

# The Law Society of South Africa

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## **'Distribution of Legal Work'**

**Final Report on Research Findings on the Distribution  
of Legal Work in the Legal Profession in South Africa,  
and Report on the Summit on Briefing Patterns  
in the Legal Profession 13 July 2016**

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DRAFT: For comment

# Chapter One

## 1. Executive summary

This study was commissioned by the Law Society of South Africa (LSSA) to investigate the distribution of legal work from 5 January 2015 to 12 February 2016 by national Government Departments (Government Departments) and State-Owned Enterprises (SOEs) to advocates and law firms.

### 1.1 *Aim of the study*

The purpose of the study was primarily to investigate how Government Departments and SOEs distribute their legal work to advocates and law firms in terms of race, gender and value, among other things.

### 1.2 *Methodology*

The study adopted a quantitative and qualitative research approaches.

### 1.3 *Findings*

#### ***Government Departments - distribution of work and payments to advocates***

- The work is not distributed evenly among advocates, there are only few advocates who receive most of the work from time to time.
- There is a significant gap between male and female advocates, with the latter being at the bottom of the list from those who get work.
- A handful of black male advocates followed by their white male counterparts are the major recipient of legal work from Government Departments.
- A certain minority of black female advocates are the major recipient of most of the legal work from Government Departments.
- A certain few black male junior advocates are the major recipients of legal work from Government Departments.

- All coloured senior and junior advocates (male and female), Indian senior and junior advocates (male and female), white junior and senior advocates (female) receive less work from Government Departments.
- In terms of payment, the few advocates who get more work (black male advocates and white male advocates) are the most paid by Government Departments.
- In certain instances, it depends on the nature and value of the work received by an individual, for example, in terms of distribution of work by Government Departments, there were five black female junior advocates who received work and two Indian female junior advocates who were briefed. However, when it came to remuneration, the payment of two Indian female junior advocate was slightly lower than that of the five black female junior advocates. This means that even though the five black female junior advocates received more work, it was not that lucrative compared to the work received by two Indian female junior advocates. One would have expected a huge margin when it came to payment of work for two Indian female junior advocates and five black female junior advocates.

#### ***State-Owned Enterprises - distribution of work and payment to advocates***

- The work is not distributed evenly among advocates, but only a few who receive most work from time to time.
- There is a significant gap between male and female advocates with the latter being at the least of those who get work.
- A handful of black male junior advocates followed by a certain few white male senior advocates are the major recipient of legal work from SOEs.
- Indian male senior advocates are in the third place of those who receive work from SOEs and are followed by black female junior advocates.
- Senior black male advocates are in fifth place.
- Senior white female advocates and senior coloured male advocates are both in sixth place.

- In terms of payment, it dependent on the nature and value of the work that an individual advocate had received. White male senior advocates followed by Indian male senior advocates are the most paid.

#### **Distribution of work to law firms by SOE and Government Departments**

- Certain few black law firms are the recipients of most of the legal work and are the most highly paid law firms.

#### **1.4 Conclusions**

The report concludes that Government Departments mostly give their work to black male advocates and black female advocates. Black male advocates and black female advocates are also the ones who are highly paid. SOEs also give most of their work to black male junior advocates and to certain white male senior advocates. In terms of payment, specific white senior male advocates are the highly paid. Female advocates, with the exception of black female advocates, receive less work or no work from Government Departments and SOEs.

The report also concludes that only a certain few black law firms are receiving most of the work and are the most paid law firms when they are compared with white law firms.

#### **1.5 Recommendations**

It is recommended that there must be a body that will be responsible for, *inter alia*, ensuring that certain individuals and law firms are not favoured over others. The monitoring body should also oversee that work is consistently distributed to all law firms and across all the races in respect of advocates. Ultimately, it is recommended that there must also be a study that will investigate the distribution of work in the private sector.

## Chapter Two

### 1. Introduction

The membership of the General Council of the Bar (GCB) currently indicates that there are 2 641 practising advocates who are members of the GCB throughout South Africa.<sup>1</sup> Their representation in terms of race, gender and number is illustrated in terms of the table below.

WHITE		BLACK		COLOURED		INDIAN	
MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
1 374	428	405	132	63	46	117	76

- Advocates

The current statistics in the attorneys' profession reveals that there are 12 373 law firms in South Africa and 24 330 practising attorneys.<sup>2</sup> There is a concern within the members of the legal profession that out of 2 641 advocates and 12 373 law firms, only a few advocates and a certain few law firms that receive most of the lucrative work from Government Departments and SOEs thus leaving a large portion of other advocates and law firms with little or no work.<sup>3</sup>

The uneven distribution of legal work among the advocates' and attorneys' professions has received considerable media coverage in South Africa.<sup>4</sup> It has become a general view that black advocates and black law firms are receiving less work from the private sector, SOEs and Government Departments.<sup>5</sup> Certain protests and media reports also seem to bear testimony to the preceding general observation. Even though the

<sup>1</sup> General Council of the Bar of South Africa Membership Statistics as at 30 April 2015. The file is on file with author.

<sup>2</sup> Statistics for law firm and practising attorneys are available at <http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession> (Date of use: 10 May 2016).

<sup>3</sup> N Manyathi "Lack of advancement of black and female lawyers in the spotlight" *De Rebus*, July 2015:12 [2015] DEREBUS 4.

<sup>4</sup> See *inter alia*, P Nombembe and A Narsee "Black advocates cite racism as they feel the financial pinch" *Sunday Times News* 10/05/2015 available at <http://www.timeslive.co.za/sundaytimes/stnews/2015/05/10/Black-advocates-cite-racism-as-they-feel-the-financial-pinch> (accessed 15 March 2015); Advocates for Transformation "Black advocates tell court they object to 'racist sting'" [http://www.groundup.org.za/article/black-advocates-object-racist-sting-court\\_3430/](http://www.groundup.org.za/article/black-advocates-object-racist-sting-court_3430/) (Accessed 19 March 2016).

<sup>5</sup> The findings on the distribution of work for law firms will not indicate gender as the study only focused on how law firms are getting work. The information will be presented in terms of race (White and Black).

distribution of legal work remains one of the topical issues in South Africa, there is a dearth of literature that can be easily consulted to show the current and accurate data on the distribution of legal work in the legal profession. The existing research on South Africa's legal profession does not cover the entire profession.<sup>6</sup> For example, areas that have been studied before include the composition of the judiciary and demographics in large corporate law firms.<sup>7</sup> The distribution of work to and payment of advocates and law firms remains unknown.

This study is, therefore, pivotal as it will provide a clear picture of the current state of affairs and further confirm or rebut the general view that black advocates and black law firms receive a lesser amount of work.

### **3. Scope of the study**

The scope of the study was to investigate the manner in which Government Departments and SOEs distributed their legal work to advocates<sup>8</sup> and law firms. The amount paid to a specific race, gender and seniority of advocates and law firms will also be considered. The study covered the period from 5 January 2015 to 12 February 2016.

### **4. Limitation of the study**

The study focussed on finding how Government Departments and SOEs distribute their legal work to advocates and law firms. Therefore, issues such as how private enterprises distribute their work, are beyond the ambit of this research.

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<sup>6</sup> CALS Report on the Transformation of the Legal Profession August 2014, 11-12,65, 67 available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf> (date of use: 5 February 2015).

<sup>7</sup> J Klaaren "Current Demographics in Large Corporate Law Firms in South Africa" *African Journal of Legal Studies* 2014 (7) 587–594; CALS Report on the Transformation of the Legal Profession August 2014, 65, 67.

<sup>8</sup> It is a well-known fact that advocates get their work from attorneys. However, in this instance, it must be highlighted that in all instances Government Departments and SOEs have a say about which advocate or law firm has to be given work. State Attorneys are also to a large extent responsible for briefing advocates.

#### **4. Research question**

To ascertain how the Government Departments and SOEs distribute their legal work to advocates and law firms.

#### **5. Methodology**

The study adopted qualitative and quantitative methods of conducting research. Qualitative and quantitative approaches were undertaken. The former entailed a literature review on the subject to ascertain the current status on briefing patterns in the legal profession and whether there has been any study conducted before on the field.<sup>9</sup> The latter involved a questionnaire that was sent to Government Departments and SOEs requesting data in terms of race, gender, seniority and how the work distributed.<sup>10</sup> The amount paid for work done by each advocate and law firm was also requested.<sup>11</sup> Request for information was sent to 49 SOEs.<sup>12</sup> There are only 7 SOEs who responded

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<sup>9</sup> C Williams "Research methods" 2007 (5) *Journal of Business & Economic Research* 67.

<sup>10</sup> C Williams "Research methods" 2007 (5) *Journal of Business & Economic Research* 67.

<sup>11</sup> For the purposes of this study, the identity of an individual and the amount paid to him or her will not be disclosed for reasons that include privacy and security. Instead, the amount will be disclosed as an overall amount paid to a specific race.

<sup>12</sup> These are namely; Transnet, Telkom, State Information Technology Agency, Special Investigating Unit, South African Veterinary Council, South African Tourism, South African Reserve Bank, South African Qualifications Authority, South African Post Office, South African Nuclear Energy Corporation SOC Ltd, South African National Road Agency, South African National Parks, South African Local Government Association, South African Express, South African Civil Aviation Authority, South African Bureau of Standards, South African Broadcasting Cooperation, Safety and Security, Sector Education and Training Authority, Road Accident Fund, OR Tambo International Airport, National Student Financial Aid Scheme, National House of Traditional Leaders, National Gambling Board of South Africa, National Economic Development and Labour Council, National Development Agency, National Credit Regulator, National Consumer Commission, National Arts Council of South Africa, National Archives of South Africa, National Advisory Council on Innovation, Land Bank and Agricultural Bank of South Africa, Health Professions Council of South Africa, Government Pensions Administration Agency, Government Employees Pension Fund, Government Employees Medical Scheme, Financial Services Board, Estate Agency Affairs Board, Eskom, Development Bank of Southern Africa, Denel (Pty) Ltd, Council on Higher Education, Competition Commission, Companies and Intellectual Property Commission, Commission for Conciliation, Mediation and Arbitration, Children's Rights and Responsibilities Branch, Broadcasting Complaints Commission of South Africa, Armaments Corporation of South Africa, South African Airways, and Airports Company South Africa. It must be mentioned that a small amount of the letters requesting information did not go through via email because of outdated email addresses. Attempts were made to fax them but they also did not go through. As a last resort, telephone calls were made to SOEs whose email addresses and fax numbers were not working. Some answered the phones and provided the LSSA with updated contact details. Others did not answer the phones.

to the request made by LSSA.<sup>13</sup> Request for information on distribution of legal work to advocates and law firms were also sent to 43 Government Departments.<sup>14</sup> There are only 7 Government Departments who responded.<sup>15</sup> The lack of response from Government Departments and SOEs has a negative impact on the outcomes in that the findings are inconclusive.

## Chapter Three

### **1. Information requested from Government Departments and SOEs**

In order to study, examine and arrive at a conclusion, the author requested information from Government Departments and SOEs. Overall, an information was requested from 93 institutions (Government Departments and SOEs) in the form of a sample questionnaire which included the name of the person receiving work, race, gender and the amount paid.<sup>16</sup>

### **2. Responses received from Government Departments and SOEs**

It must be mentioned that a small amount of requests for information did not go through because of outdated contact details on certain Government Departments and SOEs websites. Some letters were faxed, but did not go through. Attempts were also made to contact the departments and SOEs that the LSSA sought information from telephonically, but these attempts also failed. Therefore, there were only 14 responses with useful information as requested.

Certain Government Departments and SOEs (to be mentioned later in the study) expressed their commitment to transformation in the legal profession especially with regard to uneven distribution of work. However, they did not provide any information

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<sup>13</sup> These are namely; National Student Financial Aid Scheme, Council on Higher Education, Special Investigating Unit, South African Express, Land Bank, Road Accident Fund and Airports Company South Africa.

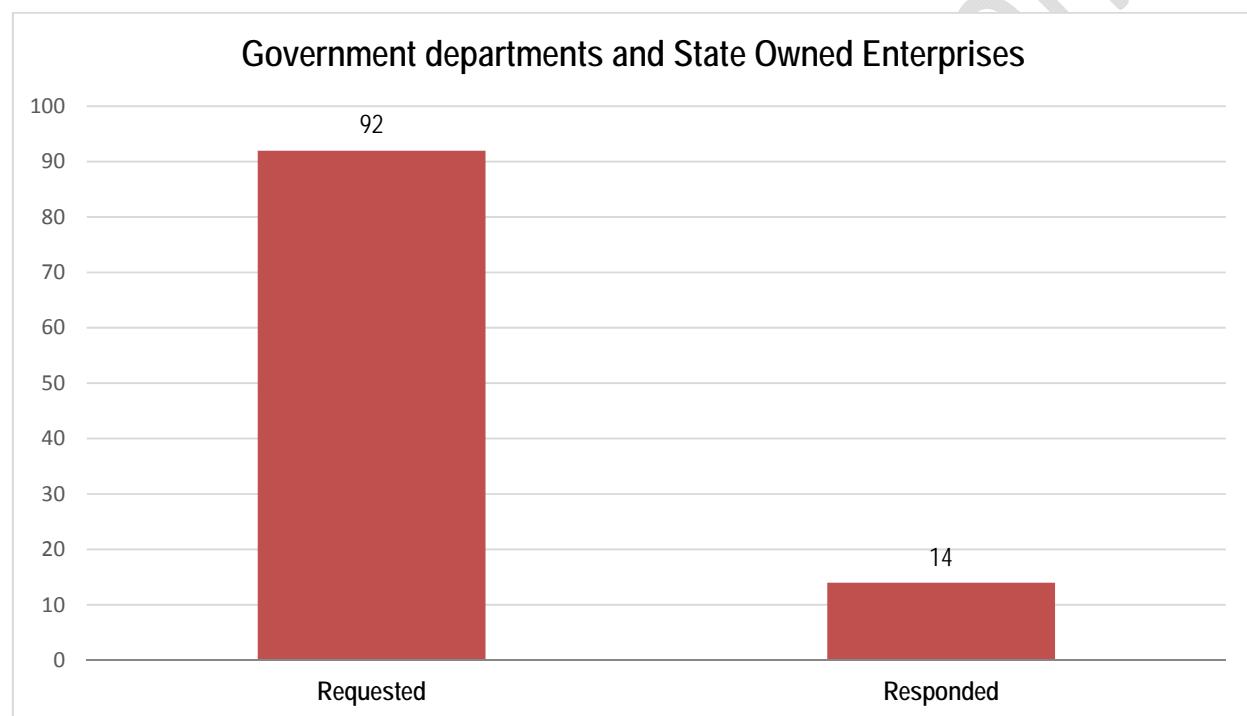
<sup>14</sup> This means that information was requested to all National Government Departments with the exception of the Office of the Chief Justice and the Department of Military Veterans.

<sup>15</sup> These are namely; Department of Energy, Department of Communications, Department of Water and Sanitation, Department of Public Service and Administration, Department of Public Enterprises, Department of Transport, and the Department of Mineral Resources.

<sup>16</sup> A sample of request for information sample is attached herein marked Appendix C.

because of confidentiality clauses with certain law firms. Confidentiality clauses prohibit the publication of such information to third parties without the necessary consent. They nonetheless advised the LSSA to request permission from the relevant law firms and thereafter write to them together with a letter granting such permission from the relevant firm.

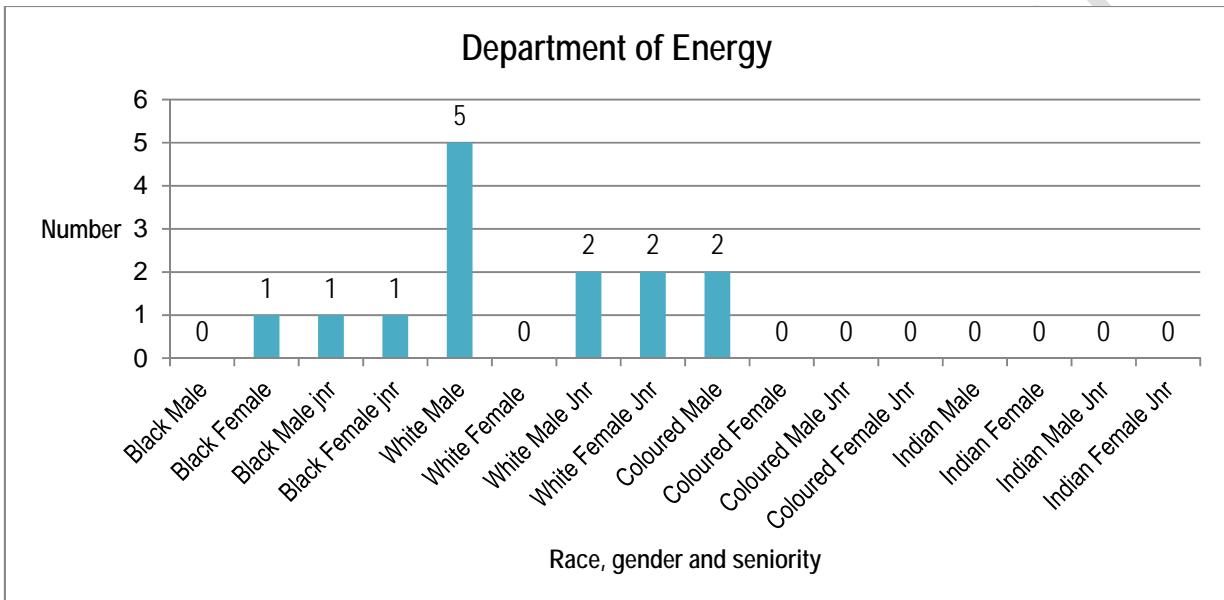
### **3. Information requested and responses**



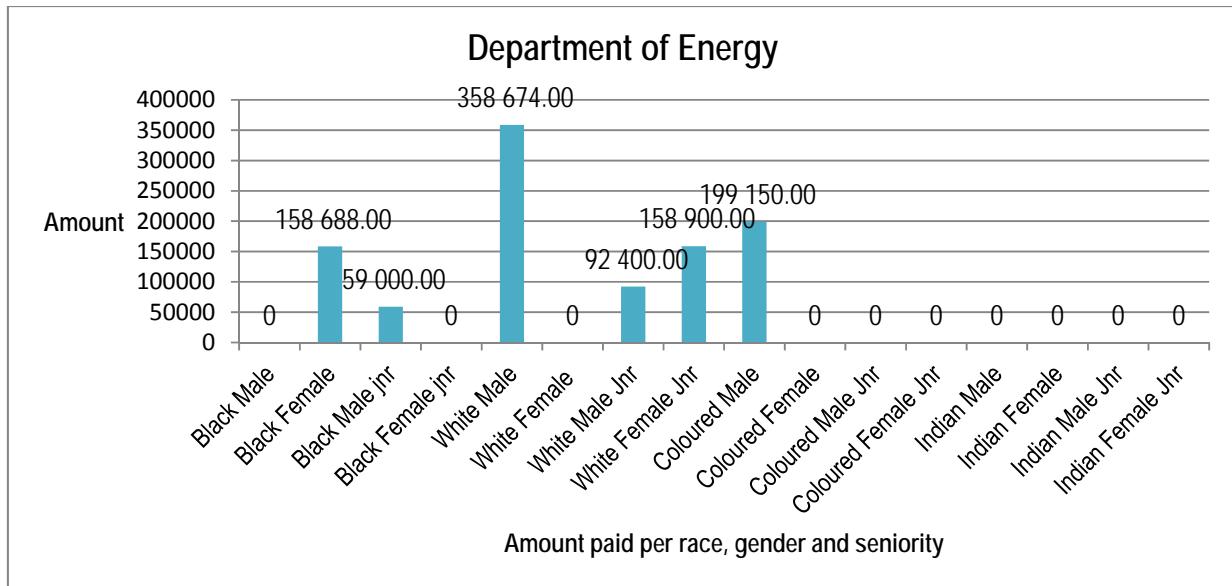
## 4. Presentation of responses from Government Departments

