Draft memorandum of law:
Affirmative Action in South Africa

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ON APRIL 27, SOUTH AFRICA WILL SELECT ITS FIRST DEMOCRATICALEDICTED GOVERNMENT. AS ITS FIRST TASK, THE NEW GOVERNMENT MUST DESTROY APARtheid. APARtheid MANIFESTS ITSELF IN INSTITUTIONS. FOR HALF A CENTURY, THE INSTITUTIONS THAT COLLECTIVELY COMPRISE THE SOUTH AFRICAN ECONOMY, SOCIAL STRUCTURE AND POLITICAL SYSTEM HAVE DENIED THE BLACK MAJORITY ACCESS, NOT MERELY TO GOVERNMENT OFFICE, BUT ALSO TO THE MINIMAL REQUIREMENTS FOR A HEALTHY, DECENT LIFE: QUALITY EDUCATION, PRODUCTIVE EMPLOYMENT, DECENT HOUSING AND HEALTH FACILITIES. IT HAS DENIED BLACKS MEANINGFUL PARTICIPATION IN THE DECISIONS THAT DETERMINE THEIR LIVES. IN SHORT, APARtheid HAS MEANT NOT ONLY POVERTY AND OPPRESSION, BUT DISEMPWERMENT.

DESTROYING APARtheid MEANS ABOLISHING OR TRANSFORMING THE INSTITUTIONS THAT MAINTAIN IT. LEGISLATION COMPRISES THE NEW GOVERNMENT’S PRIMARY INSTRUMENT TO ABOLISH, CHANGE OR CREATE NEW INSTITUTIONS. ONCE IN OFFICE, THE DEMOCRATIC MOVEMENT WILL NEED TO TRANSLATE ITS INEVITABLY RELATIVELY BROADLY-STATED POLICIES1 INTO DETAILED LAWS AND REGULATIONS. AN AFFIRMATIVE ACTION LAW WILL BECOME ONE OF GOVERNMENT’S PRINCIPAL TOOLS FOR TRANSFORMING THE INSTITUTIONAL LEGACY OF APARtheid. THIS DRAFT MEMORANDUM OF LAW AIMS TO PROVIDE AN ADEQUATE JUSTIFICATION FOR A DRAFT BILL DESIGNED

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1. See RDP draft #6 (1994).
to implement an effective programme of affirmative action.

A. THIS MEMORANDUM’S OBJECTIVES

South Africa’s new lawmakers cannot simply issue commands to land to redistribute itself, to industries to hire and upgrade workers, to houses to build themselves, to schools to open their doors to all children regardless of race. South Africa’s skewed income distribution and bitter discrimination stem from specific social actors’ repetitive patterns of behaviour, that is, the institutions of apartheid. These determine who obtain jobs — and which jobs; which businesses supply good and services to governmental and private organizations; who gets to go to which schools and universities, or receives training for high-paid jobs; to whom government agencies provide services; and who sits in the boardrooms of the organizations that control everyone’s life. Until the new law-makers introduce legislation that changes the behaviours that collectively perpetuate apartheid, after April 27, 1994 apartheid’s jackboot will continue to grind the necks of black people. This memorandum proposes and explains the reasons for affirmative action legislation designed to initiate the process of transforming those institutions.

This memorandum employs a theory and a problem-solving methodology2 that aims to guide research leading to the formulation of institution-transforming legislation like the proposed affirmative action legislation. This memorandum rests upon that

B. THE PLAN OF THIS MEMORANDUM

This memorandum’s outline conforms with the steps of the problem-solving methodology. That methodology differs fundamentally from the frequently-used ends-means methodology. In ends-means, policy-makers decide on their goals, assuming the ‘experts’ will only specify the means. Rather than relying on a rational, participatory analysis of the evidence, it rests on the choice of ends on the policy-makers’ ‘values’. Thus, the ends-means methodology buttresses authoritarian, arbitrary policy-making. In contrast, problem-solving (and this memorandum) has four steps, each of which requires reference to evidence:

Step 1: The identification of the difficulty, that is, the social problem, comprised of problematic behaviours the legislation must change.

Part I of this draft memorandum discusses the difficulties the new legislation will address. These consist of six patterns of discriminatory behaviours the proposed affirmative action bill must change:

1) Discrimination in the employment, on-job training and promotion of blacks and women in both the public and private sector;

2) Discrimination in opportunities to participate in formal educational and training programmes;

3) Discrimination in the allocation of government services;

4) Discrimination in the selection of personnel for institutional governance;
5) Discrimination in the formulation and implementation of the mission (that is, the purposes and functions) of organizations; and

6) Discrimination as to who may bid on procurement contracts by government and formal-sector businesses and organizations.

Part I concludes by identifying whose and what behaviors comprise these difficulties.

Step 2: The generation and testing of hypotheses to explain the causes of those problematic behaviours:

Part II of this memorandum introduces a set of categories designed to ensure analysis of the causes of the relevant social actors' behaviours. To illustrate the extent and complexity of the factors likely to perpetuate discriminatory behaviours, it reviews some hypotheses to explain public service personnel's discriminatory employment practices.

Step 3: The description of alternative possible legislative solutions, and their assessment in terms of their relative social efficiency in addressing the causes of the identified difficulties.

