the management structures. Although it is with caution that the SAHRC draws any conclusions from the lack of desire of complainants to have their experiences put to people cited in complaints, there is a tangible sense of fear in the centres, creating an atmosphere where incidents pass unpunished and personnel are cautious to lay complaints.

This is not conducive to either real transformation of the power relationships and working conditions nor does it engender a sense of confidence that those magistrates dispensing justice do not bring their personal views with them into the courtroom. It is essential that transformation amounts to more than a mere numbers game and that it directly addresses the culture and values put into practice in the courts. There has been much publicity, in the mass media, regarding racial disputes occurring in a number of the centres. These public disagreements may also have contributed to the current lack of confidence in the justice system.

It would appear from the submissions placed before the SAHRC that certain centres ensure that white prosecutors prosecute white accused in criminal matters, and the reverse in respect of black persons accused of a criminal offence. There were further allegations relating to the differential treatment meted out to black and white prosecutors, both in respect of disciplinary procedures as well as working conditions. This is obviously a concern, which needs to be addressed by the court management structures in consultation with the National Director of Public Prosecutions.

There were reported incidents of black magistrates being removed from cases involving a white person accused of a criminal offence, which by implication may be informed by racism. Due to the fact that the information received by the SAHRC is untested, as explained above, one can only draw conclusions from the atmosphere created by the submissions. In

certain courts, it would appear to us as if this form of action may well occur. If racism is the motive for removing black magistrates from presiding over certain matters involving white accused persons, this is a direct indictment on the management systems in the centres. The fact that one of our complainants, a black magistrate, was removed from presiding over a matter in such circumstances, and was given no explanation for his removal, goes some way to showing either racial bias, failing which, unacceptably low levels of management involvement, affording key persons an opportunity to display racial bias in distributing cases amongst magistrates.

In October 2001 the SAHRC visited certain centres and consulted with role players in order to ascertain whether transformation had indeed been addressed, since we began our enquiry. The following was observed:

- It became clear to us that certain aspects had indeed changed. The SAHRC is of the view that integral to these positive changes, was the catalyst provided by the SAHRC's process. The differences we experienced in comparison to our initial visits led us to conclude that the centres had applied their minds to the concerns we'd raised, and had accordingly acted to effect some change.
- The magistrates interviewed advised us that the court allocation system in these centres were no longer informed by racism and there had been tangible improvements in this regard.³
- The complaints regarding the merit system had also been addressed (see below), and the SAHRC was given undertakings that the racial composition of the administration staff was being addressed (both in respect of the fact that certain positions were allegedly reserved for white employees, and the diametrically opposed complaint that these administrative positions were lower paid, and therefore tended to be filled by black employees).
- It was established that in some centres, the appointment of magistrates occurs under the auspices of a provincial committee, consisting of fair representation from all racial groups. This committee is separate from the Magistrate's Commission, this we were advised, has gone some way to addressing concerns of nepotism and appointments based solely on race.
- It was further alleged that black magistrates will, in time, accrue the necessary experience to preside over civil matters, which tend to be more complex than the criminal matters, therefore requiring more expertise and experience. It would appear as if the aforementioned committee would rely on criteria such as this, in order to ensure that the realm of civil magistracy is not reserved solely for white magistrates, but is based on merit. This proffers only a part solution as, as indicated below, career enhancing training programmes appear to be less accessible to black magistrates. After appointment a magistrate is sent to the Justice College for 8 weeks training in civil and

³ It must be noted that the civil courts at Pretoria magistrate's court were still experiencing the same problems as previously raised with us, namely, that civil courts remained the domain of white magistrates alone. It is clear to the SAHRC that the situation in Pretoria is informed by conflicts of personality as well as personal interests and concerns. The SAHRC is not well placed to deal with conflicts of this nature, but would like to highlight that these personal conflicts go to the root of the particular and idiosyncratic problems faced by Pretoria Magistrate's Court.

criminal adjudication, which should qualify all magistrates to hear both civil and criminal matters, regardless of race.