### 4.1 Department of Energy

#### 4.1.1 Distribution of work to advocates



#### 4.1.2 Amount paid



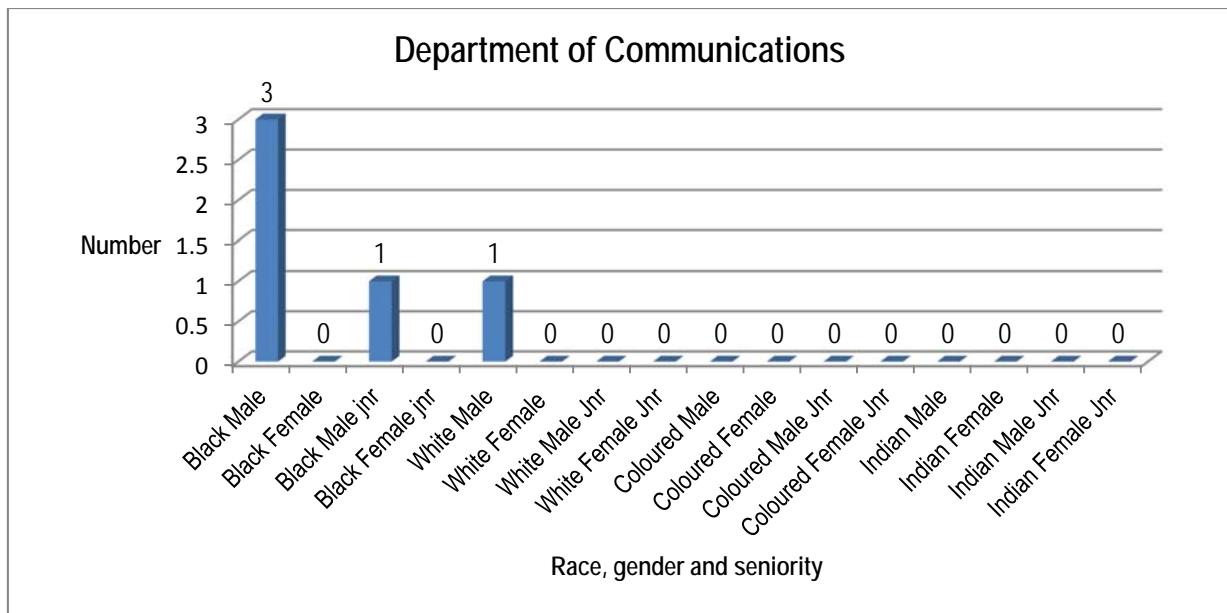
- The Department indicated that it had not yet paid some of the legal costs during the period of 5 January 2015 to 12 February 2016.

#### 4.1.3 Comments

Advocates from the Indian and coloured (male and females) communities are to a great extent overlooked. Women from the aforesaid race are also at a disadvantaged position. Amounts paid to counsels differ in a fairly reasonable manner. This obviously depends on the nature and value of the work given to an individual. The study has also established that there are three certain individual white male advocates and coloured male advocates who are regulars in terms of getting lucrative work. This is possibly due to the fact that when an advocate gets more work, he/she is more likely to appoint a junior that he/she has established a good relationship with. The State Attorney is responsible for briefing.

### 4.2 Department of Communications

#### 4.2.2 Distribution of work to advocates



#### 4.2.2 Amount paid

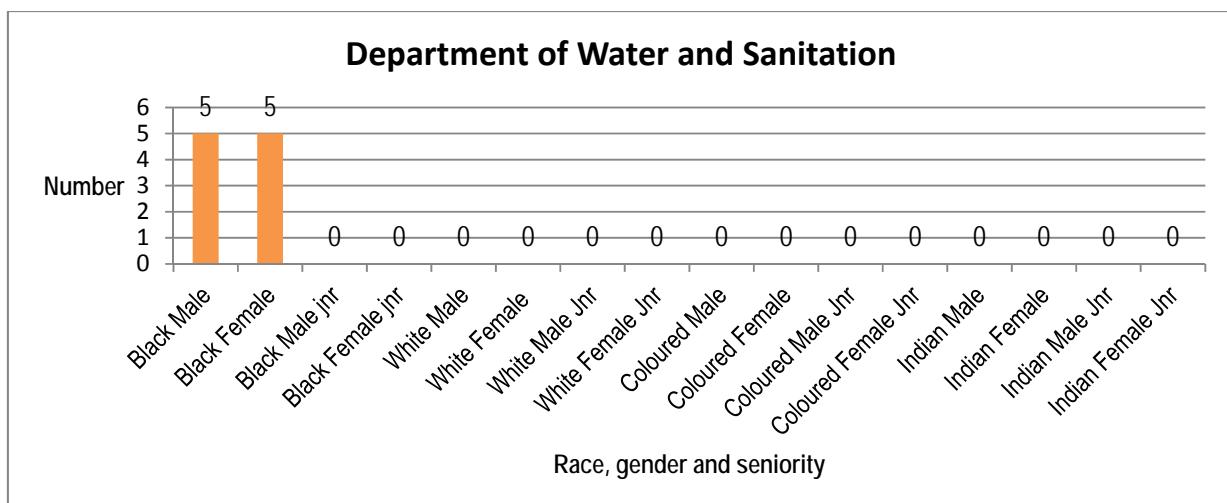
The amount to be paid to advocates was not yet known by the department when the information was supplied to the LSSA.

#### 4.2.3 Comments

In this department, females across all races do not receive any work. Indian and coloured male advocates also do not feature anywhere in terms of receiving work. Advocates are briefed by the State Attorney.

### 4.3 Department of Water and Sanitation

#### 4.3.1 Distribution of work to advocates



#### 4.3.2 Amount paid

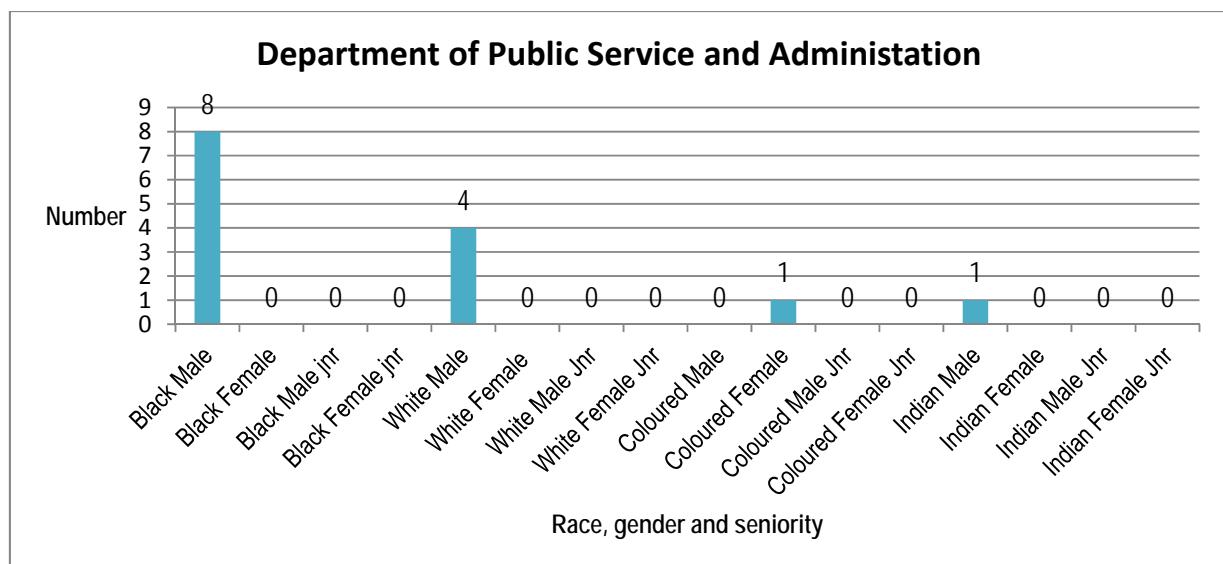
The amount paid was not yet known by the department when the information was supplied to the LSSA.

#### 4.3.3 Comments

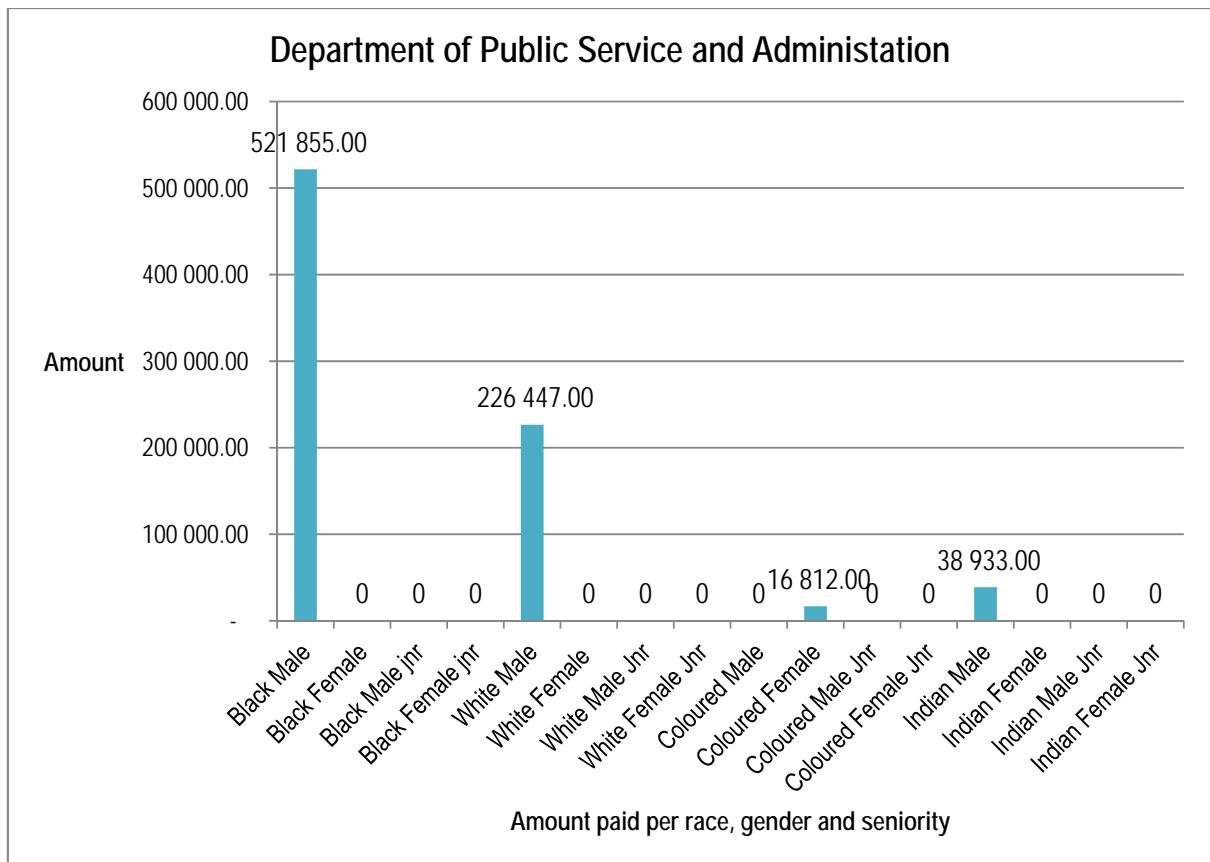
The response supplied by the Department of Water and Sanitation to the LSSA did not comply with the sample response in that it did not specify the seniority of advocates. The amounts paid to advocates were also not specified. There are two black female advocates who get more work than all other female advocates. As a result, females from the white, coloured and Indian community have not received any work. The same applies to male advocates from the coloured and Indian communities. Advocates who do some work for this department are briefed by the State Attorney. According to the department, it insists that those who are from the previously disadvantaged groups should be given first preference.

### 4.4 Department of Public Service and Administration

#### 4.4.1 Distribution of work to advocates



#### 4.4.2 Amount paid



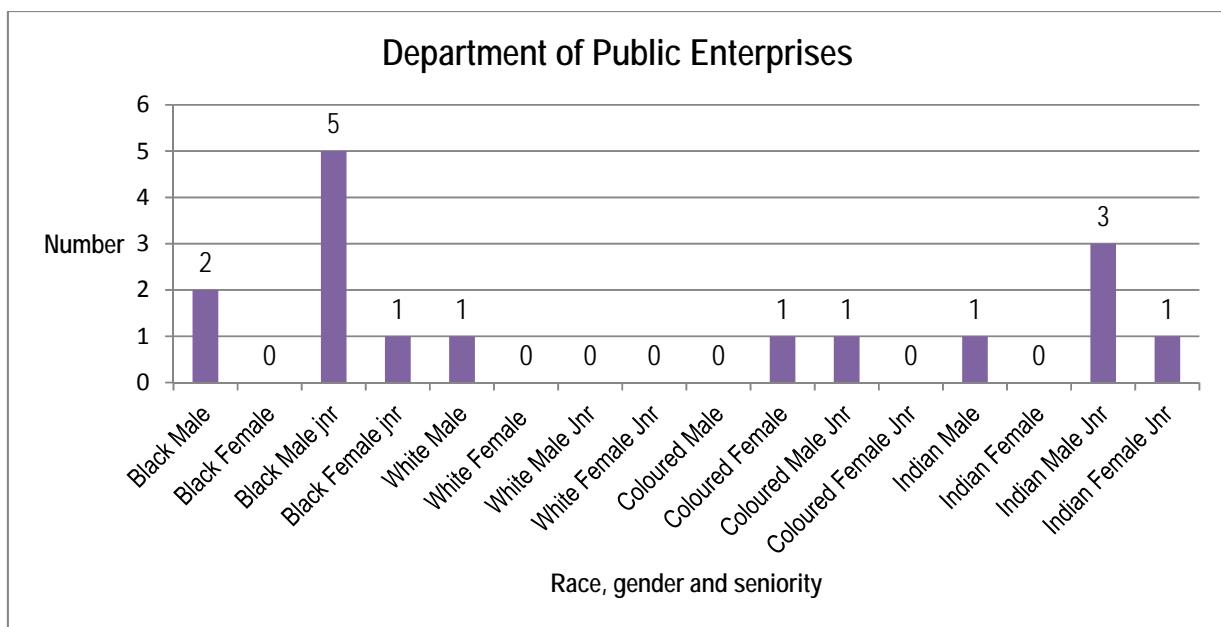
- The Department indicated that the State Attorney has a fee agreement with the advocates. Therefore the information relating to expenses was not supplied to the LSSA.

#### 4.4.3 Comments

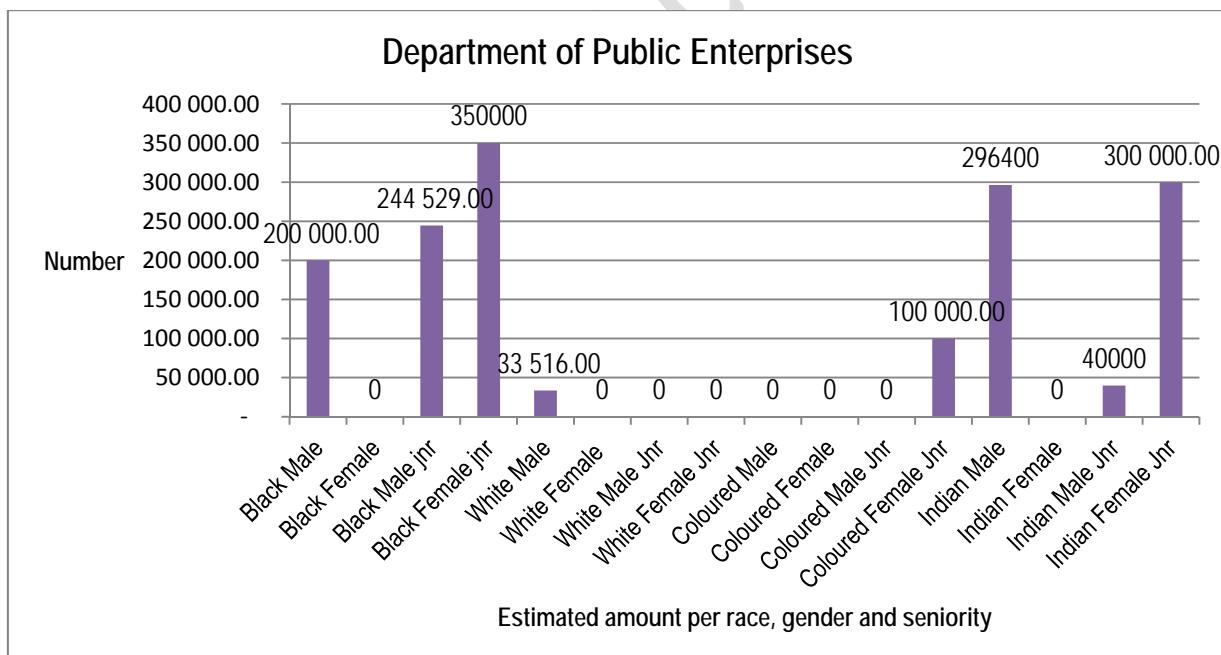
The work is distributed to a specific few black male senior advocates and a particular few white male advocates. Women from all races have not received any work.

