

SOUTH AFRICAN LAW COMMISSION

TWENTY-FIFTH ANNUAL REPORT

1997

25 YEARS OF LAW REFORM

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1997 ANNUAL REPORT

To Dr A M Omar, MP, Minister of Justice

I have the honour to submit to you in terms of section 7(2) of the South African Law Commission Act, 1973 (Act 19 of 1973), the Commission's report on all its activities during 1997.

Mr Justice I Mahomed

CHAIRPERSON

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REVIEW

The South African Law Commission has celebrated its 25th anniversary during the year under review. Compared to the age of law reform agencies in other jurisdictions, this milestone would make the Commission one of the older agencies internationally. A review of the Commission's development and achievements during the past 25 years is reflected in Chapter 2.

In the previous annual report mention was made of the new policies adopted by the present Commission. The main one was that emphasis should be placed on making the Commission a

community-orientated institution which could be seen by members of the public as a body concerned with, and driven by, their needs. A concerted effort has been made to give effect to this approach. For the first time in its history, the Commission enjoyed exposure in the form of a video publicising one of its investigations (into a new juvenile justice system), which was produced with the financial and technical assistance of UNICEF. The video was shown to a wide segment of the public, and enabled the Commission to benefit from discussions stimulated by the video. It also facilitated the consultation process, upon which the Commission has placed and continues to place a high premium. In addition to the video a number of other measures have been taken to ensure that the Commission is not viewed by the public as an academic and aloof institution. These include the holding of workshops and seminars country wide, involving members of the public in the Commission=s investigations, the distribution of questionnaires couched in language intelligible to lay persons and increased media exposure.

With a view to extending the basis for consultation and involving interested parties and the community at an earlier stage in the process of law reform, the Commission has embarked upon a working method in terms of which, in appropriate cases, shorter documents in the form of issue papers - which precede the publication of discussion papers - are compiled for general information and comment. The object is to stimulate and activate the debate in respect of relevant matters and to give direction to the reform which is to follow. Documents of this nature can also serve as background material for seminars or workshops on the topics in question. Seven issue papers were published during the year under review:

- * Project 100 Family law and the law of persons: review of the maintenance system (issue paper 5)
- * Project 73 Simplification of criminal procedure: access to the criminal justice system (issue paper 6)
- * Project 82 Sentencing: restorative justice (compensation for victims of crime and victim empowerment) (issue paper 7)
- * Project 94 Arbitration: alternative dispute resolution (issue paper 8)

- * Project 106 Juvenile justice (issue paper 9)
- * Project 107 Sexual offences against children (issue paper 10)
- * Project 82 Sentencing: mandatory minimum sentences (issue paper 11)

The issue papers are also listed in **Annexure E**.

Five discussion papers, previously referred to as working papers, were finalised during the year under review and published for consultation purposes. They are:

- * Project 100 Family law and the law of persons: domestic violence (discussion paper 70)
- * Project 86 Euthanasia and the artificial preservation of life (discussion paper 71)
- * Project 85 Aspects of the law relating to AIDS: pre-employment HIV testing (discussion paper 72)
- * Project 85 Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools (discussion paper 73)
- * Project 90 Harmonisation of the common law and indigenous law: customary marriages (discussion paper 74)

The discussion papers are also listed in **Annexure F**.

One report was finalised and approved by the Commission during the year under review:

- * Project 85 First interim report on aspects of the law relating to AIDS

A summary of the recommendations contained in this report appears in Chapter 5.

A number of other reports were also finalised during the year under review and are awaiting Commission approval. The draft reports will be considered at the first meeting of the Commission scheduled to take place early in 1998. The investigations to which these reports relate are the following:

- * Project 47 Unreasonable stipulations in contracts and the rectification of contracts
- * Project 85 Aspects of the law relating to AIDS: pre-employment HIV testing
- * Project 85 Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools
- * Project 88 The recognition of a class action in South African law
- * Project 94 Arbitration: international arbitration

The following Acts emanating from draft Bills recommended by the Commission were adopted by Parliament during 1997:

- * The Prescribed Rate of Interest Amendment Act 7 of 1997. The Act mainly contemplates provision for the payment of interest on unliquidated debts resulting from damages.
- * The Contingency Fees Act 66 of 1997 which is expected to commence during 1998. The Act will facilitate access to justice by allowing legal practitioners to bring their fees more into line with the needs of their clients.
- * The Magistrates= Courts Amendment Act 81 of 1997. The Act gives effect to the Constitutional Court judgement pertaining to the imprisonment of debtors and creates a mechanism for ensuring debtors= attendance in court.

- * The Natural Fathers of Children Born out of Wedlock Act 86 of 1997. The Act grants a right of access to the natural father of a child born out of wedlock by enabling him to apply to the division of the High Court in which the child is domiciled or usually resident for such an order.

The following completed investigations and recommendations of the Commission are receiving the attention of Parliament:

- * Project 65 - Surrogate motherhood: The Commission's report is being finalised by an ad hoc committee of Parliament.
- * Project 74 - Debt collecting: The Debt Collectors Bill, 1997 was introduced in Parliament and referred to the Justice Portfolio Committee.
- * Project 87 - Jurisdictional lacuna in the Supreme Court Act 59 of 1959: The Judicial Matters Amendment Bill, 1997 was introduced in Parliament and referred to the Justice Portfolio Committee.
- * Project 89 - Declaration and detention of persons as State Patients: The Criminal Matters Amendment Bill, 1997 was introduced in Parliament and referred to the Justice Portfolio Committee.

The following completed investigations and recommendations of the Commission are receiving attention at departmental level:

- * Project 50 - Investigation into the payments system in South African law: The Commission's report is under consideration by the Department of Finance.
- * Project 52 - Investigation into the legal consequences of sexual realignment and related matters: The Commission's report is under consideration by the Department of Justice.

- * Project 62 - The protection of a purchaser of shares: The Commission's report is under consideration by the Department of Finance.

- * Project 85 - Legal aspects relating to AIDS: Regulations emanating from the Commission's first interim report on AIDS are under consideration by the Department of Health.

- * Project 100 - Access to minor children by interested persons: The Minister of Justice proposes to discuss the matter with the Minister of Welfare.

- * Project 104 - Money laundering: The Commission's report is under consideration by the Department of Finance.

A number of new investigations commenced during the year under review. A progress report in this regard appears in Chapter 5.

The transformation of our legal system offers great challenges in the area of law reform. The Law Commission and its secretariat view their involvement in the process of law reform as a valuable opportunity to contribute to the inception and preservation of a legal system that satisfies the needs of the South African community.

TWENTY FIVE YEARS OF LAW REFORM

*** Introduction**

On 1 September 1997 the Commission entered its 25th year of existence. This is a milestone at which it is appropriate to pause and look back over more than two decades of law reform initiated by the Commission and, perhaps, to gain inspiration for the future. It is also an appropriate time to record the Commission's development and achievements in the field of law reform, and to pay tribute to those who have contributed to its success. From a modest start in 1973 the Commission has grown into a law reform body that has become an integral and necessary part of the law reform process in South Africa, and through its close contact with similar bodies abroad it has become a fully fledged member of the international family of law reform bodies.

*** Development of the Commission**

Over the past 25 years significant developments have taken place with regard to the structure and functioning of the Commission. The Commission evaluates its functioning on a continuous basis to ensure that the process of law reform is efficient and effective so as to meet the needs of an ever-changing society. Its efficient and effective functioning is evidenced by the increasing demands that have been made on its services by the public and private sectors and by the general populace.

In order to maintain a high standard of service and to expedite the process of law reform, changes were effected to the Commission's functions and structure. Upon the Commission's recommendation, the Act was amended in 1984 so as to provide for the establishment of a working committee and such other committees as the Commission may deem necessary, and for the designation by the State President of full-time members. In respect of the establishment of committees the Act now provides that if the Commission deems it necessary for the proper performance of its functions it may-

- establish a working committee, consisting of such members of the Commission as the Commission may designate, to perform, subject to the directions of the Commission, those functions of the Commission assigned to it by the Commission;
- establish such other committees as it may deem necessary, consisting of such members of the Commission as the Commission may designate, or such members of the Commission as the Commission may designate and other persons appointed by the Minister for a period determined by the Minister, to perform, subject to the directions of the Commission, those functions of the Commission assigned to it by the Commission.