- The appointment of a Chief Magistrate is determined by reference to the following criteria; legal qualification, managerial skills- especially of a cluster, adjudication in both civil and criminal courts, research, training and financial planning. Personality and leadership abilities are also used to underscore these criteria.

b. Interpersonal relationships

The individual complaints received by the SAHRC alerted us to a far more insidious form of racism than that evidenced by the organograms and objectively ascertainable information. There appear to be systemic forms of racism, which inform almost all aspects of the work lives of those personnel employed by magistrate's courts, from magistrates to clerks. In particular, there were examples of white people refusing to share desks with their black colleagues and separate toilet and tea facilities for black and white personnel. We received numerous complaints in which complainants had been addressed by reference to racial epithets and slurs. It is a striking indictment on the centres that these overt forms of racist conduct persist in our justice system. They do no more than entrench unacceptable and unlawful conduct, in an environment, which should be dedicated to upholding the law and respect for the constitution.

A pattern evolved in terms of which interpersonal strife resulted in personnel aligning themselves with each other, along racial lines. This is a direct consequence of a failure to effectively address the underlying dispute. In this way, it would appear to us that racial alliances are forged, borne of personal conflict and disputes.

More covert forms of inter-personal strife were reported, in particular, the fact that junior white officials are afforded allocated parking spaces whereas more senior black officials aren't. Junior white officials, it is alleged, receive their office furniture before black officials who are required to wait for longer periods of time. These forms of differentiation, as experienced by black officials in the centres, lead to resentment and a distinct reinforcement of the status quo, as determined prior to 1994.

The hostility and suspicion, which is sown between personnel in the various centres can be directly linked to the differential treatment, which is informed by racism. This atmosphere is not conducive to sound performance and the dispensing of justice in the centres under review. In actual fact, the management in these centres appear to have taken no steps to either disabuse people of the idea that these practices persist, nor has it taken steps to address them, when they do occur. This form of management sanctioned behaviour, despite it being unlawful, does no more than to impact negatively on the service offered by personnel in these centres, and ultimately it is the citizen who utilises the courts who suffers. One of the observations of the visits held during October 2001 was that management appears to be immobilised for want of direction or guidance on how to deal with conflict resolution.

During the SAHRC's visits conducted in October 2001, we were advised that the management of administrative staff no longer falls under the auspices of the magistrates. A Head of Administration, who is appointed by the Department of Justice and Constitutional Development, accepts responsibility for the administrative functions of the court. Whether this new regime will indeed address the concerns raised above, remains to be seen.

c. Merit awards

The SAHRC received complaints from individuals alleging that black personnel do not receive merit awards. In respect of merit awards, the head of administration, in certain centres, is responsible for these increases. During the SAHRC's visit to the centres during October 2001, it was explained to us that the criteria used to give these awards, in one of the centres under review, is based on a decision by a committee, which consists of 70% black people. A candidate must make a representation before the committee motivating why she is of the view that she qualifies for a merit award. A candidate can bring her trade union representative with her to the hearing. It was alleged that one of the concerns with the current system is that most black people do not compile a comprehensive report for their applications. Even if someone qualifies, people do not keep records of their overtime worked, and it would appear as if they are not encouraged or advised to do so.

The problems regarding merit awards appear to be two fold, namely, personnel do not utilise the system and where it is utilised, personnel are not guided on the correct and appropriate manner in which to motivate for a merit award. The effect of these two factors is that white applicants have tended to be better apprised of the requirements for merit awards and have therefore benefited from the system.

d. Language

Although the complaints we received regarding the use of languages in the various centres may not be directly linked to racial discrimination, the use of languages has had that effect. It must be noted that we have 11 official languages yet, historically only Afrikaans and English have been the medium of the judicial system. Most centres have continued this tradition, with the assistance of translators. The SAHRC is of the view that this issue needs to be addressed in order to effectively deal with transformation.

