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Understanding policy implementation:

An exploration of research areas
in the justice sector

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Introduction

South Africa's new constitution has been widely acclaimed; however, the political institutions it has created still have to take proper root in this deeply fractured society. Given that the ministry of justice is responsible for ensuring that the constitution is upheld, the justice sector carries a large part of the burden of establishing a democratic public order.

But not all is well in the justice arena. The prisons are overcrowded, mainly with prisoners awaiting trial; the courts are struggling with growing numbers of caseloads; many prosecutors are inexperienced; there are serious infrastructural backlogs in court buildings and equipment; and court management and co-ordination systems are often deficient – to name but a few of the problems. All these problems lie in the realm of implementation. They are serious, as they have the potential to undermine confidence in the constitution itself.

This paper represents the first phase of a study of the gap between current justice policies and their implementation. It presents the findings of a preliminary literature-based exploration of the sector, aimed at isolating areas for in-depth field work and formulating relevant research questions.

It is divided into five sections. The first describes the general environment in which justice policy is made and implemented. The second reviews justice policy, and defines the research questions. The third, fourth and fifth sections examine issues relating to implementation of policies in the three main research areas identified, namely court management and functioning, representivity in the profession and department of Justice, and the accessibility of the justice system.

General environment

Relative to other branches of government, the department of justice benefits from a number of factors that should contribute to successful policy implementation. Although under the previous regime the courts helped to implement laws passed by a repressive minority regime, the formal independence of the judiciary enabled some judges to act in a principled manner. This earned the courts a degree of respect among the public that they would not otherwise have enjoyed. The judiciary therefore started the new era with a somewhat higher degree of legitimacy than, for example, the police. Secondly, judicial officials are mostly professionals who tend to be broadly sympathetic towards the political changes in the country. Thirdly, the justice department is relatively small; it only has some 14 000 employees, of whom 3 700 are judicial officers. This makes the task of transforming it somewhat less daunting than in the case of other, much larger, departments.

But that does not mean that the department is not facing formidable problems. The judiciary the new government inherited was arguably the most unrepresentative branch of government, made up almost exclusively of white men and epitomising elitist values. Moreover, while some had acted in a principled manner, many judges had complied with serious abuses of justice under apartheid.

The judiciary was therefore certainly in need of reform to bring it into harmony with the new constitutional order. However, justice planners have not yet struck a comfortable

balance between efforts to increase the representivity of the judiciary and the need to ensure that all judicial officers are not only adequately qualified but also respect the constitution. A degree of unease about the independence of the judiciary under the new government was also expressed in the media when known ANC members and sympathisers were appointed to judicial bodies such as the Constitutional Court and Judicial Service Commission as well as quasi-judicial bodies such as the Truth and Reconciliation Commission.¹ Attempts to improve the representivity of the judiciary have thus been controversial.

While the new ANC government formulated extensive new justice policies during its first term of office, it became clear, when its second term began, that it had run into severe problems in implementing those policies. The ANC started out in government with an optimism and confidence that belied the severity of problems on the ground, and the limitations of available resources to address those problems.

Crime

Mushrooming crime has imposed new and unexpected demands on the justice system, and has become one of the most serious threats to the ANC's objectives. Although crime statistics are beset with numerous problems (including variations in areas included in categories of crime over time, changes in crime reporting and non-reporting behaviour, and changes in methods and categories of data collection), the table below nevertheless reflects the unacceptably high and generally, though not uniformly, increasing crime rate.

Table 1: Ratio of crime per 100 000 of the population, 1994-8²

Crime	1994	1995	1996	1997	1998
Murder	69,3	67,2	63,5	59,2	58,5
Attempted murder	71,0	75,3	82,2	89,9	98,9
Robbery – aggravating circ	219,2	202,0	165,7	167,7	207,6
Robbery – other	83,7	103,1	126,9	126,8	146,0
Rape (incl attempted)	109,6	119,8	124,4	125,5	115,8
Assault	542,9	557,4	567,8	564,5	550,2
Common assault	500,3	517,4	506,0	485,8	468,5
Residential burglaries	588,8	615,6	607,2	600,2	627,2

Crime is undermining confidence in the new society – both locally and internationally – which in turn weakens the economic growth required to address problems of poverty and inequality. Higher levels of crime appear to accompany most political transitions to democracy as, for example, in Latin America, eastern Europe, and the former Soviet Union. But when transitions are preceded by a prolonged period of violent conflict, crime during

¹ Ruth Rabinowitz, *The Star*, 21 October 1996.

² Statistics obtained from the Crime Information Analysis Centre, South African Police Service.

the transition tends to be worse because the very institutions expected to combat crime have been involved in the conflict.³

The fact that the transition was negotiated, resulting in a government of national unity, meant that former enemies were expected to co-operate overnight as various forces were amalgamated into one police service. This did not make for a dedicated and efficient organisation. The amalgamation of the various former police forces and the assimilation of township self-defence units⁴ into the South African Police Service (SAPS) have disrupted established loyalties and chains of command. Management and control are tenuous, and racial and labour tensions are rife. Although, according to international standards, there are enough police officers for the size of the population, most are not properly trained. Pay is poor, the work dangerous, incentives for specialisation virtually non-existent, information systems antiquated, and demoralisation and levels of absenteeism high. In 1997 some 10 000 of the country's approximately 120 000 police were facing serious criminal charges.⁵ Police corruption and co-operation with criminal gangs have also contributed to crime.

The commanding officer of the Hillbrow police station has estimated that up to 70 per cent of police are inadequately trained and undereducated. Some 38 per cent of police officers cannot drive a motor vehicle.⁶ Although universities and NGOs are increasingly becoming involved in training, most training is undertaken by the same institutions that trained police personnel under the old government. The result is slippage between policies adopted by political leaders and their implementation by bureaucrats.

Problems in policing contribute significantly to the problems in implementing policy faced by the department of justice. With a police force apparently unable to cope with increasing crime, both the rule of law and the constitutional right to 'freedom and security of the person' are under threat. The fact that the police force is beset with problems to which there are no quick solutions means that there is little prospect of arresting the erosion of the rule of law in the short to medium term.

For the department of justice, a high crime rate coupled with an inadequately trained and experienced police force spells a heavy workload for which the department is not well equipped. According to Martin Schönteich of the Institute for Security Studies, '(t)he prosecution service is taking fewer cases to trial than at any time since 1949. Some serious violent crimes are solved so rarely that the perpetrators of these crimes have less than a one-in-50 chance of being caught and punished.'⁷

³ Seminar entitled 'War transitions: building democracy after conflict', presented at the Centre for Policy Studies on 24 March 1997 by Professor Terry Lynn Karl of Stanford University, California.