Part III considers alternative legislative programmes (including those suggested by foreign law and experience) which might change the relevant social actors' behaviours. It concludes that the legislation should create an Affirmative Action Authority to administer a participatory process that requires public and private organizations to conduct self-audits and to formulate and implement affirmative action plans designed to end these six sets of discriminatory behaviours.

Step 4: The implementation and evaluation of the preferred legislative solution.

Part IV discusses the necessity that the new legislation include provisions prescribing an on-going, participatory process of monitoring and evaluating implementation of its provisions.

The first Part begins with an examination of the nature and scope of the six patterns of discriminatory behaviours the proposed legislation seeks to end.

PART I: DEFINING THE SIX DIFFICULTIES THE AFFIRMATIVE
ACTION LAW WILL ADDRESS

To abolish the institutionalized legacies of apartheid, the proposed affirmative action law must change the repetitive patterns of behaviours of the relevant social actors that perpetuate them. The problem-solving methodology's first step requires identification of whose and what behaviours constitute those legacies. Who are the relevant social actors? How do they behave to perpetuate apartheid's impact? This Part first discusses the criteria for determining which aspects of apartheid's all-embracing impact this bill will address; second, it describes in turn each of the six sets of discrimination it will seek to change; and, third, it analyzes whose and what behaviours perpetuate these discriminatory patterns.

A. THE CRITERIA FOR INCLUSION

The Interim Constitution declares:

3.8.2: No person shall be unfairly discriminated against, directly or indirectly...on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Within its inherited resources and constraints, the newly-elected democratic government must begin to translate this lofty principle into concrete action. Government cannot, however, do everything at once. The history of the impact of apartheid ineluctably shapes the three goals and the criterion for the proposed law.

As its first goal, the law should seek to end the discrimination that pervades South African society. The Reconstruction and
Development Programme of the mass democratic movement [6th Draft, 13 January 1994] states:

"1.2.1 Our history has been a bitter one dominated by colonialism, racism, apartheid and repressive labour policies. The result is that poverty and degradation exist side by side with modern cities and a developed mining, industrial and commercial infrastructure. Our income is racially distorted and ranks as one of the most unequal in the world -- lavish wealth and abject poverty characterise our society.

"1.2.2 The economy was built on systematically enforced racial division in every aspect of our society. Rural areas have been divided into underdeveloped Bantustans and well developed white-owned commercial farming areas. Towns and cities have been divided into townships without basic infrastructure for blacks and well resourced suburbs for whites.

"1.2.3 Segregation in education, health, welfare, transport and employment left deep scars of inequality and economic inefficiency. In commerce and industry, very large conglomerates dominated by whites control large parts of the economy. Cheap labour policies and employment segregation have left skills in white hands. Our workers are poorly equipped for the rapid changes taking place in the world economy. Small and medium enterprises are underdeveloped, while highly protected industries underinvested in research, development and training.

"1.2.4 The result is that in every sphere of our society -- economic, social, political cultural, environmental -- South Africans are confronted by serious problems. There is not a single sector of South Africa or a person living in it untouched by the ravages of apartheid. Foremost amongst the country's problems is the appalling poverty and degradation in which millions of our people live."

The RDP further observes:

"5.1.4 Apartheid patterns of minority domination and privilege are not confined to the state and parastatals. Every aspect of South African life is deeply marked by minority domination and privilege. A vast range of institutions in the private domain (in civil society) benefited from apartheid, and also actively fostered and sustained it."
The new, democratically elected government will come into office with a programme that promises to destroy apartheid's legacy, root and branch. In its broadest sense, therefore, affirmative action describes the entire legislative programme of the democratic forces, all of which aim to improve the lot of the oppressed majority: Land reform, improved worker health and safety laws, improved health care laws, improved education laws, housing laws, laws concerning industrial policy, and on and on and on.

Plainly, however, no single law can transform all the institutions of South Africa in one gulp. Transforming land tenures calls for completely different measures than does transforming universities. Necessarily, the affirmative action law here proposed must adopt a narrower definition of affirmative action. What further criteria should determine which among the many social problems that constitute the detritus of apartheid this affirmative action law should address?

The pervasive consequences of apartheid in all aspects of South African requires an affirmative action legislation that reaches beyond most other countries' primary focus. In Canada, for example, the term 'affirmative action' has mainly referred to rules and procedures purporting to ensure that organizations give some advantage to members of disadvantaged groups in filling jobs. In the United States, the term extends the rules giving an edge to the disadvantaged beyond the arena of employment to selection for educational and training places, and, in procurement contracts, to minority-owned businesses. In Malaysia, it primarily relates to
appointments to the public service and university admission.

These countries' affirmative action laws concern the selection and compensation of individual members of historically-disadvantaged groups for relatively scarce posts (usually high-level or well-paying jobs; typically, everywhere, most of those groups' members could find work only as hewers of wood and drawers of water). These laws aimed, not only to end employment discrimination, but to eliminate the institutionalized obstacles that forced the historically-disadvantaged to swim upstream in competition with more advantaged candidates aided by the current. Their purpose lay in ensuring that the disadvantaged had equal opportunity within existing institutions.