### 4.5 Department of Public Enterprises

#### 4.5.1 Distribution of work to advocates



#### 4.5.2 Amount paid



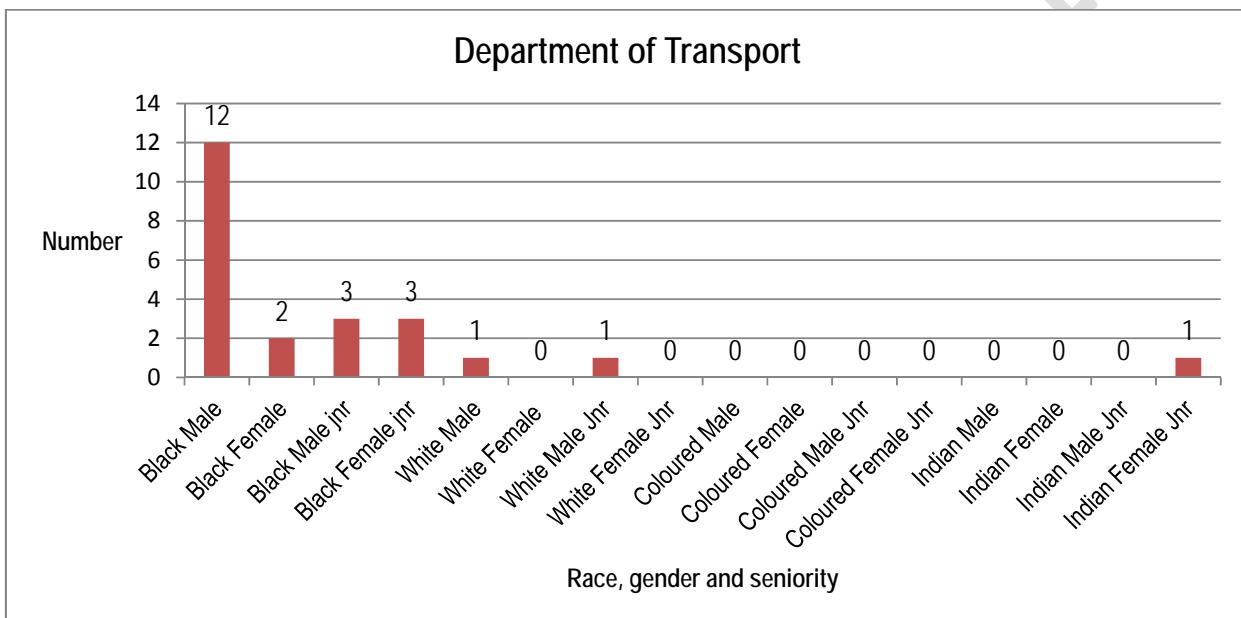
- The department indicated that these are estimated amounts as the final bills were not yet received.

#### 4.5.3 Comments

The work is mostly distributed to advocates who were previously disadvantaged. Indian and white female advocates do not appear from those who receive work.

#### 4.6 Department of Transport

##### 4.6.1 Distribution of work to advocates



##### 4.6.2 Amount paid

The amount requested was not supplied to the LSSA.

##### 4.6.3 Comments

The amount billed by advocates was not supplied to the LSSA. It is said that there is a fee agreement with the State Attorney. The work is distributed on a rotational basis, with black advocates getting more work. There are no advocates appearing several times on the list or being favored. There are few females involved (in some instances absent).

#### 4.7 Department of Mineral Resources

#### 4.7.1 Distribution of legal work

There was no information supplied by this Department.

#### 4.7.2 Amount paid

There was no information supplied by this department.

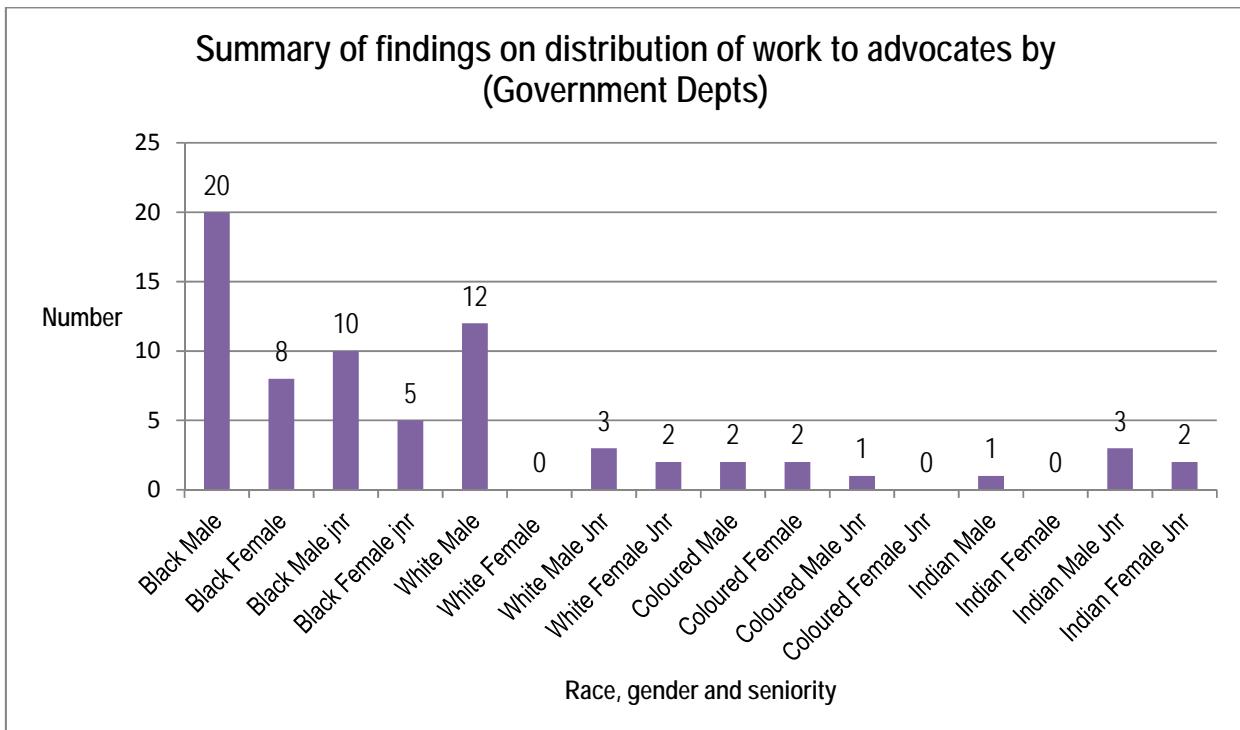
#### 4.7.3 Comments

The department indicated that it has referred the request for information to the Department of Justice in terms section 20 of the Promotion of Access to Information Act.

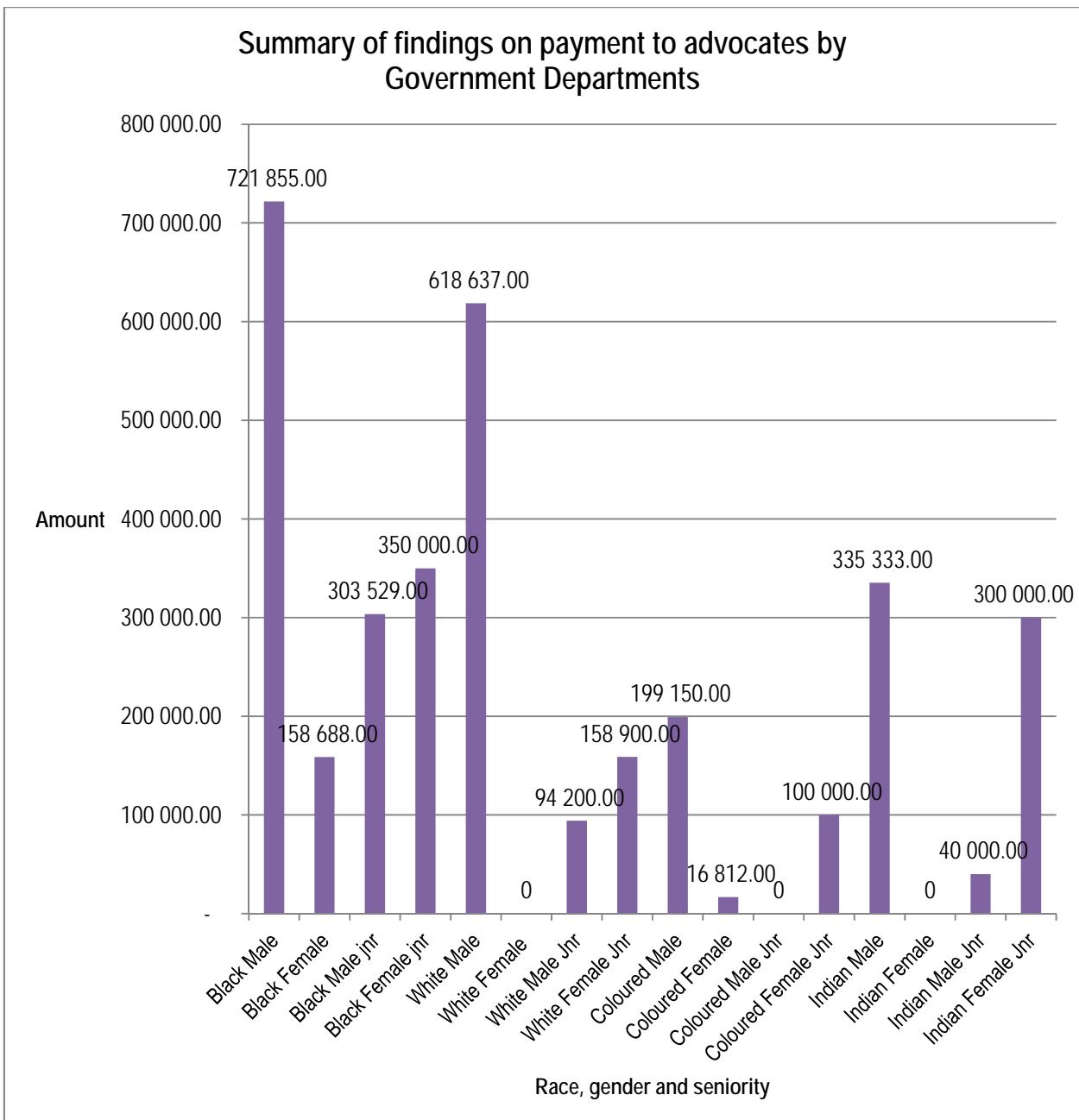
### **5. Findings**

The lack of response from several Government Departments is a major concern. It would have been more appropriate to have an overall clear picture of how Government Departments distribute their legal work to law firms and advocates.

## 5.1 Summary of findings on distribution of work by Government Departments to advocates



## 5.2 Summary of findings on amounts paid by Government Departments to advocates



## 6. Conclusion

The lack of response and/or unavailability of data that was requested in order to make an informed study and analysis of the information received is a major concern as this has major implications for the findings. It would, therefore, have been more appropriate

for the institutions contacted to provide some form of response given the manner in which the topic under discussion has received attention. In any event, these are government institutions and a high level of cooperation is expected from them. The lack of response from these institutions raises more questions than answers.

## **7. Presentation of responses from SOEs**

### **7.1 Land Bank**

#### **7.1 Distribution of work**

There was no information supplied by the Land Bank.

#### **7.2 Amount paid**

There was no information supplied by Land Bank.

#### **7.3 Comments**

According to Land Bank representatives, they are barred from revealing any information to the LSSA because of a service level agreement with certain selected law firms. The said service level agreement has confidentiality and non-disclosure clauses that prohibit both parties to the service level agreement from disclosing the information requested by the LSSA. Instead, its representatives indicated their commitment in supporting the steps initiated to address the skewed briefing patterns. Further, they assured the LSSA that the Land Bank follows a strict process wherein law firms are selected from the Bank's panel of attorneys in line with the Broad-Based Black Economic Empowerment and Preferential Procurement Policy.

### **7.2 South African Express**

#### **7.2.1 Distribution of work to advocates**

There were no advocates given work.

#### **7.2.2 Amount paid**

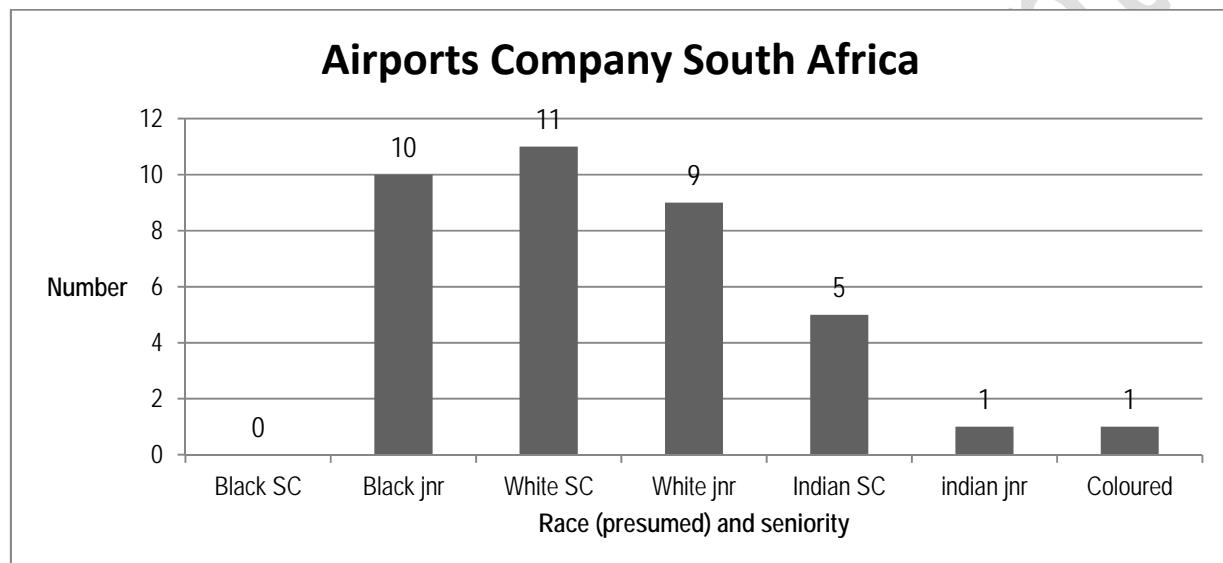
There were no advocates paid.

### 7.2.3 Comments

There were no advocates briefed and paid during the period in which the information was requested.

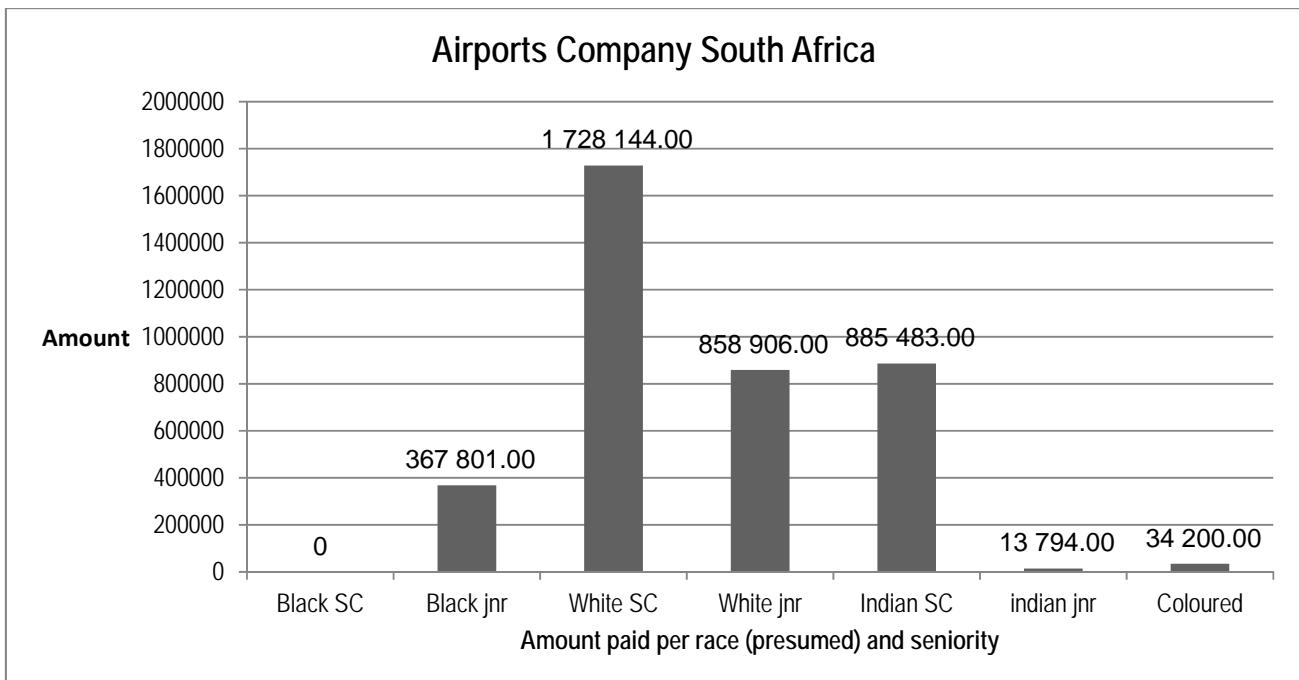
## 7.3 Airports Company South Africa

### 7.3.1 Work distribution to advocates



- The graph in this instance does not mean that 10 different Black male junior advocates and 11 different white male advocates received work. Instead, it means that certain advocates were regulars on the list of those who received work and therefore one person appeared several times on the list of those who received work.*

### 7.3.2 Amount paid

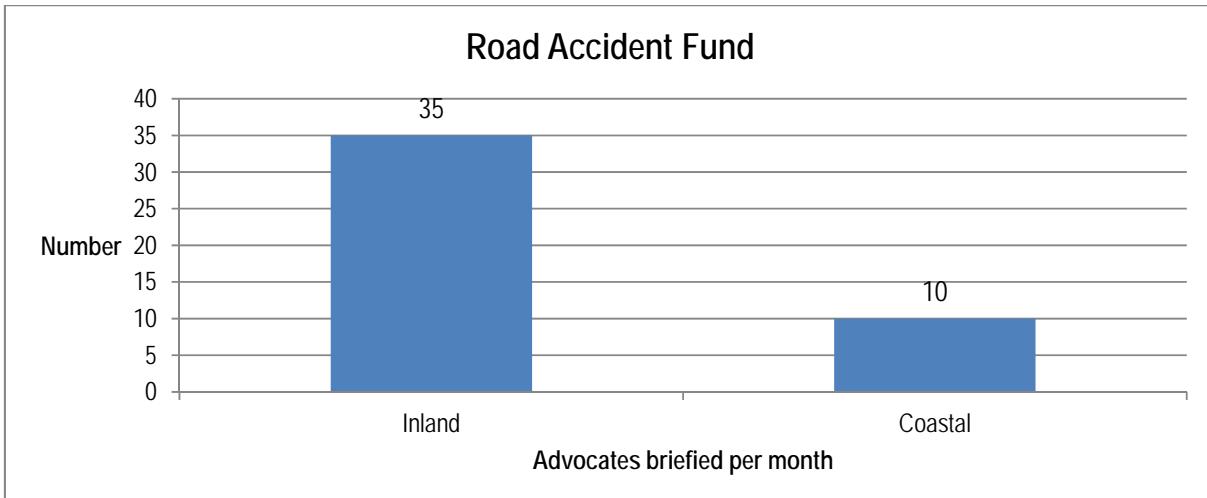


### 7.3.3 Comments

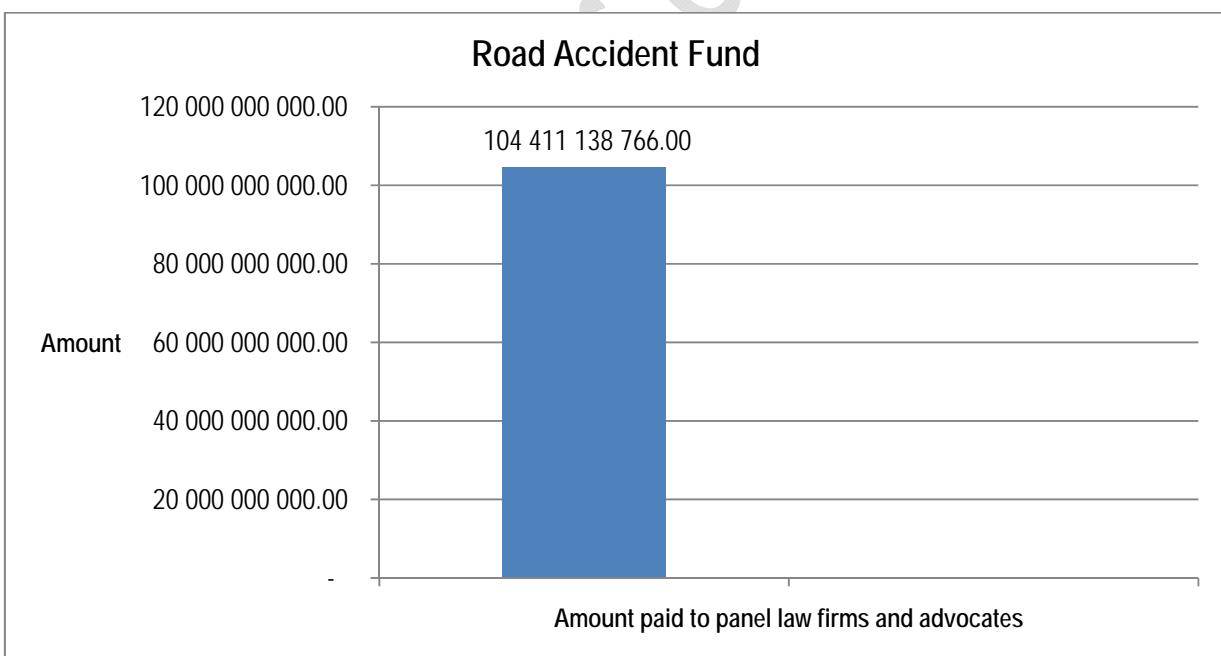
The information requested by LSSA was supplied but not in the required format. The gender and race were not specified. The race was ascertained by looking at the surname of an individual. It is conceded that a surname may in certain instances lead one to an incorrect conclusion. The work appears to be distributed across all races. However, about eight white advocates were regulars on the list of those who receive work. There is also a black advocate who featured several times on the list. The amounts paid to advocates indicate that those who are regulars on the receiving end get lucrative work. The distribution of work to certain individuals is a concern given the large pool of advocates that exists in the country.