The most important changes that were effected include the designation of full-time members, the establishment of a working committee, the formal establishment of a project committee system, the expansion of the Commission=s Secretariat and the improvement of its working methods.

*** The new Commission**

An important and significant development that took place during the last two years was the restructuring of the Commission=s membership. For the first time in its history the Commission has two female members, elected with effect from 1 January 1996. The restructuring was aimed at making the Commission more representative of the profile of the population, whilst retaining the balance as far as representing various branches of the legal profession is concerned. Thus the new members represent the Constitutional Court, the Supreme Court of Appeal, the bar and side-bar as well as the academic branch.

Since the new Commission=s first meeting it became evident that the members leaned more towards a community oriented approach of law reform. A number of measures have been implemented to develop public participation in the Commission=s activities and to enhance the Commission=s profile. These include the establishment of additional project committees, the employment of external expertise and knowledgeable persons to act as project leaders for investigations on the programme, the refinement of the Commission=s document series, the holding of workshops and seminars and increased media exposure. Moreover, the Commission now deliberately places more emphasis on the protection of the wider interests of the South

African people as a whole, seeking to avoid an unduly academic approach. This approach urged the new Commission to reconsider the priorities attached to investigations on the programme as it appeared when the present members took office, resulting in the removal of several investigations from the programme and the reprioritising of others.

*** Full-time members**

The Commission started off with part-time members only. From time to time additional members with expertise in a particular field of law relevant to an investigation were appointed in terms of the Act. Owing to the increase in investigations undertaken by the Commission and the fact that all the members of the Commission served on a part-time basis, the need arose for the appointment of full-time members. The first full-time members were Mr Justice P J J Olivier (Vice-Chairperson) and Mr G G Smit who served in this capacity for ten years. At present the Commission has only one full-time member, namely Professor Thandabantu Nhlapo. In addition to assisting with the planning of the various investigations on the Commission=s programme and giving guidance to the researchers concerned, he serves as a liaison between the members of the Commission and the secretariat. He also monitors the progress made with investigations and serves on the working committee. Since the appointment of full-time members in the middle of the eighties, the Commission has reaped considerable dividends in increased productivity and greater efficiency.

*** Working committee**

Because most of the members of the Commission serve in a part-time capacity the Commission finds it difficult to hold formal meetings regularly. The need was therefore felt for the establishment of an executive committee of the Commission to attend to day-to-day matters or urgent matters that require the Commission=s attention and to bring about greater continuity in the functioning of the Commission. Consequently a working committee was established for the first time in 1984. The working committee performs those functions assigned to it by the Commission, which include, *inter alia*, the consideration and approval of issue papers, discussion papers and annual reports, the monitoring of the progress of investigations, the management of the Commission=s Secretariat, recommendations for the appointment of additional members of the Commission and members of the project committees and any other

matter specifically assigned to it by the Commission. Since its establishment the working committee has been a great success. It has contributed significantly to the effective and efficient functioning of the Commission.

* **Project committees**

When the Act was amended in 1984 to provide for the establishment of committees, the power conferred by the Act was used exclusively to establish project committees consisting of experts to assist the Commission with particular investigations on its programme. Investigations in respect of which such committees have been established are those concerning the law of insolvency, Islamic marriages and related matters, the recognition of a class action in South African law and aspects of the law relating to AIDS, unreasonable stipulations in contracts and the rectification of contracts, and Jewish divorces.

In addition to the above-mentioned committees, the Commission established committees for the reform of different branches of the law. The following fields of study, to which committees were appointed, were identified: law of succession, criminal law, law of partnerships, law of things, law of evidence, law of trusts, administrative law, unjustified enrichment, law of delict, common law authorities, law of civil procedure, law of contract, law of criminal procedure, harmonisation of the common law and indigenous law, law of persons, family law and sentencing. The appointment of members of these project committees expired on 31 August 1994. The aspects or branches of the law that should be reformed were identified by the committees, and work is now proceeding on an *ad hoc* basis with the available personnel.

During the past 25 years some project committees completed their assignments while others were newly established. The present project committees are listed in **Annexure B**.

* **Expansion of the Commission=s Secretariat**

When the Commission was established in 1973 its Secretariat consisted of a secretary and an administrative officer. Towards the end of 1974 two research officers were appointed. As the Commission=s workload increased the Secretariat was gradually expanded. At present the

research staff of the Commission consists of 13 researchers who have been admitted as advocates of the High Court of South Africa. Four vacant posts are in the process of being filled. When circumstances require and sufficient funds are available, additional researchers are appointed on account of their expert knowledge to do research in particular investigations. The administrative component of the Secretariat consists of 10 posts.

*** Working methods**

Research is done to determine authoritatively the existing legal position and to identify shortcomings or deficiencies that need to be rectified. Consultation takes place between the researcher or project committee, if one has been appointed, and interested parties or persons with particular knowledge concerning the matter under investigation. Comparative studies are carried out in order to enable the Commission to benefit from experience elsewhere in the world. The primary aim of the Commission is to effect law reform by consulting with as many interested persons and bodies as possible. This process is facilitated by the Commission's policy of compiling issue papers as a first step - an addition to the Commission's publication series which has been added in 1996. Issue papers outline the problems encountered with particular areas of the law and invite submissions on possible solutions. They are distributed as widely as possible for general information and comment and are in appropriate cases also supplemented by workshops. Discussion papers are then prepared by the Commission's research staff to serve as a basis for its deliberations. They contain essential information on the investigation concerned and the Commission's tentative proposals for reform. Members of the public are informed of the availability of discussion papers by notices in the *Government Gazette*, press releases and press conferences. In addition, copies are distributed to organisations and, sometimes, individuals whose views on the subject under discussion the Commission particularly wishes to canvass. The responses to the provisional proposals are carefully studied before final decisions are made. The Commission also hears oral evidence in appropriate cases. The Commission's recommendations are embodied in comprehensive reports that also contain, where applicable, the draft legislation to give effect to the proposals. Reports are submitted to the Minister of Justice.

In making its recommendations the Commission bears in mind that there is a need to provide access to justice for all, to protect the rights of all parties involved - especially those of women

and children, to make legal processes affordable, to make the law less complicated, and to give effect to the values and principles underlying the Constitution.

Judging from comments received, the Commission's discussion papers and reports are well regarded. There appears to be an increasing tendency in faculties of law to use and prescribe the Commission's discussion papers and reports for their students at undergraduate as well as postgraduate level.

In view of the many valuable comments and proposals received on the Commission's recommendations as contained in its documents, there is no doubt that its working methods have proved successful. These methods ensure that the Commission's final recommendations as contained in its reports are well substantiated and are the product of a thorough airing of views and debate. They also facilitate the legislative passage of the Commission's proposed legislation in which its final recommendations are embodied.

*** Achievements of the Commission**

During the past 25 years the Commission has made every effort to adhere and give effect to its objects of developing, improving, modernising and reforming all branches of our law. During this period it has produced 94 reports and since 1982 it has published 74 working papers (since 1996 known as discussion papers) and distributed 11 issue papers (since 1996) for general comment. In the overwhelming majority of instances the Commission's recommendations have been accepted and put into effect. In fact, less than 13% of the Commission's proposals were not accepted. Many important reforms of our law were brought about on the recommendation of the Commission. The following examples may be mentioned:

□ ***Family law***

The Commission has made several recommendations concerning the reform of family law. These recommendations relate mainly to the law of divorce and to matrimonial property law.

Concerning the law of divorce, the Commission's recommendation resulted in the passing of the Divorce Act 70 of 1979, the Divorce Amendment Act 7 of 1989 and the Divorce Amendment

Act 44 of 1992. The Divorce Act 70 of 1979 introduced a new ground for divorce, namely irretrievable break-down of the marriage. This brought the South African divorce law into line with developments elsewhere in the world. The Commission's recommendations providing for a divorced woman to share in the pension benefits of her former husband are contained in the Divorce Amendment Act 7 of 1989. The Act greatly improves the position of a party to a divorce by including the pension interest of the other party in his or her assets for determining the patrimonial benefits to which the parties are entitled. Owing to problems experienced with the Act, the Commission subsequently further recommended that provision should be made for the determination of the pension interest in a retirement annuity according to the reserve value at the date of death or divorce of the member of the fund, as assessed by an actuary. The Divorce Amendment Act 44 of 1992 was also passed as a result of a recommendation by the Commission. Section 1 of the Amendment Act confers certain powers upon a court in the case where the court grants a decree of divorce in respect of a marriage, the patrimonial consequences of which are governed by the law of a foreign state.

