

Recommendations

n COMMITMENT TO RECONCILIATION AND UNITY

The Commission, believing that reconciliation is a process vital and necessary for enduring peace and stability, invites fellow South Africans to:

- accept our own need for healing;
- reach out to fellow South Africans in a spirit of tolerance and understanding;
- work actively to build bridges across the divisions of language, faith and history;
- strive constantly, in the process of transformation, to be sensitive to the needs of those groups which have been particularly disadvantaged in the past, specifically women and children;
- encourage a culture of debate so that, together, we can resolve the pressing issues of our time;
- initiate programmes of action in our own spheres of interest and influence, whether it be education, religion, business, labour, arts or politics, so that the process of reconciliation can be implemented from a grassroots level;
- address the reality of ongoing racial discrimination and work towards a non-racial society;
- call upon leaders in local, provincial and national government to place the goal of reconciliation and unity at the top of their respective agendas.

In order to give expression to this commitment, we request the President of South Africa to call a National Summit on Reconciliation, not only to consider the specific recommendations made by the Commission, but to ensure maximum involvement by representatives of all sectors of our society in the pursuit of reconciliation.

The Summit should be held towards the end of 1999. In this way South Africa, on the eve of the new millennium, should re-commit itself to a future characterised by reconciliation and unity by: –

- re-looking at the haunting memories of conflicts and division;
- opening our eyes to the legacies of the past.

n INTRODUCTION

1

The Promotion of National Unity and Reconciliation Act (the Act) required the Truth and Reconciliation Commission (the Commission) to make recommendations with regard to the creation of institutions conducive to a stable and fair society and the

institutional, administrative and legislative measures which should be introduced to prevent the commission of human rights violations.¹

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However, the Act goes further and grants the Commission powers to make recommendations concerning any matter with a view to promoting or achieving national unity and reconciliation. It is with this in mind that this chapter begins with a statement entitled “Commitment to Reconciliation and Unity”. It is the conviction of the Commission that the goal of reconciliation remains elusive and deserves central importance. This section of the report will also incorporate specific recommendations which, in the opinion of the Commission, contribute to the common search for reconciliation and unity.

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These are followed by a series of recommendations related to specific areas of the public and private sectors that the Commission believes could assist in the consolidation of democracy and the building of a culture of human rights. Although separately itemised, all the recommendations in this chapter should be seen as part of a whole and as contributing to the quest for overall stability and peace in South African society. It is important to state explicitly that there is a need for sensitivity to the particular issues pertaining to women and children.

RECONCILIATION AND UNITY

A common criticism of the Commission is that it has been strong on truth but has made little or no contribution to reconciliation.

History will judge whether or not this particular criticism is accurate. It is, nevertheless, worth making two points in this regard. The first is that, while truth may not always lead to reconciliation, there can be no genuine, lasting reconciliation without truth. Certainly, lies, half-truths and denial are not a desirable foundation on which to build the new South Africa. Second, it is readily conceded that it is not possible for one commission, with a limited life-span and resources, on its own to achieve reconciliation against the background of decades of oppression, conflict and deep divisions.

The Commission accepts that, if reconciliation and unity are to become a reality in South Africa, the energy and commitment of all of its people will be required. While the Commission may have made a small contribution to laying some foundation stones, proactive steps from all institutions, organisations and individuals will be required if the building is to be completed.

During the life of the Commission, Commissioners and staff travelled the length and breadth of South Africa. Hearings were held in rural towns and urban cities – in small church halls and large, dignified city halls, in the offices of non-governmental organisations (NGOs), school classrooms, town halls and magistrates' courts. Sometimes attendance was quite small – an intimate community huddled together in grief and memory. On other occasions, halls have been packed to overflowing. The largest audience, in a Port Elizabeth township, consisted of three and a half thousand people, with long queues of people waiting to take the places of those who left. Most times the mood was sombre and dignified; at others, there was an undercurrent of anger. Yet always there was an awareness of a spirit of compassion and acceptance which enabled victims to talk freely and in their own language.

Above all, the Commission tried to listen, really to listen – not passively but actively – to voices that for so long had been stilled. And as it listened to stories of horror, of pathos and of tragic proportion, it became aware again of the high cost that has been paid by so many for freedom. Commissioners were almost overwhelmed by the capacity of human beings to damage and destroy each other. Yet they listened, too, to stories of great courage, concluding often with an astonishing generosity of spirit, from those who had for so long carried the burden of loss and tragedy. It was often a deeply humbling experience.

The Commission also listened to perpetrators describing in awful detail the acts of terror, assassination and torture that they inflicted on so many over so long a period. Here the mood was very different. Encouraging, though, were the expressions of remorse and a seeking for forgiveness on the part of some of those who applied for amnesty.

In this complicated process of conflict and pain, the Commission often became aware that one of the most destructive legacies of the past is the labelling of sometimes innocent people as 'informers' or collaborators. Individuals and their families were killed, assaulted, harassed and ostracised as a result of this stigmatisation. Many people still live with the daily experience of rejection because they were identified as informers during the period of the Commission's mandate. The problem is complex and not readily resolved and the Commission was unable, in the vast majority of cases, to prove or disprove such allegations. However, the ongoing persecution of these so-called informers is a serious hindrance to the process of reconciliation.

After so long a journey with so many different and challenging experiences, the Commission concluded that all of South Africa – rural, urban, black, white, men, women and children – had been caught up in oppression and resistance that left no one with clean hands. Reconciliation is necessary for all, because all need to be healed.

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These experiences and conclusions reinforced the view that reconciliation is not something that the Commission alone can achieve. The Commission believes that reconciliation without cost and pain is cheap, shallow and must be spurned. Those who, through the Commission, witnessed the scars on so many human bodies and spirits as well as the deep scars on the country as a whole, found themselves unable to remain onlookers. They came to acknowledge their own complicity, their own weakness, and accepted their own need for healing.

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It is in this spirit of listening, sharing and acknowledging its own need for reconciliation, that the Commission invites its fellow South Africans to share a commitment to reconciliation and unity.

One of the essential goals of the Commission was to ensure that there would be no repetition of the past. For reconciliation to have any chance of success, it is imperative that a strong human rights culture be developed. The Commission recognises, however, that for such a culture to become a reality, a number of simultaneous actions will have to take place.

THE RECORDS OF THE COMMISSION'S PROCEEDINGS, THIS REPORT AND THE RECORDED AUDIO AND VIDEO TAPES OF THE PUBLIC HEARINGS FORM A RICH CONTRIBUTION TO THE PUBLIC MEMORY, AND SHOULD BE MADE AVAILABLE IN THE WIDEST POSSIBLE WAY. MUSEUMS WHICH CELEBRATE DIFFERENT ASPECTS OF THE PAST SHOULD BE ESTABLISHED AND MAINTAINED.

THE COMMISSION RECOMMENDS THAT GOVERNMENT ACCELERATE THE CLOSING OF THE INTOLERABLE GAP BETWEEN THE ADVANTAGED AND DISADVANTAGED IN OUR SOCIETY BY, *INTER ALIA*, GIVING EVEN MORE URGENT ATTENTION TO THE TRANSFORMATION OF EDUCATION, THE PROVISION OF SHELTER, ACCESS TO CLEAN WATER AND HEALTH SERVICES AND THE CREATION OF JOB OPPORTUNITIES. THE RECOGNITION AND PROTECTION OF SOCIO-ECONOMIC RIGHTS ARE CRUCIAL TO THE DEVELOPMENT AND SUSTAINING OF A CULTURE OF RESPECT FOR HUMAN RIGHTS.

IN REGARD TO THE CREATION OF JOB OPPORTUNITIES, THE COMMISSION APPRECIATES THAT THE PRIVATE SECTOR AS WELL AS GOVERNMENT WILL HAVE TO PLAY A LEADING ROLE. TWO AREAS WHICH THE COMMISSION ASKS GOVERNMENT TO CONSIDER ARE THE ESTABLISHMENT OF A PEACE CORPS AND A MORE FOCUSED EMPHASIS ON PUBLIC WORKS WHICH, BY DEFINITION, WOULD BE LABOUR INTENSIVE.

IT WILL BE IMPOSSIBLE TO CREATE A MEANINGFUL HUMAN RIGHTS CULTURE WITHOUT HIGH PRIORITY BEING GIVEN TO ECONOMIC JUSTICE BY THE PUBLIC AND PRIVATE SECTORS. RECOGNISING THAT IT IS IMPOSSIBLE FOR THE PUBLIC SECTOR ALONE TO FIND THE RESOURCES REQUIRED TO EXPEDITE THE GOAL OF ECONOMIC JUSTICE, THE COMMISSION URGES THE PRIVATE SECTOR IN PARTICULAR TO CONSIDER A SPECIAL INITIATIVE IN TERMS OF A FUND FOR TRAINING, EMPOWERMENT AND OPPORTUNITIES FOR THE DISADVANTAGED AND DISPOSSESSED IN SOUTH AFRICA.

FURTHER, THE COMMISSION RECOMMENDS THAT A SCHEME BE PUT INTO PLACE TO ENABLE THOSE WHO BENEFITED FROM APARTHEID POLICIES TO CONTRIBUTE TOWARDS THE ALLEVIATION OF POVERTY. IN SUBMISSIONS MADE TO THE COMMISSION, A WEALTH TAX WAS PROPOSED. THE COMMISSION DOES NOT, HOWEVER, SEEK TO PRESCRIBE ONE OR OTHER STRATEGY, BUT RECOMMENDS THAT URGENT CONSIDERATION BE GIVEN BY GOVERNMENT TO HARNESSING ALL AVAILABLE RESOURCES IN THE WAR AGAINST POVERTY.

RECOGNISING THAT RACISM UNDERLIES MANY OF THE RIFTS AND DIVISIONS STILL PRESENT IN SOCIETY, THE COMMISSION RECOMMENDS THAT GOVERNMENT INSTITUTIONS AS WELL AS THE PRIVATE SECTOR AND CIVIL SOCIETY TAKE ALL POSSIBLE MEASURES TO OVERCOME RACISM. SUCH MEASURES SHOULD INCLUDE POLICIES AND PRACTICES OF TRANSFORMATION AND DEVELOPMENT WITH REGARD TO STRUCTURES, CULTURE AND ATTITUDES.

ONE FACTOR MILITATING AGAINST THE ESTABLISHMENT OF A HUMAN RIGHTS CULTURE IS THE HIGH INCIDENCE OF SERIOUS CRIME. SECURITY OF PERSON AND PROPERTY IS A FUNDAMENTAL HUMAN RIGHT. TO ADDRESS THE UNACCEPTABLY HIGH RATE OF SERIOUS CRIME, GOVERNMENT IS REQUESTED TO GIVE CONSIDERATION TO THE INTRODUCTION OF COMMUNITY POLICING AT ALL LEVELS AS A MATTER OF URGENCY.

ANOTHER BARRIER TO THE CREATION OF A HUMAN RIGHTS CULTURE IN SOUTH AFRICA IS THE EXTENT OF WIDESPREAD CORRUPTION IN BOTH THE PRIVATE AND PUBLIC SECTORS. IF THERE IS TO BE AN ENTHUSIASTIC RESPONSE BY THE GENERAL PUBLIC TO THE WAR AGAINST POVERTY AND CRIME, THERE HAS ALSO TO BE A CORRESPONDING RUTHLESS STAND AGAINST INEFFICIENCY, CORRUPTION AND MALADMINISTRATION AT EVERY LEVEL OF THE PUBLIC AND PRIVATE SECTORS.

THE RULE OF LAW – THAT PRINCIPLE WHICH ENSURES THAT NO EDICT OF STATE MAY OVERRULE THE RIGHTS OF CITIZENS, IS NOW SPECIFICALLY PROTECTED IN THE CONSTITUTION. EVEN IF CONDITIONS REQUIRE THE PROCLAMATION OF A STATE OF EMERGENCY, NO ONE SHOULD BE ABLE TO BE HELD INCOMMUNICADO AND WITHOUT BEING CHARGED, OR IN CIRCUMSTANCES WHERE THEY ARE VULNERABLE TO TORTURE AND SEVERE ILL TREATMENT. IN ADDITION, GOVERNMENT SHOULD NEVER AGAIN PASS LEGISLATION INDEMNIFYING THE POLICE OR OTHER SECURITY FORCES AGAINST PROSECUTION OR CIVIL CLAIMS FOR ILLEGAL ACTIONS CARRIED OUT IN SUPPORT OF THE STATE, EVEN UNDER A STATE OF EMERGENCY.

*Where human relations are strained by war, meaningful human rights enforcement requires constant vigilance, and an unyielding commitment to sanctions – no matter how worthy the cause for which one is fighting.*²

n ACCOUNTABILITY

WHERE AMNESTY HAS NOT BEEN SOUGHT OR HAS BEEN DENIED, PROSECUTION SHOULD BE CONSIDERED WHERE EVIDENCE EXISTS THAT AN INDIVIDUAL HAS COMMITTED A GROSS HUMAN RIGHTS VIOLATION. IN THIS REGARD, THE COMMISSION WILL MAKE AVAILABLE TO THE APPROPRIATE AUTHORITIES INFORMATION IN ITS POSSESSION CONCERNING SERIOUS ALLEGATIONS AGAINST INDIVIDUALS (EXCLUDING PRIVILEGED INFORMATION SUCH AS THAT CONTAINED IN AMNESTY APPLICATIONS). CONSIDERATION MUST BE GIVEN TO IMPOSING A TIME LIMIT ON SUCH PROSECUTIONS.

ATTORNEYS-GENERAL MUST PAY RIGOROUS ATTENTION TO THE PROSECUTION OF MEMBERS OF THE SOUTH AFRICAN POLICE SERVICE (SAPS) WHO ARE FOUND TO HAVE ASSAULTED, TORTURED AND/OR KILLED PERSONS IN THEIR CARE.

IN ORDER TO AVOID A CULTURE OF IMPUNITY AND TO ENTRENCH THE RULE OF LAW, THE GRANTING OF GENERAL AMNESTY IN WHATEVER GUISE SHOULD BE RESISTED.

n HEALING AND REHABILITATION

15

Recognising that victims and perpetrators alike need healing, the Commission recommends that all possible steps be taken to achieve this:

SEVERAL NON-GOVERNMENTAL ORGANISATIONS (NGOS) EXIST TO ASSIST VICTIMS AND SURVIVORS, AND THESE SHOULD BE ENCOURAGED AND HELPED TO EXTEND THEIR SERVICES AND SHARE THEIR SKILLS AND KNOWLEDGE.