Certainly, apartheid imposed similar institutionalized obstacles that blocked black people, especially black women, from well-paying skilled posts and from educational opportunities within the institutions of apartheid South Africa. A manifest imbalance persists between the demographic and gender composition of the population, and those of the better-paying job categories, the student body both in the educational system as a whole, and in practically every educational institution, and the suppliers of inputs to and markets for government agencies and large private firms. Of course, the proposed South African affirmative action law must address these problems.

In South Africa, however, the impact of discrimination, officially-enforced for many decades, reaches deeper and further than in any other country. In no other country did a racially-
distinct minority so explicitly exercise state power to oppress and impoverish the majority. The entire thrust of South Africa’s institutions embody that discrimination, and not merely in decisions about who gets better jobs or better pay, lucrative procurement contracts or scarce educational places. The inherent characteristics of those institutions also determine to which population groups specific organizations extends their services, which groups have representation in the seats of power, which groups’ interests the organizations’ missions serve. The affirmative action laws of Canada and the United States aim to put members of disadvantaged groups on an even playing field with others, so that they can compete fairly within the existing social, political and economic structure. In South Africa, in contrast, the institutional structures shaped by existing law coerces the majority into positions of subordination. Ensuring equitable representation in job categories and education will not alone alter the way practically every formal sector institution in South Africa helps to perpetuate the majority’s poverty and powerlessness. An affirmative action law that aids particular individuals to achieve their fair place in the social, economic and political structure, important as that is, could have as its consequence no more than making some changes in the complexion of high level job categories and university student bodies. Unless it explicitly seeks to change the governance or the basic mission and structure of every important organization, it will not likely empower the majority to participate in transforming and developing South Africa for the
benefit of all. As the RDP asserts, in South Africa, affirmative action measures "must . . . empower not only individuals, but communities and groups".

This analysis, then, suggests the general difficulties the proposed affirmative action law must address. First, like the U.S. Canadian and Malaysia laws, it must seek to eliminate discrimination in selecting candidates for places within existing institutions. Second, unlike those laws, it must seek to give those institutions, new missions and therefore new structures and procedures consistent with the Interim Constitution's imperatives. Finally, at every point, it must seek to empower the black majority to participate in both shaping and benefitting from the performance of the public and private institutions that shape South African economic, social and political realities.

Those three difficulties, however, constitute the general difficulties that the new government's entire legislative programme will address. Out of the bewildering maze of South African life, how to select those institutions to which this affirmative action law will apply?

For reasons that appear throughout this Memorandum, the central strategy of this bill (like that of the U. S. Contract Compliance Programme and the Canadian Equity in Employment law) rests on institutional self-action. The selection of the particular social problems related to apartheid that this bill addresses, therefore, rests upon their suitability for resolution,
at least in the first instance, through affirmative self-action. The criterion for selecting the particular public and private organizations to which the proposed affirmative action law will apply, therefore, rests on practical considerations.

Practical considerations also dictate the exclusion of three institutions which otherwise might seem ripe for affirmative self-action: The Army, the police, and trade unions. With respect to the uniformed forces, negotiations underway aim to transform them. It seems doubtful that they need this bill to aid that process. With respect to trade unions with discriminatory membership policies, the new labour law presently under consideration will undoubtedly ensure the elimination of those invidious legacies of apartheid.

Practical considerations may also require the exclusion of many other organizations that otherwise might fall within the ambit of the criterion for inclusion. The proposed bill gives the implementing authority to exclude categories of organizations from the bill's reach, but only on the ground of the lack of administrative resources.

In short, these considerations suggest three imperatives for the proposed bill, and one criterion for inclusion:

1. It must --
   a. eradicate discrimination within existing organizations that disadvantage the black majority;
   b. initiate processes to transform the mission and therefore the structures of organizations in accordance with the
new imperatives; and

(c) empower the black majority to participate in the governance of these organizations; and

(2) it must select the particular sorts of discrimination and the organizations involved in terms of their seeming capacity to engage in meaningful affirmative self-action.

B. THE DIFFICULTIES THIS BILL ADDRESSES

Pursuant to these criterion, the proposed bill addresses six sorts of discrimination against black people and women: (1) In employment decisions (in hiring, wage levels, promotion, discipline, and so forth); (2) in procurement contracts; (3) in granting educational places and funding, and in treatment of students; (4) by government agencies in the delivery of services; (5) in appointment to policy-making positions in organizations (boards of directors, boards of trustees, the highest level of executive posts); and (6) in mission statements and the structures that purport to carry out those missions.

1. Discrimination in employment. Over the last half century, and today, the apartheid system deliberately and explicitly deprived black people of the opportunity to participate in the management and development of a democratic state and economic system. Even when they possess the same educational qualifications, black people earn significantly less than whites doing the same kind of work. Typically, furthermore, whites enjoy additional perquisites and allowances that stretch even wider the gap between their wealth and privilege and the black majority's
Apartheid also fostered gaps between men and women, especially black women, but also between white women and white men. The apartheid legal order specifically restricted black women's access to land, urban residential housing, education and employment opportunities. As a result black women earn about a third the incomes of black men. "Only a quarter as many women as men hold jobs in the formal sector. High unemployment, the migrant labour system and the difficulties facing the informal sector hit them particularly hard" (RDP, 6th draft, Para. 4.1.6). White women have benefitted from greater educational and job opportunities than black men, as well as from the available pool of cheap black domestic labor generated apartheid. Nevertheless, they still remain restricted to less skilled, less prestigious jobs and receive average incomes only half those of white men.