The Commission found it necessary to investigate the effects of a presumption of death on the marriage of a person presumed to be dead. The Commission recommended that legislation be introduced to provide that the High Court may, at the request of the surviving spouse, grant an order dissolving the marriage. The Commission also recommended that a finding of a presumption of death in pursuance of section 18(2) of the Inquests Act 58 of 1959 should automatically result in the dissolution of a marriage. The Commission's recommendations resulted in the Dissolution of Marriages on Presumption of Death Act 23 of 1979.

The Commission reviewed the entire field of matrimonial property law and recommended drastic changes that were put into effect in terms of the Matrimonial Property Act 88 of 1984. This brought matrimonial property law into line with modern-day needs. In particular the weak position in which women often found themselves has been greatly improved. The Act provides, *inter alia*, for the abolition of the marital power of the husband and for a system of joint management of the joint estate of spouses married in community of property. It also introduced a matrimonial property system that enables the spouses to share in the accruals of each other's estates. Furthermore it introduced the principle of the redistribution of assets in marriages contracted out of community of property before the commencement of the Act. In 1988 these

changes were extended to marriages of Black persons, which had until then been regulated on a different basis.

The Commission also investigated the question of access rights to children born out of wedlock and came to the conclusion that the present common law position in terms of which the mother of such a child has exclusive rights in regard to access, custody and guardianship, should be reformed. The Commission recommended that the natural father of a child born out of wedlock may apply to the division of the High Court in which the child is domiciled or usually resident for an order granting him a right of access to such child. After the completion of this investigation, the Commission - upon public demand - further recommended the granting of visitation rights with regard to minor children to persons having any particular family tie or other relationship making it desirable, in the interests of the child, that those persons should have access to the minor child. The Commission's recommendations led to the adoption of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

The Commission also addressed problems encountered with divorce in religious marriages. The rules relating to divorce under Jewish law, for instance, treat a marriage as a private arrangement between the parties thereto and requires mutual consent in the event of dissolution. The Commission recommended an amendment to the Divorce Act 70 of 1970 so as to empower a court to refuse the granting of a decree of divorce or to make any order it deems just when one of the spouses refuses to co-operate in releasing the other spouse from any marriage bonds existing in terms of the rules of religion where it is in the power of the first-mentioned spouse to remove such bonds. The Divorce Amendment Act 95 of 1996 was passed as a result of the Commission's recommendations.

□ *The law of succession*

The Commission reviewed the entire field of the law of succession. Its recommendations resulted in two enactments, namely the Intestate Succession Act 81 of 1987 and the Law of Succession Amendment Act 43 of 1992. The Intestate Succession Act 81 of 1987 is a codification and simplification of the rules of intestate succession. The position of the surviving spouse has been improved. If the deceased is survived by a spouse, but no descendants, the spouse inherits the intestate estate. Previously the spouse had to compete with parents, brothers and sisters. The spouse's minimum share has been increased from R50 000 to R125 000.

The Law of Succession Amendment Act 43 of 1992 deals with testate succession. Its aim is to simplify formalities and to remove uncertainties. It empowers a court to declare a will valid in certain circumstances, despite non-compliance with certain formalities. It also improves the position of illegitimate children and clarifies the position of adopted children.

□ *The law of persons*

The Commission reviewed the law relating to children born out of wedlock with a view to removing certain legal disabilities from which they suffered and improving their legal status. This resulted in the Children's Status Act 82 of 1987. The Act regulates, *inter alia*, the status of a child born of a voidable marriage which is annulled; the legitimation of a child through the marriage of his parents; the guardianship of an illegitimate child whose mother is a minor; and the legal status of a child who is procreated through artificial insemination with donor gametes. Provision is further made to facilitate proof of paternity in certain instances.

The Commission investigated the introduction of a system of enduring powers of attorney to enable appointed agents to deal with the affairs of persons who become mentally incapacitated. This resulted in the adoption of the Mentally Ill Persons' Legal Interests Amendment Act 108 of 1990. The Act provides for a simpler procedure for the appointment of a curator for a mentally ill person.

The Commission has been investigating aspects of the law relating to HIV/AIDS since 1993. Strictly speaking the purview of the investigation cannot be confined to the law of persons, since it also encompasses aspects that touch upon public health law, administrative law and constitutional law. In the first of a proposed series of interim reports, the Commission dealt with certain matters which from a scientific, medical and legal viewpoint appear to be relatively uncontroversial. Recommendations pertaining to a prohibition on the use of non-disposable syringes, universal work place infection control measures, a national compulsory standard for condoms, regulations relating to communicable diseases and a national policy on testing for HIV/AIDS were made. Subsequent interim reports will deal with other matters identified for reform.

Surrogate motherhood is a modern phenomenon that creates legal as well as ethical problems. It is a consequence of scientific development that makes it medically possible for a woman through artificial insemination or embryo transplantation to give birth to a child for and on behalf of another woman, even though she (the woman giving birth) has no genetic bond with the child. Having investigated this contentious issue, the Commission recommended that it would be impractical to prohibit surrogate motherhood and to attempt to enforce such a prohibition. It further recommended that legislation is necessary for the proper regulation of surrogate motherhood, and proposed a draft Bill contemplating strict control over the issue and securing the best interests of the child who is to be born.

□ *The law of domicile*

A person's domicile is important in law for various reasons. In most cases it determines the legal system that applies to certain juristic acts and the court that has jurisdiction in this regard. The Commission's recommendations concerning the reform of the law of domicile resulted in the Domicile Act 3 of 1992. The most important principles contained in the Act are -

- that an intention to reside at a place indefinitely, coupled with the requirements of lawful residence at that place, is sufficient for the acquisition of a domicile of choice;
- that the age at which a domicile of choice may be acquired is reduced from 21 to 18 years;
- that a married woman's domicile of dependence is abolished;
- that the domicile of children and mentally incapacitated persons is determined according to the place to which they are most closely connected;
- that the rule is abolished that a person's domicile of origin revives if he or she leaves the place where he or she was domiciled without acquiring a new domicile;

- ☐ that no person loses his or her domicile before he or she acquires another domicile by choice or by law; and
 - ☐ that jurisdiction in actions for divorce is extended to cases where either of the parties is domiciled in the area of jurisdiction of the court or where either of them is ordinarily resident in the area of jurisdiction of the court and has been ordinarily resident in the Republic for a period of at least one year.
- ☐ ***The law of things***

Game farming in South Africa has expanded greatly in recent years. From a legal point of view game farmers have experienced problems resulting from the common law rules relating to the acquisition and loss of ownership of game. They were faced with the predicament that under the common law one loses ownership of game as soon as the game escapes from one's control. The Commission's recommendations resulted in the Game Theft Act 105 of 1991, which provides better protection for game farmers. The Act provides that the owner of game who keeps the game on land that is sufficiently enclosed does not lose ownership merely by reason of the game escaping from such enclosed land. The Act further provides that the ownership of game does not vest in a person who without consent hunts or catches game on the land of another. The entering upon land with the intent to steal game has been made an offence. The Act further contains provisions to facilitate proof of the theft of game.

☐ ***The law of trusts***

The Commission reviewed the law of trusts and recommended better control over trusts. Its recommendations resulted in the Trust Property Control Act 57 of 1988. The most important recommendations contained in the Act are the following:

- ☐ No trustee may act in that capacity until he or she has been authorised thereto in writing by the Master.
- ☐ The courts' power to vary the provision of a trust instrument is extended, in particular to obviate the unprofitable investment of trust property and to terminate the trust.

- Whether or not the trust instrument provides for trustees' resignation, they may resign without a court order after giving notice to the Master and the beneficiaries.

- ***The law of admiralty***

A study was made of the state of South African admiralty law and certain shortcomings were identified. The most important of these was that South African admiralty law had, for historical reasons, remained stagnant since 1890. The concurrent jurisdiction of admiralty courts and of the provincial and local divisions of the Supreme Court also gave rise to problems. Furthermore, it appeared desirable that the jurisdiction of admiralty courts should be clearly defined and that the procedure of those courts be modernised.

In order to address these problems and to bring South African admiralty law into line with modern-day requirements, the Commission, ably assisted by Mr D J Shaw, QC, an expert on admiralty law, made recommendations that resulted in the Admiralty Jurisdiction Regulation Act 105 of 1983.