⁴ Township activists organised in cells with a military function.

⁵ Sydney Mufamadi, minister of safety and security, reply to a question in parliament, *The Star*, 21 May 1997.

⁶ Interview with Douglas Gibson, DP MP and spokesperson on justice, 25 February 1997.

⁷ M Schönteich, Assessing the crime fighters -- the ability of the criminal justice system to solve and prosecute crime. *ISS Papers*, no 40, Johannesburg: Institute for Security Studies, September 1999, p 1.

The average experience of prosecutors in 1997 was three and a half years, and in the case of the Western Cape, six months.⁸ In 1998 there was one prosecutor for every 85 reported robberies: while the number of reported robberies increased by 225 per cent between 1987 and 1998, some 546 of about 1 600 prosecutors resigned between 1994 and 1998.⁹ Prosecutors are therefore not only overloaded, but are expected to conduct cases which may be defended by senior advocates, on the basis of police dockets that are often not in order. There is little liaison with investigating officers, whom prosecutors may only meet for the first time when they step into the witness box.¹⁰

Given long court rolls and inexperienced prosecutors, accused persons have to wait for hours for their cases to come up, and when they do they are often postponed because the state is inadequately prepared. By the time the case is heard the witnesses may fail to appear, having repeatedly been sent home after waiting for hours. While the number of cases reported to the police has remained relatively stable at around 230 000 a month, the number of cases on the courts' rolls rose by almost 81 per cent between December 1995 and June 1998, from 240 748 to 434 657.¹¹

The sluggishness of the justice system results in thousands of awaiting-trial prisoners remaining in custody for many months. In mid-1996 there were some 29 000 people in prison awaiting trial.¹² By January 1998 this figure had risen to 43 103.¹³ Some accused were in prison for minor offences, but, because they could not afford even minimal bail, had been in prison for months. Many cannot afford legal representation. Magistrates' court cases cost about R7 000 per litigant, and high court cases between R25 000 and R70 000.¹⁴

Although accused persons are entitled to legal representation, the vast majority of criminal accused are not represented. Accused persons are also entitled to legal aid if they face a possible jail sentence and earn R500 a month or less. At least 80 per cent of the population cannot afford to pay the average legal fee of R200 an hour. The Legal Aid Board accepts about 200 000 cases a year, about 80 per cent criminal and 20 per cent civil. However, attorneys and advocates have been reluctant to accept cases from the board as it may take months or even years before their accounts are paid. Apart from the reduced fees, legal practitioners are expected to pay in advance for travel and accommodation when taking cases in other areas, knowing that they will not recover these expenses for up to nine months. The chairman of the KwaZulu Natal professional commit-

⁸ Ibid.

⁹ Ibid.

¹⁰ Mark Shaw, *Reforming South Africa's criminal justice system*, Institute for Defence policy paper no 8, August 1996.

¹¹ Department of finance, budget office, *1998 Medium Term Expenditure Review*, integrated justice sector, October 1998.

¹² The total prison population is about 120 000 out of a total population in 1996 of 41,2 million.

¹³ Department of finance, 1998 Medium Term Expenditure Review, integrated justice sector.

¹⁴ *The Star*, 10 May 1996.

tee for legal aid, Adv Anton van Zyl, has commented that the situation is bringing the whole system of justice into disrepute.¹⁵

Bail, sentencing and parole policy are further areas of concern. Magistrates do not apply the new laws intended to tighten bail conditions in a co-ordinated or uniform way, and, in the absence of guidelines, do not hand down uniform sentences either. Prisoners may be released or paroled simply because prisons are overcrowded. Well over half of all prisoners are recidivists,¹⁶ which suggests that the prison system is ineffective in either deterring crime or rehabilitating criminals.

Most courts in South Africa are housed in old buildings, and resourced with antiquated equipment. In the poorer rural areas such as the former Transkei and Ciskei there is often no running water or electricity in court buildings; up to six officials share one office; record rooms are in disarray; there are safes which have neither keys nor doors; and some courts even do not have doors, so that cattle stray in at night.¹⁷

The net results of these weaknesses are that criminals are often not arrested, and when they are their cases have frequently not been properly investigated, leading to unsuccessful prosecutions. The number of prosecutions and convictions as a proportion of reported cases in 1998 is given in table 2.¹⁸

Table 2: Prosecutions and convictions as a proportion of reported cases, 1998

Crime	Percentage prosecuted	Percentage convicted
Carjacking	2,8	1,9
Car theft	3,1	2,3
Robbery (aggravated)	4,2	2,6
Housebreaking (residential)	6,4	5,2
Assault (common)	11,9	9,7
Assault (grievous bodily harm)	17,5	12,6
Rape	17,7	8,9
Murder	24,5	15,7
Drunken driving	57,3	53,3
Drug-related	58,7	53,3

If accused persons are linked to a criminal gang or syndicate, their case files may go missing, or arrangements may be made for them to escape or for their releases to be signed. Overcrowding and understaffing in prisons are threatening to turn them into criminal training institutions.

One consequence of the malfunctioning criminal justice system is the increasing mobilisation of various private interest groups to fight crime, by legal and illegal means. The

¹⁵ Ingrid Oellermann. Justice system 'in danger of collapse', *The Mercury*, 6 March 2000.

¹⁶ Gibson, interview.

¹⁷ *The Star*, 13 October 1995.

¹⁸ Schönteich, 1999.

organisation Business Against Crime has supported the monitoring of inner city areas by private security firms, supplied vehicles for highway patrols, and advised the national crime prevention strategy team on crime-fighting measures. While this kind of support is valuable, it may have implications for the democratic process. Not only could business increasingly determine police priorities outside the democratic process; providing material support to police outside normal state channels could also become an avenue for bribery.

More and more people are reacting to this situation by organising themselves. Neighbourhood watches monitor residential areas and set up communication systems between residents. Householders increasingly rely on private security firms. More and more neighbourhoods are sealed off with booms operated by private security firms. The increasing use of private security firms to police wealthier suburbs is leading to a situation in which inequalities in access to security are becoming even more acute than they were previously.

The poor functioning of the criminal justice system is thus helping to erode the rule of law, and to place pressure on the social order. If the government cannot protect citizens' personal security, the constitution may lose its meaning for the average citizen.