Because of apartheid restrictions on training for black people at all skill levels, the relevant pools of qualified black workers necessarily remain smaller than the proportion they represent in the population. Until black people receive adequate education and training they will lack the capacity to perform skilled jobs at the levels of efficiency required to ensure the national political economy grows sufficiently to eradicate the black majority's poverty. Until they do receive that education/training, therefore, the relevant comparison for determining the proportion of black people and women hired under the affirmative action programme cannot consist of their proportion in the population at large, but rather
their proportion in the pools of qualified available black labor (male and female).

As illustrated by table 1 for education, extensive data documents the way apartheid has systematically deprived black people, and especially black women, of access to employment opportunities, training and promotion.

The table included here illustrates the kind of data required for each department of the civil service (eg education, health, housing, rural development, police, etc etc) and each parastatal and private enterprise presented separately for each major category of industry, agriculture, distribution and finance:

- total employment;
- black men and women as a percentage of total numbers of employees in each job category;
- the available pools of qualified black men and women at each skill level; and
- white women as a percent of total employees in each job category as a percent of the available pool of qualified white women.

<table>
<thead>
<tr>
<th>Total no. employed</th>
<th>As % of all employed</th>
<th>Available pool of black women</th>
<th>White women as % of pool</th>
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<td>National administrators</td>
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<td>Local administrat.</td>
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<td>Principles</td>
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<td>Teachers</td>
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<td>Maintenance</td>
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<td>Other</td>
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organizational policy-making. The massive disparity between the proportion of blacks in the general population, and those employed in skilled jobs, reflects the discrimination they face in obtaining upper-level training and education.

Considerable evidence reveals the disparity between their proportion in the general population, and the numbers of black people permitted to enter existing South African education and training institutions.

[This evidence should be presented for each educational and training category -- e.g. universities, technikons, medical schools, law faculties, etc. Again, to illustrate, a table re training for the Department of Education might look like this:

<p>| Table 2: Training programs within the Department of Education (combined statistics for 12 departments) |</p>
<table>
<thead>
<tr>
<th>Blacks as % of relevant population</th>
<th>Blacks as % of relevant student group</th>
<th>White females as % of relevant population</th>
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</table>

Primary school
Secondary School
Technical instits.
Universities
All others(a)

Note: (a) define the pools.

Where evidence does not yet exist, the legislation will have to provide measures for obtaining it.

b. Primary and secondary schools. Whether the self-audit/self-devided affirmative action plan strategy could work to desegregate primary and secondary education in South Africa seems at best doubtful. That issue depends upon the boundaries of the school district of each school -- a matter that can hardly be determined
by individual schools. It may be best to omit primary and secondary schools from the bill's provisions with respect of the composition of their student bodies.

3. **Delivery of governmental services.** The Interim Constitution states that "every person shall have the right to equality before the law" [Art. 8(1)]. To achieve that end, it enjoins the public service to "serve all members of the public in an unbiased and impartial manner". [Art. 212(2)(c)]. That it does not do so, either nationally, regionally or locally, everybody knows. The discriminatory skew in the delivery of government and parastatal services appears at every point. For example, for every white child in school, in 1992 the state spent four times as much as for each black child. The same holds true for housing, health facilities, roads, water, electricity, etc. (Insert tables).

4. **Distribution of power.** The literature notes what everyone knows: In government, in education, in the private formal business sector, white men hold all the reins of power (Insert tables) From the viewpoint of the black people and women, that in itself constitutes an obvious social problem. It also serves as a major explanation for the three difficulties earlier defined. So long as black people and women remain excluded from the decision-making processes, so long will the institutions that white males dominate likely discriminate against them.

5. **Discrimination in the mission statement.** Like any social and economic system, apartheid worked as it did because institutions nestled into its system -- in a word, apartheid became
institutionalized. Many institutions had an explicitly racist mission. For example, under apartheid, the Department of Education’s mission statement in terms limited it to servicing the white population; while the words of have changed, has the content of the curriculum and the impact of the system? Other mission statements had discriminatory impact even though they did not explicitly deny services to black people. If one asked ESKOM’s manager to state its mission, for example, no doubt he would reply that ESKOM should provide electricity to those sectors of society that need and could pay for it. Since whites had most of the money, that mission statement inherently discriminated against black people. If one asked for the Southern African Development Bank (DBSA)’s mission statement, no doubt its managers would reply "to supply credit for the population in the rural districts and the homelands, as evidenced by viable requests for credit." Since bank lending personnel negotiated loans with the homeland authorities -- and the homelands became the quintessential political structures of apartheid -- that too constitutes a discriminatory mission statement.

Mission statements like these furnished the framework for the institutionalization of apartheid. Changing them in light of the organization’s existing capacities and the capacities it might readily attain seems within the reach of self-action by the organizations concerned.

6. Procurement contracts. Today, almost half of South Africa’s black workers remain unemployed. Many must struggle for survival
by trying to run their own enterprises in the informal sector. The RDP (6th Draft), however, points out:

"4.1.5 A particular weakness of the economy, aggravated by racist policies, is the inability to maintain a dynamic small-scale and informal sector. Smaller firms, especially if owned by black people, can rarely develop productive linkages with the large-scale sector. Most people in the informal sector lack productive and managerial skills plus access to business sites, capital and markets. They face an array of repressive regulations originally designed to undermine black business and farming."