- ***Constitutional law***

During 1991 the Commission produced two of its most important reports, namely the *Interim Report on Group and Human Rights* and the *Report on Constitutional Models*. These reports were preceded by a tremendous amount of research and by wide and extensive consultation, both in South Africa and abroad. They were received with great interest and enthusiasm by members of the public and private sectors and by the general public.

In its *Interim Report on Group and Human Rights* the Commission recommended the adoption of a bill of fundamental rights for South Africa. The draft bill of rights proposed by the Commission provides, *inter alia*, for the well-known civil and political rights as well as for certain social and economic rights and environmental rights.

An important feature of the bill of rights is that it is justiciable in the sense that the courts are granted the power to test the validity of legislation and the legality of executive or administrative

action against the norms set out in the bill. The Commission recommended that the ultimate testing power should vest in a constitutional chamber of the Appellate Division. The report also proposed the establishment of a permanent human rights commission and an extension of the Ombudsman=s power to enable him or her to investigate complaints regarding the violation of fundamental rights.

After the enactment of the 1993 Constitution, it became evident that a substantial part of the Commission=s recommendations in its interim report found substance in the Bill of Rights embodied in the Constitution. A final report on group and human rights was completed in 1994. Although the Commission did not recommend changes to the wording of the Bill of Rights in the 1993 Constitution, it did record reservations in respect of some issues dealt with in the Constitution, and also made recommendations on certain issues that were not expressly dealt with in the 1993 Constitution=s section on the Bill of Rights.

In its investigation into constitutional models the Commission concentrated on the following matters:

- ❑ The identification of the basic matters and institutions to be provided for in a future constitution for South Africa with a view to the balanced protection of human rights.
- ❑ The identification of the main types of models of democratic constitutions that should be considered for a future South Africa.
- ❑ An analysis of the different ways of protecting the individual rights of all citizens, as well as the rights of collective units, associations, minorities and peoples in each such type or model.
- ❑ A discussion of the possible methods by which a future constitution can be safeguarded and guaranteed in a legitimate way.

The investigation did not aim to draft a model constitution for South Africa. The Commission merely endeavoured to evaluate the different possibilities in respect of each important aspect of

the constitution as objectively as possible. The report comprises some 1 500 pages and covers a vast field of research, comparison and thought.

□ ***International law***

During 1991 the Commission reacted to an urgent request by the former Minister to consider whether accession to the Hague Convention on the Civil Aspects of International Child Abduction and the promulgation of legislation that would be necessitated by accession would limit the inherent common law jurisdiction of the High Court. The Commission concluded that accession to the Convention would not result in any curtailment of the powers of the High Court and recommended that South Africa accede to the Convention. The Commission's recommendations led to the adoption of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

□ ***Criminal law and procedure***

The Commission's investigation entitled *Women and Sexual Offences* in South Africa produced several important and significant recommendations that were implemented by, *inter alia*, the Law of Evidence and the Criminal Procedure Amendment Act 103 of 1987 and the Criminal Law and the Criminal Procedure Act Amendment Act 39 of 1989. The implementation of these recommendations produced the following results:

- The irrefutable presumption that a boy under 14 is incapable of having sexual intercourse was abolished.
- Any person whose presence is not necessary at criminal proceedings involving the prosecution of an accused for allegedly committing or attempting to commit, *inter alia*, any indecent act may not be admitted at such proceedings while the complainant is giving evidence, unless the complainant requests otherwise.
- The identity of such a complainant is protected under certain circumstances.

- ❏ Evidence as to sexual intercourse by, or any sexual experience of, any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, may not be adduced or such person may not be questioned thereon unless the court is satisfied that such evidence or such questioning is relevant or that it relates to the offence that is being tried.

In the case where a husband has been convicted of assault on his lawful wife and could, but for the existence of the marriage relationship between them at the time the assault occurred, have been convicted of rape, the fact that he could have been convicted of rape had he not been married to his wife may be regarded by the court as an aggravating circumstance in the passing of sentence.

In its investigation into the protection of child witnesses the Commission recommended that additional protection should be afforded witnesses under the age of 18 years who give evidence in criminal proceedings. The Commission's recommendation is contained in section 3 of the Criminal Law Amendment Act 135 of 1991. The protection relates to the appointment by the court of an intermediary if it appears to the court that such a witness would be exposed to undue mental stress or suffering if he or she testified in criminal proceedings. No examination, cross-examination or re-examination of the witness, except examination by the court, may take place except through the intermediary. The intermediary may, unless the court directs otherwise, convey the general meaning of any question to the witness. If the court appoints an intermediary it may direct that the witness may give evidence in a place which will set the witness at ease, which is so situated that any person whose presence may upset the witness is outside the sight and hearing of the witness, and which enables any person whose presence is necessary at the proceedings to see and hear, either directly or through the medium of any electronic or other device, the intermediary as well as the witness during his or her testimony. The implementation of the Commission's recommendation is a vast improvement in the protection of such witness.

The recommendations of the Commission concerning offences committed under the influence of liquor or drugs resulted in the Criminal Law Amendment Act 1 of 1988. The main aim of the recommendations is to create an offence in circumstances where a person commits an unlawful act but is not criminally liable therefor owing to the impairment of his or her faculties caused by the use of any substance that has that effect.

In its investigation into bribery the Commission found that the most important shortcomings in the legal position were that the Prevention of Corruption Act 6 of 1958 did not provide for all categories of persons that should be dealt with under the Act and that there was no criminal sanction for acts of bribery that took place outside the Republic=s borders but that adversely affected the interests of the Republic. The Corruption Act 94 of 1992 emanated from the recommendations of the Commission and rectifies these shortcomings.

The role of the Attorney-General as the official *curator ad litem* was considered by the Commission in its investigation into the declaration and detention of state patients and the release of such patients. The recommendations were aimed at relaxing the strict procedural requirements pertaining to these patients and at addressing the interests of mentally ill people who are accused of committing offences.

The Commission considered reform of the present system of trapping in the light of the impact of a human rights dispensation and trends in other parts of the world. While not recommending the abolition of the trapping system, the Commission recommended greater judicial control and the broadening of the court=s discretion in dealing with trapping. The recommendations led to the adoption of the Criminal Procedure Second Amendment Act 85 of 1996.

Although the Commission completed a report on the South African law of bail in 1992, it reconsidered and adapted that report - at the request of the present Minister - against the background of certain sections of the 1993 Constitution. The Commission held the view that in reforming the law relating to bail a healthy balance should be struck between the rights of an arrested person, as provided for in the Constitution, and the community=s rights to live in safety and the combatting of crime. The recommendations were therefore aimed at ensuring that, on the one hand, legal rules which are presently in force and which are irreconcilable with the rights of an arrested person are removed from the statute book or are adapted, and on the other hand, that these rights are limited in accordance with constitutional guidelines. The Commission=s recommendations were embodied in the Criminal Procedure Second Amendment Act 75 of 1995.

As part of the Commission=s comprehensive investigation into the simplification of criminal procedure, recommendations were made aimed at relaxing the cumbersome procedures relating to appeals in criminal cases. By also recommending the extension of the powers of the High

Court with regard to the hearing of further evidence on appeal, the Commission attempted to eliminate unnecessary obstacles in the way of an individual who wishes to appeal to a higher authority. In a second phase of the investigation the Commission made recommendations pertaining to delays in the finalisation of trials, abuses of the process, particular provisions of the Criminal Procedure Act of 1977 causing delays, as well as delays resulting from the administration of the process. The recommendations resulted in the adoption of the Criminal Procedure Amendment Act 86 of 1996.

In order to improve South Africa's ability to participate in international mutual legal assistance and extradition arrangements, the Commission undertook an investigation into international co-operation in criminal prosecutions. The recommendations, resulting in the adoption of three separate Acts - namely the International Co-operation in Criminal Matters Act 75 of 1996, the Proceeds of Crime Act 76 of 1996 and the Extradition Amendment Act 77 of 1996 - contemplate improvement in the following areas: the obtaining of evidence from, and providing of evidence to foreign states; the confiscation and transfer of the proceeds of crime; the execution of foreign penal orders and sentences, and extradition.