It is for these reasons that new institutions -- such as the National Directorate of Public Prosecutions, and the special police unit, the Scorpions -- have been created, and the national crime prevention strategy (NCPS) has been devised. The NCPS is an interdepartmental strategy involving the departments of correctional services, defence, intelligence, justice, safety and security, and welfare. Its implementation is guided by a committee comprising the directors-general of the departments concerned, and operating from the president's office. The NCPS is South Africa's first coherent strategy for dealing with crime as a complex and differentiated phenomenon. However, it too has run into serious problems at the level of implementation.

Within the multisectoral approach is also the Integrated Justice Sector (IJS) which comprises the departments of Safety and Security, Justice, and Correctional Services. The combined IJS budgets are expected to level off at about 10 per cent of government spending, with justice at 1,2 per cent, correctional services at 2,7 per cent, and safety and security at about 6,1 percent.¹⁹ Since all three departments have exceeded initial budget allocations in recent years, non-personnel spending has had to be cut, resulting in low levels of investment and less equipment being bought. In all three departments remuneration levels have increased dramatically. In the department of justice, real personnel spending increased by 32,5 per cent in 1994--5 and 1998--9, despite a fall in the number of staff.²⁰ The budget office of the department of finance believes that in some instances new policies and processes are adopted without anyone checking whether they will be affordable and sustainable:

In the DOJ (department of justice), the rapid rise in expenditure on human rights and entitlements has been at the expense of spending money on basic judicial and prosecutorial processes. Between

¹⁹ Department of finance, 1998 Medium Term Expenditure Review, integrated justice sector.

²⁰ Ibid.

1994/5 and 1998/9, spending on legal aid has risen from R91 million to R223 million in 1998/9 (an increase of 145 per cent) ... Spending on commissions and other institutions has risen by nearly 1500 per cent in real terms from R17 million to R274 million over the same period.²¹

Together these figures (R223 million and R274 million) amount to 20 per cent of the total justice budget of some R2,5 billion. However, this proportion is likely to drop as the work of the Truth and Reconciliation Commission is wound down, depending on the eventual form that monetary retribution for victims is likely to take.

The department of finance has recommended that the government make certain choices – ie, to redirect expenditure away from real wage increases towards investment in capital and equipment, and to limit the legal aid programme and expenditure on rights commissions, to free up funds to spend on court management and prosecutorial efficiency. These are tough choices for a government priding itself on its internationally acclaimed rights-respecting constitution, after decades of severe human rights abuses and discrimination under the former government.

Justice policy

During 1994 and 1995 the department of justice held several consultative conferences with interested parties in civil society, including NGOs, community organisations, legal professionals, consultants, and legal academics. Those present discussed various aspects of the administration of justice, including representivity, inclusivity, legal education, business and commercial law, human rights law, simplifying legal language, the right to information held by government, and access to the justice system.

Although some participants saw these consultations as little more than a rubber stamp for policies the government had already decided on, they often did reduce tensions and uncertainty and increase understanding among groups with conflicting interests.

The outcome of these consultations were numerous lengthy and intricate policy and discussion documents, including:

- Justice Vision 2000: a draft strategic plan for transforming and rationalising the administration of justice;
- a policy document on representivity and employment equity;
- a customer service charter for court users;
- a discussion paper on the transformation of the legal profession; and
- matters arising out of the statement by the minister of justice and constitutional development on the efficiency of the courts, made in parliament on 9 September 1999.

The department has also published two substantial progress reports: *The first 1 000 days (May 1994–January 1997)*, *justice for all*; and *Five years of law reform: piece by piece towards justice for all*.

In addition, the ministry has drafted various pieces of legislation, including legislation:

²¹ Department of finance, 1998 Medium Term Expenditure Review, integrated justice sector, executive summary, p 5.

- establishing and regulating bodies provided for in the constitution;
- transforming the legal profession;
- regulating the judicial approach to crime;
- facilitating access to the courts; and
- enacting human rights.

These acts are described in greater detail in appendix 1.

Policy-making by the ministry has differed somewhat from policy making in other departments. Because the department had the task of establishing several high-profile institutions required by the constitution, it was initially seen as delivering more efficiently than many other ministries. But, as the poor functioning of the criminal justice system has increasingly become apparent, this perception has faded. The development and implementation of justice policy is taking far longer than the establishment of the new constitutional institutions. The first comprehensive judicial policy document, *Justice vision 2000*,²² was only published towards the end of 1996, and no justice white paper has yet appeared.

The department's 'mission' is defined in *Justice vision 2000* as establishing a legitimate administration of justice that is efficient, accessible, accountable, just, user-friendly, and representative. It also wants to promote equality, freedom, fairness, respect for human rights, and to incorporate and expand community participation in the administration of justice. Moreover, it undertakes to do this in an efficient, cost-effective, and transparent manner.

The policy document identifies six 'visions', also described as 'strategic areas', on which the whole policy for the justice system is based. These are:

- a single, integrated, coherent, and representative department;
- access to justice for all;
- safety, security, and freedom from crime;
- a legitimate, representative and people-friendly structural framework for the administration of justice;
- effective and efficient education, training and information systems; and
- a well-trained, representative, and evenly distributed legal profession.

Next, 20 'key result areas' are identified. The first three read, for example: 'stability in all sectors: staff fluctuation'; 'efficiency: an employee satisfaction index as a function of a consumer satisfaction index'; and 'representativeness: opportunity'. At this point it is not clear how these 'key result areas' relate to the department's mission, values, visions or goals, and they are not mentioned again in the document.

Each vision statement is then developed in greater detail and summarised in tabular form under the headings goals, success indicators, strategies, target, action, success criteria, resources, time, and responsible. Vision statement number one lists five goals, five success indicators and five strategies, but it is far from clear how all these are interrelated. No targets are given. While vision number one has to do with establishing an integrated, coherent and representative department, one of the goals under this vision is to 'build a

²² Ministry of justice, *Justice vision 2000: a draft strategic plan for the transformation and rationalisation of the administration of justice*, internal draft discussion document, third draft, undated.

positive relationship with communities'. Some of the success indicators include developing public awareness and respect for human rights, and some of the strategies include implementing an effective communications policy and community outreach programmes. These seem to have more to do with building legitimacy than with establishing an internally coherent and representative department.