The complaints we received, during the course of this enquiry, identified that black officials were of the view that Afrikaans was used by white officials, in a bid to either exclude or preclude black personnel from discussions or training courses. Many black participants in training courses did not feel comfortable or conversant in Afrikaans, yet found themselves in situations where instruction was solely in Afrikaans. When black participants in training courses requested that material and questions be translated into English, they received a negative response. In this way, the perception is created that those personnel who are first language Afrikaans speakers, are afforded an advantage in training courses. The suggestion that all instruction be conducted in English has also been rejected by those bodies or organisations, which offer career enhancing training for personnel at the centres.

The use of Afrikaans in courtrooms was also identified as problematic. It was alleged that magistrates, prosecutors or accused persons were not allowed the use of a translator to translate from Afrikaans to English. One complainant asserted that black magistrate's are refused positions in the civil magistrate's court on the basis that they do not speak Afrikaans. A further complaint asserted that Afrikaans speaking officials insist on conducting all proceeding in Afrikaans, regardless of the language preferences of the accused. This artificial barrier has created resentment amongst magistrates and afforded an arena for racist attitudes to be furthered by reference to the use of language.

There have also been complaints regarding the failure of interpreters to translate into or from Afrikaans, creating a negative attitude towards people who speak Afrikaans.

e. Lay assessors

In terms of section 1 of the Magistrates' Courts Amendment Act of 1998, a court may, on the application of either party, use the services of an assessor or assessors. The Act states further, in section 2, that in respect of certain criminal offences, contained in a schedule, a judicial officer shall be assisted by two assessors. The Act then affords a judicial officer a discretion whether to utilise assessors for bail applications and any other criminal trial, falling outside those named in the schedule. Guidelines are set out to assist the judicial officer in exercising her/his discretion, which guidelines suggest that the factors to be taken into account, should include, amongst others, the culture and social environment of the accused, educational background as well as the interests of the community.

There is also policy on the question of lay assessors, which underpins the need for lay assessors and the unique perspective they can bring to a trial. The lay assessor affords the voice of the community a hearing in a courtroom. They are appointed by members of the community and have a say only on questions of fact, not of law, which prerogative is retained by the judicial officer.

The SAHRC received many complaints regarding the failure of judicial officers to utilise the services of lay assessors. It also became clear that in certain centres, the lay assessors did not correctly reflect the demographics of that community which the court served. In particular, complainants alleged that white magistrates, who may best benefit from the input of an assessor in certain circumstances, refuse to utilise their services. Black magistrates, on the other hand, it is alleged, use assessors more readily.

We are advised that the lay assessor system is currently part of a pilot project to assess its efficacy. The SAHRC would encourage the pilot project to use this report, when addressing concerns, failures and successes of the lay assessor system.

4. Recommendations

a. Transformation

- The SAHRC is of the view that each centre must accurately audit its personnel and allocation of resources, in order to obtain a clear picture of that centre. Once this audit is complete, it should be furnished to that centre's client base to assess. In this way, there may be a convergence between the demographics of our society and the demographics of that particular centre.
- A recurrent theme throughout our enquiry was the fact that the civil courts are reserved predominantly, for white magistrates. This issue needs to be addressed as one of urgency.
- Interfering with the independence of the judiciary is not desirable. By the same token, if individuals are not called to account for their conduct towards their colleagues, which conduct is racist in nature, the idea of transforming our justice system will fail. Court management structures have to be reassessed; in particular, the process by which the management structure of a court is appointed. The Chief Magistrates appear to be appointed, as such, on the basis of their skills and service as magistrates and with little emphasis on their managerial skills. The aspects of personality and leadership skills appear to be so subjective as to undermine whether indeed, a person is duly qualified to manage a court, consisting of people performing vastly different job descriptions. The issue of a person's ability and commitment to transformation plays no role in such an appointment.
- The SAHRC is of the view that professional managers should run each centre. The person appointed to this position should ensure that racist incidents between colleagues are appropriately addressed and that mechanisms are in place to support this culture. By having a low tolerance of racism in the workplace, there may well be a rollout effect towards low tolerance of racism in the courtroom and the dispensing of justice.