CLINICS AND APPROPRIATE SERVICES SHOULD BE ESTABLISHED TO FACILITATE THE REHABILITATION OF PERPETRATORS. SUCH CLINICS WOULD ASSESS THE NEED FOR PSYCHIATRIC AND PSYCHOLOGICAL COUNSELLING AND MAKE ARRANGEMENTS FOR SUCH TREATMENT TO BE ADMINISTERED. (THE COMMISSION NOTED THAT THERE WAS A SERIOUS LACK OF SUCH FACILITIES.)

Reintegration and rehabilitation

16

Recognising that the promotion of national unity and reconciliation will require the rehabilitation of people of all political perspectives and their reintegration into society, the Commission recommends that:

STRATEGIES BE DEvised FOR REINTEGRATING PERPETRATORS INTO SOCIETY. IN THIS REGARD THEY MAY ASSIST IN COMMUNITY-BASED PROJECTS INVOLVING THE COMMUNITIES WHO WERE WRONGED, OFFERING EITHER DONATIONS OR THEIR SKILLS AND TIME.

WHERE PEOPLE WERE ACCUSED OF HAVING BEEN COLLABORATORS OR INFORMERS, AND HAD THEIR LIVES DESTROYED AS A RESULT, A PROCESS SHOULD BE ESTABLISHED WHEREBY THEIR SITUATION CAN BE REMEDIED. POLITICAL PARTIES, COMMUNITY ORGANISATIONS AND OTHER BODIES INVOLVED SHOULD TAKE ACTION, POSSIBLY IN THE FORM OF CEREMONIES OR MEDIATION, TO FACILITATE A PUBLIC PROCESS OF REINTEGRATION AND FORGIVENESS.

COMMUNITIES SHOULD BE ASSISTED IN PREPARING TO ACCEPT SUCH PERSONS BACK INTO THEIR MIDST.

Lustration

17

The Commission gave careful consideration to the possibility of lustration as a mechanism for dealing with people responsible for violations of human rights. As used in several Eastern European countries, lustration (from the Latin meaning to illuminate or to purify by sacrificing or purging) involves the disqualification of such persons from certain categories of public office, or their removal from office. Other international and South African commissions have commented on this matter. For example, the report of the Skweyiya Commission recommends that “no person who is guilty of committing atrocities should ever again be allowed to assume a position of power”.³

18

The current opinion in International Law is that lustration should be limited to positions in which there is good reason to believe that the subject would pose a significant danger to human rights, and that it should not apply to positions in private organisations.

19

The Commission decided not to recommend lustration because it was felt that it would be inappropriate in the South African context.

Commercial publications

20

Those who publish works for commercial sale which have drawn or will draw substantially upon the statements, testimony and submissions of victims of violations of human rights have a responsibility towards such victims.

THE COMMISSION RECOMMENDS THAT A PORTION OF THE PROFITS DERIVED FROM SUCH PUBLICATIONS BE CONTRIBUTED TO THE PRESIDENT'S FUND FOR REPARATIONS AND REHABILITATION.

Promotion of a human rights culture

21

To enhance the development of a human rights culture, which is a cornerstone of reconciliation, the Commission recommends that:

THE GOVERNMENT RECOMMIT ITSELF TO REGULAR AND FAIR ELECTIONS.

THE GOVERNMENT RECOMMIT ITSELF TO OPEN, CLEAN AND TRANSPARENT GOVERNANCE.

THE GOVERNMENT RE-EXAMINE THE REFORM AND STRENGTHENING OF STATE INSTITUTIONS IN ORDER TO REINFORCE THE PROTECTION OF HUMAN RIGHTS. CONSIDERATION SHOULD BE GIVEN TO THE ESTABLISHMENT OF HUMAN RIGHTS BUREAUX IN GOVERNMENT MINISTRIES AND TO INCREASING THE RESOURCES GRANTED TO INDEPENDENT WATCHDOGS, ESPECIALLY THE OFFICE OF THE PUBLIC PROTECTOR.

HUMAN RIGHTS CURRICULA BE INTRODUCED IN FORMAL EDUCATION, SPECIALISED EDUCATION AND THE TRAINING OF LAW ENFORCEMENT PERSONNEL. THESE CURRICULA MUST ADDRESS ISSUES OF, AMONGST OTHERS, RACISM, GENDER DISCRIMINATION, CONFLICT RESOLUTION AND THE RIGHTS OF CHILDREN.

THE GOVERNMENT GIVE SERIOUS CONSIDERATION TO THE POSSIBILITY AND DESIRABILITY OF INCLUDING THE YOUTH, GENDER AND HUMAN RIGHTS COMMISSIONS IN A SINGLE HUMAN RIGHTS COMMISSION SO AS TO IMPROVE EFFICIENCY, CO-ORDINATION AND COST-EFFECTIVENESS; ALSO THAT SUCH A BODY BE ADEQUATELY FINANCED AND EQUIPPED TO FUNCTION EFFECTIVELY AND INDEPENDENTLY, WHILE COMPLYING WITH PRINCIPLES OF OPENNESS AND ACCOUNTABILITY.

AS THE WORK OF THE COMMISSION AND ITS REPORT ARE VITAL RESOURCES FOR HUMAN RIGHTS EDUCATION, GOVERNMENT ENSURE THAT THE CONTENTS OF THE REPORT ARE MADE AS WIDELY AVAILABLE AS POSSIBLE TO ALL SECTORS AND LANGUAGE GROUPS OF OUR COUNTRY. THIS COULD BE DONE IN PARTNERSHIP WITH CIVIL SOCIETY AND SHOULD INCLUDE AUDIO AND VIDEO TAPES, TO ENSURE THAT THOSE WHO CANNOT READ OR WRITE HAVE ACCESS TO THE REPORT.

ACADEMICS, JOURNALISTS AND RESEARCH INSTITUTIONS BE ENCOURAGED TO UNDERTAKE QUANTITATIVE ANALYSES OF THE DATA GIVEN TO THE COMMISSION AS A BASIS FOR UNDER-STANDING THE MOTIVES AND PERSPECTIVES OF THOSE ENGAGED IN THE CONFLICTS OF THE PAST. RESEARCH AND FIELD-BASED INITIATIVES AIMED AT PROMOTING A BETTER UNDERSTANDING BETWEEN PEOPLE OF DIFFERENT PERSUASIONS SHOULD ALSO BE ENCOURAGED.

n REPARATIONS AND REHABILITATION⁴

22

The granting of reparation awards to victims of gross violations of human rights adds value to the “truth-seeking” phase by:

a

enabling the survivors to experience in a concrete way the state's acknowledgement of wrongs done to victims and survivors, family members, communities and the nation at large;

b

restoring the survivors' dignity;

c

affirming the values, interests, aspirations and rights advanced by those who suffered;

d

raising consciousness about the public's moral responsibility to participate in healing the wounded and facilitating nation-building.

23

Thus the Commission recommends that:

A STRUCTURE BE DEVELOPED IN THE PRESIDENT'S OFFICE, WITH A LIMITED SECRETARIAT AND A FIXED LIFE-SPAN, WHOSE FUNCTION WILL BE TO OVERSEE THE IMPLEMENTATION OF REPARATION AND REHABILITATION POLICY PROPOSALS AND RECOMMENDATIONS. THE FUNCTIONS OF

THE PROPOSED SECRETARIAT WILL REQUIRE CO-OPERATION WITH A NUMBER OF MINISTRIES WHICH HAVE A LONG-TERM MANDATE TO INTEGRATE SERVICES AND ACTIVITIES. THE SECRETARIAT WILL ALSO APPLY ITSELF TO:

- FACILITATING MECHANISMS FOR FINANCIAL REPARATION;
- FACILITATING THE ISSUING OF DEATH CERTIFICATES BY THE APPROPRIATE MINISTRY;
- EXPEDITING EXHUMATIONS AND BURIALS BY THE APPROPRIATE MINISTRY;
- FACILITATING THE ISSUING OF A DECLARATION OF DEATH IN THOSE CASES WHERE THE MEMBERS REQUEST IT; FAMILY
- FACILITATING THE EXPUNGING OF CRIMINAL RECORDS WHERE THE POLITICAL ACTIVITY OF INDIVIDUALS WAS CRIMINALISED;
- FACILITATING THE RESOLUTION OF OUTSTANDING LEGAL MATTERS RELATED TO VIOLATIONS; REPORTED
- FACILITATING THE RENAMING OF STREETS AND COMMUNITY FACILITIES IN ORDER TO REMEMBER AND HONOUR INDIVIDUALS OR SIGNIFICANT EVENTS;
- FACILITATING THE BUILDING OF MONUMENTS AND MEMORIALS AND THE DEVELOPMENT OF MUSEUMS TO COMMEMORATE EVENTS OF THE PAST.

THE GOVERNMENT DECLARE A NATIONAL DAY OF REMEMBRANCE.

THE PRESIDENT, IN CONSULTATION WITH ORGANISED BUSINESS AND CIVIL SOCIETY AT LARGE, ESTABLISH A TRUST FUND WHOSE FINANCES WILL SUPPORT REPARATION AND RESTITUTION INITIATIVES AS PRIORITISED BY DIFFERENT MINISTRIES AND CIVIL SOCIETY.

n ORGANISATION, ADMINISTRATION AND MANAGEMENT

24

To build, protect and maintain a new human rights culture in line with the new dispensation in South Africa, the Commission recommends that:

CORPORATE AND GOVERNMENT STRUCTURES COMMIT THEMSELVES TO THE TRANSFORMATION PROCESS WITH RENEWED VIGOUR. THE COMMISSION WELCOMES THE PRINCIPLES ENCAPSULATED IN THE EMPLOYMENT EQUITY ACT, WHILE RECOGNISING THE NEED FOR GOVERNMENT, BUSINESS AND LABOUR TO FIND VIABLE WAYS TO IMPLEMENT ITS PROVISIONS, PRIOR TO THE PROMULGATION OF THE ACT. THE PRINCIPLES OF AFFIRMATIVE ACTION AND EMPLOYMENT EQUITY ARE ESSENTIAL TO THE TRANSFORMATION PROCESS. TO FACILITATE THIS, TRAINING IN CAREER DEVELOPMENT AND PROFESSIONAL SKILLS FOR ALL SECTIONS OF SOUTH AFRICAN SOCIETY NEED TO BE GIVEN PRIORITY. SPECIAL ATTENTION, IN THIS REGARD, NEEDS TO BE GIVEN TO THE ERADICATION OF INEFFICIENCY AND THE PROMOTION OF A CULTURE OF HARD WORK AND HONESTY.

THE GOVERNMENT MUST ENSURE THAT THE RULE OF LAW, HUMAN RIGHTS PRACTICE, TRANSPARENCY, ACCOUNTABILITY AND THE ROOTING OUT OF CORRUPTION AND OTHER FORMS OF CRIMINALITY AT ALL LEVELS OF SOCIETY ARE SERIOUSLY ADDRESSED.

n PRISONS

25

Apart from the need for greater security at all our prisons, it is the view of the Commission that the bureaucratic organisation of the Department of Correctional Services makes it particularly difficult to institute the appropriate initiatives to promote transformation. The relatively closed institutional culture of Correctional Services also makes it difficult to ensure that the moral and legal imperatives of law are implemented at the level of daily practice. The authority of prison officers and even that of heads of prisons tends, in practice, to derive from the prison hierarchy and an entrenched culture within which gross violations of human rights occurred in the past, rather than the norms of prison law, human rights law and the Constitution.

Training of prison personnel

26

The Commission recommends that:

PRISON OFFICERS RECEIVE HUMAN RIGHTS TRAINING, AS A BASIC GUIDE FOR TREATMENT OF PRISONERS AND THE MANAGEMENT OF THE PRISON SYSTEMS.

PRISON STAFF BE ADEQUATELY TRAINED IN PRISON LAW, THEIR DUTIES AND RESPONSIBILITIES, ETHICS AND CONFLICT RESOLUTION.

PRISON STAFF RECEIVE TRAINING IN CREATIVE AND HUMANE WAYS OF MOTIVATING PRISONERS TO REGAIN THEIR HUMAN DIGNITY AND CO-OPERATE WITH THE REHABILITATION PROGRAMMES IN PRISONS.

ALL PRISON STAFF INVOLVED IN THE HEALTH CARE OF INMATES RECEIVE APPROPRIATE TRAINING TO ENABLE THEM TO UNDERSTAND AND DEAL WITH THE MENTAL STRESS OF IMPRISONMENT.

Rehabilitation of prisoners

27

The Commission recommends that:

SKILLS TRAINING FOR PRISONERS BECOME A PRIORITY.

ALL INMATES BE INFORMED OF THEIR BASIC RIGHTS AND RECEIVE A COPY OF THE CONSTITUTION AND THE BILL OF RIGHTS IN THE LANGUAGE OF THEIR CHOICE. THEY SHOULD ALSO HAVE ACCESS TO INDEPENDENT LEGAL ADVICE.

ALL PRISON WARDERS RECEIVE TRAINING WHICH WILL ENABLE THEM TO RECOGNISE THE BASIC NEEDS OF PRISONERS IN THIS REGARD.

PRISONERS RECEIVE TRAINING IN HUMAN RIGHTS AND NON-VIOLENT WAYS OF CONFLICT RESOLUTION.

COUNSELLING BE MADE AVAILABLE TO ALL PRISONERS.

PRISONERS HAVE ACCESS TO LITERACY CLASSES AND SKILLS TRAINING. WORK SESSIONS SHOULD BE DESIGNED TO PROMOTE REHABILITATION, RATHER THAN SIMPLY BEING PUNITIVE HARD LABOUR.

Health care⁵

28

The Commission recommends that:

PRISONERS BE ALLOWED ACCESS TO MEDICAL PRACTITIONERS OF THEIR CHOICE (AT THEIR OWN EXPENSE).

International standards

29

The Commission recommends that:

THE DEPARTMENT OF CORRECTIONAL SERVICES PUBLICLY REAFFIRM ITS COMMITMENT TO INTERNATIONAL STANDARDS OF PENAL REFORM AND ENCOURAGE THE PUBLIC TO ENSURE THAT THESE STANDARDS ARE UPHOLD.

SOLITARY CONFINEMENT AND OTHER FORMS OF ISOLATION, DEPRIVATION OF FOOD AND EXERCISE, AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT BE ELIMINATED. IN THIS REGARD, THE COMMISSION NOTES WITH CONCERN THE ESTABLISHMENT OF THE MAXIMUM SECURITY FACILITY KNOWN AS C-MAX, WHERE CONDITIONS OF DETENTION AMOUNT TO ALMOST COMPLETE SENSORY DEPRIVATION.