A number of offences to criminalise money-laundering activities and certain related acts were created with the enactment of the Proceeds of Crime Act of 1996 which, as indicated above, resulted from the Commission's investigation. The description of money laundering used for this purpose entails the manipulation of illegally acquired wealth in order to obscure its true source or nature and so to avoid prosecution or the confiscation of property. It was realised that the criminal law alone would not be effective to curb money laundering as described here. The Commission therefore recommended, in a supplementary investigation, the establishment of an administrative framework to control money-laundering activities. The framework recommended by the Commission is based on five pillars, *ie* client identification, record-keeping, reporting of certain information, implementing internal policies and creating a financial intelligence unit.

□ *The law of delict*

As a general rule an award of damages is made according to the value of money at the date when the damage occurred. Usually there is a lapse of time, sometimes a long period, before claimants

receive such damages. Claimants therefore receive compensation that is worth less at the later date of receipt than at the occurrence of the damages. The Commission therefore investigated the need for awards of interest in South African law and ways in which it could be introduced. The recommendations mainly contemplate provision for the payment of interest on unliquidated debts resulting from damages.

□ ***The law of insolvency***

In the course of the Commission's comprehensive investigation into the review of the law of insolvency, a number of interim reports were published, leading to the enactment of the following legislation: section 1 of Act 6 of 1991 substituting section 34 of the Insolvency Act of 1936, to regulate the voidable sale of a business; section 1(3) to (5) of Act 57 of 1993 dealing with the preference conferred by a special bond over immovable property; Act 122 of 1993 dealing with insolvency interdicts; section 1 of Act 129 of 1993 dealing with appeals against sequestration orders; and Act 32 of 1995 dealing with the protection of financial markets in the event of insolvency.

□ ***The law of evidence***

The advent of the computer posed new and exciting challenges for law reform, especially with regard to the law of evidence. The problem in this regard was that the rules of evidence did not provide adequately for the admissibility of computerised records. In its investigation into the admissibility in civil proceedings of evidence generated by computers, in which the Commission was ably assisted by Mr Justice J M Didcott, the Commission recommended that this matter should be regulated specifically by legislation. The Commission's recommendations resulted in the Computer Evidence Act 57 of 1983. The Act makes provision for, *inter alia*, the authentication of computer print-outs, the admissibility in civil proceedings of authenticated computer print-outs and the evidential weight which a court in all the circumstances of the case can attach to such print-outs.

Other important reforms relating to the law of evidence resulted in the Law of Evidence Amendment Act 45 of 1988. These include the admissibility of hearsay evidence as evidence under certain circumstances at criminal proceedings, the introduction of the rule that the wife or

husband of an accused is competent, but not compellable, to give evidence for the prosecution in criminal proceedings, and that the wife or husband of an accused cannot be a compellable witness where a co-accused calls that wife or husband as a witness for the defence.

□ *Statute law*

Shortly after its establishment the Commission initiated an investigation to identify obsolete and unnecessary pre-Union statutory provisions. As a result the Commission could as early as 1977 report that it had succeeded in having all but 78 pre-Union statutes removed from the statute book. The last Act in a series of Acts recommended by the Commission is a declaratory Act scheduling the only pre-Union statutes still in force. This investigation resulted in the repeal of more than 1 000 pre-Union proclamations, laws and Acts.

□ *Administrative law*

After completion of the Commission's 1992 report on the courts' powers of review of administrative acts, the Commission reconsidered its recommendations in the light of the adoption of the 1993 Constitution - which contained certain provisions relating to administrative acts. Legislation was recommended bringing the Commission's original recommendations into line with section 24 and other provisions of that Constitution.

□ *Mercantile law*

Using external expertise the Commission supervised an investigation into the payments system in South African law. The objective was to bring local law relating to all forms of instruments of payment into line with modern needs and with developments elsewhere in the world. The voluminous report, completed in 1994, is still under consideration by the Minister of Finance.

In the field of shares and securities the Commission investigated the improvement of the position of a bona fide purchaser of listed shares and securities, focussing upon the protection of such a purchaser against vindication by the true owner in the case of theft or unauthorised negotiation of the shares or securities. The Commission's recommendations were based upon the policy that an equitable balance has to be maintained between the interests of the dispossessed owner, on the

one hand, and the interests of the bona fide purchaser of securities, on the other. In a later development the Commission further recommended an improvement of section 138 of the Companies Act of 1973, which section severely burdens the person who lodges documents for the transfer of listed securities of a company with that company. That person has to guarantee that such documents are genuine and has to indemnify the company against any loss or damage suffered by it arising out of a transfer registered by the company of the security referred to in such documents.

□ *The law of civil procedure*

In a comprehensive investigation into the debt collecting procedure in Magistrates' Courts, the Commission made recommendations relating to the simplification of that procedure with a view to curtailing costs and eliminating delays, the issue of imprisonment of debtors (which had been ruled to be unconstitutional as provided for in the Magistrates' Courts Act of 1944 by the Constitutional Court), and the lack of control over extrajudicial debt collectors who are not attorneys. Some of the recommendations have been enacted in the Magistrates' Court Amendment Act, 81 of 1997, while others are still under consideration.

Addressing the issue of access to justice, the Commission recommended in a report on speculative and contingency fees that legal practitioners and their clients should be able to agree to the practitioner charging an uplift fee in the event of the successful outcome of a civil action conducted by the client, and waiving his or her fees should the action be unsuccessful. The Commission's recommendations led to the adoption of the Contingency Fees Act, 66 of 1997, which has not yet come into operation.

The Commission also made recommendations regarding the elimination of a jurisdictional lacuna in the Supreme Court Act of 1959, improving the previous position in terms of which a division of the High Court could not order the attachment of property or the arrest of a person outside its area of jurisdiction but within the area of jurisdiction of another division in order to found or confirm jurisdiction.

* **Conclusion**

To the Commission the acceptance and implementation of virtually all its recommendations is a cause for satisfaction. The Commission appreciates, with equal satisfaction, the objective consideration of its recommendations by the Department of Justice and the positive approach to law reform by the Minister and Deputy Minister, who have, during their term of office, displayed a keen interest in the activities of the Commission and the promotion of its recommendations. The Justice Portfolio Committee fulfils an equally important role in the promotion of legislation. Researchers of the Commission are involved in the deliberations of the Justice Portfolio Committee when legislation emanating from the Commission is under consideration.

3

OBJECTS, CONSTITUTION AND FUNCTIONING

* **Establishment of the Commission**

The South African Law Commission was established by the South African Law Commission Act of 1973.

* **The objects of the Commission**

The objects of the Commission are set out as follows in section 4 of the Act: to do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation or reform thereof, including -

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic;

- the consolidation or codification of any branch of the law; and
- steps aimed at making the common law more readily available.

In short, the Commission is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

*** Constitution of the Commission**

The members of the Commission are appointed by the President.

In terms of section 3(1)(a) of the Act the Commission is constituted as follows:

- A judge of the High Court of South Africa, as Chairperson; and
- six persons who appear to the President to be fit for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, or on account of any other qualification relating to the objects of the Commission.

The Commission's term of office expires on 31 December 1998. For the duration of the year under review the Commission was constituted as follows:

+ Chairperson

The Honourable Mr Justice I Mahomed (Chief Justice)

+ Vice-Chairperson

The Honourable Mr Justice P J J Olivier (Judge of the Supreme Court of Appeal)

+ Other members

Adv J J Gauntlett, SC (Member of the Cape Bar)

Mr P Mojapelo (Practising attorney)

The Honourable Madam Justice Mokgoro (Judge of the Constitutional Court)

Prof R T Nhlapo (Professor in the Department of Private Law, University of Cape Town)

Ms Z Seedat (Practising attorney)

In terms of section 3(c) of the Act not more than three members may be designated as full-time members of the Commission. At present only one member of the Commission, Professor R T Nhlapo, serves in a full-time capacity.

Annexure A contains a list of former and present members of the Commission and the periods for which they served or for which they were appointed.

* **Committees**

Section 7A of the Act provides for the establishment of committees of the Commission. There are two categories of committees: those appointed by the Commission and consisting of members of the Commission only, and those consisting of members of the Commission and persons who are not members of the Commission. The latter are appointed by the Minister. The object of the second category of committees is to utilise the expertise of persons outside the Commission for the activities of the Commission and to ensure direct community involvement.

Committees of the Commission perform the activities assigned to them by the Commission and are subject to the Commission's directives. Activities performed by committees are deemed to be performed by the Commission and for the purposes of remuneration members of committees are deemed to be members of the Commission.