Not only is there a conceptual disjunction between 'vision' and 'goals'; the strategies are also extremely vague. At their most specific, the 'actions' – presumably, although this is not clear, related to the strategies for an effective communications policy and community outreach programme -- include pamphlets, posters, news letters, radio and TV programmes, school visits, seminars/workshops, and a helpline. Whereas partnerships and consultations with NGOs are mentioned under 'strategies', they do not appear at all in the 'action' column.

No time frame for achieving any of the goals or meeting any of the targets listed goes beyond the year 2001, despite the fact that the document states: 'In view of the fact that resources will always be limited, the plan will be implemented through prioritised action plans ranging from short-term, medium-term to long-term initiatives.'²³ This means the document is largely a comprehensive wish list with no clear prioritisation.

Early priorities identified outside the *Justice vision 2000* document and subsequently implemented to a greater or lesser extent include establishing a single prosecutorial system to be headed by a national director of public prosecutions, formalising the role of lay assessors in the magistrates' courts, tightening bail laws, introducing minimum sentences, reviewing the legal aid system, and creating family courts for problems such as divorce and wife and child abuse. But there is no indication in the policy document itself that these were the department's priorities.

Perhaps one of the reasons why justice policy is poorly implemented is the cumbersome way in which it is formulated in policy documents. As the earlier example shows, *Justice vision 2000* bristles with complicated concepts whose definitions and interrelationships are often unclear. It is hard to see how officials might translate the document into reality.

The document creates the impression of being hastily drawn up by a committee using a theoretical planning model, and aiming to achieve an ideal justice system by the year 2001. Although it contains the words 'prioritised action plans', there is little sign of any real prioritisation, measurement of strategies against resource limitations, or the exclusion of some goals because of practical constraints on implementation. Where targets are specified there is no discussion of how they relate to goals, strategies, or success indicators. While the policy looks impressive on paper, it is far too comprehensive to be implementable.

Starting off with a too comprehensive, ambitious, and not altogether coherent policy plan can only mean that gaps between policy and implementation will appear. It also means that policies are inevitably implemented in an irrational, erratic, fire-fighting fash-

²³ Ministry of justice, *Justice Vision 2000*, p 7.

ion, as the department has to respond to all demands made on it in terms of its own stated policy, which has not been reduced to a manageable level.

Maduna clearly recognised this problem soon after assuming office after the 1999 election. In September of that year, after visiting a number of courts throughout the country, he raised a number of issues for discussion by parliament's justice committee. A discussion document subsequently produced by the department²⁴ indicated that the department was to be restructured to increase its focus on its core function of managing the courts. The document states: 'The organisational realignment is being fast-tracked in order to have in place by 1 December 1999:

- 'a strategic plan, informed by service demands, describing the core objectives, activities, goals and targets for the department and the programme for attaining such goals and targets, linked to the budgets required;
- 'an organisational structure and post establishment that supports the strategic plan;
- 'a service delivery improvement plan; and
- 'a comprehensive human resources plan, defining the skills and resources available as well as the training needs.'

Changes, it stated, would be in line with *Justice vision 2000*. In February 2000 the ministry launched a Millennium 10 Point Plan, and the minister promised that everything possible would be done to address the situation in the courts. The document is much shorter than *Justice vision 2000*, and the terms it uses are well defined. The principles outlined in the introduction state that goals should be clearly defined, practical and attainable, that plans should be focused, that intervention should impact on points of delivery, and that the department's core business is the courts. It states:

'Not a day goes by without reports of attacks on the most fundamental freedoms. And what confronts those women, men and children who are suffering and dying is a reality that is more unbearable than ever – whilst we have achieved our political rights; the quest for civil, social, cultural, economic and developmental rights is a blurred vision on the horizon, tainted by mal-aligned priorities, corruption, individual enrichment and ambition and ultimately grass roots alienation.'

The plan defines the department's primary challenge as providing well-managed courts that are friendly, service-oriented, and run according to the values of the constitution. The ten priorities identified in the plan are:

- 1) *Upgrading/developing the courts*. The courts to be upgraded are listed, with specific steps to be taken as well as time frames.
- 2) *Court and case management*. This involves investigating the appointment of a national court management programme director as well as court managers, increasing pre-trial service centres, reviewing court working hours and recess periods, hosting a court management forum, evaluating the court cluster management system, investigating techniques to improve court roll management, finalising policy on internship for law graduates, expanding the public defender system and mobile law clinics, re-

²⁴ Department of justice, Matters arising from the statement by the minister of justice and constitutional development on the efficiency of courts, made in parliament on 9 September 1999, <http://www.doj.gov.za/docs/reports/courtefficiency.html>.

viewing the pilot citizen's advice desks, distributing the model court blueprint, investigating the rechannelling of petty cases, upgrading court roll statistics, and designing a new performance management system.

- 3) *Human resources management and development*. This includes increased training for prosecutors, interpreters and other judicial officers, as well as training in human rights, mediation, legislative drafting, strategic management, and specific acts.
- 4) *Specialised courts and alternative dispute resolution mechanisms*. Family and sexual offence courts are to be extended, juvenile justice centres established, community and traditional courts to be investigated in terms of their capacity for resolution of community disputes, and the expansion of commercial, traffic and small claims courts are to be investigated.
- 5) *Re-engineering the maintenance system*.
- 6) *Developing an integrated approach to problems in the criminal justice system*. This involves working with other departments, the NCPS, and its integrated justice sector project office. Target areas cited include witness protection, awaiting trial prisoners, police investigations, probation officers, defence lawyers, and legislation to combat crime and strengthen the system.
- 7) *Constitutional and statutory obligations*. The goal here is to plan and budget systematically when developing draft legislation.
- 8) *Development of effective communication and promoting community and corporate participation in programmes*. This includes establishing community justice and police fora.
- 9) *Transformation of the legal profession and judiciary*. This involves hosting two meetings with representatives of all relevant sectors.
- 10) *Institutional development* – to ensure that structures, systems and personnel are aligned.

It is not yet clear how this plan relates to *Justice vision 2000* -- that is, whether it re-prioritises existing policy or whether it changes any of the original goals, strategies, success indicators, or targets.

In any event, a new policy document is currently being prepared and is expected to be released during the course of 2000. The minister has approached Business Against Crime and other business agencies to support the rationalisation of justice policy, while keeping it in the framework of Justice vision 2000. This is a further indication that the original policy document has been found to be unworkable.

The next phase of this study will focus on three broad areas in order to determine the nature of the gaps between policy and implementation. The first will be attempts to improve the department's core function: running the courts. The second will be attempts to transform the department and profession in order to achieve greater equity and representivity; and the third will be attempts to make the justice system more accessible to citizens.