Public awareness and monitoring

30

The Commission recommends that:

LOCAL AND INTERNATIONAL WATCHDOG ORGANISATIONS BE ENCOURAGED TO MAKE INFORMATION AVAILABLE ON PRISON CONDITIONS IN SOUTH AFRICA AND ELSEWHERE AND RECOMMEND STRATEGIES FOR PENAL REFORM.

AN INDEPENDENT MONITORING BODY, WITH STATUTORY POWERS, BE INTRODUCED TO MONITOR ALL PRISONS, POLICE CELLS AND OTHER PLACES OF DETENTION. THIS BODY SHOULD REPORT TO PARLIAMENT ON A REGULAR BASIS.

RESTRAINTS ON MEDIA COVERAGE OF PRISONS BE RECONSIDERED TO ENHANCE TRANSPARENCY ABOUT THE CONDITIONS IN AND MANAGEMENT OF PRISONS.

31

Responsibility for developing and implementing these recommendations, and for monitoring their implementation, rests primarily

with:

a

The Department of Correctional Services;

b

The Department of Health;

c

Professional organisations representing health professionals;

d

Unions representing prison staff;

e

Organisations representing the interests of prisoners.

n FAITH COMMUNITIES

32

Faith communities enjoy a unique and privileged position in South African society. They are widely respected and have far-reaching moral influence. As such, they should play a key role in healing and reconciliation initiatives.

Healing

33

The Commission recommends that:

RELIGIOUS COMMUNITIES ORGANISE CEREMONIES DESIGNED TO ENABLE PEOPLE TO ACKNOWLEDGE THEIR DIFFERENT LEVELS OF INVOLVEMENT IN THE HUMAN RIGHTS VIOLATIONS OF THE PAST. THESE SERVICES SHOULD BE HELD AT DENOMINATIONAL, ECUMENICAL AND INTER-FAITH LEVELS AND SHOULD BE ORGANISED LOCALLY, REGIONALLY AND NATIONALLY.

RELIGIOUS COMMUNITIES EXPLORE THE POSSIBILITY OF JOINING WITH OTHER ORGANISATIONS OF CIVIL SOCIETY IN SETTING UP TRAUMA CENTRES AND COUNSELLING INITIATIVES.

Redistribution of skills and resources

34

The Commission recommends that:

RELIGIOUS GROUPS UTILISE THE SKILLS ENJOYED BY OF MANY OF THEIR MEMBERS, TO PROVIDE TRAINING AND LEADERSHIP SKILLS TO DISADVANTAGED COMMUNITIES.

RELIGIOUS COMMUNITIES FROM DIFFERENT RACIAL AND CLASS GROUPS SEEK WAYS OF SHARING MATERIAL RESOURCES.

RELIGIOUS COMMUNITIES UNDERTAKE A 'LAND AUDIT', IDENTIFYING LAND IN THEIR POSSESSION (INCLUDING GLEBES) WHICH CAN BE MADE AVAILABLE TO THE LANDLESS POOR.

WHERE RELIGIOUS COMMUNITIES HAVE ACQUIRED LAND AS A RESULT OF APARTHEID LEGISLATION, THIS LAND BE RETURNED TO ITS RIGHTFUL OWNERS.

RELIGIOUS COMMUNITIES CONSIDER CREATING A GENERAL FUND, TO BE FINANCED IN PROPORTION TO THEIR RESOURCES, THAT CAN BE USED FOR THE VICTIMS OF PAST ABUSES.

RELIGIOUS COMMUNITIES EXPLORE WAYS, IN CONSULTATION WITH GOVERNMENT, OF RESUMING THEIR INVOLVEMENT IN EDUCATION, HEALTH CARE AND COMMUNITY DEVELOPMENT, AS PART OF A COMMITMENT TO NATION BUILDING.

Reconciliation

35

The Commission recommends that:

DIFFERENT RELIGIOUS GROUPS SEEK WAYS TO COMMUNICATE WITH ONE ANOTHER AS A BASIS FOR ELIMINATING RELIGIOUS CONFLICT AND PROMOTING INTER-RELIGIOUS UNDERSTANDING.

RELIGIOUS GROUPS SEEK WAYS OF INCORPORATING MARGINALISED GROUPS INTO THEIR COMMUNITIES AS A WAY OF ADDRESSING THE PROBLEMS CONTRIBUTING TO VARIOUS FORMS OF ASOCIAL BEHAVIOUR.

FAITH COMMUNITIES PROMOTE A CULTURE OF TOLERANCE AND PEACEFUL CO-EXISTENCE.

FORMS OF WORSHIP BE EXPLORED WHICH TRANSCEND LANGUAGE AND CULTURAL DIFFERENCES.

RELIGIOUS COMMUNITIES TAKE THE INITIATIVE TO EXPOSE MEMBERS FROM PREDOMINANTLY WHITE AND BLACK COMMUNITIES TO ONE ANOTHER.

RELIGIOUS GROUPS, IN CONSULTATION WITH OTHER NGOS, ESTABLISH INSTITUTIONAL FORUMS TO PROMOTE RECONCILIATION. SPECIFIC ATTENTION SHOULD BE GIVEN TO THE ESTABLISHMENT OF A PEACE CORPS, NOT ONLY AS A MEANS OF HELPING COMMUNITIES IN NEED, BUT ALSO FOR DEVELOPING THE SKILLS OF LESS PRIVILEGED YOUTH. SUCH A BODY COULD ALSO BE USED TO EXPOSE MORE PRIVILEGED MEMBERS OF THE COMMUNITY TO THE NEEDS AND THE LIVING CONDITIONS OF THE MAJORITY OF SOUTH AFRICANS. GIVEN THE RACIAL AND IDEOLOGICAL CONFLICT PREVALENT IN THE COUNTRY, THE PEACE CORPS SHOULD INCLUDE CONFLICT RESOLUTION AND PEACEMAKING AS AN INTEGRAL PART OF ITS CURRICULUM.

RELIGIOUS COMMUNITIES DEVELOP THEOLOGIES DESIGNED TO PROMOTE RECONCILIATION AND A TRUE SENSE OF COMMUNITY IN THE NATION. PARTICULAR CONSIDERATION COULD TO BE GIVEN TO:

- THE ROLE OF WHITES AS THE BENEFICIARIES OF APARTHEID, WITH REGARD TO RECONSTRUCTION AND RECONCILIATION;
- THE EMPOWERMENT OF BLACK PEOPLE AND THOSE WHO HAVE SUFFERED GROSS VIOLATIONS OF HUMAN RIGHTS TO MOVE BEYOND 'VICTIMHOOD' IN REGAINING THEIR HUMANITY;
- THE CHARACTERISTICS OF GOOD CITIZENSHIP, THE RULE OF LAW AND THE 'COMMON GOOD' IN SOCIETY;
- THE ARTICULATION OF A GLOBAL ETHICAL FOUNDATION WHICH IS IN KEEPING WITH THE MAJOR BELIEFS OF THE VARIOUS RELIGIONS.

Relationship with the state

36

Given the strained relations which existed between at least some churches and the security forces concerning the chaplaincy services, and what was effectively the absence of chaplains of other faiths, the Commission recommends that:

THOSE AGENCIES OF THE STATE WHICH EITHER RECEIVE OR APPOINT CHAPLAINS, MEET WITH ALL FAITH COMMUNITIES IN ORDER TO ADDRESS THE FOLLOWING CONCERNS:

- THE INDEPENDENCE OF RELIGIOUS CHAPLAINS, ESPECIALLY IN THE MILITARY AND POLICE SERVICES, TO TEACH THE TENETS OF THEIR FAITH IN AN UNHINDERED MANNER;
- THE DUAL LOYALTY WHICH CHAPLAINS HAVE TRADITIONALLY HAD TO THE AGENCY THEY ARE REQUIRED TO SERVE AND THE RELIGIOUS ORGANISATION TO WHICH THEY BELONG;
- WAYS OF ENSURING THAT NO PARTICULAR FAITH ENJOYS PRIVILEGES NOT OFFERED TO ALL FAITHS;
- OPTIONS FOR PROMOTING AN UNDERSTANDING BETWEEN RELIGIOUS GROUPS;
- THE CREATION OF AN AGREEMENT DESIGNED TO AVOID CHAPLAINS BEING IDENTIFIED TOO CLOSELY WITH THE INSTITUTION TO WHICH THEY ARE APPOINTED. TO ENSURE THIS, CHAPLAINS SHOULD NOT WEAR THE UNIFORM OF THE STATE INSTITUTION WHICH THEY SERVE, NOR HOLD MILITARY OR OTHER INSTITUTIONAL RANK;
- THE NEED TO ENSURE THAT ALL THEOLOGICAL AND RELIGIOUS LITERATURE BE THE RESPONSIBILITY OF FAITH COMMUNITIES, PROVIDED IT PASSES SCRUTINY BY AN INTER-FAITH BODY TO ENSURE THAT IT DOES NOT CONTAIN DEROGATORY MATERIAL ABOUT OTHER FAITHS.

37

Responsibility for developing and implementing these recommendations, and for monitoring their implementation, rests primarily with:

a

Faith communities, both individual members and congregations, and overseeing bodies, e.g. general assemblies, synods etc;

b

The South African National Defence Force (SANDF);

c

The SAPS.

n BUSINESS

38

The huge and widening gap between the rich and poor is a disturbing legacy of the past, which has not been reduced by the democratic process. It is morally reprehensible, politically dangerous and economically unsound to allow this to continue. Business has a particularly significant role to play in this regard.

Restitution

39

The Commission recommends that:

CONSIDERATION BE GIVEN TO THE MOST APPROPRIATE WAYS IN WHICH TO PROVIDE RESTITUTION FOR THOSE WHO HAVE SUFFERED FROM THE EFFECTS OF APARTHEID DISCRIMINATION, FOR EXAMPLE AS A RESULT OF RACISM, GENDER DISCRIMINATION, JOB RESERVATION, GROUP AREAS LEGISLATION, THE EFFECTS OF THE MIGRANT LABOUR SYSTEM, INFERIOR WAGES AND INADEQUATE OR NON-EXISTENT SOCIAL BENEFITS.

THE FEASIBILITY OF THE FOLLOWING AS A MEANS OF EMPOWERING THE POOR SHOULD BE CONSIDERED:

- A WEALTH TAX;
- A ONCE-OFF LEVY ON CORPORATE AND PRIVATE INCOME;
- EACH COMPANY LISTED ON THE JOHANNESBURG STOCK EXCHANGE TO MAKE A ONCE-OFF DONATION OF 1% OF ITS MARKET CAPITALISATION;
- A RETROSPECTIVE SURCHARGE ON CORPORATE PROFITS EXTENDING BACK TO A DATE TO BE SUGGESTED;
- A SURCHARGE ON GOLDEN HANDSHAKES GIVEN TO SENIOR PUBLIC SERVANTS SINCE 1990;

- THE SUSPENSION OF ALL TAXES ON LAND AND OTHER MATERIAL DONATIONS TO FORMERLY DISADVANTAGED COMMUNITIES.

6

n

47

In spite of the various clauses contained in the Constitution relating to the judiciary, and in spite of the substantial steps taken since 1994 by the Ministry of Justice to review the justice system, serious problems still remain with regard to access to justice and the general administration of justice.

48

The Commission has analysed the various submissions by members of the judiciary and magistracy, NGOs and government with regard to these issues, and has incorporated these, where appropriate, into the following recommendations. These recommendations are brief and merely direct attention to the most important areas requiring attention.

Access to justice for victims of crime

49

The victims of crime are the most neglected and disempowered of the role-players in the legal system. They are not being adequately served by the criminal justice system for a number of reasons, including:

- the absence of a professional, motivated and appropriately staffed national police service;
- the inability of the prosecutorial system to prosecute effectively and ensure criminal convictions in a manner that will change the current perception of criminals and potential criminals that their wrongdoing is unlikely to be detected and punished;
- the inability of the Department of Correctional Services to carry out its role of effectively incarcerating awaiting-trial and convicted prisoners.

The Commission thus recommends that:

THE FEASIBILITY OF ESTABLISHING A SERIOUS CRIMES COMPENSATION FUND, AS EXISTS IN COUNTRIES LIKE AUSTRALIA, BE EXAMINED.

A CODE OF CONDUCT FOR PROSECUTORS BE DRAWN UP, TO ENSURE IN PARTICULAR THAT THE INTERESTS OF VICTIMS ARE PROPERLY CONSIDERED. THE CODE OF CONDUCT SHOULD BE AIMED AT ASSISTING AND EMPOWERING VICTIMS BY:

- ADVISING THEM ON COMPLAINTS AND REMEDIES;
- ADVISING THEM ABOUT THE MERITS AND DEMERITS OF THEIR PARTICULAR CASE;
- INFORMING THEM OF THEIR RIGHTS TO COMPENSATION UNDER SECTION 300 OF THE CRIMINAL PROCEDURE ACT, IN TERMS OF WHICH FINANCIAL COMPENSATION MAY BE PAYABLE BY A CONVICTED PERSON TO A VICTIM;
- UPDATING THEM REGULARLY CONCERNING DEVELOPMENTS IN THE CASE;
- PREPARING THEM TO GIVE EVIDENCE IN COURT, AND FOR CROSS-EXAMINATION; ENABLING PROSECUTORS TO CARRY OUT AN EFFECTIVE AND EFFICIENT PROSECUTION.

Access to justice for accused persons

Although accused persons have a constitutional right to legal representation, the way in which this is implemented is often unsatisfactory. Legal representation is one of the most important protections against abuse of suspects by the police and criminal justice system. The Commission thus recommends that:

FURTHER ATTENTION BE GIVEN TO THE ROLE PLAYED BY THE LEGAL AID BOARD AND THE SYSTEM OF PUBLIC DEFENDERS, TO ENSURE THAT AT LEAST A CONSISTENT MINIMUM STANDARD OF LEGAL REPRESENTATION IS EXTENDED TO ACCUSED PERSONS.

PUBLIC DEFENDER OFFICES BE SET UP IN ALL THE MAIN CENTRES IN THE COUNTRY.

THE OPTION OF COMPULSORY COMMUNITY SERVICE FOR LAW GRADUATES, AND STUDENT PRACTICE RULES FOR LAW CLINICS, BE EXPLORED TO AUGMENT THE PUBLIC DEFENDER PROGRAM.

PUBLIC DEFENDERS BE INDEPENDENT FROM THE PROSECUTION ARM OF THE DEPARTMENT OF JUSTICE, SO AS NOT TO COMPROMISE THEIR SERVICES.

LEGISLATION WHICH RESTRICTS THE RIGHTS OF DEFENDANTS TO BAIL BE RESISTED.