□ ***Working committee***

Under the first category of committee the Commission has established a working committee that consists of the following members:

+ **Chairperson:**

Mr Justice P J J Olivier

+ **Members:**

Professor R T Nhlapo

Individual members of the Commission on a rotating basis

During 1997 Adv J J Gauntlett SC served as a member of the working committee.

The working committee may be considered the executive committee of the Commission. In accordance with the Commission's directives this committee attends on a continuous basis to routine matters and other matters that require urgent attention. The committee also considers the inclusion of new investigations in the Commission's programme. Furthermore, the committee plans and manages the activities of the Commission's Secretariat.

□ ***Project committees***

Project committees fall under the second category of committees. The Commission follows the practice of instituting a project committee consisting of experts to assist with an investigation and advise the Commission if a specific investigation in the Commission's programme so requires. During the course of the year under review the following project committees were established: review of the Child Care Act, maintenance, domestic violence, computer related crime. The names of the members of these committees appear in **Annexure B**. In recommending persons to the Minister for appointment, the Commission ensured representativity and promoted the employment of external experts and knowledgeable persons to act as project leaders for investigations on the Commission's programme. The Commission would like to express its appreciation to the membership of non-governmental organisations for their willingness to serve on project committees of the Commission.

*** Secretariat of the Commission**

The Commission is assisted in its task by a full-time Secretariat consisting of officials on the establishment of the Department of Justice. The Secretariat consists of an administrative component and a professional component. The Director, Mr W Henegan, also serves as the Secretary to the Commission.

The research component of the Secretariat consists of 17 State Law Advisers. Their task is to do the necessary research under the guidance of project leaders (who are designated by the Commission), to consult with interested parties, to compile discussion papers and draft reports and to carry out other assignments of the Commission. These posts are at present filled by the following persons:

Mr M B Cronje (Principal State Law Adviser)
Mr T Gwebu (State Law Adviser)
Mrs A-M Havenga (Principal State Law Adviser)
Mr G O Hollamby (Principal State Law Adviser)
Mr M Kganakga (Senior State Law Adviser)
Mrs A M Louw (Principal State Law Adviser)
Ms P Matshelo-Busakwe (Principal State Law Adviser)
Ms M Moloi (Senior State Law Adviser)
Ms P Moodley (Principal State Law Adviser)
Mr M F Palumbo (Principal State Law Adviser)
Mr P K Smit (State Law Adviser)
Mr A W F van Vuuren (Principal State Law Adviser)
Mr P A van Wyk (Senior State Law Adviser)

During the year the following persons were appointed to the Commission=s professional component: Mr T Gwebu; Mr M Kganakga; Ms M Moloi; Ms P Matshelo-Busakwe and Ms P Moodley. They are welcomed to the Commission=s staff. Currently there are four vacancies of senior state law adviser. Owing to the lack of office space, these vacancies could not be filled. The posts will be filled when the Commission moves to new accommodation early in 1998.

In the course of the rationalisation of the Department of Justice a number of additional professional posts have been created on the establishment of the Commission including an assistant for the Commission's secretary. The filling of these posts will ensure faster progress with the Commission's formidable law reform programme. It will also ensure that the secretariat is representative of the population at the professional level.

The administrative component of the Secretariat consists of the following posts:

Senior Administrative Officer	:	1
Administrative Officer	:	1
Senior Administrative Clerk	:	1
Librarian	:	1
Typist	:	2
Secretary	:	2
General Assistant	:	1
Operator	:	1

During the year under review Ms M Oosthuizen was appointed as Senior Administrative Officer. She is welcomed as a member of the Commission's staff. There is one vacancy of typist.

The Commission wishes to express its appreciation to the members of the Secretariat for their outstanding auxiliary services to the Commission. The Commission wishes to make special mention of the high standard of working documents and reports submitted to the working committee and the Commission by the research staff. The Secretariat, both on the professional as well as the administrative level, carried an extremely heavy workload during the year under review. The workload was the result of the large number of vacancies that existed during the greater part of the year as well as the additional work generated by the community orientated approach adopted by the Commission. This approach necessitated the publication of issue papers and the arrangement of numerous workshops which were conducted country wide.

The Commission also wishes to express its appreciation to the full-time member, Professor Nhlapo, and the various project leaders for guiding the researchers, for the research done by them and for the documents and reports compiled under their guidance.

*** Financing of the Commission**

Funds for the expenditure connected with the Commission's activities are provided in the Vote of the Department of Justice under the Law Reform Subprogramme. The Director is consulted on the compilation of the draft Vote. The funds made available are sufficient for the Commission's requirements, taking into account the Commission's continuous efforts to limit expenditure. It should be noted, however, that the Commission will find it extremely difficult to fulfil its obligations adequately in the forthcoming financial year unless its budget is increased significantly. Factors necessitating such an increase are the increase both in personnel and the work done by the Commission. In addition, the implementation of the strategic plan as contemplated by the Justice Vision 2000 document, in which the Commission is actively involved, will have a bearing on the Commission's resources.

The Commission's budget for the 1996/97 financial year is R5 160 000, which is made up as follows:

	R
<input type="checkbox"/> Staff expenditure	3 702 000
<input type="checkbox"/> Administrative expenditure	578 000
<input type="checkbox"/> Supplies and printing	296 000
<input type="checkbox"/> Equipment	170 000
<input type="checkbox"/> Professional and special services	362 000
<input type="checkbox"/> Sundry expenditure	52 000

The Commission's resources are supplemented by funding from foreign donors. During the year under review the Commission has received financial support from UNICEF, the United

Nations Crime Prevention and Criminal Justice through the United Nations Development Programme (UNDP), the German Government through the German Development Co-operation (GTZ) and Rädna Barnen (SA).

* **Programme**

The Act provides that the Commission must from time to time draw up programmes where the matters which in its opinion require consideration are included in order of priority. The Commission's programme is subject to the Minister's approval.

The Commission's present programme appears in **Annexure C**. The investigations included in or removed from the Commission's programme during the year under review are dealt with in Chapter 3. **Annexure D** contains a list of all the investigations included in the Commission's programme since its establishment and also indicates the result or state of investigations, where applicable.

Any person or body is free to submit proposals for law reform to the Commission. In each case the Commission considers the merits of a proposal. In some instances a preliminary inquiry is instituted in order to determine whether the inclusion of a matter in the Commission's programme is justified. The Commission also includes matters in its programme of its own accord.

Every effort is made to dispose of urgent matters with the least possible delay. It should always be borne in mind, however, that the Commission has to follow certain procedures and that these sometimes take up considerable time. The availability of funds and skilled research capacity, the nature and extent of the inquiry and the need for consultation must all be taken into consideration. Consultation in particular is time-consuming, but the Commission regards it as an indispensable part of the law reform process.

* **Working methods**

The Commission's working methods are discussed in Chapter 2. In the course of its activities the Commission publishes a variety of documents. The document series of the Commission consists of the following:

□ *Commission papers and committee papers*

Commission papers and committee papers are internal documents that are normally not available outside the ranks of the Commission. In these papers suggestions for the inclusion of matters in the Commission's programme, research results for the information of or consideration by the Commission, draft issue papers, discussion papers and reports and a variety of other matters are dealt with. The papers are numbered in sequence as they come before the Commission.

□ *Issue papers*

In order to involve the community actively at an earlier stage, the Commission has decided to publish issue papers for appropriate investigations as the first step in the consultation process. The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues.

□ *Discussion papers*

Discussion papers, previously referred to as working papers, are public documents because they are published with a view to obtaining comments and evidence. These papers are proof that the Commission has itself already given considerable attention to the investigation concerned and they provide detailed background material. They also contain detailed substantiation of the questions on which comment or evidence are required.

Discussion papers are numbered serially as they are published. The number of the discussion paper bears no relation to the number of the investigation concerned. Discussion papers published since the introduction of the document series are listed in **Annexure F**.

□ ***Reports***

The Act requires the Commission to prepare a full report on any matter investigated by it and to submit such report together with draft legislation, if any, to the Minister for consideration. All reports of the Commission are official, but not all are published. In this regard, attention is invited to the list, in **Annexure D**, of investigations reported on by the Commission since its establishment.

In addition to the reports on its investigations the Act provides that the Commission must annually submit to the Minister a report on all its activities during the previous year.