## 7.4 Road Accident Fund

### 7.4.1 Distribution of work to advocates



### 7.4.2 Amount paid



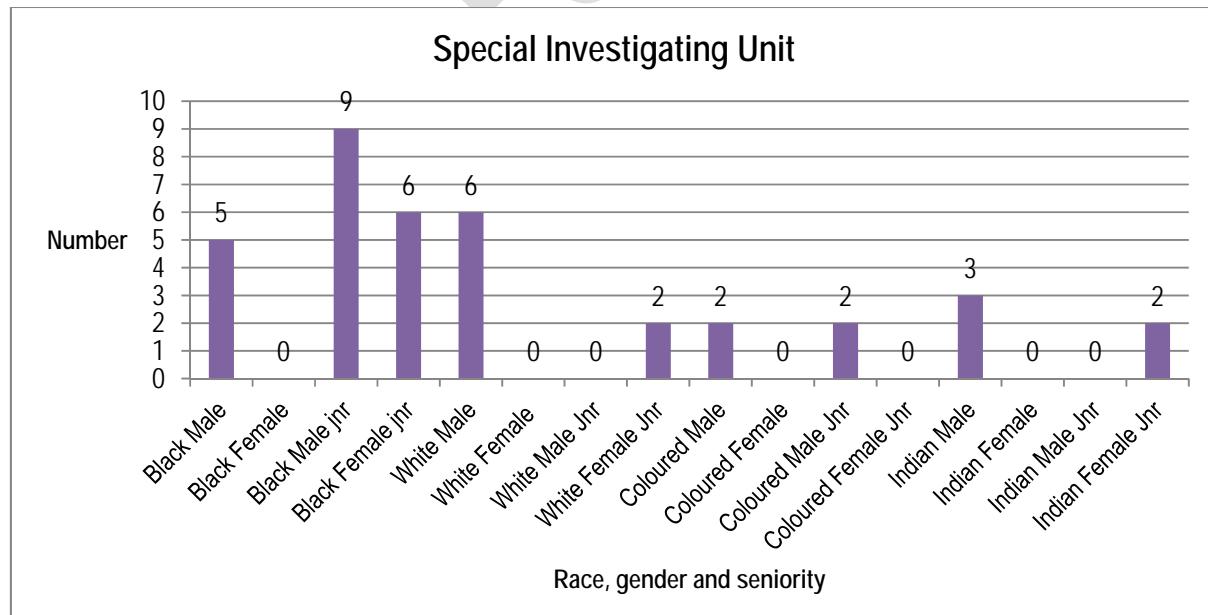
#### 7.4.3 Comments

The RAF supplied the information requested to the LSSA. However, the information was not in the format that it was requested, and it did not indicate gender and race. Further, the representatives of RAF indicated that they are aware of the reality that certain advocates are being disadvantaged because of *inter alia* racism or perceived incompetency. It is, therefore, not clear who receives more or less work in terms of race and gender.

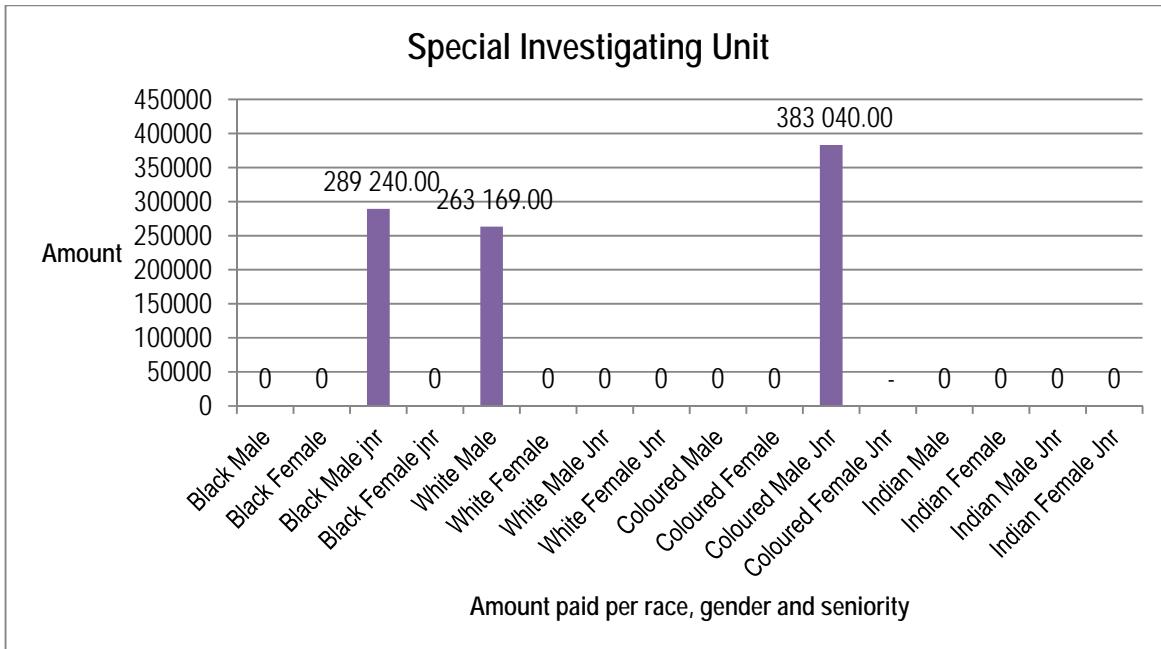
According to the RAF, it has procured eighty Panel of Attorneys and obliges them to adhere to transformation objectives as per service level agreements. It is unknown how the RAF monitors its commitment to transformation as they do not keep race and gender statistics. Without the necessary information, it is not possible to determine how the RAF distributes its work between advocates and law firms. The information above was, therefore, not added in the summary of findings.

### 7.5 Special Investigating Unit

#### 7.5.1 Distribution of work to advocates



### 7.5.2 Amount paid



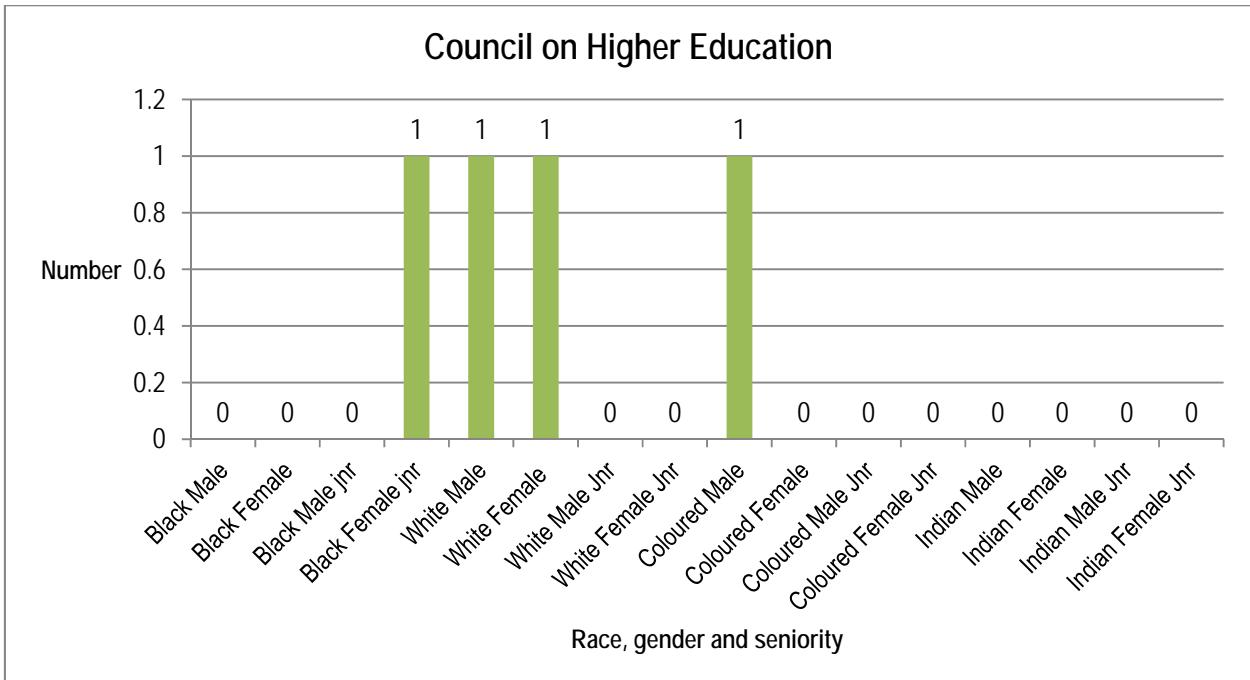
- There was no amount specified in most of the advocates briefed. In other instances, it was stated that certain advocates had offered their services free of charge.

### 7.5.3 Comments

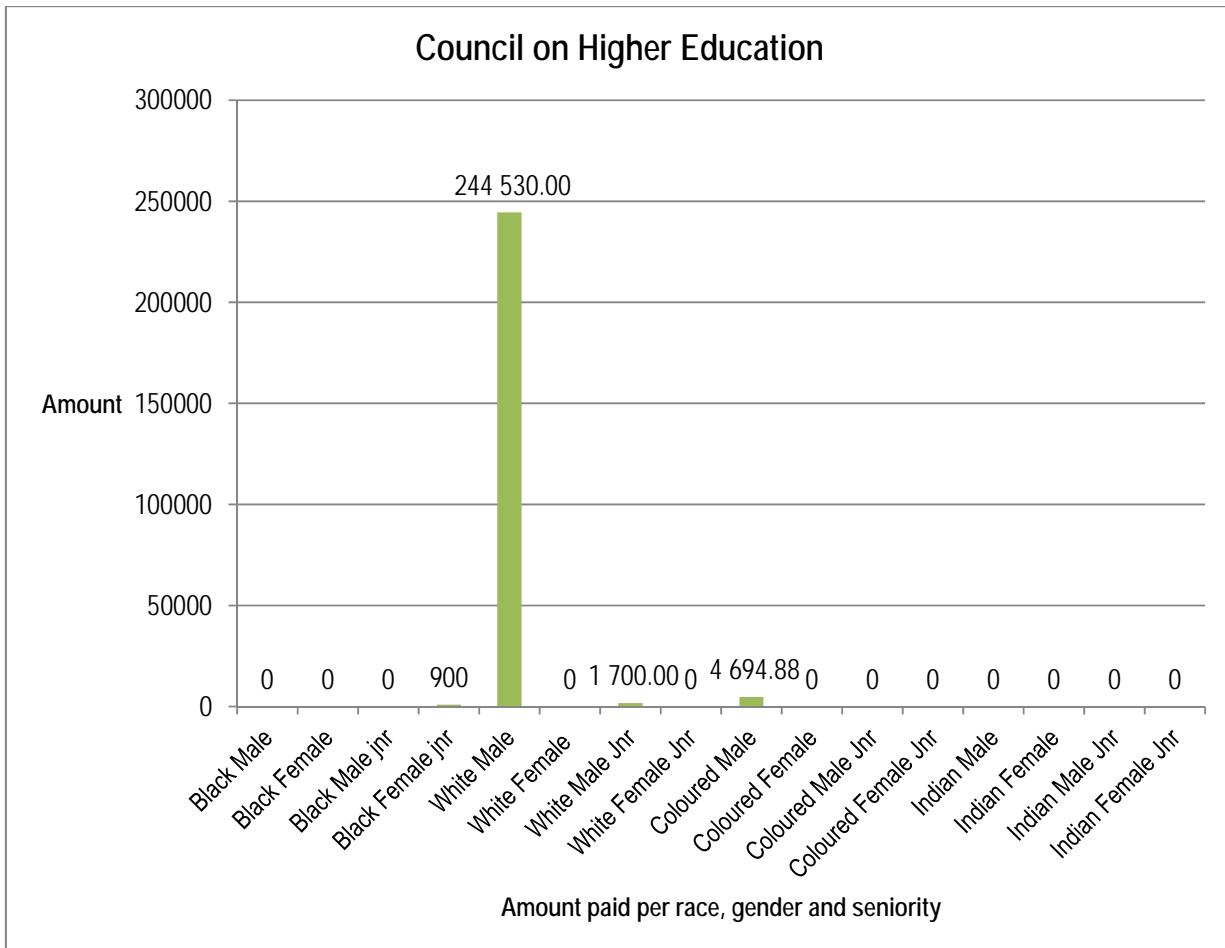
Certain amounts that were paid to other advocates was not disclosed to the LSSA. In other cases, it was indicated that advocates offered their services for free. Most of the work goes to the same small pool of individuals, mostly black and white male advocates. Females of all races are excluded from receiving briefs, with the exception of black female junior advocates.

## 7.6 Council on Higher Education

### 7.6.1 Distribution of work to advocates



## 7.6.2 Amount paid



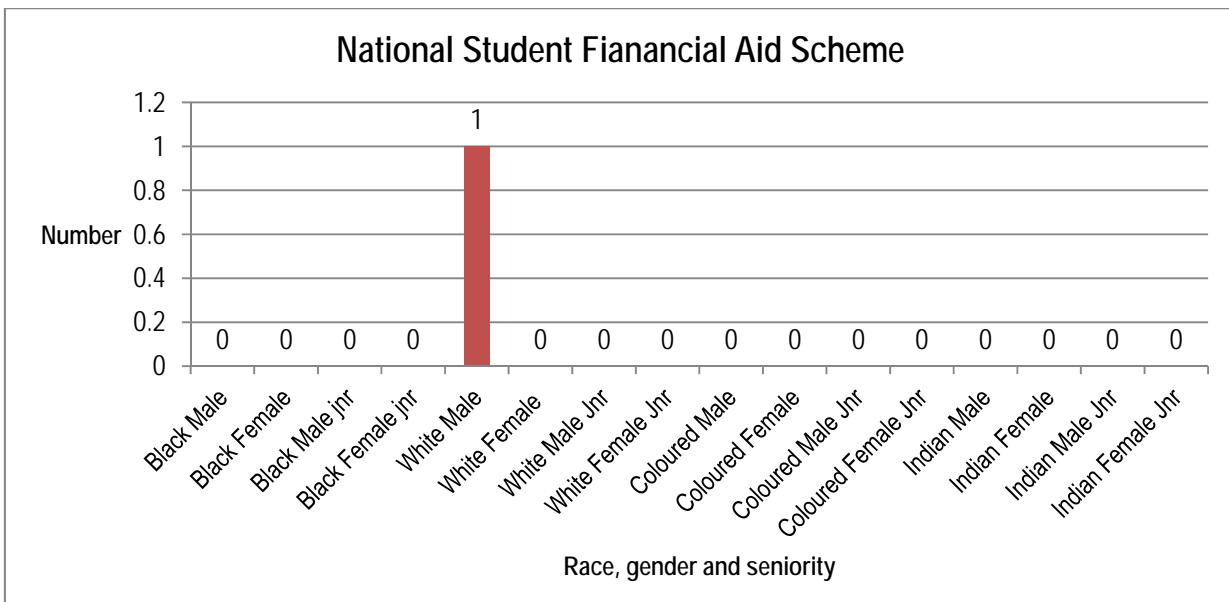
- The amount paid was supplied in the manner requested by the LSSA. For example, there is where a black female junior was charging R900 per hour and a white female junior R800 per hour. The total amount that they billed was not disclosed.

## 7.6.3 Comments

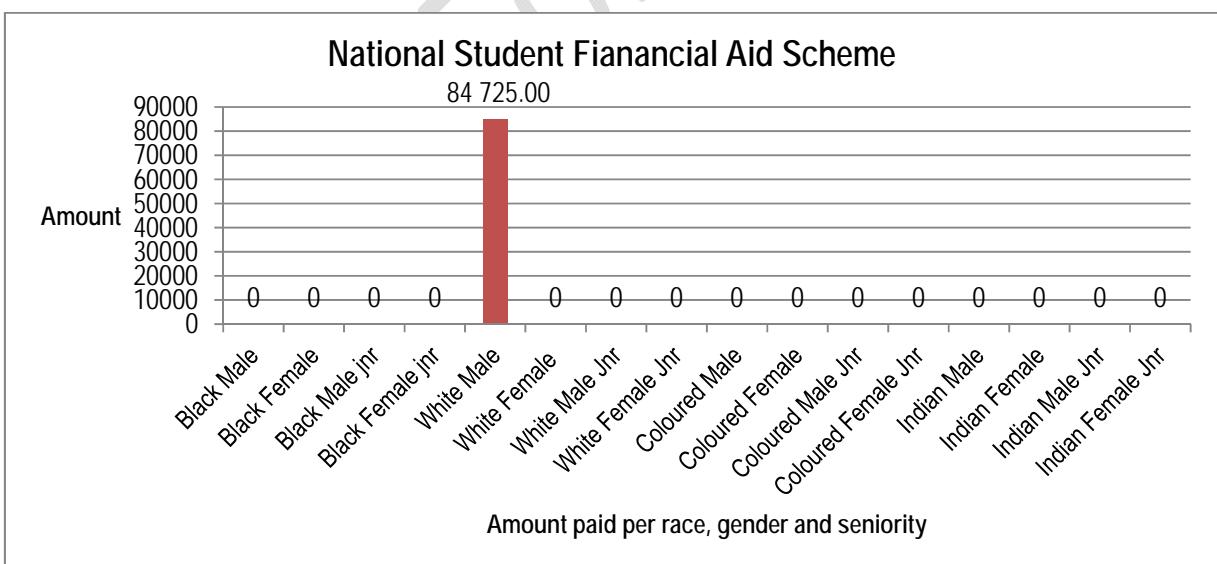
White male advocates are the most recipients of work from South African Express. Other races and females have been overlooked or receive little work.