LEGITIMATE CONCERNS ABOUT THE INAPPROPRIATE GRANTING OF BAIL TO ACCUSED PERSONS WHO HAVE PREVIOUSLY COMMITTED OFFENCES WHILE ON BAIL, BE ADDRESSED THROUGH THOROUGH POLICE INVESTIGATION OF THE STATUS OF THOSE APPLYING FOR BAIL AND THE PROPER TRAINING OF MAGISTRATES AND PROSECUTORS IN THE APPLICATION OF BAIL PROCEDURES, RATHER THAN BY AMENDING THE LAW.

PROSECUTORS, MAGISTRATES AND JUDGES DISALLOW EVIDENCE OBTAINED THROUGH UNLAWFUL METHODS.

CO-ORDINATION AND SUPERVISION

The Commission recommends that:

LAW STUDENTS WORKING IN LAW CLINICS BE ENTITLED TO ADMISSION UNDER STUDENT PRACTICE RULES, TO ASSIST THE DELIVERY OF LEGAL AID SERVICES IN THE DISTRICT MAGISTRATE'S COURT.

Training and education

The effective administration of justice demands training, not only to facilitate the efficiency of prosecutorial and other duties, but also of a more general nature, to ensure that judicial officers understand and uphold the values and principles contained in the Constitution. The Commission thus recommends that:

ALL PERSONNEL WITHIN THE JUSTICE SYSTEM (FROM CLERKS TO JUDGES) UNDERGO INTENSIVE TRAINING IN THE VALUES OF THE NEW SOUTH AFRICAN CONSTITUTION AND IN THE REQUIREMENTS OF INTERNATIONAL LAW AND STANDARDS, INCLUDING THE UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY. ONGOING TRAINING SHOULD INCLUDE SENSITISATION TO HUMAN RIGHTS PRINCIPLES, INCLUDING GENDER-SPECIFIC ABUSE AND APPROPRIATE RESPONSES. CARE MUST BE TAKEN THAT THE INDEPENDENCE OF JUDGES IS NOT COMPROMISED BY ANY TRAINING PROCESS.

TRAINING OF PROSECUTORS AND MAGISTRATES BE UNDERTAKEN BY BOTH THE JUSTICE COLLEGE AND LOCAL UNIVERSITIES.

TRAINING OF MAGISTRATES BE UNDERTAKEN SEPARATELY FROM THAT OF JUDGES.

TRAINING OF JUDGES BE CONDUCTED BY JUDGES TOGETHER WITH ACADEMIC INSTITUTIONS, RATHER THAN BY THE JUSTICE COLLEGE. JUDGES ALREADY TRAINED IN CONSTITUTIONAL AND HUMAN RIGHTS ISSUES SHOULD ASSIST WITH THE TRAINING.

MAGISTRATES BE PROPERLY TRAINED TO APPLY THE NEW BAIL PROCEDURES IN THE CONTEXT OF THE CONSTITUTION, TO ENSURE THAT THE INTERESTS OF THE PUBLIC ARE BALANCED AGAINST THOSE OF THE ACCUSED.

54

The manner in which the legal profession develops in South Africa is to some extent determined by how those at its entry point are introduced to the system. Creative use of senior law students, e.g. as public defenders for unrepresented accused, could ensure that students graduate with appropriate practical experience. The Commission thus recommends that:

LAW SCHOOLS REVIEW THEIR COURSES TO ENSURE THAT THE INTERESTS OF ALL SOUTH AFRICANS ARE SERVED. CONSIDERATION MUST BE GIVEN TO INCREASING PRACTICAL TRAINING AND/OR THE INTRODUCTION OF COMPULSORY COMMUNITY SERVICE AS REQUIREMENTS FOR GRADUATION.

LAW STUDENTS BE GIVEN A GREATER UNDERSTANDING OF HUMAN RIGHTS LAW AND MORE INTENSIVE TRAINING IN LEGAL ETHICS.

THE MAGISTRATES' COMMISSION ATTEMPT TO ATTRACT PRIVATE PRACTITIONERS TO THE BENCH, SO THAT IT IS NO LONGER DOMINATED BY MAGISTRATES WHOSE TRAINING IS MAINLY IN THE AREA OF PROSECUTIONS.

ALL POLICE OFFICERS BE IMBUED, THROUGH TRAINING AND THE INTRODUCTION OF A CODE OF ETHICAL PRACTICE, WITH AN ETHOS OF SERVICE IN A DEMOCRATIC STATE AND UNDER A CULTURE OF HUMAN RIGHTS.

INVESTIGATING OFFICERS BE TRAINED IN PROPER FORENSIC INVESTIGATION TECHNIQUES, TO REPLACE THE CURRENT PRACTICE OF EXTRACTING CONFESSIONS UNDER DURESS, THROUGH VIOLENCE AND BY OTHER IRREGULAR AND UNORTHODOX METHODS.

THE WORK OF THE DETECTIVE ACADEMY BE EXPANDED AS RAPIDLY AS POSSIBLE.

THE STANDARD OF TRAINING OF COURT INTERPRETERS BE IMPROVED. TERTIARY ACADEMIC INSTITUTIONS SHOULD DEVELOP MULTI-DISCIPLINARY UNDERGRADUATE TRAINING COURSES (INVOLVING, AMONGST OTHERS, APPLIED LINGUISTICS DEPARTMENTS AND LAW FACULTIES), TO ENSURE THAT MORE HIGHLY SKILLED COURT INTERPRETERS ARE TRAINED. SALARIES MUST BE COMMENSURATE WITH SKILLS AND RESPONSIBILITIES.

PEOPLE WHO HAVE PARALEGAL DIPLOMAS BE CERTIFIED BY A PARALEGAL INSTITUTE. ONCE CERTIFIED, THEY SHOULD BE ABLE TO APPEAR IN THE LOWER COURTS ON BASIC MATTERS SUCH AS BAIL APPLICATIONS AND REMANDS, AND SHOULD ALSO HAVE PRISON VISITING RIGHTS. PARALEGALS SHOULD BE INTEGRATED INTO THE PROPOSED LEGAL AID BOARD SCHEME.

SPECIALIST PROSECUTORIAL TASK TEAMS BE ESTABLISHED TO ADDRESS SERIOUS ENDEMIC CRIME, SUCH AS TAXI VIOLENCE, DRUG TRAFFICKING, CAR THEFT AND LICENSING SYNDICATES AND POLITICAL VIOLENCE. SUCH UNITS SHOULD HAVE SIMILAR POWERS AND INDEPENDENCE TO THOSE OF THE INDEPENDENT COMPLAINTS DIRECTORATE. THE WORK OF SPECIAL INVESTIGATIVE TEAMS, E.G. THE INVESTIGATIVE TASK UNIT IN KWAZULU-NATAL, IS NULLIFIED IF THE RESULTS OF INVESTIGATIONS ARE NOT APPROPRIATELY PURSUED IN THE PROSECUTORIAL PHASE.

Witness protection

Protection of complainants

55

In many cases victims are unwilling to lay charges because of fear of reprisals from the persons whom they implicate. The current system of witness protection is dysfunctional and inhibits successful prosecutions. The establishment of a fair, efficient and all-embracing programme is seen as a matter of urgency.

Protection of other state witnesses

56

The exposure of politically motivated human rights abuses has only been possible as a result of perpetrators coming forward and “blowing the whistle” on their organisations’ activities. Similarly, if organised crime is to be combated, those involved in crime syndicates will have to come forward. This is only likely if such persons are assured of comprehensive witness protection.

Juvenile offenders

57

A growing number of accused persons appearing on a daily basis in South African courts are juveniles. The Commission thus recommends that:

MORE EXTENSIVE PROBATION SERVICES BE MADE AVAILABLE, TO ENSURE THAT JUVENILES RECEIVE APPROPRIATE SENTENCES.

SECURE PLACES OF SAFETY FOR AWAITING-TRIAL JUVENILE OFFENDERS BE CONSTRUCTED AS A MATTER OF URGENCY.

THE POLICE MAKE PROPER EFFORTS TO TRACE THE RELATIVES OF JUVENILES WHO HAVE COMMITTED CRIMES OUTSIDE THE MAGISTERIAL DISTRICTS IN WHICH THEY LIVE.

THE POSSIBILITY OF LAW STUDENTS ACTING AS PUBLIC DEFENDERS TO REPRESENT JUVENILE OFFENDERS IN COURT BE EXPLORED, EVEN BEFORE THE INTRODUCTION OF STUDENT PRACTICE RULES.

Representivity

58

The Commission recommends that:

IMBALANCES IN THE RACIAL AND GENDER COMPOSITION OF JUDGES IN THE HIGH COURT BE URGENTLY ADDRESSED.

A FAST-TRACK JUDICIAL TRAINING PROGRAM BE INTRODUCED FOR BLACK AND WOMAN ADVOCATES, ATTORNEYS OR ACADEMICS WHO ASPIRE TO JUDICIAL APPOINTMENT.

AN ATTEMPT BE MADE TO ATTRACT MORE PRIVATE PRACTITIONERS TO AN APPOINTMENT ON THE BENCH.

IMBALANCES IN THE GENDER COMPOSITION OF THE MAGISTRACY BE ADDRESSED.

BECAUSE MOST MAGISTRATES PRESENTLY SITTING HAVE ONLY STATE PROSECUTION EXPERIENCE, MAGISTRATES BE APPOINTED FROM PRIVATE PRACTICE.

Courts of chiefs and headmen

59

Many civil legal matters in South Africa are decided by bodies outside the formal court structure, namely tribunals administered by chiefs in the former homeland areas, under laws dating from the colonial period. The Commission thus recommends that:

AN URGENT AUDIT OF THESE COURTS AND THEIR PERSONNEL BE UNDERTAKEN BY THE DEPARTMENT OF JUSTICE IN CO-OPERATION WITH THE PROVINCIAL MINISTRIES OF TRADITIONAL AFFAIRS.

DESPITE THE FACT THAT SUCH COURTS DO NOT HAVE CRIMINAL JURISDICTION, THE *DE FACTO* POSITION IS THAT, IN MANY AREAS, THIS RIGHT HAS BEEN ASSUMED AND CORPORAL PUNISHMENT AND OTHER ILLEGAL SANCTIONS ARE ROUTINELY IMPOSED. THIS PRACTICE MUST BE ENDED AS A MATTER OF URGENCY.

THE DEPARTMENT OF JUSTICE CAREFULLY MONITOR THE ADMINISTRATION OF JUSTICE AT THIS LEVEL.

IT BE ENSURED THAT THESE TRIBUNALS RESPECT THE RIGHTS ESTABLISHED BY THE CONSTITUTION, INCLUDING THE RIGHT TO DUE PROCESS. CODES OF PRACTICE, INCLUDING RULES PERTAINING TO WRITTEN RECORDS, MUST BE IMPLEMENTED.

Informal courts

60

Informal courts or “people’s courts” were established in many townships, especially during the 1980s, partly in response to the perceived illegitimacy of the state-sanctioned court system. In general they were repressive and did not comply with the basic requirements of the rules of natural justice. There is ample evidence of a reversion to alternative structures for exacting “justice” as delays in the criminal justice and policing systems increase. The Commission thus recommends that:

STEPS BE TAKEN TO INHIBIT THE REAPPEARANCE OF THE “PEOPLE’S COURT” PHENOMENON, AND THAT THE DEPARTMENT OF JUSTICE SHOULD, AS A MATTER OF URGENCY, ESTABLISH CONFLICT RESOLUTION AND MEDIATION STRUCTURES AT COMMUNITY LEVEL.

61

Responsibility for developing and implementing these recommendations, and for monitoring the implementation thereof, rests primarily with:

a

The Ministry and Department of Justice;

b

The Ministry and Department of Safety and Security;

c

The Law Society of South Africa;

d

Tertiary academic institutions;

e

NGOs involved in the law;

f

Professional organisations representing the legal profession.

n SECURITY FORCES

Intelligence services

62

The Commission had little success in its efforts to access the archives of the former National Intelligence Service. It is therefore the recommendation of the Commission that:

A COMPREHENSIVE ANALYSIS BY INDEPENDENT RESEARCHERS BE UNDERTAKEN INTO BOTH THE SCOPE AND CONTENT OF THE REMAINING ARCHIVAL HOLDINGS OF THE INTELLIGENCE SERVICES OF ALL DIVISIONS OF THE SECURITY FORCES.

ONCE SUCH AN ANALYSIS HAS BEEN COMPLETED, THESE DOCUMENTS BE SUBJECTED TO THE NATIONAL ARCHIVES OF SOUTH AFRICA ACT NO 43 OF 1996 (THE ARCHIVES ACT) AND BE TRANSFERRED TO THE NATIONAL ARCHIVES.

THESE STRUCTURES BE REQUIRED TO DELIVER AN ANNUAL REPORT TO PARLIAMENT REGARDING THEIR ACTIVITIES.

ALL EXPENDITURE BY THESE SERVICES BE SUBJECT TO REGULAR AUDITS BY THE AUDITOR GENERAL.

THE MINISTERS TASKED WITH THE OVERSIGHT OF THE RESPECTIVE INTELLIGENCE SERVICES ALSO BE RESPONSIBLE FOR ENSURING THAT ALL GATHERING OF INTELLIGENCE IS DONE IN TERMS OF THE ACT GOVERNING SUCH ACTIVITIES, AND THAT NO INTELLIGENCE-GATHERING IN RELATION TO LEGITIMATE POLITICAL ACTIVITY BE TOLERATED.

THAT THE NATIONAL INTELLIGENCE CO-ORDINATING COMMITTEE (NICOC) ENSURE THAT ALL INTELLIGENCE IS SHARED OPENLY AND THOROUGHLY BETWEEN THE RESPECTIVE DIVISIONS OF THE SECURITY FORCES.

THAT ALL MANUALS USED BY THE SECURITY FORCES BE REVIEWED AND ALTERED TO CONFORM TO THE NEW CONSTITUTION.

South African National Defence Force

63

The Commission's hearings into activities of the SADF showed that the secrecy with which the SADF operated provided the basis for operations and programmes that led to gross human rights violations. The Commission therefore recommends that:

MEMBERS OF THE SANDF SHOULD NOT BE ENTITLED TO ENGAGE IN ANY COVERT ACTIVITIES NOT SPECIFICALLY AUTHORISED BY THE MINISTER OF DEFENCE AS WELL AS A MINISTER WITH AN UNRELATED PORTFOLIO, AND THAT SPENDING ON SUCH COVERT ACTIVITIES BE SUBJECT TO THE SAME AUDITING PROCESS AS OTHER EXPENDITURE.