□ ***Papers in the Commission's research series***

This series is used mainly for publications intended to make the common law more readily available and contains translated common law sources and noter-ups. Papers published in this way are listed in **Annexure G**.

Issue papers and discussion papers are supplied free of charge to interested institutions and persons who wish to comment on a particular matter. These papers are obtainable from the Commission's offices. The annual report, papers in the research series and reports on investigations that are published are obtainable from the Government Printer in Pretoria.

* **Meetings**

The Commission met only once during the year, namely on 4 and 5 April. The meeting was held in Pretoria.

The working committee of the Commission met four times, namely on 7 February, 4 April, 31 May and 1 August. The first three meetings were held in Pretoria, and the last in Durban.

Project committees held 44 meetings during the year under review. The following project committees of the Commission met on the dates indicated:

Legal aspects relating to AIDS	31.01.1997
	06.03.1997
	11.03.1997
	25.03.1997
	08.04.1997
	30.05.1997
	30.08.1997
	02.10.1997
	30.10.1997
	22.11.1997
Arbitration	20.04.1997
	25.05.1997
	23.06.1997
(ADR)	18.10.1997
Class actions	24.10.1997
	13.04.1997
Computer related crimes	01.12.1997
Domestic violence	07.10.1997
	15.10.1997
	29.10.1997
	19.10.1997
	20.11.1997
Harmonisation of the common law and the indigenous law	
	01.04.1997
	18.07.1997
	15.11.1997

Insolvency	29.04.1997
	21.10.1997
Juvenile justice	29.01.1997
	12.03.1997
	14.05.1997
	12.09.1997
Review of the Child Care Act	28.07.1997
	11.09.1997
Sentencing	10.01.1997
	07.04.1997
	11.10.1997
Sexual offences against children	17.02.1997
	09.04.1997
	29.04.1997
	15.07.1997
	15.12.1997
Simplification of the Criminal Procedure	11.01.1997
	07.04.1997
	09.10.1997

THE COMMISSION'S PROGRAMME: INVESTIGATIONS REMOVED AND INCLUDED

Investigations removed

* **Project 103 - Capping of claims against the Multilateral Motor Vehicle Accidents Fund**

The Department of Transport approached the Commission with a request to include the investigation in its programme, which the Commission subsequently did. The inclusion of the investigation in the Commission's programme was confirmed by the Minister on 4 September 1995.

The need for the investigation emanated from the unsatisfactory financial position of the Multilateral Motor Vehicle Accidents Fund (the 'MMF'). The Auditor-General annually reports on the financial statements of the MMF and has found that the fund is technically insolvent, that there is uncertainty regarding the long-term position of the fund due especially to the actuarial liability for outstanding claims and that it is impossible to give an opinion on the continued existence of the fund as a going concern.

Research was suspended pending the possible introduction by the Department of Transport of a White Paper, a Green Paper and draft Bills dealing with the subject. The Department of Transport has since published a White Paper and has indicated to the Commission that it supports the removal of the investigation from the Commission's programme.

The Minister approved the removal of this investigation from the programme on 24 January 1997.

Investigations included

* **Project 109 - Review of the Marriage Act**

The Department of Home Affairs approached the Commission during 1996 on the issue of the review of the Marriage Act 25 of 1961 (the Marriage Act) with a request to investigate and recommend legislation relating to a new marriage dispensation for South Africa. The request was preceded by the Department of Home Affairs, who is responsible for administering the Marriage Act, reviewing and redrafting the provisions of the Marriage Act with the aim of ensuring its compliance with the Constitution of 1996. Hence, the Department of Home Affairs submitted a draft Marriage Bill to the Commission during September 1996. The Department of Home Affairs was of the view that due to the sensitivity of the whole issue of the recognition of different types of marriages, especially with regard to the matrimonial dispensation, the Commission is regarded the appropriate body to research and give advice on the issue of a new marriage dispensation for South Africa.

The Commission considered the request at its meeting on 29 and 30 November 1996. The Commission approved the inclusion of the investigation in its programme since the Commission is at present engaged in the investigation into Customary Marriages which relates to the reform of substantive law and which may also have a direct impact on the proposals for reform contained in the Department of Home Affairs' draft Marriage Bill. The Department of Home Affairs' draft Marriage Bill further deals with the adjective law and some of their proposals cannot be considered without considering the relevant substantive law at the same time. The investigation will focus mainly on whether the provisions contained in the Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected. The Marriage Act presently governs certain aspects of contracting marriages in South Africa. The Act namely -

- designates certain persons in the service of the State and in religious denominations as marriage officers, and also regulates matters such as the revocation or limitation of the authority of marriage officers;
- provides for the solemnisation of marriages outside the Republic and deals with various types of unauthorised solemnisations;

- ☐ regulates the documentary requirements of marriage, such as the furnishing of identity books or other prescribed declarations;
- ☐ deals with the lodging of objections to any proposed marriage, as well as the issue of minors, proof of age and the granting of consent for minors' marriages by parents or guardians, commissioners of child welfare, judges of the High Court or the Minister of Home Affairs, respectively;
- ☐ sets out the requirements for the contracting of a valid marriage, including the prohibition of marriage between people closely related by blood or by affinity; it also mirrors the common law definition of marriage as being a union between one man and one woman; and
- ☐ sets out the formalities that must be gone through in order to contract a valid marriage and these include the requirements that the parties appear in person with witnesses, that the marriage be solemnised by a marriage officer according to a certain formula in a public building within certain times of the day and that the parties sign a marriage register.

The Minister approved the inclusion of the investigation in the Commission's programme on 27 January 1997.

* **Project 110 - The review of the Child Care Act, 1983**

One of the recommendations of the conference entitled "Towards redrafting the Child Care Act" hosted by the Community Law Centre (University of the Western Cape) and the Portfolio Committee on Welfare and Population Development held in Gordon's Bay on 26 to 28 September 1996, was that the Commission should be requested to include the review of child care legislation in its programme in order to develop comprehensive draft legislation as a matter of urgency.

Following the conference and upon representations from the Minister of Welfare and Population Development, the Minister requested the Commission to include an investigation into the review

of the Child Care Act, 1983 in the Commission's programme. The Commission decided at its meeting held on 4 April 1997 to include the investigation in the Commission's programme and to appoint a project committee. The names of the members appointed to the project committee appears in **Annexure B**.

In scope, the investigation goes beyond the review of the present Child Care Act, 1983 and includes a comprehensive review and redraft of all child care legislation. It includes a review of legislation such as the Child Care Act, 1983, its predecessor, the Children's Act, 1960; the Matrimonial Affairs Act, 1953; the Age of Majority Act, 1972; the Children's Status Act, 1987; the Guardianship Act, 1992, etc. and religious and customary laws and practices affecting children.

* **Project 111 - Investigation into the jurisdiction of Magistrates' Courts in constitutional matters**

On 22 May 1997, the Minister requested the Commission to include in its programme for investigation the need for remedial legislative proposals, which are not in conflict with the other provisions of the Constitution, providing for appropriate instances where Magistrates= Courts should have jurisdiction in constitutional matters. On 8 December 1997, the Commission received from the Minister a request that its investigation commissioned earlier by him be widened. This request and the investigation initially commissioned arise in the following circumstances:

* Section 103(2) of the Constitution of the Republic of South Africa Act, 1993 (the interim Constitution) provided that -

if in any proceedings before a court referred to in subsection (1), it is alleged that any law or provision of such law is invalid on the ground of its inconsistency with a provision of this Constitution and the court does not have the competency to inquire into the validity of such a law or provision, the court shall subject to the other provisions of this section, decide the matter on the assumption that the law or provision is valid.

* No similar provision is to be found in the Constitution of the Republic of South Africa Act, 1996. Section 170 of the Constitution provides as follows:

magistrates= courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not inquire into or rule on the constitutionality of any legislation or any conduct of the President.

It would seem that the main inquiries which arise in this investigation, are these:

- ☐ Do Magistrates= Courts at present have any jurisdiction of a constitutional nature under the Constitution, and if so, to what extent?
- ☐ Is it desirable that Magistrates= Courts have jurisdiction in respect of constitutional matters, and if so, to what extent ?
- ☐ If it is considered that Magistrates= Courts lack jurisdiction in respect of constitutional matters, how is the situation to be remedied ?
- ☐ Is it desirable that Magistrates= Courts retain their current jurisdiction in terms of section 110 of the Magistrates= Courts Act, 1944 in relation to what its heading describes as a Aplea of ultra vires@ ?