In respect of the first area the study will examine the role of the national directorate of public prosecutions, the efficacy of court management systems and court functioning, and the introduction of computerised information systems. In respect of the second, it

will look at appointments and training in the department as well as consultations with the legal profession on steps to improve its representivity. In respect of the third, it will examine the introduction of citizens' advice desks in the courts and measures designed to improve access to legal aid.

In all these areas the process of implementation will be examined to determine the nature of obstacles to policy implementation, as well as factors that have aided successful implementation.

Court management and functioning

The National Directorate of Public Prosecutions (NDPP)

The National Prosecuting Authority Act of 1998 provided for a national directorate of public prosecutions, the head of which would be a political appointee. This provoked considerable controversy about the potential for such a person to interfere politically in the judicial system. The government argued that this post was essential to achieve greater uniformity in prosecuting practices across the country, and to deal with weaknesses in the system. Bulelani Ngcuka was appointed as the first national director in 1998. Subsequent appointments in the directorate include a deputy national director, 10 directors of public prosecutions, and three special directors. Of the 58 deputy directors, 15 are black and 11 women; of the 95 senior state prosecutors, 39 are black; and of the 1 964 state advocates and prosecutors, 726 are white, 1 238 black, and 837 are women.²⁵

Reports thus far indicate that the NDPP is operating very effectively; it may thus be an example of successful policy implementation. The initial resistance to this institution seems to have abated, and the unit is reported to have appointed very able people and to have streamlined its operations.

Research on the NDPP will focus on the policy process that created it, and how it is functioning. The NDPP's definition of its functions, the match between its functions and its financial and human resources, its relationship with other actors in the judicial system, and the extent to which it has improved prosecutions will be examined.

Court efficiency

Although several new courts have been established since 1994, government expenditure on courts has been expected to drop as a proportion of justice spending from 64 per cent in 1994/5 to 55 per cent in 2001/2, with these resources being diverted to the new constitutional institutions and legal aid programmes²⁶. But caseloads in the courts are increasing, as shown in table 3:²⁷

²⁵ Ministry of justice, *Five years of law reform, piece by piece towards justice for all*, May 1999.

²⁶ Department of finance, 1998 Medium Term Expenditure Review, integrated justice sector; Department of justice, budget analysis, p 10.

²⁷ Department of finance, 1998 Medium Term Expenditure Review, integrated justice sector, main report, p 28.

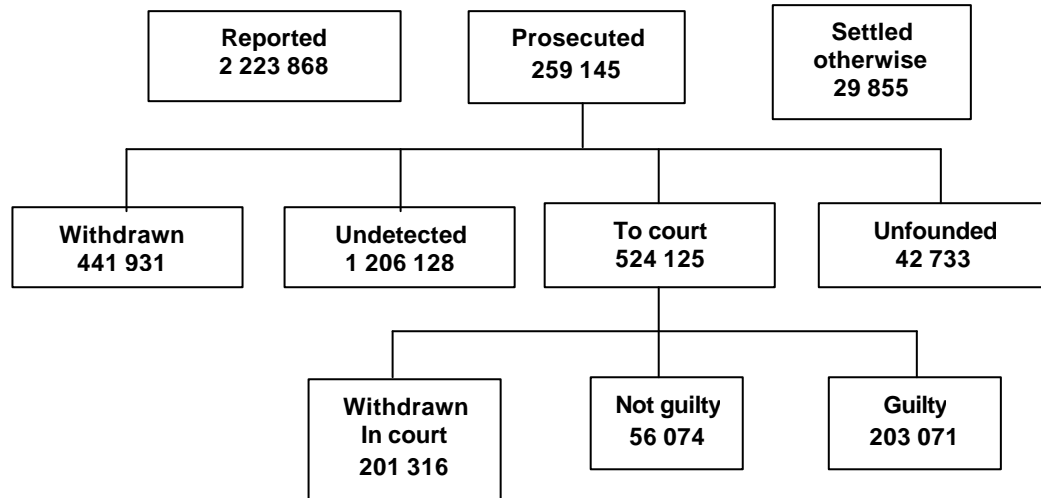
Table 3: Caseloads in South African courts, 1995-8

Cases	Dec 95	June 96	Dec 96	June 97	Dec 97	June 98
Cases reported per month	244 263	214 285	246 831	216 814	250 493	212 087
Cases open in SAPS	673 282	667 609	768 637	791 006	895 616	824 843
Cases open in justice	240 748	314 863	354 802	380 665	431 912	434 657
Total cases open	914 030	982 472	1 123 439	1 171 671	1 327 528	1 259 500

The table shows that the judiciary is falling behind in processing cases, and an enormous backlog is developing, clogging up the entire legal system. Problems include inadequate buildings and facilities, staff shortages, a shortage of experience and skills, and administrative inefficiencies. Figure 1 below depicts the flow of criminal cases in 1998.²⁸

²⁸ Taken from Schönteich, 1999, p 10.

Figure 1: Flow of criminal cases in the South African justice system, 1998



In September 1999, following a visit to a number of courts in the country, Maduna gave an overview of his findings on the efficiency of the courts to parliament. He indicated that the department would be reorganised to place greater focus on its core business of running the courts and that discrepancies in the allocation of resources to different courts would be reviewed. The Constitutional Court, for example, deals with fewer than 20 cases a year, but it has a larger budget than the Appeal Court.

The department has developed a ‘model court blueprint’ in terms of which all courts in the country are to be upgraded to certain minimum standards. The first two courts to be upgraded in this way are those in Mitchells Plain and Orlando. Courts are also being built or upgraded in Tembisa, Alexandra, Nyanga, Khayelitsha, Botshabelo, Atteridgeville, Waterval and Nqamakwe; some of this work is being funded by international donors. Court office accommodation is being extended or upgraded at Bizana, Flagstaff, Lady Frere, Mount Frere, Maluti, Mqanduli, Ngqeleni, Tsomo, Umtata and Sterkspruit. About 15 other projects are being planned.

One of the major reasons why cases have backed up is a shortage of staff. In the Johannesburg regional court, for example, eight out of 32 regional magistrates’ posts are vacant -- in other words, one quarter of the regional courts cannot operate. As a short-term solution, the department, together with the Bar, has decided to appoint five private law practitioners to help alleviate the problems caused by these vacancies. A pilot project to computerise the civil justice system in Johannesburg has been launched, and 30 temporary staff have been appointed to help work through the backlog of civil cases.