A JUDICIAL COMMISSION OF ENQUIRY BE ESTABLISHED WITH REGARD TO PROJECT COAST, TO INVESTIGATE THE FOLLOWING MATTERS:

- WHETHER THE STREET DRUGS PRODUCED BY COMPANIES RELATED TO THE CHEMICAL AND BIOLOGICAL WARFARE (CBW) PROGRAMME, AS WELL AS THE DRUGS PURCHASED OUTSIDE OF SOUTH AFRICA, WERE DESTROYED OR WHETHER THEY ENDED UP ON THE STREETS OF SOUTH AFRICA;
- WHETHER THE DIRECTORS OF COMPANIES LINKED TO PROJECT COAST WERE PARTY TO FRAUDULENT ACTIVITIES USING STATE FUNDS;
- WHETHER INFORMATION RELATING TO THE CBW PROGRAMME WAS COPIED ONTO OPTICAL DISKS THAT ARE CURRENTLY IN A SAFE IN PRETORIA, AND WHETHER UNAUTHORISED COPIES OF THESE DISKS EXIST;
- ANY OTHER ISSUES NOT FULLY CANVASSED BY THE COMMISSION OR THE CRIMINAL TRIAL OF DR BASSON.

THAT ALL ASPECTS OF THE CBW PROGRAMME STILL IN EXISTENCE BE DISMANTLED AND ALL ACTIVITIES BE DISCONTINUED, AND THAT THE MANUFACTURE AND RESEARCH OF SUBSTANCES INTENDED FOR USE AS CROWD CONTROL MECHANISMS BE CEASED.

THAT AN APPROPRIATE POLICY BE PUT IN PLACE TO ENSURE THAT THE FINANCIAL TRANSACTIONS OF THE MILITARY ARE REGULARLY AUDITED.

THAT THE SANDF CEASE TO MAKE USE OF FRONT COMPANIES FOR THEIR OPERATIONS.

64

The civil education programme that has been proposed in the Defence White Paper is a positive initiative to prevent future human rights abuses by members of the security forces and to encourage and instil an understanding of human rights values in the population at large.

THE COMMISSION RECOMMENDS THAT THIS PROGRAMME BE IMPLEMENTED RIGOROUSLY.

65

The onus is on government to ensure that any members of the security forces found to have committed human rights abuses or engaged in criminal activity of any kind are decisively dealt with through the justice system.

66

The Commission has had little success in its efforts to access the archives of the former South African Defence Force (SADF), despite the fact that significant holdings still remain in the custody of the SANDF. The limited access that the Commission did

manage to obtain was controlled, selected and censored by the SANDF nodal point. These problems of access have been detailed elsewhere in this report and have led the Commission to conclude that its research and investigation into the activities of the former SADF were insufficient and constrained by such lack of access. Commission investigations have, however, established that the former SADF, contrary to its submission to the Commission, was significantly involved in the perpetration of gross human rights violations.

67

It is therefore the recommendation of the Commission that:

A COMPREHENSIVE ANALYSIS BY INDEPENDENT RESEARCHERS BE UNDERTAKEN INTO BOTH THE SCOPE AND CONTENT OF THE REMAINING ARCHIVAL HOLDINGS OF THE FORMER SADF.

ONCE SUCH AN ANALYSIS HAS BEEN COMPLETED, THAT THESE DOCUMENTS, PRESENTLY WITHIN THE ARCHIVES OF MILITARY INTELLIGENCE, BE SUBJECTED TO THE ARCHIVES ACT AND BE TRANSFERRED TO THE NATIONAL ARCHIVES.

Policing

68

The Commission found that members of the SAPS were responsible for a substantial proportion of human rights violations committed during its mandate period. These recommendations are based on the Commission's understanding of the role played by the South African Police (SAP) in the past and the concern that, despite all efforts to reform the SAPS and improve police performance, reports of torture, coerced confessions, deaths in custody and other human rights violations remain common occurrences. More than 370 deaths in police custody or as a result of police action were reported in the six-month period from April to September 1997. While reform within the SAPS is obviously essential, this must be accompanied by appropriate independent monitoring and proper accountability.

Provincial police services

69

The Commission thus recommends that:

PROVINCIAL GOVERNMENTS NOT BE PERMITTED TO EXERCISE UNFETTERED POWER OVER PROVINCIAL POLICE SERVICES.

The Independent Complaints Directorate

70

The Commission recommends that:

THE INDEPENDENT COMPLAINTS DIRECTORATE (ICD) BE GOVERNED BY NEW LEGISLATION, INDEPENDENT OF GENERAL POLICE LEGISLATION.

THE ICD BE GENUINELY INDEPENDENT OF THE MINISTRY FOR SAFETY AND SECURITY.

THE ICD HAVE POWERS TO COMPEL THE SAPS AND OTHERS TO COMPLY WITH ITS REQUESTS RELATED TO CONDUCTING AN INVESTIGATION, INCLUDING POWERS OF SEARCH AND SEIZURE.

THE ICD BE GIVEN THE AUTHORITY TO BRING TO THE ATTENTION OF RELEVANT OFFICIALS ANY FAILURE ON THE PART OF THE SAPS TO RESPOND TO ICD RECOMMENDATIONS TO TAKE DISCIPLINARY OR LEGAL ACTION.

THE ICD BE MANDATED TO INVESTIGATE CORRUPTION WITHIN THE SAPS, RATHER THAN THIS TASK BEING ALLOCATED TO A UNIT WITHIN THE SAPS.

THE ICD BE GIVEN THE CAPACITY, RESOURCES AND AUTHORITY TO CONDUCT PROACTIVE INVESTIGATIONS AND EVALUATIONS OF OVERALL POLICING POLICIES AND PRACTICE, AS WELL AS TO RESPOND TO COMPLAINTS.

Public order policing

71

Undue use of force by security forces in controlling crowds was one of the most significant causes of deaths and injuries reported to the Commission. To address this issue, the Commission recommends that:

ALL MEMBERS OF THE SAPS DEALING WITH PUBLIC ORDER INCIDENTS RECEIVE THE REQUIRED TRAINING, AND THAT TRAINING STANDARDS WITH REGARD TO THE POLICING OF CROWDS BE MAINTAINED AT INTERNATIONAL STANDARDS IN FUTURE. IMPROVED TRAINING WILL LEAD TO GREATER CONFIDENCE ON THE PART OF THOSE POLICING CROWDS AND GATHERINGS, WHICH SHOULD RESULT IN LESS RELIANCE ON FORCE.

PUBLIC ORDER POLICING BE DECENTRALISED AND INTEGRATED INTO THE NORMAL STRUCTURES OF THE SAPS (AS PROVIDED FOR IN THE NEW POLICY), AND THAT THE TENDENCY TO CENTRALISE AND MILITARISE THIS FUNCTION BE AVOIDED IN FUTURE.

PUBLIC EDUCATION (AND TRAINING OF LOCAL AUTHORITIES) WITH REGARD TO THE PROVISIONS OF THE REGULATION OF GATHERINGS ACT, CONCERNING RIGHTS AND RESPONSIBILITIES IN RESPECT OF GATHERINGS, BE CONTINUED AND EXPANDED, ESPECIALLY FOR ELECTIONS, PUBLIC HOLIDAYS AND OTHER REGULAR PUBLIC EVENTS.

ANY PERSON OR PARTY WHO CONTRAVENES THE REGULATION OF GATHERINGS ACT BE PROSECUTED TO ENSURE COMPLIANCE WITH THE NEW APPROACH.

THE POLICE ESTABLISH AN INSPECTORATE, EITHER INTERNALLY OR WITHIN THE SECRETARIAT FOR SAFETY AND SECURITY, AS WELL AS AT PROVINCIAL LEVEL, TO CHECK ADHERENCE TO NEW NATIONAL STANDARDS, AND TO INVESTIGATE THE POLICING OF PARTICULAR INCIDENTS.

THE POLICE BE ISSUED WITH NEW EQUIPMENT AND APPAREL TO IMPROVE THEIR SAFETY AND PROTECTION – THE MORE PROTECTED THE POLICE OFFICIALS FEEL, THE LESS LIKELY THEY ARE TO USE FORCE OR ACT AGGRESSIVELY.

THE SAPS ENHANCE INTERNAL PROCEDURES TO ENSURE ACCOUNTABILITY FOR THE STORAGE AND USE OF WEAPONS AND AMMUNITION.

POST-INCIDENT INVESTIGATION BECOME STANDARD PROCEDURE IN ALL CASES WHERE FORCE WAS USED.

THE SAPS CREATE, EQUIP AND TRAIN CAMERA TEAMS TO FILM EVERY INCIDENT WHERE THE POLICE ARE DEPLOYED FOR CROWD MANAGEMENT. THIS WOULD BE A USEFUL DEVICE FOR IMPROVED ACCOUNTABILITY AS WELL AS FOR DEBRIEFING AND TRAINING OF THE POLICE OFFICIALS THEMSELVES.

THE LEGISLATION CONCERNING THE CARRYING OF WEAPONS IN CROWDS SHOULD BE FULLY ENFORCED AT ALL TIMES.

THE PUBLIC ORDER POLICING COMPONENT OF THE SAPS BE ENCOURAGED TO IMPLEMENT A MEANINGFUL AFFIRMATIVE ACTION STRATEGY TO IMPROVE REPRESENTIVITY AT SENIOR LEVELS.

CASE STUDIES OF PAST INCIDENTS OF BAD PRACTICE BY THE FORMER SAP AND HOMELAND POLICE IN THE POLICING OF GATHERINGS BE USED IN TRAINING.

Police involvement in crimes

72

Where it is alleged that a serious crime was carried out by or with the acquiescence of police, the Commission recommends that:

POLICE OFFICERS FROM OUTSIDE THE AREA INVOLVED BE BROUGHT IN TO INVESTIGATE.

PROPER DISCIPLINARY MEASURES BE TAKEN AGAINST POLICE WHO ABUSE THEIR POWERS.

INDEMNITY FOR POLICE WHO ENGAGE IN UNLAWFUL ACTIVITY IN SUPPORT OF THE STATE, EVEN DURING A STATE OF EMERGENCY, BE ERADICATED.

ATTORNEYS-GENERAL RIGOROUSLY PROSECUTE SAPS MEMBERS WHO ARE FOUND TO HAVE ASSAULTED, TORTURED OR KILLED PERSONS IN THEIR CUSTODY, AND THAT ANY MEMBERS OF THE SAPS FOUND TO HAVE REPEATEDLY BEEN ACCUSED OF HAVING USED FORCE IN THE

QUESTIONING OF SUSPECTS OR ANY PERSONS IN THEIR CUSTODY, BE SUBJECT TO AN INTERNAL INVESTIGATION, WHICH MAY RESULT IN PROSECUTION.

Recruitment and training

73

The Commission recommends that:

PROFESSIONALISM AND MOTIVATION BE ENHANCED, AND SUSCEPTIBILITY TO CORRUPTION AND UNLAWFUL PRACTICES BE MINIMISED, BY PROMOTING EMPLOYMENT PRACTICES THAT ENCOURAGE MORE EDUCATED, LITERATE AND PROFESSIONAL CANDIDATES TO APPLY FOR EMPLOYMENT AND TO REMAIN IN EMPLOYMENT WITH THE SAPS. PARTICULARLY, IMMEDIATE ATTENTION SHOULD BE GIVEN TO SALARY ISSUES TO ENCOURAGE BETTER CANDIDATES TO APPLY FOR AND REMAIN IN THE EMPLOYMENT OF THE SAPS.

ALL POLICE OFFICERS BE IMBUED, THROUGH TRAINING AND THE INTRODUCTION OF A CODE OF ETHICAL PRACTICE, WITH AN ETHOS OF SERVICE IN A DEMOCRATIC STATE AND UNDER A CULTURE OF HUMAN RIGHTS.

INVESTIGATING OFFICERS BE TRAINED IN PROPER FORENSIC INVESTIGATION TECHNIQUES, TO REPLACE THE CURRENT PRACTICE OF EXTRACTING CONFESSIONS UNDER DURESS, BY VIOLENCE AND OTHER IRREGULAR AND UNORTHODOX METHODS.

THE WORK OF THE DETECTIVE ACADEMY BE EXPANDED AS RAPIDLY AS POSSIBLE.

The SAPS and correctional services

74

To maintain control and continuity in the dealings between the SAPS and the Department of Correctional Services, the Commission recommends that there be closer liaison between the two departments. For example, at present, sentenced prisoners are paroled at the discretion of the Department of Correctional Services.

75

It is recommended that:

THE RELEASE OF SUCH PERSONS SHOULD BE IN CONSULTATION WITH THE COURTS THAT SENTENCED THEM.

76

In addition, it is recommended that

- A SOCIAL WORKER BE RESPONSIBLE FOR AN INVESTIGATION OF THE ENVIRONMENT INTO WHICH THE PRISONER IS TO BE RELEASED;
- THERE BE AN ASSURANCE THAT THE PRISONER WILL HAVE A MEANS OF LIVELIHOOD;
- A RECORD OF COMPLETE REHABILITATION IS MADE AVAILABLE;
- THE GOVERNMENT TAKE RESPONSIBILITY FOR TRAINING OF PRISONERS AND TO ENSURE THAT THEY ARE EQUIPPED FOR LIFE OUTSIDE THE PRISON;
- THE DEPARTMENT OF CORRECTIONAL SERVICES CHECK WHETHER THE PRISONER HAS BREACHED ANY PAROLE CONDITIONS IN THE PAST;
- THE INVESTIGATING OFFICER, MAGISTRATE AND CORRECTIONAL SERVICES OFFICIAL EXAMINE THE CIRCUMSTANCES OF THE PRISONER TO BE PAROLED.

Security companies

77

The Commission recommends that:

THE RELEVANT PARLIAMENTARY COMMITTEE REVIEW AND INVESTIGATE THE STATE OF THE SECURITY INDUSTRY WITH THE AIM OF INCREASING CONTROLS ON THE INDUSTRY AND ENSURING AN INDUSTRY-WIDE CODE OF CONDUCT.

Improved control over ownership and use of guns.

78

Noting that many deaths and injuries reported to the Commission, as well as many occurring after the end of the mandate period, were caused by guns, the Commission recommends that:

EXISTING CONTROLS OVER THE OWNERSHIP AND USE OF GUNS BE EXTENSIVELY REVIEWED.

n THE HEALTH SECTOR

79

Millions of South Africans were denied access to appropriate, affordable health care during the period under review. Health care workers, through acts of commission and omission, ignorance, fear and failure to exercise clinical independence, subjected many individuals and groups to further abuse. Fundamental reforms in the health care delivery system, legislative controls, monitoring and accountability mechanisms, and the training of health professionals are required.