b. Interpersonal Relationships

- It is the direct responsibility of management of these centres to firstly be made aware of practices as listed above. This can only happen when management creates an atmosphere conducive to receiving complaints of this nature and sets up structures to ensure that people have some form of recourse to address their concerns. Secondly, management has a responsibility to correctly address these concerns and to ensure that the hostility and suspicion, which is evident in many centres, is mitigated by ensuring that the racist practices of some of their responsible staff desists.
- We note that there are codes of conduct, which emanate from the Magistrates Commission as well as the NDPP. The SAHRC encourages the enforcement of these codes of conduct as, in principle, they embody the values underlying our constitution. It is also submitted that, in this way, there can be a two-tier system to discipline and call to account those personnel who fail to uphold the constitution.

c. Merit awards

- Personnel should be adequately educated and assisted to apply for merit awards. Management should assume the responsibility of encouraging appropriate candidates to apply for merit awards, and the onus should not rest solely with the employee.

d. Language

- Although the use of languages in courts falls a little outside the Terms of Reference of this enquiry, the use of language to perpetuate forms of indirect racial discrimination falls firmly within its ambit. To this end, the SAHRC is of the view that the presumption that legal proceedings will only be held in either English or Afrikaans must be challenged.
- It is vital that those who use the courts are able to work in an environment, which is friendly and accessible. It is equally important that that people have the ability to express themselves in the most effective way possible. The issue of languages in the justice system is both complex and may require costly solutions. The SAHRC, however, would like to note that it is critical to resolve this issue in order to enhance the credibility and efficacy of our justice system.
- The SAHRC is of the view that the issue of languages in courts falls firmly within the jurisdiction of the Pan South African Language Board (PANSALB), and has accordingly referred this aspect of the complaint to PANSALB. The PANSALB's jurisdiction extends to section 6 of the constitution, which reads:
 - (1) The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
 - (2) Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.
- Insofar as possible, the SAHRC will work with PANSALB in addressing this nationwide concern.

e. Lay assessors

- The SAHRC would like to encourage the use of lay assessors. In this way, issues of diversity are addressed by a court, when dispensing justice. The SAHRC is mindful that there is currently a pilot project in place and eagerly awaits its report.

f. General recommendations

- Training must be conducted incorporating issues such as social context and anti racism. This sort of training should fall under the auspices of the Justice College, with the assistance of the SAHRC's National Centre for Human Rights Education and Training (NACHRET). Organisations such as the Magistrate's Commission and the Judicial

Officers Association of South Africa must be involved in future training of court personnel to ensure that the integrity of the independence of the judiciary is upheld.

- It is obvious to the SAHRC that there are shortcomings in the management systems in place in the centres. The SAHRC notes that if the management of the centres were better skilled and equipped, they would be empowered to deal with most of those individual complaints we have received, without having reference to the SAHRC.
- The Department of Justice and Constitutional Development has a transformation unit, which consists of a directorate dealing with employment equity and transformation as well as a regionally based Employment Equity Advisory body. In essence, the Department of Justice and Constitutional Development has to bring to bear its full support behind issues of transformation in the justice system. This support must never amount to interference, but should act as a positive reinforcement of all efforts to transform the justice system.

5. Conclusion

The SAHRC, via NACHRET, will offer whatever support and training it can, within its available means. The SAHRC recognises the importance of transformation in the judiciary, not only as a valid exercise in itself, but as an important factor in ensuring that citizens of our nascent democracy can experience justice, as offered by a democratic society, underscored by the values of dignity, equality and freedom.