Fully to resolve the problems of small, black businesses probably requires special legislation. That legislation might well require remedies far beyond self-correction by existing organizations -- for example, a small business extension service, modelled after the pattern of any agricultural extension agency to help small businessmen with marketing and procurement problems; and a state-funded small-business development bank to make soft loans to small business. All that remains beyond the reach of a bill requiring existing institutions to use self-generated affirmative action to correct imbalances within their own spheres.

Nevertheless, as in other countries, the South African affirmative action law can help small, black- and female-owned businesses in one respect, by addressing the question of discrimination by formal-sector organizations’ procurement policies. What the RDP (Sixth Draft) states with respect of government procurement applies as well to private firms:

"4.5.4 All levels of the democratic government must review their procurement policies to ensure that, where costs permit, they support small-scale enterprise. In particular, we should explore new policies on the procurement of furniture and school uniforms, which
It seems impossible, however, to gather data on the demographic composition of the pool of suppliers of a particular good in order to compare it with the demographic composition of suppliers with whom formal sector organizations placed orders during the preceding year. Questions of price, quality and availability would make such a comparison meaningless. A more meaningful definition might compare the demographic composition of the universe of suppliers with those from whom a sample of formal sector organizations solicited bids.

[Here place a chart or table as above].

The next section discusses whose and what behaviours comprise these six sorts of discrimination.

C. WHOSE AND WHAT BEHAVIOURS: THE INSTITUTIONS OF APARTHEID

Laws can only attempt to solve social problems like discrimination by restructuring the social behaviours that comprise them. The analysis leading to a legislative programme must begin by identifying precisely whose and what behaviours constitute the social problems the legislation aims to overcome. Only after identifying these can a drafter write legislation addressed to them. Unless the legislation specifically addresses them, it will have little chance of changing their behaviours.

The institutions that perpetuate apartheid's many-layered discriminatory practices constitute complex organizations: Government agencies, parastatals and private employers that keep black people and women in the least skilled jobs and pay them less
than white males doing work often of even less worth, and rarely award procurement contracts to small, black-owned businesses; educational and training institutions that block the advance of black people and women; government agencies that distribute services on the basis of skin colour and gender; and everywhere, structures that ensure that white males sit in the seats of power, ruling under mission statements that implicitly, if not explicitly, often perpetuate discriminatory policies.

Although commonly treated as though they comprised individual rational actors, in fact these organizations all consist of a host of social actors interacting in complex ways. The proposed affirmative action bill addresses individuals whose behaviours perpetuate apartheid-like practices: Hiring officers in the public, quango and private sectors who select whom to employ; the personnel officers who select those who receive promotions and set their pay scales; procurement officers who decide from which firms to purchase goods and services; admissions personnel who award places in the several departments of a university, the finance officers who decide who receives bursaries, and the various instructors who grade students; the administrators who decide to whom to deliver rubbish collection services and running water, which streets to pave and which new schools to build; the boards who decide whom to select for membership in policy-making roles; the very senior officials (for example, the members of the Public Service Commission) who decide on the missions of the various organizations; and in every case, the officials who determine the
criteria and procedures by which all these people make their decisions. To change discrimination by all these collectivities, the law must change the behaviours of the many individuals who actually formulate and implement the discriminatory policies.

So deeply does apartheid penetrate South African life that the numbers of social actors whose behaviours perpetuate its discriminatory impact appear legion: Personnel officers not only in the public service, but also in thousands of diverse private enterprises, quangos, parastatals organizations, and local and regional administrations; procurement officials in all of these; persons selecting candidates for educational places and funding in a bewildering maze of educational institutions; in governmental, parastatals and quangos, and even in some private enterprises (for example, banks), those officers who determine who receives governmental services; in every organization, the people who decide who becomes a policy-maker, and who decides on the organizations mission statement. Transforming the institutions of apartheid means changing the behaviours of all these people. Except in the most general terms, without a great deal more research even to catalogue them all remains all but impossible. Until identified, however, nobody can draft or promulgate rules likely to change their behaviours.

The mechanism that the bill creates must contain a process of identifying both the social actors who actually make the decisions that together spell continuing apartheid, and the factors that cause their behaviours.
social actors' behaviours, to illustrate the requirements of the self-enforcement process the proposed bill must prescribe.

II. THE CAUSES OF DISCRIMINATORY BEHAVIOURS

The problem-solving methodology requires that legislative solutions address the causes of the identified behaviours that constitute social problems like those inherited from past apartheid. Despite the Interim Constitution's prohibition against all forms of discrimination, the data included in Part I illustrate that institutions still disadvantage black people and women; that is, various social actors in these organizations still behave in ways that -- whatever their conscious intent -- discriminate against black people and women. This Part introduces a research agenda, set of categories to help generate hypotheses as to all the possible factors, both subjective and objective, likely to cause people to behave as they do in the face of a rule of law. It then reviews those categories to suggest some hypotheses as to the causes of the discriminatory behaviours of only one set of social actors, the officials responsible for hiring personnel for the public service. The complexity of these interrelated hypotheses and the evidence required to prove them underscore the conclusion that the affirmative action law here proposed cannot possibly detail provisions prescribing each set of actors' changed behaviours. Instead, it must provide criteria and procedures for a process of engaging those affected in conducting the investigations necessary to uncover the causes of discriminatory behaviours as a basis for designing measures to fundamentally
change them.