The national director of public prosecutions has been finalising disciplinary procedures relating to misconduct on the part of prosecutors. The office was dealing with eight matters in KZN, five in the Free State, 19 in the Eastern Cape, seven in Gauteng, one in Northern Cape, five in North West, and five in the Western Cape. At September 1999, 38

complaints against magistrates were being investigated in the Eastern Cape. These involve magistrates who have been charged with criminal offences, as well as magistrates who were allegedly under the influence of alcohol during office hours, absent from work without leave, not adhering to official working hours, or neglecting their managerial duties. The Magistrates Commission has established a committee to attend to disciplinary measures against magistrates found to be guilty of misconduct.

The unusually long three-and-a-half-month high court recess period is being reviewed, as it has been found that it takes an average of 520 days for a case to reach finalisation from its first appearance in the lower courts. An NDPP audit is reported to have found that both court hours and court resources in several centres were underutilised.²⁹ Many court hours are lost because cases on the rolls are not heard. This may be due to investigations not having been completed, witnesses not being available, consultations with witnesses not having taken place, prisoners not being brought to court, prosecutors and defence lawyers not being ready to proceed, and court orderlies and interpreters not being available.³⁰

In order to improve court management³¹, magisterial districts are being divided into 14 clusters, each headed by a chief magistrate or senior magistrate. Office managers are being appointed, and supernumeraries are to be moved between provinces. A computer system is being developed to support the more effective management of cases through the courts. The system is to be piloted at the magistrate's courts in Johannesburg and Durban. Manuals for magistrates and administrators are being distributed, and training courses are being conducted on the implementation of these manuals throughout the country. Manuals for prosecutors are still being developed. This is aimed at creating uniformity and promoting efficiency with an objective standard for court management. A national steering committee is overseeing the implementation of the new court management system.

This study will focus on measures to improve the management of magistrate's courts, and will examine problems being experienced in the course of implementing them. It will examine the rationality of the allocation of resources to magistrate's courts relative to others, given the extent of their caseloads; examine the successes and/or problems in upgrading projects and staff recruitment policies; and evaluate the implementation of new court management systems.

Representivity in the profession, and the department of justice

The representivity of the judiciary is all the more important in the light of its new political role in giving effect to the constitution. As long as the judiciary is seen to be unrepresentative, it is likely to be perceived as unfair and biased.

²⁹ Department of justice, Matters arising from the statement by the minister of justice and constitutional development on the efficiency of courts, 1999, p 7.

³⁰ Ibid, page 8.

³¹ Ibid, page 9.

White magistrates and judges in the lower courts, high court and appeal court vastly outnumber their black colleagues. The racial and gender breakdown of judges, magistrates, prosecutors, state advocates, state law advisers and state attorneys is reflected in table 4:

Table 4: Racial and gender distribution of some legal personnel, July 2000³²

	WM	WF	IM	IF	CM	CF	BM	BF	TOT
Judges	126	11	9	1	5	1	25	6	184
Magistrates (Regional)	157	25	1	6	5	1	39	3	237
Magistrates (Chief)	8	1	0	1	0	0	10	1	21
Magistrates	484	194	34	27	42	13	410	77	1281
State Prosecutors (Chief)	10	4	1	1	2	0	8	2	28
State Prosecutors (Senior)	28	30	2	2	9	2	24	6	103
State Prosecutors	278	366	34	114	77	68	633	283	1853
State advocates	71	63	4	7	4	5	36	19	209
Family advocates	1	7	1	5	0	0	1	5	20
State Law Advisor	19	4	0	1	1	1	7	5	38
State Attorneys, assistant and candidate state attorneys	32	13	6	10	2	1	27	18	109
TOTAL	1214	718	92	175	147	92	1220	425	4083
Percentages	29,7	17,6	2,3	4,3	3,6	2,3	29,8	10,4	100

Key: W = white; I= Indian; C = coloured; B = black; M = male; F= female; Tot = total

While the above table shows that representivity in the courts is still far from reflecting population ratios³³ (white: 10,9 per cent, black: 76,7 per cent, Indian: 2,6 per cent and coloured: 8,9 per cent), it has improved significantly over the past few years. In 1996/7 whites made up about 60 per cent of judicial officers while blacks, including Indians and Coloureds made up about 40 per cent. In 2000 whites comprised about 47 per cent of judicial officers while blacks, including Indians and Coloureds, comprised about 53 per cent.

³² Compiled from data provided by the Department of Justice.

³³ The People of South Africa Population Census, 1996, Census in brief, report no 1: 03-01-11(1996). Pretoria: Statistics South Africa, 1996.

The profession

Although black South Africans have never been formally excluded from the legal profession, it has been far more difficult for them to gain access to it than it has been for whites. The Group Areas Act, which was only abolished in 1990, prevented black lawyers from operating from offices in 'white' areas, which included the city centres where most courts were located. When legislation was passed in 1959 to set up ethnically based universities, most black students were excluded from established universities in the main city centres. Latin, a required subject for law, was not taught at black schools, which meant that prospective black law students would have to complete two years of Latin before they could register for law. The one affordable way for poorer people to enter the legal profession was by serving a five-year period of articles with a firm of attorneys. But this option was eliminated in the early 1970s by the ruling that every articled clerk had to have a university degree.³⁴

As a result, in 1994/5 there were only some 2 000 black, as against some 11 000 white, attorneys and advocates in South Africa.³⁵ Currently, in October 2000, there are 13,398 registered attorneys in the country but unfortunately the racial breakdown of this figure is not available.³⁶ There are 1691 members of the South African General Bar Council³⁷ and 669 members of the Independent Association of Advocates of SA³⁸, giving a total of some 2 360 advocates registered with these bodies. This figure would however need to be substantially inflated as many advocates are independent of these organizations. When the Legal Practice Bill is passed in 2001, there will be one controlling body for all legal practitioners and more accurate data will hopefully then become available. However it is safe to say that there is still only a relatively small pool of qualified black people in the legal profession.

Representivity in terms of race and gender is thus still a long way off. Senior partners in law firms and counsel at the bar are mostly white men. The bar councils and law societies are consequently also run mostly by white men.

The department is trying to address these problems in a number of ways:

- Latin and courses in English and Afrikaans are no longer required for legal degrees.
- A new basic four-year law degree has been introduced at all 21 law schools in the country in terms of the Qualification of Legal Practitioners Amendment Act 1997.
- The introduction of a period of internship as part of post-graduate legal training is currently being considered as is the requirement of all aspirant legal practitioners to do a period of community service.