ANNEXURE
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

TERMS OF REFERENCE

**Racism and Racial Discrimination in the
Department of Justice and Constitutional Development**

A. Introduction:

1. In terms of Section 184 of the Constitution of the Republic of South Africa the South African Human Rights Commission has a mandate to:
 - “ a) promote respect for human rights and culture of human rights;*
 - b) promote the protection, development and attainment of human rights and*
 - c) monitor and assess the observance of human rights in the Republic”.*

2. The Human Rights Commission has the power, in terms of Section 184 (2) to:
 - “a) investigate and to report on the observance of human rights;*
 - b) take steps to secure appropriate redress where human rights have been violated”.*

3. The Bill of Rights (Chapter 2 of the Constitution) states inter alia:
 - “8 (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state”.*

 - “9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law”.*

B. Definitions:

“Act”	refers to the Human Rights Commission Act 1994.
“Constitution”	refers to the Constitution of the Republic of South Africa Act (Act 108 of 1996).
“Chairperson”	refers to the Chairperson of the South African Human Rights Commission or a person designated by the Chairperson.
“Bill of Rights”	refers to Chapter 2 of the Constitution
“Commission”	refers to the South African Human Rights Commission.

C. Terms of Reference

1. To investigate, in the centres mentioned in D below, the incidence, if any, of racism and racial discrimination.
2. To examine how the aforesaid violations, if found, manifest themselves in the said centres.
3. To examine and assess how those violations impact on the rights set out in the Bill of Rights generally, and more particularly, on sections 7 (1) and (2); 9 (equality); 12 (freedom and security of the person); 10 (dignity); 23 (fair labour practices); 33 (just administrative action); 34 (access to justice).
4. To establish the underlying causes of the conduct or omission which constitute violations of the Bill of Rights.
5. To make findings and recommendations to any person or relevant authorities.
6. To take such steps as are allowed by the Act, as read with the Regulations

D. The subject of the Enquiry

The centres to which the enquiry shall apply are:

1. The office of the Director of Public Prosecutions, Pretoria.
2. The Justice College, Pretoria.
3. The office of the Master of the High Court, Cape Town.
4. The Human Resource Division in the Department of Justice and Constitutional Development, National office, Pretoria.
5. Magistrates courts and satellite offices(where applicable) in the following districts:
Pretoria, Randburg, Wynberg, Vereeniging, Springs and Johannesburg.

The enquiry into the above shall include, but shall not be limited to:

- ❖ The administrative functions of such offices.
- ❖ An examination of appointments of judicial officers and other staff members.
- ❖ Personnel practices, policies relating to equity and the implementation and monitoring thereof.
- ❖ Transfers of personnel from one section or jurisdiction to another.
- ❖ The manner in which the courts deal with cases, including adjournments, prosecution, trials, bail, sentencing, and allocation of cases to courts.

E. Rules and Procedure

1. The investigation and inquiry will be conducted in terms of the rules of procedure promulgated in terms of Section 9(6) of the Human Rights Commission Act Number 54 of 1994, published in Gazette number 17457 of 4th October 1996 read with these rules.
2. The Commission will call for submissions from interested parties including institutions, organisations and individuals on any matters referred to in the terms of reference of this investigation and inquiry.
3. The said submissions shall be lodged with or posted to the offices of the Human Rights Commission at the address mentioned below. The Legal Department of the Commission will assist persons in formulating the said submissions. Submissions shall be in writing and must disclose the name, address and other contact details of the deponent. Anonymous submissions will not be entertained. Where however, the deponent does not wish to have his or her name published, the Commission will respect that wish. Such confidential submissions however, will not be able to form the basis of the findings.
4. The Commission may cause surveys, research and enquiries to be undertaken , in compliance with the terms of reference.
5. The submissions shall be submitted by no later than Friday, the 31st day of March 2000.
6. The Commission shall furnish any person who has been implicated or likely to be implicated by those submissions, with a copy thereof. Such a copy shall be accompanied by a written notice requiring such person to:
 - 6.1 submit a written response to the submissions to the Legal department of the Commission within 14 days of the delivery of such written notice.
 - 6.2 appear before a panel of the Commission at a public hearing to be held at a date to be announced in the Government Gazette and any person so implicated shall be notified of the hearing.
7. The Commission will invite to that hearing, specific individuals, organisations, institutions and any other interested parties to make oral submissions and give testimony at the public hearing. Such testimony shall be given under oath or affirmation.
8. Pursuant to the provisions of the Act, a panel will preside over the Public Hearings. The Chairperson of the Commission or a person designated by the

Chairperson, will chair the panel. The panel will consist of five persons, three of whom shall be Commissioners.