## 7.7 National Student Financial Aid Scheme

### 7.7.1 Distribution of work to advocates



### 7.7.2 Amount paid



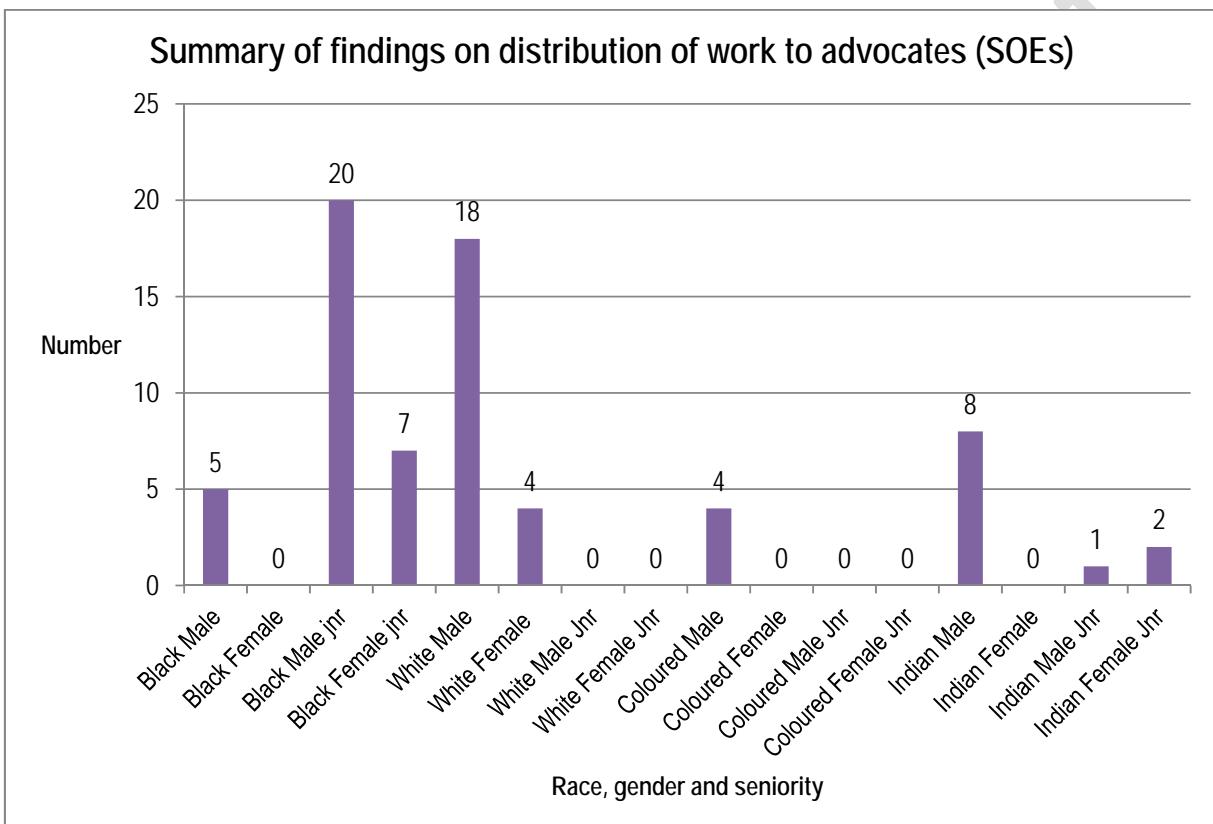
### 7.7.3 Comments

The work was distributed only to one white male advocate.

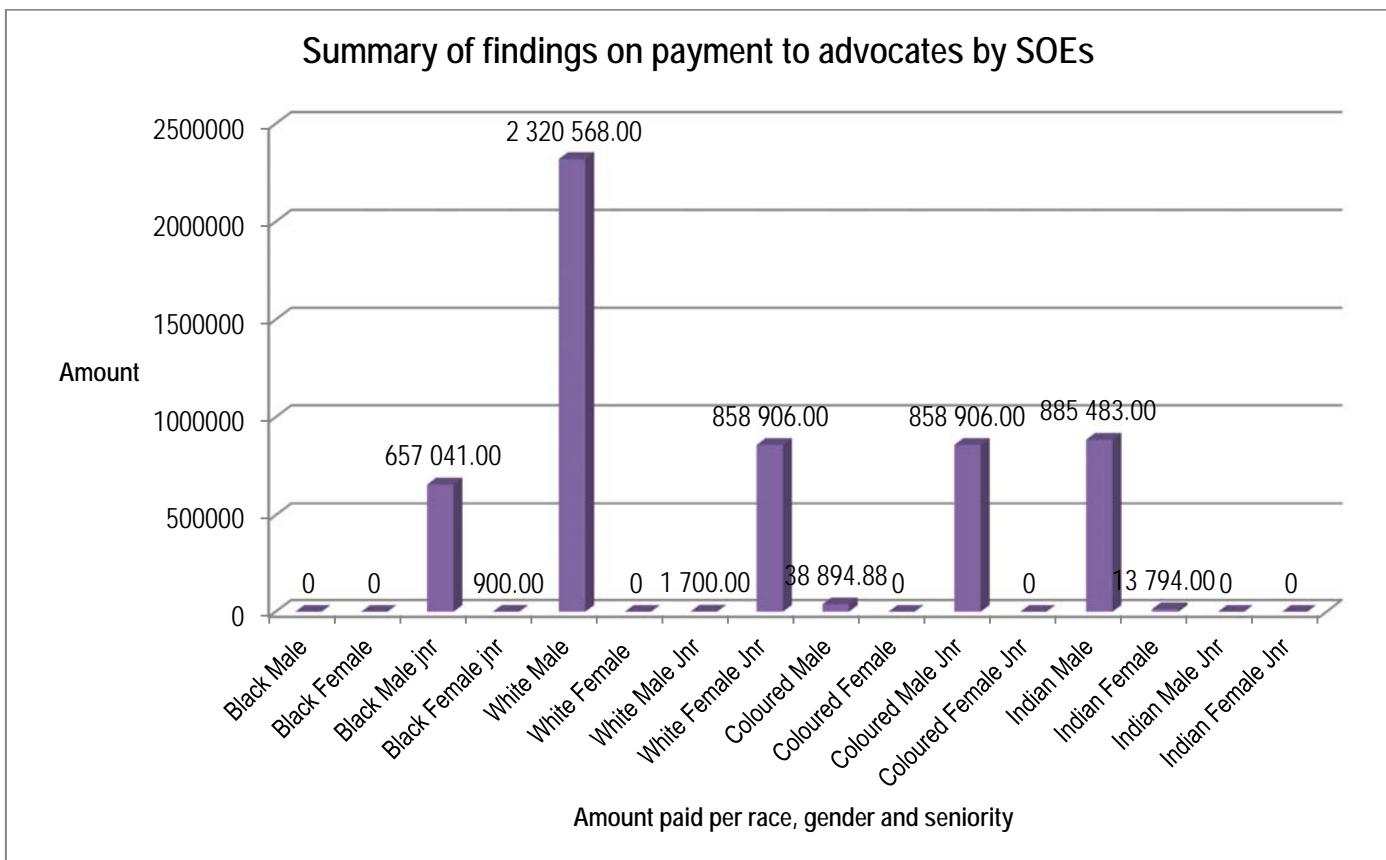
## 8. Findings

The lack of response from many SOEs is also a major concern. It would have been more appropriate to have the overall clear picture of how SOEs distribute their legal work to law firms and advocates.

### 8.1 Summary of findings on distribution of work by SOEs to advocates



## 8.2 Summary of findings on payment by SOEs to advocates



- The amount reflected herein is an estimated amount because some of the amounts were not yet paid. In some instances such as the black female jnr, an amount of R900 was given as an amount billed per hour and the total amount was not given.

## 9. Conclusion

The work is, to a certain extent, distributed to different advocates. However, only a few specific advocates receive most of the work from time to time. Female advocates receive less work. A minority of black male junior advocates followed by a certain few white male senior advocates are the ones who receive the bulk of the work. In terms of payment, it is dependent on the nature and value of the work that an individual advocate received. White male senior advocates followed by Indian male senior advocates are highly paid practitioners.

## Chapter Four

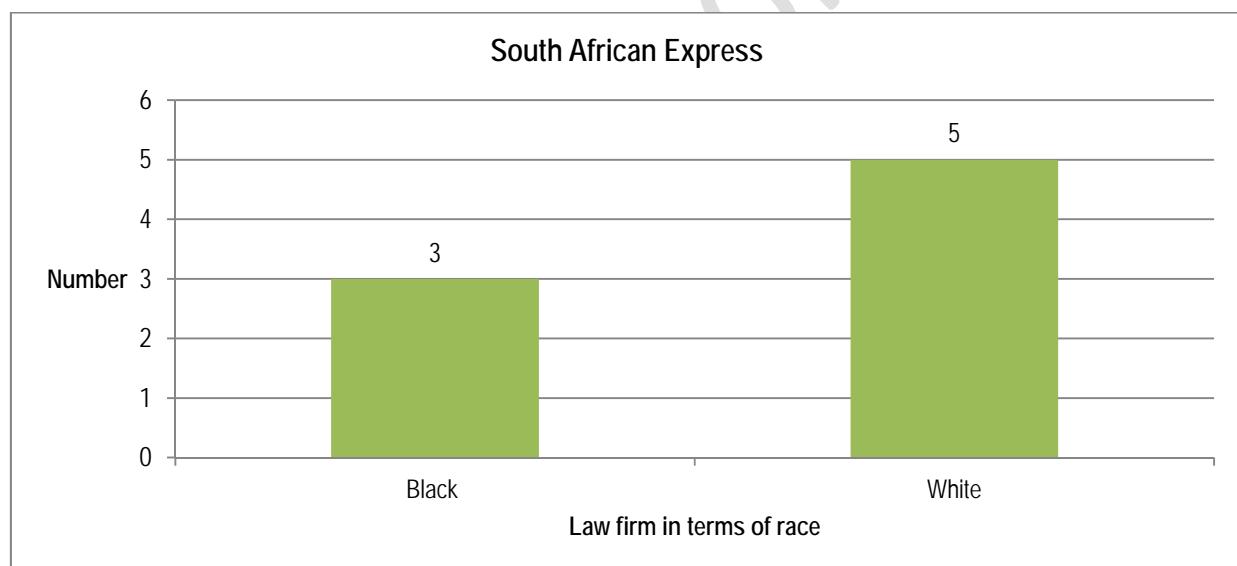
### 1. Distribution of work to law firms

This section presents information that was distributed to law firms by Government Departments and SOEs. Most of the information was not provided in the manner requested such as the omission of race and gender.<sup>17</sup> Therefore, the information is presented in terms of the law firm that received work. The reference to black includes coloured and Indian. The reference to white refers to large commercial and corporate law firms.<sup>18</sup>

### 2. Distribution by SOEs and Government Departments

#### 2.1 South African Express

##### 2.1.1 Distribution of work to law firm

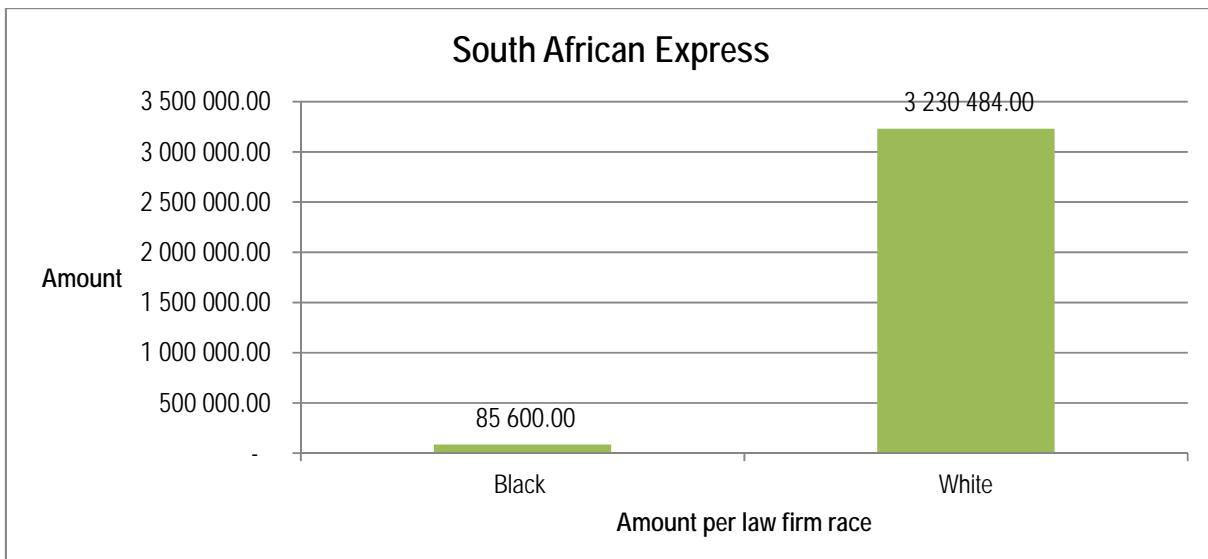


- The information presented above excludes two foreign companies whose services were also engaged. There is an amount that was not indicated in the information supplied to the LSSA and it was supposed to be paid to a black male attorney.*

<sup>17</sup> The study considered the little information provided in terms of race and gender. The outcome of this observation in terms of who gets work between males and females is indicated under the 'comments' section.

<sup>18</sup> It is conceded that these law firms now employ many black lawyers.

## 2.2.2 Amount paid



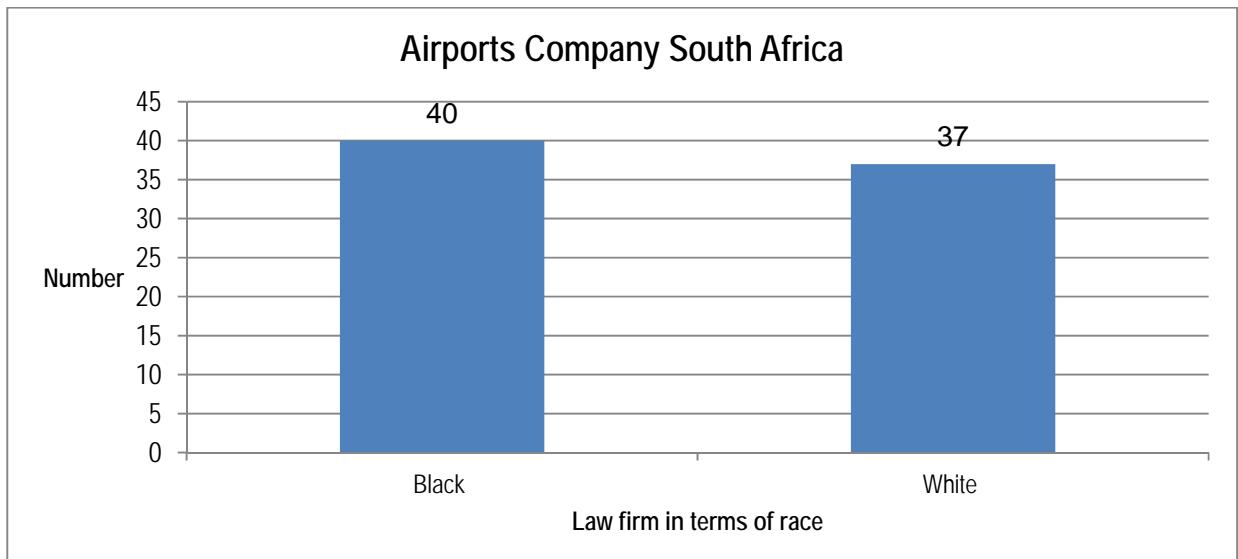
## 2.2.3 Comments

The SA Express distributed its work equally to all the law firms for the period in which the information was requested. But the majority of those who receive more work are white law firms. There is also a significant gap between the payment received by white law firms and black law firms. Therefore, white male attorneys receive most of the lucrative work.

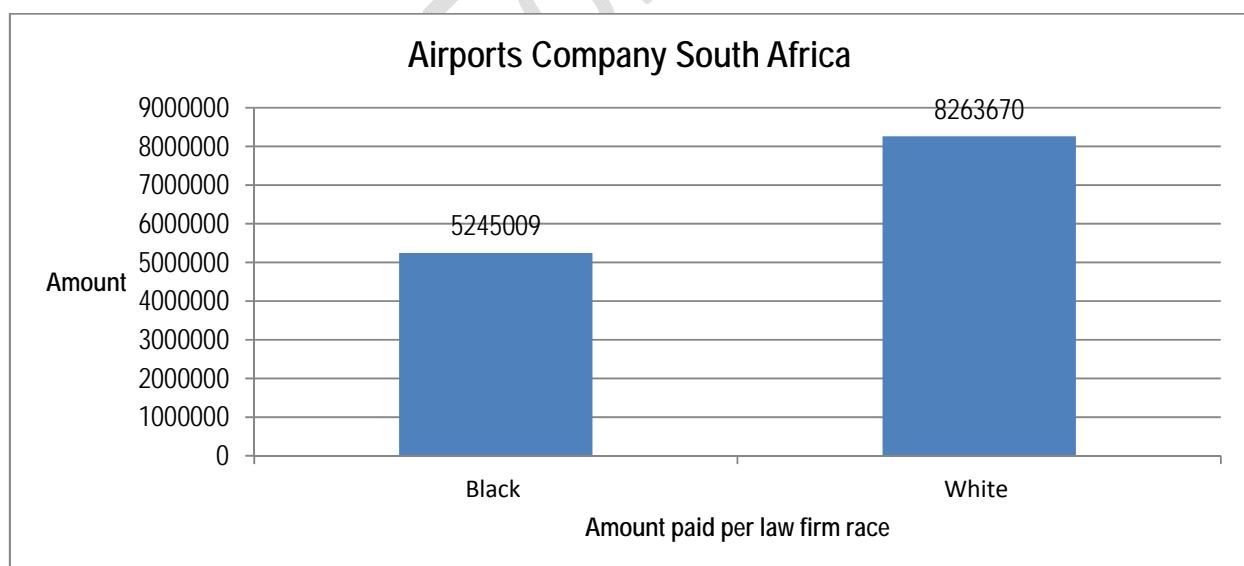
The work that is given to the law firms was mostly handled by white male and black male attorneys. Female attorneys have, to a large extent, been overlooked and excluded across all races. This is a major concern given the fact that there is a high number of female practitioners in the attorneys profession.