³⁴ Hugh Corder, Establishing legitimacy for the administration of justice in South Africa, *Stellenbosch Law Review*, 6(2), 1995.

³⁵ Plans to boost courts, *TransAct* 2(2), Centre for Policy Studies, February 1995.

³⁶ Verbal communication with Sylvia Webber, Law Society of South Africa, 27 October 2000.

³⁷ Verbal communication with the SA General Bar Council, 27 October 2000.

³⁸ Verbal communication with the Independent Association of Advocates of SA, 27 October 2000.

- A new controlling body for attorneys – the Law Society of South Africa - has been established.

The department has also issued a discussion paper entitled *Transformation of the legal profession* as a basis for consulting the profession. It proposes that all graduates who want to become legal practitioners should undergo at least one year of practical vocational training (internship) including six months of community service and a further six months of articles, pupillage, professional training, or continued community service. Options listed in respect of admission exams include a uniform national exam, separate exams for different branches of the profession, or no statutory admission exam, in which case a statutory body would have to ensure that all LLB degrees from the different universities meet minimum requirements. The paper explores options for creating a single controlling body for the profession in respect of standards of education, qualifications for admission, licensing to practice, discipline for improper conduct, and public indemnity in respect of the misappropriation of funds. It also proposes a number of capacity-building strategies for law schools at former black universities and for black and women law graduates. Finally, it discusses various measures for improving public access to legal services, including:

- means to reduce the cost of legal services
- increasing the representivity, and better geographical distribution, of the profession
- recognising the role of paralegal practitioners
- increasing public awareness of the availability of legal services
- changing the intimidating image of lawyers
- increasing the number of small claims courts operating in the country
- establishing legal insurance schemes
- changing the legal aid system such that legal services be mainly delivered by employees in legal aid clinics, advice offices and public defender offices rather than by means of instructing private practitioners, and
- introducing a requirement for 48 certified hours of non-remunerated community service for all qualified legal practitioners.

A special legal placement programme has been introduced as a further measure to increase representivity in the legal profession. In terms of a grant agreement between the South African Black Lawyers Association and the US Agency for International Development signed on 23 June 1998, practical training for 240 black law graduates will be provided by assisting to place them with firms in order to complete their articles³⁹. The programme includes training pupil advocates in chambers through lectures, workshops and examinations, and training attorneys through courses and legal placements in law firms. The programme is being co-ordinated by the Black Lawyers Association, the National Association of Democratic Lawyers, Lawyers for Human Rights, the Law Society of South Africa, the General Council of the Bar, and the Legal Resources Centre.

This project will keep track of changes in the requirements for entry into and practising the legal profession. A series of interviews will be conducted with professional

³⁹ Ministry of justice, Five years of law reform, p 9.

bodies, law schools and the department of justice to determine the nature of problems and obstacles in establishing the new requirements for legal practitioners.

The department

The 11 departments of justice that operated under the apartheid system have been amalgamated into one department. It currently employs 15 038 persons⁴⁰ and operates on a budget of R2,5 billion, 1,15 per cent of the state budget (1999—2000 financial year).⁴¹ Of all personnel,⁴² 52,9 percent are black, 4,2 percent are coloured, 2,3 percent are Indian, and 40,5 percent white. Male employees make up 50,8 percent. But the management echelon of the department (123 people) reflects a different picture: 27,6 percent are black males (34) and 65,9 percent white males (81), with one Indian male at management level. There are five white, one Indian and one black female employed at management level. Attempts to remedy this situation have been resisted by public service unions.

In 1997 the Public Servant's Association (PSA) brought a high court action against the Minister of Justice in an attempt to constrain the ministry's hand in making affirmative action appointments. The court ruled in favour of the PSA, requiring the ministry to make appointments only after considering applications from employees already in the department 'regardless of race, colour or gender of such persons; and taking into account only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment ...'⁴³

Although the appointment of the late chief justice, Ismael Mahomed, was controversial, and opposed at the time by many in the legal profession, he was the first black South African to be awarded silk and the first to be appointed to the supreme court bench. He previously served as the chief justice of Namibia and president of the Lesotho court of appeal, as well as co-chair of CODESA. His appointment was symbolically significant, and may have helped to speed up the process of improving the representivity of the judiciary. The appointment of Bulelani Ngcuka as national director of public prosecutions has similarly been symbolically and practically significant.

Other judicial appointments made on the recommendations of the Judicial Service Commission have led to greater representivity. Almost half of the appointments since 1994 have been either blacks or women. While most have been merited, one or two have caused heated controversy for allegedly being unmerited affirmative action appointments.

This study will profile the staff composition of the department over the past 15 years, in order to evaluate the success of policies aimed at increasing its representivity. Department officials and representatives of the legal profession will be interviewed in order to gauge their perceptions of the success of these policies.

⁴⁰ Department of justice, *Comprehensive policy document on representivity and employment equity*, 1999; and *Administration of justice*.

⁴¹ Department of finance, *Budget review*, 1999.

⁴² *Ibid*, p 10.

⁴³ Judgement in the High Court of South Africa. Case Number 23975/95, dated 4 March 1997, p 7.

Accessibility

One of the central goals of justice policy is to make the system more accessible to citizens, particularly those who were alienated from it under the former government. A number of policies have been formulated and are being implemented to address this situation. While this project cannot examine all these initiatives, it will conduct research to determine:

- the effectiveness of citizens' advice desks in courts; and
- the effectiveness of legal aid in improving general accessibility of the justice system.

A number of other courts have been or are being established or extended to make the justice system more accessible. These include family courts, community courts, and traditional courts. This project will not examine these areas in any detail.

Citizens' advice desks

Five citizens' advice desks, funded by Irish Aid, are currently being piloted in Pretoria, Johannesburg and Durban. If they prove successful, the department intends to establish them in all the court buildings in the country. These advice desks are usually situated somewhere near the entrance to the court building and serve as the first point of contact with the public. They provide a central point for information on the whereabouts of particular courts and offices in the building and they provide information and issue information pamphlets on a variety of court functions and legal and human rights.

The pilot desks were to be implemented over a three-year period with training for the information officers at these desks being provided by NGOs.

For the purposes of this project, department officials, desk officers and end users will be interviewed to evaluate this initiative.