Legislation

80

The Commission recommends that:

ALL LEGISLATION PERTAINING TO HEALTH CARE FOCUS ON PRIMARY HEALTH.

PRESENT HEALTH CARE LEGISLATION BE REVIEWED, AND FUTURE LEGISLATION DEVELOPED, TAKING INTO ACCOUNT THE NEED FOR TRANSPARENCY, EVALUATION AND MONITORING, THE RIGHTS OF SERVICE USERS AND THE PRIMACY OF CONFIDENTIALITY.

Professional standards of conduct

81

The Commission recommends that:

A UNIFORM CODE OF CONDUCT FOR HEALTH PROFESSIONALS BE DEVELOPED, IMPLEMENTED, AND TAUGHT IN ALL HEALTH SCIENCE FACULTIES.

THE STATUTORY COUNCILS ENSURE THAT ALL HEALTH PROFESSIONALS REGISTERED WITH THOSE COUNCILS ARE FAMILIAR WITH THE PROFESSIONAL STANDARDS TO WHICH THEY MUST ADHERE. HEALTH PROFESSIONALS MUST BE HELD ACCOUNTABLE IF THEY VIOLATE THESE STANDARDS.

HEALTH PROFESSIONALS ENGAGE IN "SELF-AUDITS" OF THEIR PROFESSIONAL CONDUCT BY MEETING REGULARLY IN SMALL FACILITATED GROUPS TO DISCUSS ETHICAL AND HUMAN RIGHTS DILEMMAS.

Training

82

The Commission recommends that:

HEALTH SCIENCE FACULTIES ESTABLISH PROGRAMMES AIMED AT INCREASING THE NUMBER OF BLACK UNDER- AND POSTGRADUATE STUDENTS. THIS MAY REQUIRE BRIDGING PROGRAMMES, FINANCIAL ASSISTANCE, TUTORS, MENTORING ETC.

TRAINING IN HUMAN RIGHTS BE A FUNDAMENTAL AND INTEGRAL ASPECT OF ALL CURRICULA FOR HEALTH PROFESSIONALS. THIS TRAINING SHOULD ADDRESS FACTORS AFFECTING HUMAN RIGHTS PRACTICE, SUCH AS KNOWLEDGE, SKILLS, ATTITUDES, AND ETHICAL RESEARCH PRACTICES. KNOWLEDGE OF AND COMPETENCE AND PROFICIENCY IN THE STANDARDS (BOTH NATIONAL AND INTERNATIONAL) TO WHICH DOCTORS WILL BE HELD ACCOUNTABLE SHOULD BE A REQUIREMENT FOR QUALIFICATION AND REGISTRATION

THE CONTENT OF THE OATHS PERTAINING TO HEALTH CARE AND THE ETHICAL PRINCIPLES EMBODIED IN THEM BE TAUGHT AS PART OF UNDERGRADUATE TRAINING FROM THE EARLIEST OPPORTUNITY POSSIBLE. THIS FACILITATES AN INTERACTION WITH THE PRINCIPLES ESPOUSED AND AN OPPORTUNITY TO QUESTION AND IMPLEMENT THEM DURING THE TRAINING PERIOD.

CONTINUING MEDICAL EDUCATION PROGRAMMES INCLUDE A REVIEW OF HUMAN RIGHTS AND ETHICAL ISSUES AND DEVELOPMENTS.

Safeguards for vulnerable health professionals

83

In order to ensure that health professionals who work in situations in which they have dual loyalties are not complicit in committing human rights abuses, the Commission recommends that:

APPROPRIATE ONGOING TRAINING IN INSTITUTIONAL HEALTH CARE AND HUMAN RIGHTS BE MANDATORY FOR ALL HEALTH PROFESSIONALS WORKING IN PUBLIC FACILITIES.

TRAINING BE DEVELOPED FOR NON-MEDICAL PRISON STAFF, SANDF MEMBERS AND POLICE, TO FACILITATE A MUTUAL UNDERSTANDING OF THE DUTIES AND OBLIGATIONS OF HEALTH PROFESSIONALS WORKING IN THOSE ENVIRONMENTS. THIS WILL SUPPORT PROFESSIONAL AND ETHICAL HEALTH PRACTICES.

STANDARDS AND NORMS THAT UPHOLD HUMAN RIGHTS BE DEVELOPED FOR INSTITUTIONAL HEALTH CARE. THESE NEED TO BE PUT INTO OPERATION VIA REGULAR INDEPENDENT AUDITS.

THE DEPARTMENT OF HEALTH ASSUME *DE JURE* AND *DE FACTO* CONTROL OF PRISON AND DETAINEE HEALTH CARE, MILITARY HEALTH CARE, STATE MORTUARIES AND FORENSIC SERVICES. (THOSE RESPONSIBLE FOR FORENSIC SERVICES SHOULD NOT ALSO BE RESPONSIBLE FOR PROVIDING HEALTH CARE TO PRISONERS AND DETAINEES, AS IS PRESENTLY THE CASE.) IN OTHER WORDS, HEALTH PROFESSIONALS WORKING IN THESE ENVIRONMENTS MUST BE EMPLOYED BY, REPORT TO AND BE PROFESSIONALLY ACCOUNTABLE TO THE DEPARTMENT OF HEALTH.

Health care services in prisons

84

The Commission recommends that:

THE ROLE, RESPONSIBILITIES AND OBLIGATIONS OF INDIVIDUALS RESPONSIBLE FOR THE HEALTH CARE OF PRISONERS AND DETAINEES, BOTH IN PRISONS AND POLICE CELLS, BE CLEARLY DEFINED AND ACCEPTED BY ALL POLICE AND PRISON STAFF.

AN AUDIT OF DISTRICT SURGEONS CURRENTLY EMPLOYED BY THE DEPARTMENT OF HEALTH BE CARRIED OUT, TO ENSURE THAT THOSE WHO PARTICIPATED IN OR COLLUDED WITH HUMAN RIGHTS VIOLATIONS IN THE PAST ARE NO LONGER IN A POSITION TO OFFER TREATMENT TO DETAINEES AND PRISONERS. (NOTE: THIS IS NOT A RECOMMENDATION THAT SUCH PEOPLE SHOULD NO LONGER BE ALLOWED TO PRACTISE, ONLY THAT THEY BE REMOVED FROM SITUATIONS IN WHICH THEY MIGHT BE VULNERABLE TO COLLUSION.)

THE MEDICAL RECORDS OF PRISONERS AND DETAINEES BE INACCESSIBLE TO NON-MEDICAL PRISON STAFF AND/OR POLICE, UNLESS THE HEALTH PROFESSIONAL IN CHARGE DEEMS SUCH ACCESS TO BE IN THE INTERESTS OF THE PATIENT.

MEDICAL EXAMINATIONS OF PRISONERS AND DETAINEES TAKE PLACE IN PRIVATE, UNLESS THE PATIENT OR THE HEALTH PROFESSIONAL PERFORMING THE EXAMINATION REQUESTS OTHERWISE.

REGULAR INDEPENDENT REVIEWS OF HEALTH CARE IN PRISONS AND OTHER PLACES OF INCARCERATION, MILITARY INSTALLATIONS AND MENTAL INSTITUTIONS BE CONDUCTED.

AN INDEPENDENT LINE OF AUTHORITY BE ESTABLISHED TO ADVISE, GUIDE AND SUPPORT DISTRICT SURGEONS AND OTHER PRISON HEALTH CARE PERSONNEL FACING CONTROVERSIAL ETHICAL DECISIONS.

COMPULSORY REFRESHER COURSES FOR PRISON HEALTH CARE WORKERS FOCUS ON ETHICS, MENTAL HEALTH ISSUES, HUMAN RIGHTS AND THE SPECIFIC HEALTH NEEDS OF PRISONERS.

THE FORMAT OF DOCUMENTATION COMPLETED BY HEALTH PROFESSIONALS PROVIDING HEALTH CARE FOR PRISONERS AND DETAINEES SPECIFICALLY INCLUDE SECTIONS ON ALLEGATIONS OF TORTURE OR ABUSE, EVIDENCE OF SUCH ABUSE AND HOW THE ALLEGATIONS ARE

BEING INVESTIGATED. ALL ALLEGATIONS OF ABUSE MUST BE REPORTED TO AN INDEPENDENT MONITORING BODY. FAILURE TO REPORT ABUSE SHOULD BE A DISCIPLINARY OFFENCE.

Medico-legal services

85

The Commission recommends that:

THERE BE UNIFORM STANDARDS OF TRAINING FOR ALL STAFF REQUIRED TO PERFORM *POST MORTEM*S OR OTHER FORENSIC EXAMINATIONS.

CUSTODIAL CARE AND FORENSIC SERVICES BE SEPARATED. TO PREVENT A CONFLICT OF INTERESTS, PROFESSIONALS WHO PROVIDE HEALTH CARE TO PRISONERS AND TO OTHERS INCARCERATED OR DETAINED SHOULD NOT HAVE FORENSIC RESPONSIBILITY.

THE LEGISLATION GOVERNING FORENSIC PSYCHIATRY BE REVISED, THE SECRECY CLAUSE RELATED TO FORENSIC PSYCHIATRY BE LIFTED, AND FORENSIC PSYCHIATRY SERVICES BE REVIEWED.

THE STATE FUND AN INDEPENDENT FORENSIC SERVICE FOR THE USE OF THE FAMILY OF ANYONE WHO DIES IN CUSTODY. THE FAMILIES BE INFORMED OF THEIR RIGHT TO HAVE AN INDEPENDENT FORENSIC PATHOLOGIST PRESENT AT A *POST MORTEM*.

THERE BE REGULAR INDEPENDENT AUDITS OF THE POLICE MORTUARIES AND FORENSIC PATHOLOGY LABORATORIES.

POLICE MORTUARIES AND FORENSIC LABORATORIES BE ADEQUATELY EQUIPPED. THE ABSENCE OF X-RAY FACILITIES, FOR INSTANCE, IN THE MAJORITY OF MORTUARIES IS NOTED WITH CONCERN.

Mental health

86

The Commission recommends that:

MENTAL HEALTH BE GIVEN PRIORITY AS A NATIONAL CONCERN AND BE BROUGHT INTO THE PRIMARY HEALTH CARE SYSTEM.

MENTAL HEALTH SERVICES BE ACCESSIBLE TO ALL SOUTH AFRICANS, WITH PARTICULAR EMPHASIS ON THE RURAL AREAS.

THE FOCUS OF MENTAL HEALTH SERVICES BE SHIFTED FROM THE ALMOST EXCLUSIVELY ONE-ON-ONE THERAPY MODEL, TO BECOME COMMUNITY BASED. DIFFERENT CARE AND THERAPY MODALITIES BE EXPLORED AND INSTITUTED, PARTICULARLY TRADITIONAL AND INDIGENOUS MODES OF TREATMENT. COMMUNITY COUNSELLORS AND FAMILY MEMBERS BE INVOLVED IN CARE PROVISION. SERVICE USERS MUST BE INCLUDED IN DECISIONS ABOUT SERVICE PROVISION.

THE QUALITY AND TYPE OF CARE PROVIDED IN MENTAL INSTITUTIONS BE MONITORED BY AN INDEPENDENT BODY.

PSYCHOMETRIC TESTS WHICH ARE CULTURALLY APPROPRIATE IN ALL ASPECTS BE DEVELOPED AND APPROPRIATELY APPLIED.

APPROPRIATE MODELS FOR TRAUMA COUNSELLING IN THE SOUTH AFRICAN CONTEXT BE DEVELOPED AND IMPLEMENTED.

MENTAL HEALTH ISSUES BE TAKEN INTO CONSIDERATION BY ALL APPROPRIATE MINISTRIES, FOR EXAMPLE HOUSING, CORRECTIONAL SERVICES, EDUCATION, AND SAFETY AND SECURITY, IN THEIR PLANNING PROCESSES.

MENTAL HEALTH SERVICES HAVE A DEVELOPMENTAL FOCUS.

THERE BE INCREASED RESEARCH INTO THE CONSEQUENCES OF TRAUMA RELATED TO THE EXPERIENCE OF VIOLENCE. THE GROWING BODY OF RESEARCH ON POST-TRAUMATIC STRESS DISORDER (PTSD) NEEDS TO BE MORE WIDELY SHARED AND PRACTICALLY APPLIED IN SOCIAL SETTINGS. KNOWLEDGE AND AWARENESS OF PTSD SHOULD BE ENCOURAGED IN INSTITUTIONS, COMMUNITIES AND THE FAMILY.

The organised medical profession

87

The Commission recommends that:

THE STATUTORY COUNCILS GOVERNING THE HEALTH PROFESSIONS BE PROACTIVE IN PROMOTING HUMAN RIGHTS.

THE STATUTORY COUNCILS BE GIVEN A PROACTIVE CAPACITY TO INVESTIGATE UNETHICAL/UNPROFESSIONAL CONDUCT, WITHOUT HAVING TO DEPEND ON THE SUBMISSION OF A FORMAL COMPLAINT.

THE COMPOSITION OF THE COUNCILS REPRESENT SOCIETY IN TERMS OF GENDER, RACE ETC. AND THAT THE COUNCILS INCLUDE COMMUNITY REPRESENTATIVES AND MEMBERS OF OTHER PROFESSIONS. THIS WILL ENSURE THAT THE SYSTEM OF SELF-REGULATION, WHICH HAS FAILED SO OBVIOUSLY IN THE PAST, IS NOT PERPETUATED. THE APPOINTMENT OF COUNCIL MEMBERS SHOULD BE A TRANSPARENT PROCESS WHICH ENSURES THE POLITICAL INDEPENDENCE OF THE COUNCILS.

THE DISCIPLINARY “ARMS” OF THE COUNCILS BE BODIES WHOSE MEMBERS HAVE A CORE OF APPROPRIATE KNOWLEDGE AND EXPERIENCE; DISCIPLINARY MEASURES AND SANCTIONS BE IMPLEMENTED IN A CONSISTENT, FAIR MANNER; THE FULL COUNCILS HAVE THE POWER TO REVIEW OUTCOMES OF DISCIPLINARY ENQUIRIES AND THE SANCTION(S) IMPOSED.

POLITICAL AND FUNCTIONAL AUTONOMY AND INDEPENDENCE OF STATUTORY COUNCILS BE ENTRENCHED.

THE COUNCILS ENSURE THAT NO LEGISLATION OR POLICIES VIOLATE THE RIGHTS OR DIGNITY OF PATIENTS, CLIENTS OR HEALTH CARE PROFESSIONALS.