## 2.2 Airports Company South Africa

### 2.2.1 Distribution of work to law firms



### 2.2.2 Amount paid

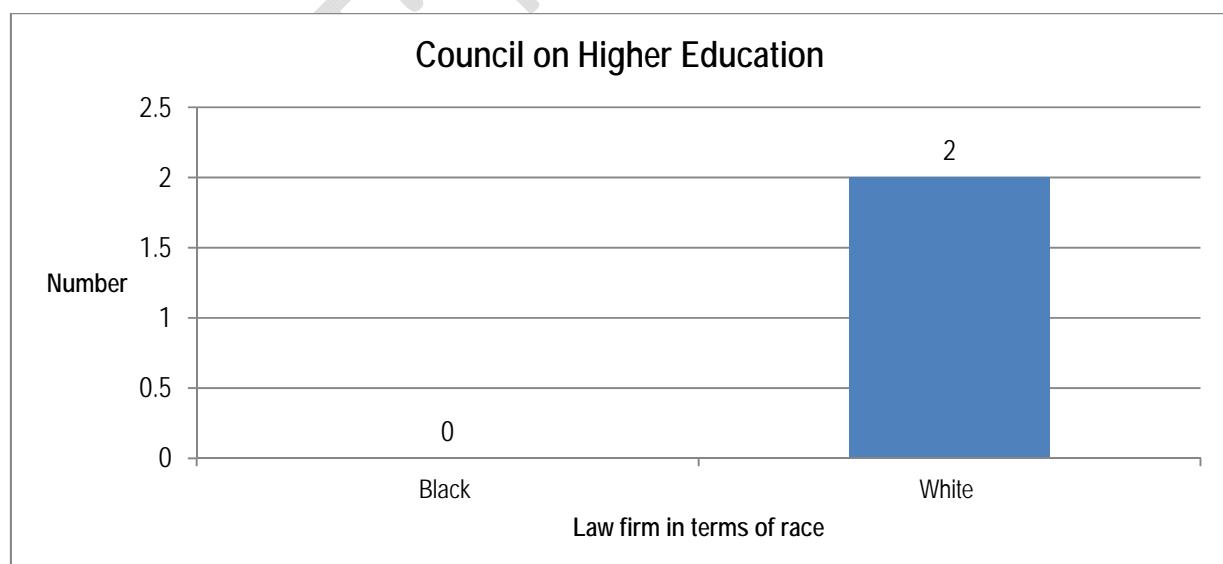


### 2.2.3 Comments

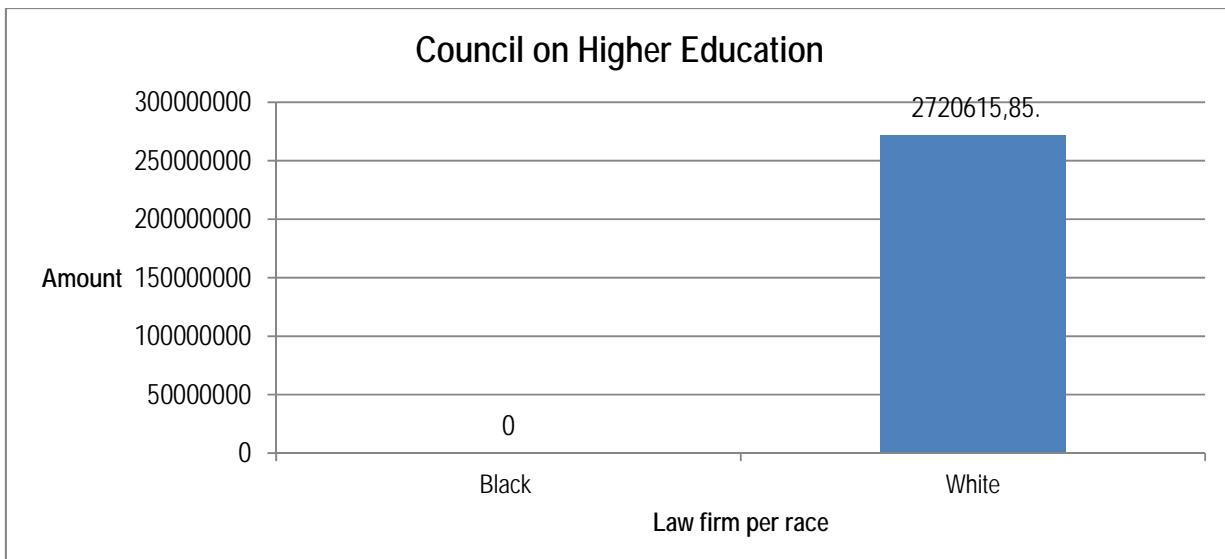
The work appeared to be distributed to several law firms. Even though black law firms were in the majority in terms of receiving work, the value of the work that they had received was less lucrative as compared to the work given to white law firms. The information requested regarding attorneys was supplied in terms of law firms without indicating the name, gender and race of the person handling the case. There were approximately 80 legal matters that were handled by different firms. Most of the work was distributed to certain law firms. For example, out of 80 legal matters, one law firm received 5 matters; another law firm was given 13 cases, a further law firm was given 6 cases and the other law firm 12 cases. It follows that when one firm gets legal work repeatedly, there are those who will remain on the panel of attorneys without receiving any work. The aforesaid law firms were also leading in terms of being the top four most paid law firms. The unequal distribution of work means that other law firms receive less work and others do not receive any form of work.

## 2.3 Council on Higher Education

### 2.3.1 Distribution of work to law firms



### 2.3.2 Amount paid

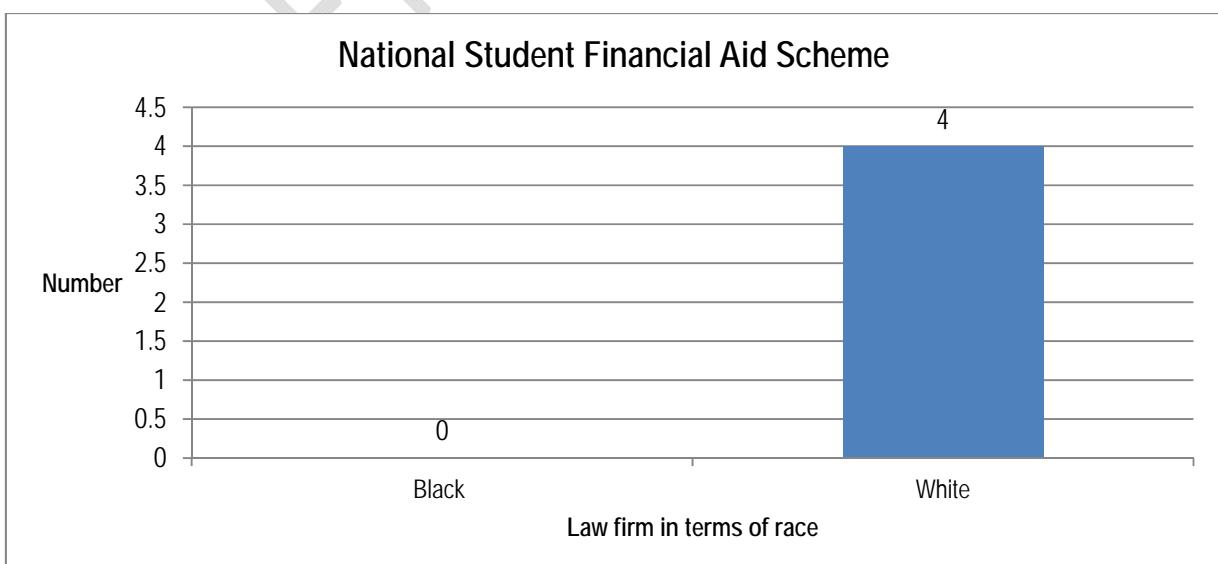


### 2.3.3 Comments

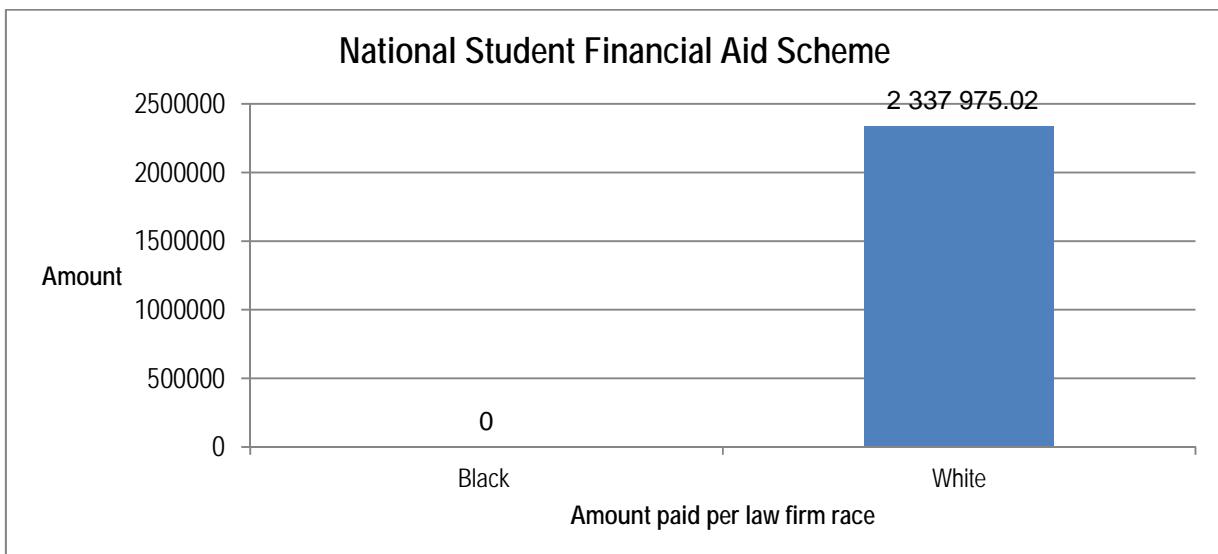
There is only one white law firm that does work for Council on Higher Education. This puts other firms at a disadvantaged position.

## 2.4 National Student Financial Aid Scheme

### 2.4.1 Distribution of work



#### 2.4.2 Amount paid

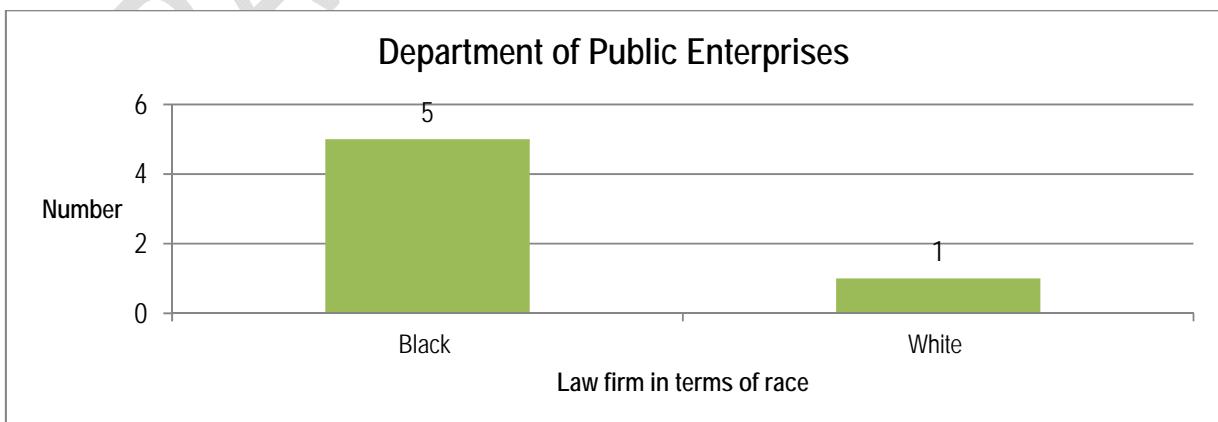


#### 2.4.3 Comments

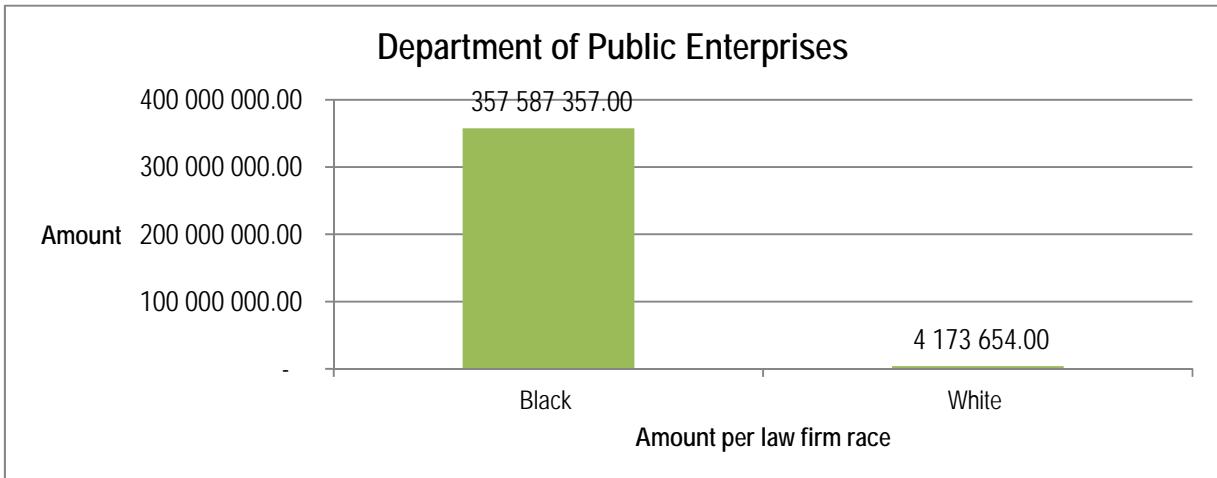
There are two white firms that do the work for the National Student Financial Aid Scheme. One firm received more work on several occasions compared to the other law firm. This department uses only two firms. The work was handled by a coloured male, white male and white female.

### 2.5 Department of Public Enterprises

#### 2.5.1 Distribution of work to law firms



## 2.5.2 Amount paid

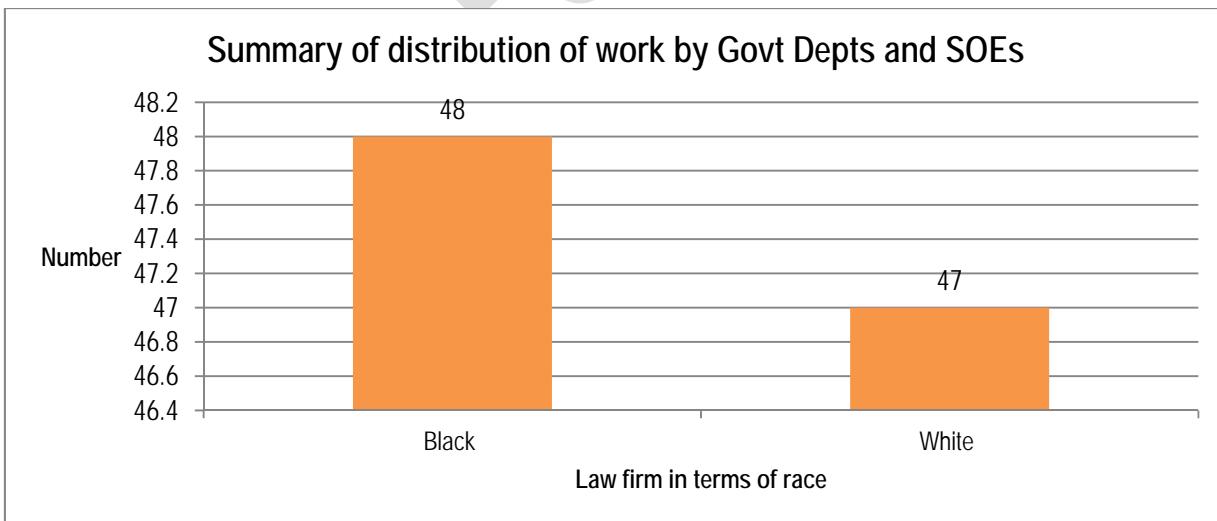


## 2.5.3 Comments

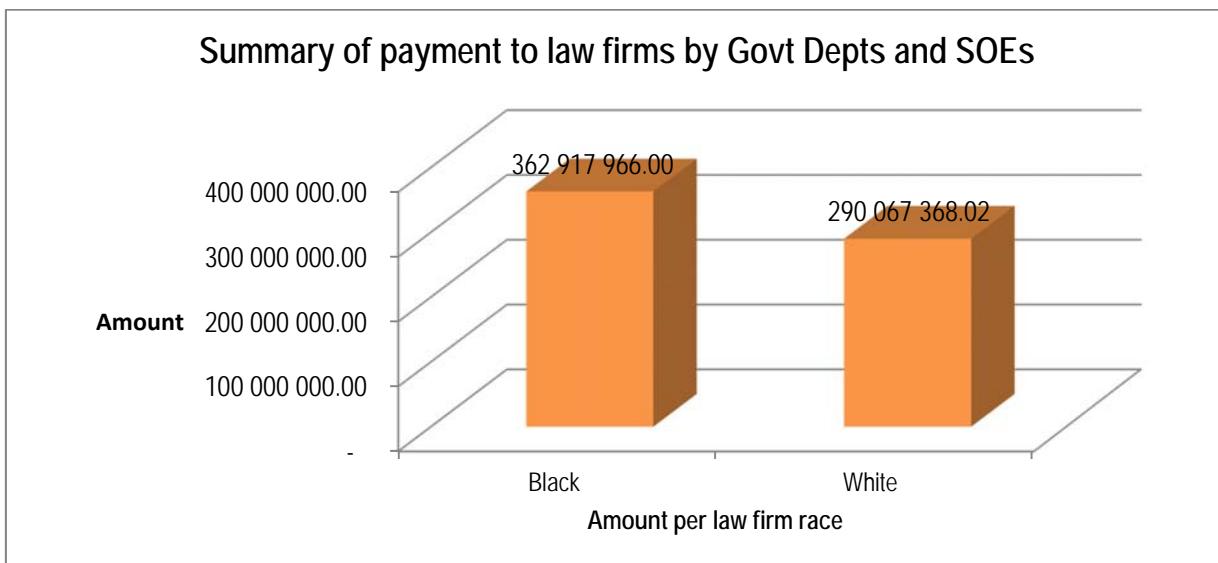
The work is mostly distributed to black law firms.

## 5. Findings

### 5.1 Summary of findings on distribution of work by Govt Depart and SOEs



## 5.2 Summary of findings on payment by Govt Departments and SOEs



## 6. Conclusion

The conclusion is that only a certain few black law firms are receiving most of the work and are the most paid when compared with white law firms. The study also established that in all the work given to both black and white law firms, women across all races were receiving less work (or no work at all in certain cases).

This information will be updated as and when further responses are received. The LSSA has decided not to obtain additional information for now in order to release the report.

## Chapter Five

### 1. Department of Justice and Constitutional Development as policy maker and major consumer of legal services

The State (especially the Department of Justice and Constitutional Development (DOJ&CD)) is the policy maker when it comes to the transformation of the legal profession and the major consumer of legal services.<sup>19</sup> The DOJ&CD acknowledged in *Justice Vision 2000* that South Africa's legal professions remained untransformed. It *inter alia* undertook to adopt policies that will ensure that "briefing policies contribute towards eliminating current race, gender and disparities in the legal profession".<sup>20</sup> In October 2016, at the State Attorney Symposium, the Deputy Minister of Justice and Constitutional Development, Hon J Jeffery (MP), indicated that "both at the Bar and at firms, briefing patterns tend to prefer a small selection of black women and a larger selection of white men".<sup>21</sup> This indicates that the DOJ&CD has an interest in ensuring that disparities within the legal profession are addressed.