A. WHY DO PEOPLE BEHAVE AS THEY DO IN THE FACE OF A RULE OF LAW?

This section first introduces a general model to explain why the relevant social actors -- indeed all people -- behave as they do in the face of a rule of law. It then suggests some detailed categories useful in generating hypotheses as to the reasons for their specific behaviours.

1. A general model of behaviour in the face of a rule of law.

MODEL I: THE FACTORS INFLUENCING ROLE OCCUPANTS’ BEHAVIOURS IN THE FACE OF LAW

As the model indicates, lawmakers address rules to the relevant actors -- sociologists call them 'role occupants' -- telling them how the lawmakers expect them to behave. Simultaneously, the lawmakers address rules to implementing agencies, telling them what they must do to ensure that the role occupants obey. The role occupants may comprise private citizens or companies, public officials who decide the policies of implementing agencies, or even
The model suggests that role occupants and implementing agencies do not behave merely by obeying the rule. Rather, they choose among the constraints and resources existing in their unique social and physical circumstances. Those circumstances include the threats and promises of implementing agency sanctions. An implementing agency, however, acts not merely pursuant to the law that instructs them, but also by making choices within the constraints and resources of its environment.  

2. The ROCCIPI categories. Model I leaves vague the structure of the non-legal constraints and resources in the role occupants’ differing circumstances which may influence their behaviours. Besides the existing rule itself, six other sets of factors may contribute to causing them to behave as they do: their Opportunity; their Capacity, whether the authorities have Communicated the law to them; their own perceived Interest in obeying the law; the Process by which they decide how to behave; and their Ideology. (Using R for the category of existing Rules,

3. When drivers drive their cars on a highway at speeds well over the limit, they take into account not the penalty prescribed by the law, but the possibility that a policeman patrolling the highway who might catch them.

4. Most research for legislative drafting purposes focuses on examining the rules in the books. Legal realists, however, recognize that the law-in-the books seldom matches the law-in-action. Most lawyers and mainstream economists tend to believe that only self-interest motivates behavior in the face of a rule of law. Most sociologists assign primacy to ‘values and attitudes.’ Both sets of variables affect behavior, but whether individual or together, they still do not exhaust the categories of possible factors explaining behaviors (A. & B. Seidman, Ch. 6)
the mnemonic, ROCCIPI, formed by the first letters of each category's name, facilitates remembering them). Together, these categories provide a research agenda or check list of possible explanations -- that is, hypotheses -- for the behaviours of particular role occupants. Those hypotheses do not constitute explanations for behaviour, but only educated guesses as to possible causes. They do not substitute for empirical research; they do, however, help to guide investigations by indentifying the facts required to falsify them. If proven consistent with available evidence, they logically suggest the range of legislative measures required to alter the causal factors, and thus to overcome the (undesirable) behaviors.

**B. EMPLOYING THE ROCCIPI RESEARCH AGENDA TO EXPLAIN THE BEHAVIOUR OF PUBLIC SERVICE OFFICIALS**

Unless the rules directed to the role occupants address the causes of the behaviours that perpetuate apartheid, they will likely merely poultice the symptoms. The rules must provide detailed prescriptions premised on a thorough knowledge of the specific causes of the undesirable behaviour; otherwise, they necessarily leave to the role occupants broad fields of discretion in deciding what new behaviours to adopt. The greater the discretion left to the role occupants, the more they will likely act in ways that reflect their personal interests and ideologies -- and the devil take the legislation's objectives. In the context of the affirmative action law, unless the drafters acquire adequate information about the specific causes of discriminatory behaviours, they cannot formulate the kinds of detailed rules required to limit
role occupants' discretion in deciding how to change their past discriminatory behaviours.

The ROCCIPI categories help to identify detailed explanatory hypotheses concerning the likely causes of problematic behaviours. The analysis in Part I of the many role occupants who may exhibit one or more of the six aspects of discriminatory behavior suggests no drafter can possibly detail all the possible explanations of all their behaviours. To illustrate the complexity of those possible causes, and the wealth of evidence required to warrant them, this section employs the ROCCIPI agenda to review the available evidence to generate hypotheses to explain the discriminatory behaviour of only one set of officials, the public service personnel who decide whom to employ:

(1) Rule: To what extent do the existing rules adequately prescribe the role occupants' desired behaviours? If obeyed, will those rules achieve a public service that consists of a cross-section of the nation's population? Do the rules sufficiently sufficiently limit discretion by providing criteria and procedures to guide their decision-making processes? Do they convey their message in language appropriate to their intended readers?

The Interim Constitution states that the public service shall (inter alia) "promote an efficient public administration broadly representative of the South African community. . . [Section 212(2)(b)]," and that "[e]mployment in the public service shall be accessible to all South African citizens who comply with the requirements determined or prescribed by or under any law for
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employment in such service [Section 212(3)]". It also provides, however, that the Public Service Commission decides on regulations for hiring, training and promotion [Interim Constitution, Section 210(1)] -- and that, until changed, the existing Public Service Commission remain in office, subject to the same rules as before [Sections 238(1), 236(3)]. It specifically asserts that all the rules that prescribed the behaviours of "an institution which immediately before the commencement of this Constitution performed governmental functions" shall continue in force until changed [Section 236(3)]. In other words, the rules that today control the hiring, training, promotion and discipline of members of the public service remain today as they were before the Interim Constitution.