HEALTH CARE PROFESSIONALS WHO OPPOSE OR DRAW ATTENTION TO HUMAN RIGHTS ABUSES BE ACTIVELY SUPPORTED AND PROTECTED BY STATUTORY COUNCILS AND PROFESSIONAL ORGANISATIONS.

Checks and balances for state-run organisations

88

The Commission recommends that:

A BODY ON HEALTH AND HUMAN RIGHTS BE ESTABLISHED, CONSISTING OF HEALTH CARE PROFESSIONALS, HUMAN RIGHTS EXPERTS, CONSUMER REPRESENTATIVES AND LEGAL EXPERTS. THIS BODY COULD BE APPROPRIATELY LOCATED WITHIN THE HUMAN RIGHTS COMMISSION. IT SHOULD BE INDEPENDENT OF GOVERNMENT, PROFESSIONAL ORGANISATIONS AND STATUTORY COUNCILS, BUT WOULD OBVIOUSLY WORK IN CO-OPERATION WITH THESE.

THIS BODY BE RESPONSIBLE, AMONGST OTHER THINGS, FOR:

- IMPLEMENTING HEALTH SECTOR-RELATED RECOMMENDATIONS ADOPTED BY PARLIAMENT AS A RESULT OF THIS COMMISSION’S REPORT;
- MONITORING INSTITUTIONAL HEALTH CARE;
- ADVISING ON CURRICULA IN HEALTH AND HUMAN RIGHTS EDUCATION;
- RECEIVING AND DEALING WITH REPORTS AND COMPLAINTS ABOUT HUMAN RIGHTS ABUSES IN THE HEALTH PROFESSIONS;
- CREATING THE POSITION OF AND OVERSEEING THE WORK OF A “MEDICAL PUBLIC PROTECTOR” OR OMBUDSPERSON;
- IMPLEMENTING AN ENQUIRY INTO THE LEGAL, ETHICAL AND PROFESSIONAL POSITION OF HEALTH PERSONNEL IN THE MILITARY, AND DEVELOPING CLEAR GUIDELINES TO AVOID CONFLICT BETWEEN MILITARY LAW AND PROFESSIONAL ETHICS.

THIS BODY HAVE A MECHANISM TO ALLOW FOR ONGOING CONFIDENTIAL REPORTING OF HUMAN RIGHTS ABUSES BY HEALTH PROFESSIONALS.

Service users

89

The Commission recommends that:

CURRENT EFFORTS TO CREATE A PATIENTS’ RIGHTS CHARTER BE ENCOURAGED. THE DEPARTMENT OF HEALTH, STATUTORY COUNCILS AND PROFESSIONAL ORGANISATIONS BE REQUIRED TO ENGAGE IN ONGOING PROGRAMMES TO INFORM USERS OF HEALTH SERVICES OF THEIR RIGHTS AND OF WAYS IN WHICH COMPLAINTS CAN BE LODGED.

The Commission recommends that:

THE DISPARITIES IN HEALTH CARE RESOURCE ALLOCATION BE REDRESSED, WITH A SPECIAL FOCUS ON THE DISPARITIES BETWEEN THE URBAN AREAS AND TOWNSHIPS, AS WELL AS BETWEEN URBAN AND RURAL AREAS. THIS COULD BE ACCOMPLISHED THROUGH A ONCE-OFF TAX, OR SLOWLY OVER TIME.

ALL EMPLOYEES OF STATE-RUN INSTITUTIONS BE MADE AWARE OF THEIR DUTIES, OBLIGATIONS AND RIGHTS.

HEALTH CARE PROFESSIONALS EXERCISE THE PRIVILEGE AND RESPONSIBILITY OF HAVING FINAL AUTHORITY REGARDING DECISIONS AFFECTING THE HEALTH OF PATIENTS. THIS IS PARTICULARLY IMPORTANT IN SITUATIONS WHERE THE PATIENT IS INCARCERATED.

THE SANDF PROVIDE APPROPRIATE MENTAL AND PHYSICAL HEALTH CARE FOR THOSE SUFFERING FROM THE EFFECTS OF SADF ACTIONS OR PARTICIPATION IN THEM. SIMILARLY, SERVICES ARE NEEDED FOR THOSE WHO PARTICIPATED IN AND SUFFERED THE RESULTS OF OTHER STATE-SPONSORED OR LIBERATION MOVEMENT VIOLENCE.

ALL HEALTH CARE FACILITIES HAVE POLICIES THAT PROTECT AND PROMOTE:

- DOCTOR–PATIENT CONFIDENTIALITY
- CLINICAL INDEPENDENCE
- INSTITUTIONAL INDEPENDENCE
- PATIENT ADVOCACY

Research and publications

The Commission recommends that:

THE PROFESSIONAL BODIES, STATUTORY COUNCILS, AND THE HEALTH AND HUMAN RIGHTS BODY (REFERRED TO ABOVE) MONITOR RESEARCH PRACTICES, ESPECIALLY AMONG VULNERABLE POPULATIONS WHOSE MEMBERS MAY BE UNAWARE OF THEIR RIGHTS.

THERE BE A PROHIBITION AGAINST RESEARCH INTO SCIENTIFIC METHODS OF INTERROGATION AND TORTURE.

SOUTH AFRICA ADHERE RIGOROUSLY TO ALL THE STIPULATIONS OF THE INTERNATIONAL CONVENTIONS ON CHEMICAL AND BIOLOGICAL WEAPONS, PARTICULARLY THOSE PERTAINING TO RESEARCH AND DEVELOPMENT.

THE *SOUTH AFRICAN MEDICAL JOURNAL* (SAMJ) HAVE EDITORIAL INDEPENDENCE FROM ANY INTEREST GROUP SUCH AS THE STATE, THE MEDICAL ASSOCIATION OF SOUTH AFRICA (MASA) ETC.

THE EDITORIAL BOARD OF THE SAMJ BE BROADLY REPRESENTATIVE AND INCLUDE COMMUNITY REPRESENTATIVES.

Responsibility for developing and implementing these recommendations, and for monitoring their implementation, rests primarily with:

a

The Department of Health – national and provincial;

b

The statutory councils;

c

Professional organisations;

d

The SANDF;
Health science faculties;
The Human Rights Commission;
NGOs involved in health.

MEDIA

State restrictions on the freedom of the media played an important role in facilitating gross violations of human rights during the period covered by the Commission's mandate. While these restrictions were not in themselves a gross violation of human rights as defined in the Act, they denied South Africans the right to a free flow of information and ideas, and created conditions conducive to the perpetration of gross human rights violations by a range of forces. Laws and restrictions controlling the media created an atmosphere conducive to self-censorship in the white-controlled media. As a result, most journalists failed to delve thoroughly enough into allegations that gross violations of human rights were occurring, or to speak out strongly enough when evidence was uncovered.

Legislation

The Commission thus recommends that:

THERE BE LESS LEGISLATION CONTROLLING THE MEDIA, RATHER THAN MORE.

SECTION 205 OF THE CRIMINAL PROCEDURE ACT, WHICH COMPELS THE REVELATION OF SOURCES, BE REPEALED. THIS IS IN LINE WITH THE CODE OF CONDUCT OF THE INTERNATIONAL FEDERATION OF JOURNALISTS, WHICH STRESSES THAT THE JOURNALIST SHOULD OBSERVE PROFESSIONAL SECRECY ON SOURCES OF INFORMATION OBTAINED IN CONFIDENCE. THERE MAY BE A NEED TO DEVISE A NEW FORMULATION, WHICH WOULD ASSURE THE MEDIA'S RIGHT TO PROTECT A SOURCE AND ITS INTEGRITY, AS WELL AS THE STATE'S NEED FOR INFORMATION, FOR INSTANCE WHEN STATE SECURITY IS THREATENED.

A THOROUGH REVIEW OF ALL LAWS BE UNDERTAKEN WITH A VIEW TO REDUCING RESTRICTIONS ON THE FREE FLOW OF INFORMATION, ON FREEDOM OF EXPRESSION AND ON DIVERSITY OF OPINION. THERE SHOULD BE NO INTERFERENCE FROM GOVERNMENT IN EDITORIAL MATTERS.

RECRUITMENT OF AGENTS AMONG, OR PAYMENTS FOR INFORMATION FROM, THE RANKS OF JOURNALISTS AND OTHER MEDIA WORKERS BY ANY STATE INTELLIGENCE OR SECURITY AGENCIES BE PROHIBITED BY LAW.

Independence

The Commission recommends that:

THE INDEPENDENCE OF THE SOUTH AFRICAN BROADCASTING CORPORATION, FROM BOTH GOVERNMENT AND COMMERCIAL PRESSURES, BE ESTABLISHED AND RETAINED.

THE INDEPENDENCE OF THE INDEPENDENT BROADCASTING AUTHORITY FROM GOVERNMENT BE MAINTAINED.

Alternative media

The Commission recommends that:

THE STATE PROMOTE A MULTIPLICITY OF MEDIA VOICES IN SOCIETY BY ESTABLISHING A LEGISLATIVE ENVIRONMENT AND STATE SUBSIDIES TO ENCOURAGE THE GROWTH OF GRASSROOTS PUBLICATIONS AND LOCAL BROADCASTING STATIONS.

THE ESTABLISHED PRESS PLAY A LEADING ROLE IN HELPING TO ENCOURAGE A VARIETY OF MEDIA SOURCES BY, FOR INSTANCE, FUNDING AND RESOURCING ALTERNATIVE PUBLICATIONS. COMMUNITY PUBLICATIONS SHOULD BE DEVELOPED ALONG THE LINES OF LOCAL, PROVEN GRASSROOTS MODELS LIKE *GRASSROOTS*, *SOUTH* AND *SAAMSTAAN*. MODELS FROM OTHER COUNTRIES SUCH AS ZIMBABWE AND PAPUA NEW GUINEA SHOULD ALSO BE EXPLORED.

Media self-regulation

97

The Commission recommends that:

THE ESTABLISHED PRESS TAKE STEPS TO WIDEN THE DIVERSITY OF OPINIONS AND INFORMATION PUBLISHED IN ITS NEWSPAPERS BY ESTABLISHING LOCAL EDITORIAL ADVISORY BOARDS FOR ITS NEWSPAPERS AND BY NEGOTIATING EDITORIAL CHARTERS WITH ITS JOURNALISTS.

THE PRINT MEDIA AND BROADCASTERS INTRODUCE A CONDITION OF EMPLOYMENT IN THE CONTRACTS OF JOURNALISTS AND OTHER MEDIA WORKERS MAKING IT A DISMISSIBLE OFFENCE TO TAKE PAYMENT FROM ANY STATE INTELLIGENCE OR SECURITY AGENCY IN EXCHANGE FOR INFORMATION.

JOURNALISTS' ORGANISATIONS AND EDITORS DEBATE THE DEGREE TO WHICH IT IS PERMISSIBLE FOR JOURNALISTS, IN THE COURSE OF NEWS GATHERING, TO HAVE CONTACTS AND SHARE INFORMATION WITH OPERATIVES OF STATE INTELLIGENCE OR SECURITY AGENCIES. (IT IS RECOMMENDED THAT, AT THE VERY LEAST, SUCH CONTACTS FOR NEWSGATHERING PURPOSES OUGHT TO BE DECLARED IN WRITING TO EDITORS.)

MEDIA EMPLOYERS REQUIRE JOURNALISTS TO DECLARE PAST RECEIPT OF PAYMENTS FROM STATE INTELLIGENCE OR SECURITY AGENCIES, AND REMOVE SUCH JOURNALISTS FROM COVERING THE ACTIVITIES OF THESE OR SIMILAR AGENCIES IN THE FUTURE.

Labour and employment issues

98

The Commission recommends that:

MEDIA EMPLOYERS INTENSIFY PROGRAMMES OF AFFIRMATIVE ACTION AND THE EMPOWERMENT OF WOMEN AND BLACK MEDIA WORKERS WITHIN THE MEDIA, WITH THE OBJECTIVE OF ENSURING THAT MORE, BETTER-SKILLED AND QUALIFIED BLACK PEOPLE ARE EMPLOYED IN ALL NEWSROOMS AND THAT THERE IS A PROPER GENDER BALANCE AT ALL LEVELS, MANAGERIAL AND PROFESSIONAL.

THE DIFFERENT MEDIA UNIONS STRIVE FOR A UNIFIED STRATEGY AND APPROACH TOWARDS THE MEDIA INDUSTRY.

99

Responsibility for developing and implementing these recommendations, and for monitoring their implementation, rests primarily with:

a

The Department of Posts and Telecommunications;

b

The South African Broadcasting Corporation;

c

The Independent Broadcasting Authority (IBA);

d

Publishing houses: Independent Newspapers, NasPers, TML;

e

The Newspaper Press Union;

f

Trade unions: The South African Union of Journalists, The Union of Black Journalists;

g

NGOs.

100

One of the key aspects of the Commission's work has been its commitment to transparency and public scrutiny. Its records, which are in the form of documents, video and audio tapes, pictures and photographs as well as a computerised database, are a national asset which must be both protected and made accessible.

101

Sections 11(2) and 13(2)(a), of the Archives Act stipulate that no public record may be disposed of (transferred from one office to another, erased, destroyed or disposed of in any other manner) without the written authorisation of the national archivist.

102

The Archives Act further requires that public records with enduring value must be transferred into the custody of the archives only when they have been in existence for twenty years. The national archivist is, however, empowered to identify records which should be transferred to the National Archives sooner, after consultation with the head of the governmental body concerned.

103

The Commission thus recommends that:

ALL COMMISSION RECORDS BE TRANSFERRED TO THE NATIONAL ARCHIVES WHEN THE CODICIL TO THE FINAL REPORT IS MADE PUBLIC.

ALL COMMISSION RECORDS BE ACCESSIBLE TO THE PUBLIC, UNLESS COMPELLING REASONS EXIST FOR DENYING SUCH ACCESS, BEARING IN MIND THAT THE INDIVIDUAL'S RIGHTS TO PRIVACY, CONFIDENTIALITY AND RELATED MATTERS MUST BE RESPECTED. IN THIS REGARD, PARTICULAR ATTENTION NEEDS TO BE GIVEN TO THE RELEASE OR WITHHOLDING OF DETAILS OF HUMAN RIGHTS VIOLATIONS STATEMENTS IN CASES WHERE INDIVIDUALS FEEL THEIR SAFETY IS PREJUDICED.

VICTIMS HAVE THE RIGHT OF ACCESS TO THEIR OWN FILES, REGARDLESS OF WHETHER THESE ARE PUBLICLY AVAILABLE OR NOT. VICTIMS SHOULD BE PROVIDED WITH A COPY OF THEIR FILE IF THEY SO WISH.