#### 1.1 Comments

It is unfortunate that the DOJ did not provide any form of response to the LSSA's request for information in terms of how it distributes its legal work. As a policy maker and a forerunner on transformation, it was expected that the DOJ&CD would cooperate fully with this initiative. During the Summit on Briefing Patterns, the Deputy Minister, Mr Jeffery expressed his embarrassment at the fact that the DOJ&CD had not responded to the request for information on how it distribute its legal work. The Deputy Minister undertook to follow up personally on this and asked for the details of the person who was approached. In the Deputy Minister's words, failure to respond is wrong as the DOJ&CD is responsible for the administration of the Promotion of Access to Information Act and

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<sup>19</sup> Closing remarks by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery, MP, at the State Attorney Symposium, 1 October 2015 available at [http://www.justice.gov.za/m\\_speeches/2015/20151001\\_StateAttSymp.html](http://www.justice.gov.za/m_speeches/2015/20151001_StateAttSymp.html) (Date of use: 15/05/2016).

<sup>20</sup> Justice Vision 2000 available at [http://www.gov.za/sites/www.gov.za/files/justicevision2000s\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/justicevision2000s_0.pdf) (Date of use: 15/05/2016).

<sup>21</sup> The Minister cited the CALS Report on the Transformation of the Legal Profession. His presentation can be found at: [http://www.justice.gov.za/m\\_speeches/2015/20151001\\_StateAttSymp.html](http://www.justice.gov.za/m_speeches/2015/20151001_StateAttSymp.html) (Date of use: 15/05/2016).

that the requested information is freely available. Fortunately, the then Director-General, Ms Nonkululeko Sindane, was also present at the Summit and conveyed her apologies as she had seen the letter requesting for information only on 29 or 30 March 2016. She undertook to provide the requested information. To date, the information has not been furnished.

## Chapter Six

### **1. Summary of deliberations at Summit**

An advertisement was circulated in three national newspapers inviting all interested parties to make submissions to the LSSA. The submissions made played an integral part in the deliberations at the Summit. A copy showing the newspaper adverts appears in the addendum as Appendix B.

#### **1.1 Morning session**

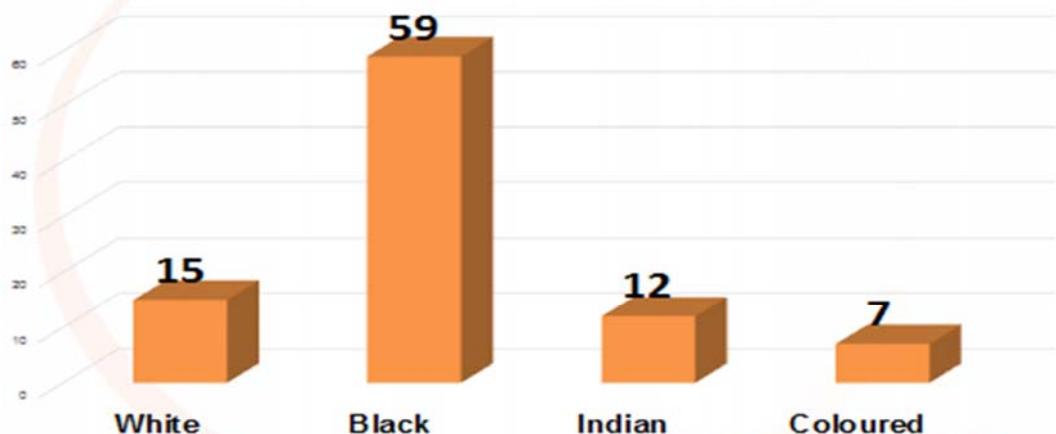
The morning session was opened by **Chief Justice Mogoeng Mogoeng** who highlighted that this was the first, important and progressive Summit on the topic to be held in the legal profession. He invited delegates to consider the Preamble to the Constitution, 1996 which alerts everyone to South Africa's unjust past and bestows responsibility on everyone to take action in order to heal the divisions of the past. In his view, there is both a collective and an individual responsibility to heal the occurrences of the past. The Chief Justice further indicated that one of the reasons that divided the South African society was that, on one hand, it was at one point believed that the white race was equivalent to superiority and wisdom, whereas on the other, blackness was associated with the opposite of what whiteness was perceived to entail. Additionally, he indicated that women of all races were not allowed to "occupy their rightful place" in society, the judiciary, as well as the attorneys' and advocates' professions. He, inter alia, cautioned that people should not be "written off" without being given any opportunity to showcase their potential. According to the Chief Justice, uneven briefing patterns will be addressed only through collective efforts from all stakeholders. He warned that people should be careful of being unconsciously biased. He concluded by indicating that "we", as professionals, have a duty to "take care of those fundamental

issues which defined us in the past and which we need to set aside as the injustices that we recognise them to be”.

**Busani Mabunda**, former Co-Chairperson of the Law Society of South Africa, followed with an introduction of the Summit. This was supposed to have been done before the Chief Justice’s address. However, due to time constraints as the Chief Justice had to leave to deliver a judgment, he had presented first. Mr Mabunda prefaced by indicating that apartheid laws were used to promote injustice. This is something that the legal profession, attorneys and advocates, should always be aware of and do something about. It was, therefore, a social obligation and in the public interest that the suffering brought by the uneven distribution of work be addressed. He stated that the Government, as a “driver of social policy” should show the dignity of black practitioners by giving them lucrative work. According to him, the lack of Black counsels in the silicosis case, requires a collective effort to be resolved. By way of example, he noted with concern that members of the Executive mostly appear to employ white counsel. He stressed that there was nothing wrong with briefing white counsel. However, from the “reconstructions” perspective, he questioned the kind of message that was conveyed by briefing white advocates only. He further said that the Constitutional Court has also expressed concern about the lack of black counsel appearing before it. He concluded by stating that it was “expected from the Summit” that rigorous and constructive discussions will bring about solutions that will be monitored in the future.

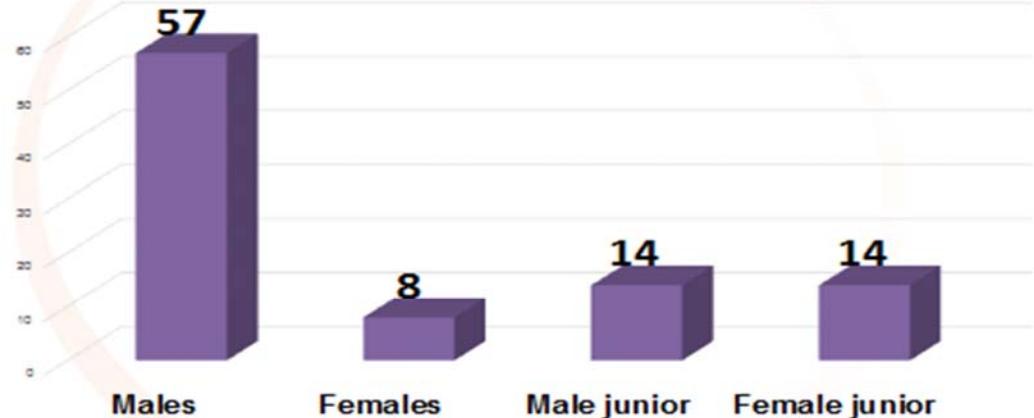
**Moses Retselisitsoe Phooko**, a researcher from the University of South Africa, presented his preliminary findings on briefing patterns in the legal profession. The study covered the period from 5 January 2015 to 12 February 2016. The summary of his preliminary findings were as follows:

### NUMBER OF ADVOCATES BRIEFED ITO RACE



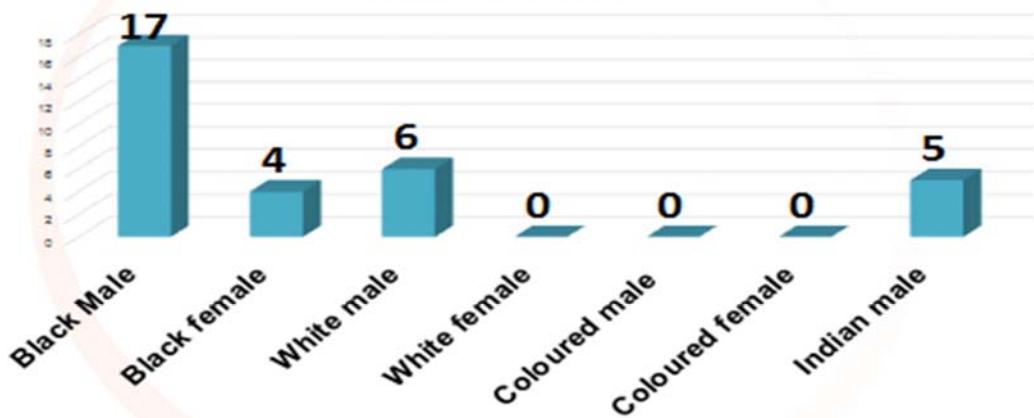
- ITO stands for in terms of race.

### NUMBER OF ADVOCATES BRIEFED ITO GENDER



- ITO stands for in terms of race.

## ATTORNEYS RECEIVING WORK (PRIVATE/STATE ATTORNEY)



Delegates raised concerns in that the statistics had to reveal the names of individuals receiving work and the amount paid to them. According to the delegates, the information did not say much if it did not reveal the amount paid to an individual, the law firm and/or advocate briefed.

### 1.1.1 Panel A – Perspectives from the consumer of legal services\*

**Nonkululeko Sindane**, DOJ&CD, first offered her apology for not having sent the information requested by LSSA as she had received the request late from her Department. She undertook to make the information available. She stated that the Office of the State Attorney has offices throughout the country. She highlighted that in instances where allegations of “taking kickbacks” are reported to her office, her office has investigated and taken disciplinary measures to the extent that some of those involved have been dismissed. To this end, she encouraged people to report issues of corruption via the hotline managed by the Public Service Commission. According to her, there is a forensic team that deals with these issues whether committed by the State Attorney or elsewhere in the DOJ&CD.

\*An invitation was extended to and accepted by Ms Khanyisile Kweyama, CEO, Business Unity South Africa. However, a day before the Summit, the CEO of Business Unity South Africa indicated her unavailability.

With regard to transformation she, *inter alia*, indicated that the DOJ&CD has a policy which requires that 76% of value of briefs be given to previously disadvantaged individuals. In addition to this, the DOJ&CD has devised a *Draft Briefing Policy* that has been circulated to the public sector. The aim of the policy is to address the uneven distribution of work. She stated that this was evidence that the DOJ&CD is “committed, ... in promoting the equal distribution of work” and asked delegates to comment on the *Draft Briefing Policy*. The work that the DOJ&CD has done over the years was best summed up by her presentation below. Her concern was that in all provinces, there is a shortage of female attorneys and female advocates.

## BRIEFS: 2013/14

SEX	REGION	AFRICAN	COLOURED	INDIAN	WHITE	Grand Total
<b>FEMALE</b>	Eastern Cape	42	11	13	21	<b>87</b>
	Free State	4		1	8	<b>13</b>
	Gauteng	408	12	30	72	<b>522</b>
	KZN	163	3	240	5	<b>411</b>
	Limpopo	9				<b>9</b>
	North West	36			11	<b>47</b>
	Northern Cape	4	3		10	<b>17</b>
	Western Cape	94	94	47	37	<b>272</b>
<b>FEMALE Total</b>		<b>760</b>	<b>123</b>	<b>331</b>	<b>164</b>	<b>1378</b>
<b>MALE</b>	Eastern Cape	364	27	25	66	<b>482</b>
	Free State	58			32	<b>90</b>
	Gauteng	952	15	21	236	<b>1224</b>
	KZN	260	30	131	24	<b>445</b>
	Limpopo	39			2	<b>41</b>
	North West	81		2	32	<b>115</b>
	Northern Cape	30	1		9	<b>40</b>
	Western Cape	45	150	32	73	<b>300</b>
<b>MALE Total</b>		<b>1829</b>	<b>223</b>	<b>211</b>	<b>474</b>	<b>2737</b>
<b>Grand Total</b>		<b>2589</b>	<b>346</b>	<b>542</b>	<b>638</b>	<b>4115</b>

## BRIEFS: 2014/15

SEX	REGION	AFRICAN	COLOURED	INDIAN	WHITE	Grand Total
<b>FEMALE</b>	Eastern Cape	54	16	52	46	<b>168</b>
	Free State	1	1	2	8	<b>12</b>
	Gauteng	359	15	16	74	<b>464</b>
	KZN	156	6	258	11	<b>431</b>
	Limpopo	24			4	<b>28</b>
	North West	55		2	11	<b>68</b>
	Northern Cape	8		1	5	<b>14</b>
	Western Cape	105	121	73	33	<b>332</b>
<b>FEMALE Total</b>		<b>762</b>	<b>159</b>	<b>404</b>	<b>192</b>	<b>1517</b>
<b>MALE</b>	Eastern Cape	496	89	108	275	<b>968</b>
	Free State	26			10	<b>36</b>
	Gauteng	802	19	55	128	<b>1004</b>
	KZN	261	31	147	12	<b>451</b>
	Limpopo	105			8	<b>113</b>
	North West	86	1	3	19	<b>109</b>
	Northern Cape	17	1		2	<b>20</b>
	Western Cape	65	147	60	88	<b>360</b>
<b>MALE Total</b>		<b>1858</b>	<b>288</b>	<b>373</b>	<b>542</b>	<b>3061</b>
<b>Grand Total</b>		<b>2620</b>	<b>447</b>	<b>777</b>	<b>734</b>	<b>4578</b>

## BRIEFS: 2015/16 Q1-3

SEX	REGION	AFRICAN	COLOURED	INDIAN	WHITE	Grand Total
<b>FEMALE</b>	Eastern Cape	115	26	38	62	241
	Free State	2			5	7
	Gauteng	169	3	20	30	222
	KZN	210	17	163	9	399
	Limpopo	39			2	41
	North West	42	5	1	3	51
	Northern Cape	15		4	13	32
	Western Cape	98	92	55	21	266
<b>FEMALE Total</b>		<b>690</b>	<b>143</b>	<b>281</b>	<b>145</b>	<b>1259</b>
<b>MALE</b>	Eastern Cape	406	30	90	147	673
	Free State	42		1	8	51
	Gauteng	382	6	30	90	508
	KZN	200	30	166	14	410
	Limpopo	108	3	2	4	117
	North West	48			8	56
	Northern Cape	16			3	19
	Western Cape	73	86	41	42	242
<b>MALE Total</b>		<b>1275</b>	<b>155</b>	<b>330</b>	<b>316</b>	<b>2076</b>
<b>Grand Total</b>		<b>1965</b>	<b>298</b>	<b>611</b>	<b>461</b>	<b>3335</b>

## COUNSEL PAYMENTS: 2013/14

Sex	Region	African	Coloured	Indian	White	Grand Total
Female	Eastern Cape	R 3 405 403.62	R 1 226 245.81	R 3 462 514.97	R 4 082 640.83	R 12 176 805.23
	Free State	R 411 854.65			R 1 065 943.00	R 1 477 797.65
	Gauteng	R 41 590 094.81	R 1 173 032.00	R 17 489 034.03	R 11 316 761.09	R 71 568 921.93
	KZN	R 4 949 940.17	R 568 316.00	R 5 087 704.03	R 81 900.00	R 10 687 860.20
	Limpopo	R 719 505.79			R 39 029.90	R 758 535.69
	North West	R 2 935 168.50		R 83 200.00	R 211 770.00	R 3 230 138.50
	Northern Cape	R 1 705 977.27	R 16 900.00	R 22 572.00	R 284 639.33	R 2 030 088.60
	Western Cape	R 3 477 279.09	R 3 975 599.60	R 3 367 649.71	R 1 223 336.21	R 12 043 864.61
Female Total		R 59 195 223.90	R 6 960 093.41	R 29 512 674.74	R 18 306 020.36	R 113 974 012.41
Male	Eastern Cape	R 50 408 327.03	R 4 323 960.74	R 4 248 375.10	R 27 896 986.80	R 86 877 649.67
	Free State	R 5 169 685.00	R 477 309.50	R 1 167 360.00	R 3 552 722.87	R 10 367 077.37
	Gauteng	R 187 260 870.58	R 2 092 909.04	R 23 644 131.78	R 99 048 990.69	R 312 046 902.09
	KZN	R 7 004 073.89	R 271 167.00	R 10 953 738.08	R 2 362 118.75	R 20 591 097.72
	Limpopo	R 5 998 599.92	R 8 208.00		R 321 014.34	R 6 327 822.26
	North West	R 18 262 013.39		R 1 486 928.54	R 3 496 678.72	R 23 245 620.65
	Northern Cape	R 8 690 886.72			R 2 690 808.24	R 11 381 694.96
	Western Cape	R 11 242 459.79	R 21 875 761.62	R 3 825 666.59	R 20 118 848.00	R 57 062 736.00
Male Total		R 294 036 916.32	R 29 049 315.90	R 45 326 200.09	R 159 488 168.41	R 527 900 600.72
Grand Total		R 353 232 140.22	R 36 009 409.31	R 74 838 874.83	R 177 794 188.77	R 641 874 613.13

## COUNSEL PAYMENTS 2014/15

Sex	Region	African	Coloured	Indian	White	Grand Total
Female	Eastern Cape	R 3 625 784.80	R 1 958 952.64	R 4 041 936.36	R 3 473 932.35	R 13 100 606.15
	Free State	R 294 027.35	R 118 170.00	R 38 859.78	R 1 394 792.02	R 1 845 849.15
	Gauteng	R 41 720 380.36	R 2 072 633.25	R 20 158 508.68	R 11 824 638.41	R 75 776 160.70
	KZN	R 3 563 239.12	R 778 131.62	R 5 841 283.57	R 25 300.00	R 10 207 954.31
	Limpopo	R 1 388 516.92			R 99 708.00	R 1 488 224.92
	North West	R 1 973 239.30		R 154 830.00	R 170 420.00	R 2 298 489.30
	Northern Cape	R 2 624 392.54		R 112 521.98	R 544 951.20	R 3 281 865.72
	Western Cape	R 4 095 551.08	R 4 201 574.32	R 1 993 106.81	R 889 051.97	R 11 179 284.18
Female Total		R 33 607 287.56	R 8 542 823.95	R 17 064 221.63	R 10 523 105.92	R 69 737 439.06
MALE	Eastern Cape	R 59 947 903.30	R 5 658 615.10	R 6 670 735.99	R 34 444 576.96	R 106 721 831.35
	Free State	R 5 671 143.41	R 139 232.00	R 1 920 174.00	R 3 902 366.92	R 11 632 916.33
	Gauteng	R 169 487 062.64	R 3 428 897.38	R 16 519 270.83	R 82 280 219.27	R 271 715 450.12
	KZN	R 6 889 308.60	R 957 664.07	R 11 160 980.10	R 2 841 620.82	R 21 849 573.59
	Limpopo	R 8 787 338.51	R 34 041.00		R 1 524 288.06	R 10 345 667.57
	Limpopo	R 684 308.00			R 42 298.00	R 726 606.00
	North West	R 14 890 717.85		R 645 906.77	R 4 340 804.85	R 19 877 429.47
	Northern Cape	R 8 248 378.58	R 11 628.00		R 3 168 573.34	R 11 428 579.92
	Western Cape	R 10 389 226.89	R 16 316 789.83	R 4 620 671.62	R 21 204 396.67	R 52 531 085.01
	Western Cape	R 280 944.00	R 1 687 029.00	R 856 149.00	R 1 841 163.00	R 4 665 285.00
MALE Total		R 285 276 331.78	R 28 233 896.38	R 42 393 888.31	R 155 590 307.89	R 511 494 424.36
Grand Total		R 347 105 978.90	R 39 946 107.31	R 75 930 915.18	R 175 288 943.64	R 638 271 945.03