9. The panel may subpoena any person in possession of any information or document relevant to the hearing to appear before the panel and give testimony.
10. The persons referred to in 5 and 9 above shall be entitled to be represented by his her legal representative and shall give his or her testimony under oath or affirmation. He or she will be given the opportunity to cross- examine any person who has given evidence before the panel.
11. At the conclusion of the Hearing the panel will make findings and recommendations.
12. Such findings and recommendations will be made public.

Organograms

PRETORIA

Post(s)	Number of Approved Posts	Racial and Gender Breakdown of posts filled							
		African		Coloured		Indian		White	
		M	F	M	F	M	F	M	F
<u>Magistrates</u>									
<u>Criminal Courts</u>									
Magistrates	19	6	3	1	1	1	1	5	1
<u>Civil Courts</u>									
Magistrates	7						1	1	5
<u>Inquests</u>									
Magistrates	1		1						
<u>Maintenance Courts</u>									
Magistrates	2		1						1
<u>Court & Family Violence</u>									
Magistrates	2								2
<u>Internal Relief</u>									
Magistrates	2							2	
Total	33	6	5	1	1	1	2	8	9
<u>Administration</u>									
Clerks	91	24	22	4	5			6	30
Management	8				1			2	5
Temporary Staff	2	1		1					
Lay Assessors	18	7	2	4	1	1	3		
Total	119	32	24	9	7	1	3	8	35

SPRINGS

Post(s)	Number of Approved Posts	Racial and Gender Breakdown of posts filled							
		African		Coloured		Indian		White	
		M	F	M	F	M	F	M	F
<u>Magistrates</u>									
<u>Head of Office</u>									
Senior Magistrate	1							1	
<u>Criminal Matters</u>									
Magistrates	4	2	1			1			
<u>Civil Matters</u>									
Magistrates	2							2	
<u>Relief Services</u>									
Magistrates	1								1
Total	8	2	1	0	0	1	0	2	1
<u>Prosecutorial Services</u>									
Senior State Prosecutor	1							1	
State Prosecutors	10	5	1					2	2
Total	11	5	1	0	0	0	0	3	2
<u>Administration</u>									
<u>Auxiliary Services</u>									
Senior Administration Officer	1							1	
<u>Finance & Criminal Court</u>									
Administration Officer	1								1
<u>Civil Court & Diverse Auxiliary Services</u>									
Chief Administration Clerk	1		1						
<u>Cash Hall</u>									
Administration Clerks	4			1	1			1	1
<u>Criminal Court Support Services</u>									
Administration Clerk	4	1	2						1
Administration Clerks	4	1	2						1
Administration Clerks	1								1
<u>Civil Court Support Services</u>									
Administration Clerks	3	1	1	1					
<u>Family Matters Services</u>									
Administration Clerks	2	1							1
<u>Office Services</u>									
Administration Clerk	1								1

Typists	3		1						2
Telecom operator	1								
Messenger	1	1							
<u>Interpreting Services</u>									
Court Interpreters	7	6	1						
<u>Relief Services</u>									
Administration Clerks	3								3
Court Interpreter	1		1						
Lay Assessors	21	6	2			3	1	6	3
Members of Management Staff	6	1	1					3	1
Total	61	17	10	2	1	3	1	11	16