TO FACILITATE THE ABOVE, THE DEPARTMENT OF JUSTICE PROVIDE PUBLIC NOTICE OF THE INTENT TO TRANSFER THE RECORDS OF THE COMMISSION TO THE NATIONAL ARCHIVES. THE NOTICE SHOULD INCLUDE A STATEMENT ABOUT THE BASIC ACCESS PROVISIONS FOR THE RECORDS.

THE FOLLOWING GUIDELINES BE USED TO DETERMINE ACCESS TO COMMISSION RECORDS IN THE NATIONAL ARCHIVES:

- BECAUSE COMMISSION RECORDS ARE LESS THAN TWENTY YEARS OLD, ACCESS TO THESE RECORDS BE DETERMINED BY THE NATIONAL ARCHIVIST IN TERMS OF SECTION 12(1) OF THE ARCHIVES ACT.
- IN THE CASE OF RECORD CATEGORIES IDENTIFIED AS REQUIRING PROTECTION, THE NATIONAL ARCHIVIST REFER REQUESTS FOR ACCESS TO THE DEPARTMENT OF JUSTICE. IN THE CASE OF ALL OTHER RECORD CATEGORIES, A POLICY OF UNRESTRICTED PUBLIC ACCESS SHOULD BE APPLIED.
- THE FOLLOWING INFORMATION, WHICH IS ALREADY IN THE PUBLIC DOMAIN, BE MADE AVAILABLE AS SOON AS PRACTICALLY POSSIBLE TO THE PUBLIC: TRANSCRIPTS OF HEARINGS; REASONS FOR AMNESTY DECISIONS; PUBLIC STATEMENTS ISSUED BY THE COMMISSION; ALL OTHER MATERIAL ALREADY AVAILABLE TO THE PUBLIC ON THE COMMISSION'S INTERNET WEBSITE (www.truth.org.za).
- THE NATIONAL ARCHIVES TAKE OVER THE COMMISSION'S INTERNET WEBSITE, CONTINUE TO MAKE EXISTING MATERIAL – INCLUDING THE REPORT OF THE COMMISSION – AVAILABLE TO THE PUBLIC, LOCALLY AND INTERNATIONALLY, ON THE WEBSITE, AND EXPAND THE WEBSITE IN CREATIVE WAYS (TAKING INTO ACCOUNT THE FACT THAT MANY COMMISSION RECORDS ARE STORED IN COMPUTER FILES).

THE GOVERNMENT ALLOCATE ADEQUATE ADDITIONAL FUNDING TO THE NATIONAL ARCHIVES TO PRESERVE AND MAINTAIN THE RECORDS OF THE COMMISSION. TO THIS END, THE NATIONAL ARCHIVES SHOULD PREPARE A COMPREHENSIVE BUDGET PLAN ON THE COSTS OF ADMINISTERING THE COMMISSION'S RECORDS.

THE GOVERNMENT GIVE SPECIAL SUPPORT TO THE NATIONAL ARCHIVES TO FACILITATE THE CREATION OF DECENTRALISED, NATION-WIDE 'CENTRES OF MEMORY', AT WHICH MEMBERS OF THE PUBLIC WHO DO NOT HAVE PERSONAL ACCESS TO COMPUTERS CAN ACCESS DETAILS OF THE PROCEEDINGS OF THE COMMISSION, INCLUDING TRANSCRIPTS AND SOUND AND VIDEO CLIPS OF HEARINGS.

104

Responsibility for developing and implementing these recommendations, and for monitoring the implementation thereof, rests primarily with:

a

The Department of Arts and Culture, Science and Technology;

b

The Department of Justice.

n DESTRUCTION OF DOCUMENTS

105

Measures must be implemented to prevent the destruction of records which form part of our history, however unpleasant. Particularly cynical is the deliberate destruction of records which may incriminate individuals or groups in power. To prevent such destruction, appropriate legal powers must be given to the state's public archives service. The Archives Act provides the necessary legislative framework, but requires rigorous implementation.

Legislation

106

The Commission thus recommends that:

THE GOVERNMENT ENSURE THAT FUTURE PROVINCIAL ARCHIVAL LEGISLATION EMBODIES THE FEATURES OF THE NATIONAL ACT.

THE GOVERNMENT PROVIDE THE NATIONAL ARCHIVES WITH THE RESOURCES IT REQUIRES TO IMPLEMENT THE ACT. THE POWER TO INSPECT GOVERNMENTAL BODIES, FOR INSTANCE, IS RENDERED MEANINGLESS IF THE RESOURCES TO EXERCISE THIS RIGHT ARE NOT MADE AVAILABLE.

THE GOVERNMENT TAKE STEPS TO ENSURE THAT THE NATIONAL ARCHIVES FUNCTIONS AS THE AUDITOR OF GOVERNMENT RECORD-KEEPING. THIS REQUIRES THAT THE NATIONAL ARCHIVES BECOMES AN INDEPENDENT AGENCY, RATHER THAN REMAINING A SUB-COMPONENT OF A SINGLE GOVERNMENT DEPARTMENT (PRESENTLY THE DEPARTMENT OF ARTS AND CULTURE, SCIENCE AND TECHNOLOGY). CONSIDERATION SHOULD BE GIVEN TO CREATING A NATIONAL ARCHIVES UNIT IN THE OFFICE OF THE PRESIDENT OR DEPUTY PRESIDENT.

THE SECURITY ESTABLISHMENT NOT BE ALLOWED TO BYPASS THE OPERATION OF THE ACT. WHILE A SPECIAL STATUS APPROPRIATE TO THE SENSITIVITY OF ITS RECORDS WOULD BE LEGITIMATE, IT SHOULD REMAIN FULLY SUBJECT TO THE PROFESSIONAL SUPERVISION OF THE NATIONAL ARCHIVES.

Implementation of legislation

107

The Commission recommends that:

THE MINISTRY OF SAFETY AND SECURITY TRANSFER ALL SURVIVING SECURITY BRANCH RECORDS TO THE NATIONAL ARCHIVES.

THE NATIONAL INTELLIGENCE AGENCY AND SOUTH AFRICAN SECRET SERVICE TAKE APPROPRIATE STEPS TO FINALISE THE SECURING OF ALL DOCUMENTATION PRE-DATING 1995 IN THEIR CUSTODY, AND THAT SUCH DOCUMENTATION BE SUBJECTED TO APPRAISAL BY THE NATIONAL ARCHIVES.

NO STATE RECORDS PERTAINING TO HUMAN RIGHTS ABUSES BE DESTROYED WITHOUT THE EXPRESS APPROVAL OF THE NATIONAL ARCHIVIST, EVEN IF OTHER DISPOSAL AUTHORITIES AUTHORISE SUCH ACTION.

THE SANDF COMPILE A COMPREHENSIVE INVENTORY OF ALL NATIONAL SECURITY MANAGEMENT SYSTEM (NSMS) RECORDS IN ITS CUSTODY, FOR SUBMISSION TO THE NATIONAL ARCHIVIST.

THE SOUTH AFRICAN GOVERNMENT ACKNOWLEDGE THAT, IN TERMS OF INTERNATIONALLY RECOGNISED ARCHIVAL PRINCIPLES, THE EXTANT RECORDS OF THE SOUTH WEST AFRICA TERRITORY FORCE (CURRENTLY IN THE SANDF ARCHIVES) PROPERLY BELONG IN NAMIBIA AND MUST BE RETURNED TO THE NAMIBIAN GOVERNMENT. (IT MUST BE NOTED THAT SUCH AN AGREEMENT COVERING EQUIVALENT CIVILIAN RECORDS IS ALREADY IN PLACE.)

THE TRANSFER TO THE NATIONAL ARCHIVES OF DOCUMENTATION ON THE SECURITY LEGISLATION DIRECTORATE OF THE DEPARTMENT OF JUSTICE, SECURITY DETAINEES, POLITICAL PRISONERS AND PRISONERS SENTENCED TO DEATH BE NEGOTIATED BETWEEN THE NATIONAL ARCHIVES AND THE APPROPRIATE MINISTRIES.

THE SECURITY ESTABLISHMENT MAKE EVERY ATTEMPT TO LOCATE AND RETRIEVE DOCUMENTS REMOVED WITHOUT AUTHORISATION BY OPERATIVES OF APARTHEID SECURITY STRUCTURES.

THE NATIONAL ARCHIVES BE ENABLED TO FILL THE GAPS IN OFFICIAL MEMORY, THROUGH THE COLLECTION OF NON-PUBLIC RECORDS AND THE PROMOTION OF ORAL HISTORY PROJECTS (IN TERMS OF SECTION 3(D) OF THE ARCHIVES ACT).

THE NATIONAL ARCHIVES BE GIVEN THE NECESSARY RESOURCES TO TAKE TRANSFER OF, PROCESS PROFESSIONALLY AND MAKE AVAILABLE TO THE PUBLIC, THE RECORDS OF THE COMMISSION (WHICH IN THEMSELVES FILL MANY GAPS IN SOUTH AFRICA'S SOCIAL MEMORY).

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Responsibility for developing and implementing these recommendations, and for monitoring their implementation, rests primarily with:

a

The Department of Arts and Culture, Science and Technology;

b

The Department of Justice;

c

The Department of Defence, particularly the SANDF;

d

The National Intelligence Agency;

e

The Department of Safety and Security, particularly the SAPS;

f

The Department of Foreign Affairs.

n THE LIBERATION MOVEMENTS

109

The Commission notes that, while the liberation movements were motivated by a just cause in the struggle against apartheid, they nevertheless committed gross violations of human rights both inside and outside of the country.

110

The Commission notes further that, in this conflict, the African National Congress was the only party which signed the Geneva Convention and its protocols regarding the conduct of national wars of liberation, that it made a conscious effort to conduct itself within that framework, and that it instituted several commissions of enquiry into its conduct.

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The Commission therefore recommends that:

THE LIBERATION MOVEMENTS ISSUE A CLEAR AND UNEQUIVOCAL APOLOGY TO:

- EACH VICTIM OF HUMAN RIGHTS ABUSES IN EXILE;
- THOSE DETAINED WITHOUT TRIAL AND THOSE DETAINED, TRIED AND FOUND TO BE INNOCENT.

THE LIBERATION MOVEMENTS WITHDRAW ALL ALLEGATIONS AGAINST AND PUBLICLY CLEAR THE NAMES OF THOSE DETAINED WITHOUT TRIAL AND THOSE DETAINED, TRIED AND FOUND TO BE INNOCENT.

THE LIBERATION MOVEMENTS SEEK TO RECONCILE WITH AND REINTEGRATE THE VICTIMS OF ABUSES.

THE LIBERATION MOVEMENTS SEEK TO ESTABLISH THE WHEREABOUTS AND FATE OF ALL THOSE WHO WENT MISSING IN EXILE, AND REGULARLY PUBLISH INFORMATION ABOUT PROGRESS IN THESE INVESTIGATIONS.

n INTERNATIONAL HUMAN RIGHTS

International human rights instruments

112

The Commission recommends that:

SOUTH AFRICA RATIFY, IN PARTICULAR:

- THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR) AND BOTH ITS PROTOCOLS;
- THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS;
- THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT.

THE GOVERNMENT ENGAGE IN AN INTERNAL REVIEW OF POLICY – SIMILAR TO THAT WHICH OCCURRED AFTER THE RATIFICATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) AND THE ATTENDANCE OF A HIGH-LEVEL GOVERNMENT DELEGATION AT THE 1995 UNITED NATIONS FOURTH WORLD CONFERENCE ON WOMEN, HELD IN BEIJING, CHINA – TO DETERMINE WHETHER SOUTH AFRICAN LAW AND PRACTICE CONFORM TO INTERNATIONAL OBLIGATIONS.

RENEWED INTERNATIONAL CONSIDERATION BE GIVEN TO:

- THE WAY IN WHICH LIBERATION WARS AND CIVIL WARS ARE CONDUCTED.
- THE TREATMENT OF PARTICIPANTS IN ARMED COMBAT IN CIRCUMSTANCES OF WAR, CIVIL WAR, REVOLUTIONS, INSURGENCY OR GUERRILLA WARFARE.

IN THIS ERA OF INTERNATIONAL CONCERN FOR HUMAN RIGHTS, IT IS NECESSARY TO EXAMINE WHETHER IT IS ACCEPTABLE FOR DESERTERS OR TRAITORS TO BE EXECUTED, EVEN IF THEY HAVE BEEN TRIED BY A TRIBUNAL. IT MUST BE BORNE IN MIND THAT IN MANY SUCH CIRCUMSTANCES IT IS NOT POSSIBLE FOR TRIBUNALS TO COMPLY WITH ALL THE PRESENT INTERNATIONAL REQUIREMENTS. MINIMUM ACCEPTABLE STANDARDS SHOULD BE DEvised, GOVERNING CONDITIONS OF DETENTION AND FAIR TRIALS. THE COMMISSION FOUND THE GENEVA CONVENTION AND ITS VARIOUS PROTOCOLS TO BE OF GREAT ASSISTANCE, BUT BELIEVES THERE IS STILL MORE THAT COULD BE ADDED.

Apologies to neighbouring states

113

The Commission received a number of statements from citizens of neighbouring countries, including Namibia, alleging that they had suffered gross violations of their human rights as a result of actions of representatives of the previous South African government. The Commission, lacking the resources and time to address such claims, has not made findings on such violations, nor is it recommending that reparations be paid to the victims. However, the Commission recommends that:

THE SUFFERING OF SUCH PERSONS BE CONSIDERED IN GOVERNMENT-TO-GOVERNMENT NEGOTIATIONS.

A PUBLIC APOLOGY BE MADE TO THE PEOPLE OF OUR NEIGHBOURING COUNTRIES FOR PAST VIOLATIONS.

IMMEDIATE AND APPROPRIATE SYMBOLIC REPARATIONS BE CONSIDERED, IN THE FORM OF STATUES OR MONUMENTS, SCHOLARSHIPS OR OTHER FORMS OF RECOGNITION, DEMONSTRATING SOUTH AFRICAN CITIZENS' EMPATHY WITH THE SUFFERING OF THE CITIZENS OF OUR NEIGHBOURING STATES AND APPRECIATION OF THEIR SOLIDARITY.

Prosecutions for apartheid as a crime against humanity

114

The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.

n CONCLUSION

115

This chapter concludes where it began. Reconciliation is a process which is never-ending, is costly and often painful. For this process to develop, it is imperative that democracy and a human rights culture be consolidated. Reconciliation is centred on the call for a more decent, more caring and more just society. It is up to each individual to respond by committing ourselves to concrete ways of easing the burden of the oppressed and empowering the poor to play their rightful part as citizens of South Africa.