## COUNSEL PAYMENTS 2015/16 Q1-3

Gender	Region	African	Coloured	Indian	White	Grand Total
FEMALE	Eastern Cape	R 4 543 176.96	R 1 885 095.41	R 3 860 943.92	R 5 111 921.52	R 15 401 137.81
	Free State	R 572 697.33	R 283 474.00	R 364 811.34	R 1 096 503.30	R 2 317 485.97
	Gauteng	R 35 244 499.47	R 2 399 571.96	R 11 704 341.34	R 9 939 299.52	R 59 287 712.29
	KZN	R 2 486 072.99	R 690 181.45	R 4 033 272.70	R 246 570.00	R 7 456 097.14
	Limpopo	R 1 630 047.17	R 0.00	R 30 750.00	R 58 720.00	R 1 719 517.17
	North West	R 6 225 821.18	R 19 650.00	R 518 736.40	R 166 202.00	R 6 930 409.58
	Northern Cape	R 2 183 771.58	R 0.00	R 224 789.08	R 205 528.50	R 2 614 089.16
	Western Cape	R 3 961 675.98	R 5 303 125.35	R 4 162 585.80	R 1 137 852.00	R 14 565 239.13
Female Total		R 56 847 762.66	R 10 581 098.17	R 24 900 230.58	R 17 962 596.84	R 110 291 688.25
MALE	Eastern Cape	R 54 132 639.20	R 3 486 522.97	R 5 373 042.14	R 28 573 160.10	R 91 565 364.41
	Free State	R 6 113 657.68	R 223 473.82	R 60 790.50	R 3 247 467.35	R 9 645 389.35
	Gauteng	R 139 483 933.31	R 2 738 346.00	R 14 181 549.36	R 63 516 175.58	R 219 920 004.25
	KZN	R 5 215 140.29	R 1 645 570.06	R 8 417 250.38	R 1 334 818.52	R 16 612 779.25
	Limpopo	R 10 389 692.74	R 60 000.00	R 49 590.00	R 759 793.56	R 11 259 076.30
	North West	R 12 155 091.05		R 645 635.50	R 2 065 433.63	R 14 866 160.18
	Northern Cape	R 7 383 614.07	R 31 920.00	R 64 980.00	R 816 249.05	R 8 296 763.12
	Western Cape	R 9 855 767.63	R 14 777 443.21	R 3 847 669.08	R 13 709 855.19	R 42 190 735.11
MALE Total		R 244 729 535.97	R 22 963 276.06	R 32 640 506.96	R 114 022 952.98	R 414 356 271.97
Grand Total		R 301 577 298.63	R 33 544 374.23	R 57 540 737.54	R 131 985 549.82	R 524 647 960.22

Delegates raised concerns about the figures in that it was not clear who had received the work.

**Mohale Ralebitso**, CEO, Black Business Council, reminded everyone about the famous and eloquent speech presented by former President Thabo Mbeki entitled “I am an African”. According to him, “everybody who was going to say something on the day said something different and they wanted to articulate why they were an African”. The basis for this was as a result of an earlier presentation on research findings on briefing patterns. He further said that those who did not respond to the request for information by the LSSA did not have a good answer and, therefore, did not want to provide something that was going to embarrass them. This is the only reason why they opted not to respond.

Mr Ralebitso was at pains to mention that he was embarrassed to see the State as a “principle actor and catalyst for the change that we want to see in the general economy” failing to achieve a balance in terms of its briefing patterns. He was concerned that there is still an uneven distribution of work. In his words, “what do they confirm about your conscious and unconscious biases?” He also questioned black consumers of legal services and what this said about some of them, if they were among the delegates at the Summit deliberations. Mr Ralebitso did not mince his words when he asked what this said about an individual’s inferiority complex if one finds him/herself unwilling or incapable of briefing a black law firm on an issue of importance? He encouraged people to interrogate themselves. He further asked white people who find themselves in a similar position as black people, to ask themselves what this had to say about them when they did not ask about the whereabouts of their black counterparts, if they are in the same law firm and “engaging certain issues if you’re on the client’s side”? He was also alert to the fact that people “consciously or unconsciously make those decisions to brief one way or the other”. In response to the lack of women in terms of receiving work, he cautioned those “who have been on the receiving end of that bias”, not to find themselves perpetuating unequal distribution of work as this was “illegitimate and dangerous for the ambitions of our country”. He concluded by indicating that “we” must stop entrenching apartheid.

### **1.1.2 Panel B – Perspective from the legal profession**

Adv Dali Mpofu SC commenced by indicating that he was weary of attending these Summits for three decades without any solution. His was, therefore, of the view that there is an urgent need to form a transformation working group to deal with the issues that include:

- Rotation of briefs and skills areas;
- Skills transfer programmes;
- Public education;
- Traditional leadership;
- Success evaluation, ratings, peer review mechanisms;
- Corruption;
- Sexual harassment;
- Racial and gender discrimination;
- Diversity and diversification of skills;
- Value measurements of briefs;
- Private sector procurement of legal services;
- Statistics and targeted empowerment;
- Transparency;
- Decongestion of the State Attorney's offices; and
- Inclusion of state-owned enterprises and municipalities.

According to him, these will, *inter alia*, serve as benchmarks against which to measure performance of enterprises on how they are addressing these issues. Performance can be measured, for example, on a weekly or monthly basis.

**Adv Samantha Martin** started by outlining the plight of female practitioners as reflected in the earlier presentations. According to her, issues facing women at the Bar required a collective approach from all stakeholders and not merely asking the State to intervene. She was of the view that the problem lies in retaining women at the Bar. Women advocates leave the Bar for various reasons, including lack of mentorship. Most junior advocates or pupils (females) who approach her indicate that they receive no

mentorship. The said pupil advocates have no idea on how to develop their own practice and create relationships with attorneys who specialise in their areas of interest. According to Ms Martin, it was high time that people should start mentoring juniors even beyond the pupillage stage. She was also alert to the fact that women struggle to “break through to the market place” because there is no right platform for them to do so. Another challenge that is facing women is the 97 day rule as counsel has to wait for three months to be paid. Black females have on certain occasions informed her that they are unable to pay their rent. Taking maternity leave also comes with challenges. Ms Martin related the experience of a black female advocate who had just given birth and was back at work. She was asked by her group why she was back. Pregnancy is also seen as a form of incapability. Ms Martin said that they get comments from certain attorneys to the effect that they are not briefing certain individuals because those individuals are pregnant “as if their hormones render them incapable of doing their work”. She was surprised by such comments and called on everyone to deal with these comments and perceptions as they are held by both male and female attorneys. She attributed these factors to a lack of a coherent policy, and particular implementation mechanisms on how one ought to manage her chambers and also how one is briefed. Ms Martin urged a “comprehensive solution” to the existing challenges facing female advocates.

**Max Boqwana** was concerned that the discussions on briefing patterns had been ongoing even before 1994. According to him, the deliberations at the Summit were in no way different from any other discussions that have been held in the past. He attributed the lack of progress to a non-existent policy to implement the transformative agenda on briefing patterns. He also blamed the lack of accountability from SOEs to drive transformation in the manner in which they distribute their work. He was at pains to mention that there is something called a BEE code that requires black lawyers to comply with its provisions. He expressed his utmost dissatisfaction with the Code. He said that he was given a first brief by one government department fifteen years ago. After he had done the work, he was not paid for almost six months. He followed up on the payment only to be informed that the said Department did not have his BEE certificate. He was astonished by this as he was required to produce a document to prove that he was

black. Further, the people who instructed him knew that they wanted a black practitioner. He was also surprised by the non-inclusion of a “transformation clause” in the Legal Practice Act. According to him, “we are back to square one”. The only way forward is a united profession that will raise the issues with one voice.

He also indicated that the practice of the State Attorney to brief only advocates was wrong because it implies that only advocates may appear in the High Court. He states that attorneys also appear in the High Court and can represent Government. He was of the view that attorneys need to take this up and make their own case and also indicate that they will charge a lower rate than advocates. He concluded by indicating that the DOJ&CD has to take a leadership role in transforming briefing patterns together with other stakeholders. Finally, he said that there is a need for “creating a common vision, with clear implementation plans” and also to use the “State’s ability to procure services”.

**Baitseng Rangata** stated that she has seen the frustration of previous speakers and that it was obvious that there is a problem. With reference to the Freedom Charter which, *inter alia*, advocates for the wealth of the country to be restored to the people, Ms Rangata was at pains to mention that 60 years later, there were still discussions about the distribution of wealth. In her view, “the legal profession is bleeding”. She questioned the fact that practitioners were relying on “Good Samaritan” who share their little work with them whilst the major consumer of legal services (Government) is doing nothing. She disputed the general assumption that female lawyers were good in family law and criminal law. According to her, this unfounded perception has to end. She further indicated that, as a practitioner from Maponya Attorneys, it was frustrating to be on the panel of attorneys for government institutions without receiving any work for over twelve months. She stressed that this was the time that the issue of uneven distribution of work was addressed once and for all. She concluded her presentation by indicating that all lawyers have been trained and, therefore, there must be a “drastic change” as “both blacks and whites, females and males” have to survive.

**The Deputy Minister of Justice and Constitutional Development, Hon J Jeffery** begun by stating that as the Government, they want a “Bar, an advocates profession, an attorneys’ profession that reflect the race and gender demographics of the country”.

This is their primary aim even though this is still far from being achieved. He said that 70% of the Bar is largely white, even though whites accounted only for 8.9% of the population. When it came to Africans (including of coloureds and Indians), they made up only 18% of the Bar; but 79.2% of the population. The same was applicable to the attorneys' profession where the members of three of the four Law Societies are overwhelmingly white (Cape Law Society 66%, Law Society of the Free State 77%, Law Society of the Northern Provinces 64%, KwaZulu-Natal Law Society 38%, 40% were Indian and the rest African and coloured).

The Deputy Minister emphasised that he has had a meeting with, *inter alia*, with the Cape Bar Council and the Black Lawyers Association to deal with uneven distribution of work. He differed with the view that the Legal Practice Act does not deal with transformation because the “long title, is to provide a legislative framework for the transformation and restructuring of the legal profession”. In addition the Legal Practice Act aims “to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic”. It was, therefore, clear that the Legal Practice Act deals with transformation.

The Deputy Minister agreed that there must be transparency in briefing patterns so that such information can be made available to the public for perusal. He, however, expressed doubt about how far one could go as regards transparency in releasing the names of those who get briefs, as privacy issues comes into play.

The Deputy Minister was of the view that most of the criticism against the State was not fair. He was of the opinion that the issue was the unavailability of information to the public. According to him, the issue was how the State can be made to provide available information when requested. In his view, the value of briefs that were given to previously disadvantaged individuals that amounted to 76% is “pretty high”. He said that it was unfortunate that research had not been conducted for the private sector. In his view, that is where the massive problem lies. He was of the view that something has to be done as regards the private sector. He said that it was essential to investigate the extent

to which the private sector briefs black counsel. Although he conceded that privacy issues may be an obstacle, he was optimistic that there was a way that this can be done. The Deputy Minister ended his address by stating that we all have “to get to the situation where in other sectors of society, particularly advocates, nobody questions a black African advocate, because that is ... the sort of psychological prejudices from society in that regard”.

## **1.2 Solutions session**

The afternoon session was mainly focussed at finding solutions. Delegates were divided into 15 groups. Each group, through a representative, presented its views and recommended solutions. The questions were as follows:

### **Groups 1 - 8 focussed on:**

- The absence of Black practitioners among the more than 40 lawyers in the landmark silicosis case, indicates that there is a serious problem. What could be done to address this complex problem?
- Are power relations in the private sector a contributing problem to selective briefings? If so, what can be done to address this?
- How do attorneys choose to brief advocates? Are they taking into account those who are previously disadvantaged such as Black males, White and Black female advocates to advance transformation; or are they putting their client's needs above anything else? How can this be resolved to ensure the transfer of skills and balanced briefing patterns?
- Whose responsibility is to transform the traditional briefing patterns? The briefing of White males to do work of any complexity? Is it the State through the Department of Justice and Constitutional Development? The LSSA, GCB, Attorneys or Advocates? How?
- What is the role of clients in addressing uneven distribution of work?

### **Groups 9 - 15 considered the following questions:**

- Is there a policy and criteria for selecting both attorneys and counsel from the ranks of the historically disadvantaged?
- What is the role of the private sector such as the mining and banking industries? Whom are they briefing?
- What is the role of the State as a massive consumer of legal services doing about – taking a look at counsels who appear at the Constitutional Court representing the State?
- Who should monitor compliance with briefing patterns and what are the consequences of not complying with the suggested policy or criteria?
- How should the monitoring body measure compliance – through annual reports? How should the reports be made available to the public?

Similar to the speakers, delegates expressed their frustrations at having to attend all the seminars related to briefing patterns without any solutions.<sup>22</sup> Delegates further indicated that for two decades they had been listening to one speech after another with no workable outcome. They, therefore, hoped that the Summit would bring about change, unlike previous seminars. The delegates from all groups shared common points such as:

- The private sector should advertise its work to the general public.
- Legal practitioners should alert their clients about the need to brief all the people regardless of race and gender.
- Junior counsel should be advertised – have their bios and areas of expertise circulated in their Bars.
- There must be a mentoring system.
- There must be a policy for firms regarding briefing of advocates (directors must ensure that advocates are briefed on a rotational basis).
- Briefing must be on rotational basis taking into account race, gender and seniority.

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<sup>22</sup> It must be mentioned that most of the points raised above were to a large extent similar by those made by stakeholders via the newspaper invitation for submissions.

- There must be an obligation on senior counsel to negotiate fees with junior counsel for purposes of sharing.
- There must be quarterly/annual reports on briefing patterns showing empirical data.
- There must be a Task Team to monitor how the State Attorney distributes its work to advocates.
- Those who do not brief black lawyers/advocates must be engaged to find the common solution.
- There must be campaign for big firms to change their briefings patterns.
- Government should be compelled to withdraw business from those who keep work only among themselves.
- There must be a budget for the empowerment of practitioners in areas regarded as too complex, so that they may also get work in those fields.
- There must be a fine for non-compliance with agreed guidelines.
- Counsel must be engaged to market new advocates to attorneys/law firms.
- There must be a policy for female practitioners to accommodate them during maternity and child-nurturing periods.
- Recruitment policies must be tailored towards transformation.
- The DOJ&CD must assess why mostly White advocates appear before the Constitutional Court.
- All stakeholders, including the private sector, must be part of the issues raised.
- There must be a multi-body monitoring mechanism.

After robust discussions – including the concerns raised – the delegates unanimously adopted the resolutions on briefing patterns that will address the issues discussed. Part of the resolutions require that a Task Team that will consist of the State through the DOJ&CD, three representatives of the attorneys' profession through the LSSA, three representatives of the advocates' profession, two representatives of business through the Black Business Council and Business Unity South Africa and one representative of the large law firms be formed. The Task Team will convene within two months of the date of the Summit. A copy of the resolutions appears as Annexure 5.

The Summit organisers were:

Name	Organisation
Nic Swart	LSSA
Fiona Kedijang	LSSA
Barbara Whittle	LSSA
Moses Retselisitsoe Phooko	Independent consultant to the LSSA

## **Appendix A – Sources consulted and acknowledgements**

The researcher is grateful to:

1. the Government Departments and SOEs who took their time to compile the information as requested.
2. The General Council of the Bar of South Africa for the membership statistics as at 30 April 2015.
3. The Law Society of South Africa for the statistics for the law firms and practising attorneys.
4. N Manyathi-Jele: "Lack of advancement of black and female lawyers in the spotlight' *De Rebus*, July 2015:12 [2015] DEREBUS 4.
5. P Nombembe and A Narsee "Black advocates cite racism as they feel the financial pinch" *Sunday Times* 10/05/2015 available at <http://www.timeslive.co.za/sundaytimes/stnews/2015/05/10/Black-advocates-cite-racism-as-they-feel-the-financial-pinch> (accessed 15 March 2015)
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7. CALS Report on the Transformation of the Legal Profession August 2014, 11-12,65, 67 available at: <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf>
8. J Klaaren "Current Demographics in Large Corporate Law Firms in South Africa" *African Journal of Legal Studies* 2014 (7) 587–594.
9. C Williams "Research methods" 2007 (5) *Journal of Business & Economic Research* 65-72.

## **Appendix B – Newspaper invitation on Summit and call for submissions from all stakeholders**

- The Summit advert appeared in the *Star*, *Sowetan* and *Business Day* on 15 February 2016. It also appeared in the *Sunday Times*, 14 February 2016.

## Appendix E – Resolutions adopted at the Summit



### **Resolutions adopted at the Summit on Briefing Patterns in the Legal Profession held at Emperor's Palace, Kempton Park 31 March 2016**

The Summit expresses its deepest concerns about the legal briefing patterns in the public and private sectors insofar as these endanger the constitutional democracy and insofar as there appears to be bias against black practitioners and women practitioners in these sectors.

This flies against the principles of non-racialism and non-sexism as espoused in the Preamble and elsewhere in the Constitution.

It further has a negative impact on the occupational progression of practitioners in these groupings and their economic wellbeing.

The Summit recognises that meaningful action must be taken by all stakeholders from the date of this Summit and that this process be subjected to strict accountability.

The Government is expected to embrace decisive action and must not be seen to promote the skewed briefing patterns as set out above.

#### **It is, therefore, proposed that:**

1. Representatives of the following sections nominate a representative to a Task Team to be convened by the Law Society of South Africa (LSSA) –
  - The State through the Department of Justice and Constitutional Development.
  - Three representatives of the attorneys' profession through the LSSA.
  - Three representatives of the advocates' profession.
  - Two representatives of business through the Black Business Council and Business Unity South Africa.
  - One representative by the large law firms represented.
2. This group will convene within two months from the date of the Summit and will consider an agenda, *inter alia* including:

- 2.1 Developing a uniform protocol on the procurement of legal services;
- 2.2 Setting targets for entities doing State work;
- 2.3 Establishing a common register for the recording of State legal work, with reference to name, frequency, value and nature of brief;
- 2.4 Drafting a Code of Conduct for private enterprise in respect of legal work, with which the private sector can associate;
- 2.5 Considering relevant research, training and development;
- 2.6 Monitoring progress with regard to briefing patterns for a report to Summit delegates and for considering the necessity of a follow-up summit.  
In this respect, performance by the State and corporate sector factor in deciding whether the Summit should be reconvened.

3. The Task Team will give due consideration to all proposals and concerns raised by the delegates at this Summit.

**Appendix G – Attendance Register**

DRAFT: For comment