Legal Aid

The constitution obliges the state to provide free legal representation to detainees, sentenced prisoners, and accused persons, where substantial injustice would result if they were not represented. The body charged with meeting this obligation is the Legal Aid Board. It operates three systems:⁴⁴

- 1) The *judicare* system, in terms of which the board instructs lawyers to represent those who qualify for legal aid in criminal trials and civil matters. A team was appointed by the minister in January 1998 to investigate this system and advise on more cost-effective ways of providing legal aid.
- 2) The public defender system, in terms of which lawyers employed by the board represent accused persons in district and regional courts. Introduced as a pilot project

⁴⁴ Ministry of justice, *Five years of law reform*, p 4.

in 1992, this system appears to be a more cost-effective means of providing legal assistance.

- 3) The legal aid clinic system, in terms of which each clinic has a principal and several candidate attorneys paid by the board to provide legal assistance in criminal and civil matters.

A pilot project is being conducted in Colesburg and Caledon in terms of which the board pays the salaries of candidate attorneys in private practice, who are then obliged to take on a certain number of legal aid cases a month without charging a fee.

It is clear that some measures have to be introduced to limit the number of legal aid cases. As a proportion of expenditure on justice, legal aid costs have risen from 6 per cent in 1994/5 to 10 per cent in 1998/9. The board has projected that, from 1990—1 to 2002—3, the number of legal aid cases is likely to increase by 1 577 per cent from 35 513 to 595 464, most arising from the rights enshrined in the constitution.⁴⁵ In terms of sections 35(2) and 35(3) of the constitution, detained and accused persons have the right to legal representation at the state's expense if substantial injustice would otherwise result. The board has interpreted this to include all accused persons who cannot afford legal representation and who face the danger of being imprisoned without the option of a fine. The means test in terms of the Legal Aid Act of 1969 cannot be applied to applications for legal representation in terms of the constitution, where the only question to be considered is whether or not the person can afford the services of a lawyer.

- For this project, the nature of the problems in implementing the legal aid system will be investigated, and the options for addressing these problems reviewed. Representatives of the Legal Aid Board, legal professional bodies, NGOs working in the legal arena as well as academics and government officials will be interviewed.

Conclusion

As justice is a national competence, it is not administered by the provinces. However, there are ten judicial divisions of the high court that roughly correspond to the nine provinces (except that there are three divisions in the Eastern Cape, and none in Mpumalanga), and 434 magistrates' courts. For the purposes of this project, three regions will be selected where interviews will be conducted and the functioning of the courts observed. To conclude, research on the gap between policy and implementation in the justice sector will cover the following areas:

- policies aimed at improving the functioning of the magistrates' courts;
- policies aimed at improving the representivity of the judiciary both in the department and in the profession; and
- policies aimed at improving accessibility of the justice system through the introduction of citizens' advice desks, and the reform of the legal aid system.

⁴⁵ Department of finance, Medium Term Expenditure Review, integrated justice sector.

Methods of study will include:

- studies of policy documents;
- interviews with government officials, judicial officers, representatives of professional legal bodies, academics and NGOs; and
- observation at various magistrates' courts.

A major aim of the study will be to identify the reasons why implementation in these areas is being impeded and thereby help to overcome the obstacles to creating a stable society based on respect for human rights and the rule of law.

APPENDIX I: EXAMPLES OF NEW ACTS

- **Legislation establishing and regulating bodies provided for in the constitution**, such as the Truth and Reconciliation Commission, the Constitutional Court, the Human Rights Commission, the Public Protector, the Youth Commission, the Gender Commission, and the Judicial Service Commission.
- **Legislation transforming the legal profession**, including The *Admission of Advocates Amendment Act*, which removes Latin as a requirement for admission; The *Admission of Legal Practitioners Amendment Act*, which removes English and Afrikaans as requirements for entry into the legal profession; The *Right of Appearance in the Courts Act*, which allows attorneys to appear in the high court in certain circumstances; The *Magistrates Amendment Act*, which makes the Magistrates** Commission more representative; The *Qualification of Legal Practitioners Amendment Act*, which establishes a uniform fouryear LLB degree for entry into any branch of the legal profession; and the *National Prosecuting Authority Act*, which establishes this authority.
- **Legislation regulating the judicial approach to crime**, including The *Investigation of Serious Economic Offences Amendment Act*, which brings search and seizure powers in line with the constitution; several *Criminal Procedure Amendment Acts*, which regulate and tighten bail conditions, speed up the finalisation of criminal trials, regulate the trapping system, and provide for the imposition of minimum sentences for some serious offences; The *Prevention of Organised Crime Act*, which gives police and prosecutors new powers to deal with organised crime, including the power to seize assets which are either the proceeds of crime or have been used to commit crimes, making it an offence to participate in the affairs of any criminal organization and criminalising the recruitment of members by street gangs; The *Special Investigating Units and Special Tribunals Act*, which provides for speedy and cost-effective investigation of allegations of serious corruption, maladministration, or misappropriation of state funds and assets; The *International Co-operation in Criminal Matters Act*; and The *Witness Protection and Services Act*, establishing witness protection programmes. The Judicial Matters Amendment Bill of 1998 is intended to increase the maximum penal jurisdiction of the lower courts, thus enabling them to impose more severe sentences: for magistrate's courts, from one to three years, and for regional courts, from 10 to 15 years.
- **Legislation facilitating access to the courts**, including The *Legal Aid Amendment Act*, which extends the powers of the Legal Aid Board to provide legal representation for accused persons as contemplated in the constitution; The *Abolition of the Restriction on the Jurisdiction of the Courts Act*, which removes legal provisions that limit the jurisdiction of the courts in a way that denies people access to justice; and The *Magistrates' Courts Amendment Act*, which regulates the appointment of lay assessors in certain criminal proceedings in the lower courts so as to increase community involvement in the administration of justice.

- **Legislation enacting human rights**, including The *Abolition of Corporal Punishment Act*; the abolition of the death penalty; The *Divorce Courts Amendment Act*, which deracialises the former black divorce courts; the abolition of imprisonment for debt; The *Natural Fathers of Children Born out of Wedlock Act*, which gives such a father the right to approach a court with regard to custody and guardianship of his child; The *Domestic Violence Act*, which offers protection to victims of domestic violence and provides guidelines to policy for dealing with domestic violence; The *Recognition of Customary Marriages Act*, which gives full legal recognition to customary law marriages; and provisions in The *Judicial Matters Second Amendment Act*, which brings provisions concerning the use of force in making an arrest in line with the constitution.