Aside from the abolition of explicitly discriminatory clauses introduced by the apartheid regime (and only careful examination of each law can ensure the achievement of that minimal requirement), no law that today structures the public service specifically addresses the issue of rooting out official behaviours that perpetuate apartheid. Even if no provisions prohibit the appointment of black people, no provisions require that in selecting candidates for those ranks the public service in which black persons and women have practically no representation, officials must undertake affirmative action to rectify historically-imposed imbalances. No provisions in the existing law require, far less specify criteria and procedures, for hiring or training and promoting black people, including women. No law or regulation requires responsible officers to examine their hiring
criteria and procedures to see which of them may have a disparate impact on black people and women, and to substitute criteria and procedures to give an edge to the historically disadvantaged. In short, where they do not explicitly discriminate, existing laws and regulations grant the role occupants almost complete discretion (that is, all but complete power) to decide not to appoint, hire, train, or upgrade black people, and not to change existing criteria and procedures that militate against their appointment.

To prove these hypothetical propositions requires a critical review of evidence, that is, the detailed provisions, including the precise wording, of the existing laws structuring the Civil Service, and the regulations passed by the Civil Service Commission.

(2) Opportunity and (3) Capacity. Do the role occupants have the opportunity and capacity to behave in conformance with affirmative action goals, or do they respond to other opportunities and capacities which lead them to behave in ways contrary to those objectives?

The broad discretion granted members of the Public Service Commission likely gives them the opportunity and the power to rewrite regulations requiring the hiring, training and promotion of black people for posts at specified skill levels. The experiences of Kenya, Zambia and Zimbabwe, and other countries, however, indicate that for several reasons, as long as the same members remain in office, they generally lack capacity to do so, even should they so desire. First, born and bred under the rigid
circumstances of apartheid, these officers lack knowledge of the size of existing available black labor pools, how to facilitate recruitment of qualified black people and women, how to create job criteria without unseen disparate impacts on black people and women, how to assess properly the educational qualifications of black people. Elsewhere, the use of standardized (often written) tests for culturally distinct groups have had a disparate impact; it seems doubtful that many personnel officers in the South African Public Service have even considered that problem, far less the importance of introducing alternative testing techniques. Language differences may also thwart training personnel's ability to mount appropriate training programs.

Secondly, a principal cause for failure to employ more black persons and women may consist of the small size of the pool of qualified black and women candidates. That probably does not coincide with the fact insofar as a general arts degree satisfies the requirements for a posting in the administration; it may hold with respect to some specialized positions (for example, in engineering). That, however, does not ipso facto relieve the Service of responsibility. To the extent that it can, under affirmative action it has a responsibility to take steps to increase the size of the pool, for example, by offering training courses, or using its considerable prestige to persuade university engineering departments to do so. Existing officials may not,

5. One educated guess suggests that at least 150,000 Africans hold BA degrees (Neil Parsons, interview, January 10, 1994).
however, have the skills required to introduce the appropriate training programmes.

To falsify these hypothetical propositions requires gathering evidence of a different sort. Specifically, it requires detailed information about the training and qualifications of all the personnel responsible for hiring, training, and promoting employees in every department of the Public Service.

(4) Communication. Have the law makers established adequate channels to inform the role occupants about changes in the existing legislation?

Explanations generated by considering this category seem less likely to influence the decision-making behaviour of role occupants like officials employed by the Public Service. It seems probable that Public Service Commission members may have participated in formulating new legislation relating to discrimination in employment and training. It seems only somewhat less likely that civil servants, even in remote rural posts -- for example, in locations where a high percentage of South Africa's black unemployed, especially black women, live -- will receive communications concerning new affirmative action law or black peoples' rights under them. That suggests that the causes of continued discriminatory behaviours would probably lie elsewhere than in their lack of knowledge of changes the new law-makers might make in the relevant laws.

To test this set of propositions would require tracing for each department the channels of communication between the law-makers and
the Public Service Commission, and from the Commission to the relevant personnel in the provinces and local governments.

(5) **Interest**: To what extent do the way role occupants behave in light of existing legislation reflect their own perceptions of their interests?

Some Public Service Commission members might consider it in their own as well as national interest to slow down the employment and promotion of black people in skilled and decision-making posts. They might view this as one way to protect the white power base the apartheid era established in high level government posts.

Lower level Public Service managerial personnel’s interests may reflect their perceptions of factors likely to influence their own job and salary status. Consciously or unconsciously, they may fear the competition that an increased pool of candidates may pose for their own jobs and promotion opportunities. They may still believe that, as in apartheid’s heyday, their own promotions and salary increases hinge on a continued failure to hire, train or promote black people and women.

Again, these hypotheses require empirical warrant. That calls for a variety of social science techniques designed to assess the influence of interest on behaviours. All of these require further resources for the research.

(6) **Process**: The process by which role occupants decide whether and how to obey the law lies at democracy’s heart, for it determines the extent to which and how popular participation may influence the decision-making process.
The public service departments, in which officials decide on hiring, training and promoting individuals, constitute complex decision-making organizations. As Model II indicates, complex organizations involve the interactions of the relevant role occupants at several points. Each of the processes shown in the model consists of sets of role occupants who make decisions concerning employment, training, and promotion in the context of long-established formal and informal rules.