RANDBURG

Post(s)	Number of Approved Posts	Racial and Gender Breakdown of posts filled							
		African		Coloured		Indian		White	
		M	F	M	F	M	F	M	F
<u>Magistrates</u>									
<u>Randburg Criminal Courts</u>									
Acting Chief Magistrate	1								1
Additional Magistrates	7	2			1	1		2	1
Regional Magistrate	1							1	
-									
<u>Randburg Civil Courts</u>									
Additional Magistrate	7						1	5	1
-									
<u>Midrand Criminal Court</u>									
Additional Magistrate	1							1	
-									
<u>Wynburg - Criminal Courts</u>									
Senior Magistrate	1	1							
Additional Magistrate	3	2	1						
Total	21	5	1	0	1	1	1	9	3
<u>Administration</u>									
<u>Management</u>									
Acting Chief Magistrate	1								1
Senior Magistrate	1	1							
Additional Magistrate	1							1	
Chief Admin.	1						1		
Chief Interpreter	1	1							
-									
<u>Randburg Criminal</u>									
Control Officer	1						1		
Assist Control	1		1						
Vote Account	1		1						
Deposit Account	1		1						
Clerk of Court	1		1						
Appeals	1		1						
Process	1		1						
Counter	3		2					1	
Switchboard	1								1
Typist	2		1						1
Maintenance	3	1	2						
Inquests	1		1						
Messenger	1	1							
Chief Security	1							1	
Security	2	1	1						
-									
<u>Randburg Civil</u>									
Control Officer	1		1						
Switchboard and Typist	1								1
Children Court	2		1						1

Domestic Violence	1	1							
Black Estates	1	1							
Warrants	1						1		
Sect 65 and Taxation	1	1							
Default Judgements	1			1					
Sec 57 & 58	1				1				
Motion Roll	1							1	
Filing	1	1							
Counter	1	1							
Small Claims	1						1		
<u>Midrand</u>	0								
Clerk of the Court	1		1						
Security	1	1							
<u>Wynberg</u>	0								
Counter	1	1							
Clerk of Court	1		1						
Cash Hall	1		1						
Maintenance	2		2						
Estates	1		1						
Domestic violence	1	1							
<u>Interpreters - Randburg</u>									
Chief Interpreter	1	1							
Interpreter	7	3	4						
<u>Interpreters - Midrand</u>									
Interpreter	1	1							
<u>Interpreters - Wynburg</u>									
Interpreters	3	2	1						
<u>Prosecutors - Randburg</u>									
Senior Public Prosecutor	1						1		
Public Prosecutors	10	5	2				1	2	
<u>Prosecutors - Midrand</u>									
Public Prosecutors	1	1							
<u>Prosecutors - Wynburg</u>									
Control Prosecutor	1	1							
Public Prosecutors	5	5							
<u>Lay Assessors</u>									
Lay Assessors	5	2	1	1					1
Total	84	36	29	1	1	0	2	6	8

JOHANNESBURG

Post(s)	Number of Approved Posts	Racial and Gender Breakdown of posts filled							
		African		Coloured		Indian		White	
		M	F	M	F	M	F	M	F
<u>Magistrates</u>									
Special Grade Chief Magistrates	1	1							
Chief Magistrates	1							1	
Senior Magistrate	9	3	2			1		2	1
Magistrates	71	20	8	1	1	2	3	22	12
Total	80	24	10	1	1	3	3	25	13
<u>Administration</u>									
Deputy Director	1					1			
Assistant Director	3		1					1	1
Senior Administrative Officer	3	1	1						1
Administrative Officer	8	1	6		1				
Chief Administrative Officer	3	1						1	1
Administration Clerk	146	56	39	5	9	1		12	24
Chief Typists	1								1
Typists	15	2	4						9
Chief Interpreter	3	2	1						
Intepretor	80	47	31		2				
Assitant Librarian	1		1						
Telcom Operator	2							1	1
Messenger	7	2	3		1				1
Security Officer	24	11	1	1				10	1
Personal Secretary	1	1							
Total	298	124	86	6	13	2	0	25	40