MODEL II: COMPLEX DECISION-MAKING PROCESSES

input processes conversion processes output processes

As Model II suggests, in complex organisations like Public Service departments role occupants make decisions which might contribute to perpetuating discrimination in employment, training, and promotion at three points:

1) In determining whose and what inputs to consider: In the past, certainly, and probably still today, white males often constitute the only job candidates recommended for consideration by (usually white) government or private agencies or relevant educational institutions -- typically contacted informally through an 'old (white) boys' network. Inevitably, this process narrows the likelihood that relevant officials can even learn about the availability of qualified black candidates;

2) In the conversions processes relevant officials use in deciding whether to hire, train or promote particular individuals, the kinds of criteria and procedures used may prove despositive. The kinds of standards adopted or the way the officials apply them may block advancement of qualified black people and sometimes women, because of cultural or language differences that hinder an adequate assessment of their actual relevant capabilities.
3) In the feedback processes the officials introduce to learn of the consequences of their decisions. Experience elsewhere suggests that few officials actually introduce any form of systematic feedback mechanism to discover the consequences of their decisions, especially those relating to workers they did not hire, promote or train. If candidates chosen fail to reach their (often inadequately formulated standards), the officials simply replace them by others -- typically using the same selection system, no matter how biased!

In South Africa, as in most of formerly colonial Africa, in most cases the actual processes by which government officials make these three sets of decisions remain hidden behind the closed doors of the bureaucracy. A host of government secrecy acts protect officials' decision-making from outside scrutiny and interference. Experience elsewhere suggests that, as long as these three decision-making processes remain secret, biases almost inevitably creep in. Only by making them open to the public, by ensuring the relevant officials' accountability to appropriate authorities, and providing the opportunity for feedback from the affected community as to their decisions' consequences, can any system effectively avoid the kinds of racist and sexist biases bred by half a century of apartheid.

To prove this set of explanatory propositions valid in light of available evidence would require detailed analysis of the decision-making processes adopted by the relevant officials. A survey of a representative sample of the hiring, training and promotion personnel should provide information concerning the criteria and

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6. Acting according to these rules, civil servants required even the new members of the Transitional Executive Council to pledge not to reveal to the public the factors influencing TEC policy decisions!
procedures they adopted. Studies (Klitgaard, elsewhere argue that it pays to engage the representative decision-makers, together with those affected, in the investigative process.\(^7\)

(vii) **Ideology:** Role occupants' values and attitudes, or ideologies, often influence their behaviours, especially if the process does not require them to justify their decisions.

Almost inevitably, the relevant white officials, indeed every white in South Africa, must have imbibed (unconsciously, if not consciously) values and attitudes infected by the virus of apartheid. These may take many forms, ranging from outright racist assumptions that black people remain inherently incapable of learning the skills required for modern government to the notion that women should remain at home taking care of their children. These kinds of values and attitudes almost inevitably must influence the relevant officials' decisions as to whether or not to hire, train and promote black people and women. For higher-skill-level jobs, a prevalent ideology among managerial personnel asserts, without investigation, that no black person or woman can possibly have -- or acquire -- the skills necessary to do the job. That ideology tends to block them from even looking for the pool of available qualified black people and women.

Social scientists have long since documented the persistence of

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\(^7\). Often that procedure helps the former to discover for themselves the kinds of unrecognized biases that shape their behavior; and empowers the latter by enabling them to better understand the system they seek to change (See Klitgaard, Robert. 1991. *Beyond the State versus the Market in Economic Development*. San Francisco: ICS Press).
such discriminatory attitudes and values, many of them unrecognized by their holders. Further studies must expose the specific ways in which of Public Service officials’ ideologies impact on their decisions relating to hiring, training and promotion in South Africa exist.

In sum, review of the ROCCIPI agenda structures analysis of the range of possible factors likely to cause public service managerial personnel’s resistance to affirmative action measures: The existing laws grant them discretion to decide whom to hire, train, and promote; they typically lack knowledge of the available pools of skilled black people and women, and the capacity to judge their real qualifications; their own interests may militate against a vigilant search for those qualified; government’s typically secret decision-making processes conveniently mask their (consciously or unconsciously) biased behaviours; and their values and attitudes may tend to rationalize their continued use of employment practices that perpetuate apartheid.

This review exposes the many complex interrelated explanatory factors likely to influence only one set of role occupants’ discriminatory behaviours out of the six sets the affirmative action law should address. To warrant these kinds of detailed explanations for the relevant role occupants’ behaviours in all public and private agencies and firms to lay a sound for the kind of detailed rules the new affirmative action law must introduce

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would require gathering infinite amounts of evidence. In other words, this review illustrates the impossibility -- given government’s existing financial and human resources -- of undertaking the necessary investigations relating to all six sets of discriminatory behaviours before drafting the law. Instead, the law itself must set in motion a process of self-action to gather the necessary information and formulate the detailed rules prescribing the desired changed behaviours for the myriads of different role occupants in the public and private sector.

The next part considers the logical implications of the need for these sorts of detailed explanations and their supporitng data for the proposed affirmative action law.