The Commission decided to include the investigation in its programme at its meeting on 31 May 1997, whereupon the Minister formally endorsed the inclusion on 14 June 1997.

* **Project 112 - The sharing of pension benefits**

The Divorce Amendment Act 7 of 1989 was the result of an investigation by the Commission into the possibility of a divorced woman to share in the pension benefits of her former husband. After the commencement of the Amendment Act, several representations were however made to the Department of Justice regarding alleged obscurities and anomalies in the Act. Despite the fact that a supplementary report by the Commission on the division of pension benefits dealing with the difficulties experienced in the application of the existing provisions was tabled in Parliament on 12 October 1995, a former member of the Commission, Mr G G Smit, submitted a

memorandum to the Minister on 7 November 1996 in which he pointed out that the whole system of the sharing of pension interests of spouses on divorce remains unsatisfactory. Several deficiencies were listed by Mr Smit which, in his view, were not adequately addressed by the Commission in the supplementary report.

The main cause of dissatisfaction is the manner in which the pension interest of a member of a pension fund is determined. The Commission's recommendation in this regard did not deal with marriages, entered into between 1 November 1984 and the date of commencement of the proposed provision, where part of the pension interest may have accumulated before the date of the marriage. In addition to other deficiencies, Mr Smit also pointed out that an aspect which did not receive attention in the supplementary report was the division of pension interests on the dissolution of a marriage by death or, in the case of a marriage in community of property, where the court makes an order for "boedelscheiding" or, in the case of a marriage subject to the accrual system, where the court makes an order in terms of section 8 of the Matrimonial Property Act 88 of 1984.

The Commission's working committee approved the inclusion of the investigation in its programme at its meeting on 31 May 1997, and the Minister endorsed the inclusion on 17 June 1997. Mr Smit was contracted to assist the Commission in the investigation.

* **Project 113 - The use of electronic equipment in court proceedings**

The Minister requested the Commission, in a letter dated 13 November 1996, to consider a proposal by Mr Justice H C J Flemming regarding the adoption of legislation authorising video conferences in court.

In brief, video conferences enable the 'live' participation in court proceedings of a person in his or her physical absence. In judge Flemming's view legislation is urgently required in the interests of access to the law and improvement of the operation of the courts in that video conferences have the potential to reduce costs in, for example, cases involving witnesses having to travel from distant places or even residing in foreign countries and to eliminate inspections *in loco* in certain instances. In addition, a letter by Mr D Dalling, MP, to the Minister dealing with

electronic trials was referred to the Commission. Mr Dalling pointed to the benefits that could be reaped in terms of savings and otherwise from adopting legislation authorising trials by telecommunication in respect of less serious offenses. Procedures abroad involve telecommunication between a presiding officer in a court room in the usual court buildings or in his or her office and the accused person in a court room in the place of detention. Telecommunication systems also provide for communication between public prosecutors and the legal representatives in the proceedings concerned. Mr Dalling argues that the major benefit of utilising this particular form of trial is that transportation is saved, procedures are speeded up and prisoners do not have to be transported from one venue to another in circumstances which are often a danger to security.

After the Commission's working committee approved the inclusion of an investigation into the use of electronic equipment in court proceedings in its programme, the Minister endorsed the inclusion on 14 June 1997.

PROGRESS REPORT

In this chapter the position regarding uncompleted investigations on the Commission's programme is discussed. At present there are 26 uncompleted investigations on the Commission's programme. The interim report submitted to the Minister is discussed in Chapter 5.

*** Project 8 - Steps aimed at making the common law more readily available**

One of the objects of the Commission as set out in section 4(e) of the Act is to take steps to make the common law more readily available. Works that were published in this regard are listed in the Commission's research series contained in **Annexure G**.

The Commission resolved that there is no real need for its involvement in the project and that it should consequently enjoy a very low priority.

*** Project 25 - Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book**

The object of this investigation is the ultimate establishment of a simple, coherent and generally accessible statute book. This comprises the repeal of obsolete and unnecessary provisions, the consolidation of provisions that belong together, the codification, where appropriate, of particular branches or aspects of the law, and the bringing about of uniformity in the law in all parts of the Republic. This is a task of immense proportions. In fact, it is a never-ending task because new legislation that should be regulated in accordance with the accepted rules is continually being passed.

Up to the present the investigation has remained an ideal in respect of which very little has been achieved. Over the years the Commission has got rid of a considerable amount of dead wood in the statute book through a number of repeal Acts - see projects 7 and 25 (**Annexure D**).

Furthermore, the Commission is striving to give effect to the above-mentioned objectives in the separate investigations that it is undertaking.

The present position is unsatisfactory, especially as regards subordinate legislation. There are no reliable registers of subordinate legislation. The prevailing legal position can in most cases be established only by enquiring at the government department or institution responsible for the making of the measures concerned. The position is further worsened by the fact that such legislation, as a rule, is not available in annotated form, with the result that a search of various *Government Gazettes* or official gazettes has to be conducted in order to establish the latest position. Briefly, there is a need for the consolidation and indexing of all prevailing, subordinate legislation and the updating thereof in an accessible form. The same problem is encountered with regard to the legislation adopted by the former independent states and self-governing territories within the present Republic.

The fact that under the new constitutional dispensation, apart from the central legislature, there are nine provincial legislatures, each having extensive legislative powers, makes it essential to look very closely at ways of preventing our statute book from becoming increasingly inaccessible. This is obviously an enormous task which will be very expensive. Up to the present it has in fact been the aspect of costs that has obstructed any real progress with the investigation. In addition, the Commission does not have sufficient professional personnel to undertake a task of this magnitude without adversely affecting the other investigations on the Commission's programme.

A further important dimension of this investigation is the need to purge the statute book in order to identify and rectify unconstitutional provisions.

During the year under review representations were made to acquire additional funding to establish a unit under the auspices of the Commission to assist with this task. The Commission succeeded in raising half the amount necessary to run the project. Negotiations to obtain the outstanding amount are currently taking place.

* **Project 47 - Unreasonable stipulations in contracts and the rectification of contracts**

This investigation was included in the Commission's programme in 1983. The initial research was financed by the Human Sciences Research Council. Prof C F C van der Walt of the University of Potchefstroom was appointed as an additional member of the Commission for the purposes of the inquiry.

The aim of the investigation is to determine to what extent adequate measures exist in South African law to restrict unreasonable stipulations and practices in contracts and whether those measures meet the needs of modern South African society.

Prof Van der Walt and several assistants formed a team to carry out the necessary research, which commenced in 1984. The research results were handed to the Commission by Prof Van der Walt on 11 October 1989. The research papers were submitted to the project committee appointed for the purposes of the investigation. The committee indicated that the comprehensive research results and proposals for reform should be published in summarised form as a working paper for general information and comment. A working paper was published in May 1994 for general information and comment. The closing date for comment was 30 September 1994. A workshop was held on 20 April 1995. At a meeting of the working committee assisted by experts in the field of the law of contract on 3 August 1995, the principles that should be contained in draft legislation were considered.

In the light of the Commission's decision that there is a need for further discussion of this matter, the Commission published a discussion paper for general information and comment during 1996. The following principles were contained in the discussion paper:

- * Contracts are daily concluded in the expectation that they will satisfy the needs and aspirations of the contracting parties. It may only subsequently be realised that, in practical application, the contract or some of its terms are unjust or unconscionable. The question was considered whether the courts should be able to grant relief in these circumstances by either setting aside the contract or modifying its terms. With the rise of the movement for consumer protection in the early seventies, it became the generally accepted view in most first world countries that legislative action was required to deal with contractual unconscionability. The question was considered whether legislation should grant courts the power to review contracts and whether and how the scope and

extent of the power of review should be defined. The *Unconscionability* or the *Good faith* criterion was considered in this regard and the unconscionability criterion considered advisable.

- * The question was further considered whether the courts will need guidelines to limit their powers of intervention and to indicate the ambit of the intended doctrine. **The provisional conclusion was that the laying down of guidelines by legislation may result in the courts considering themselves bound exclusively by those guidelines.** Another question was whether the review power of the courts should extend to all types of contracts, to non-consumer transactions, to international agreements or to standard term contracts only. It was believed that no exceptions should be made to the provisions relating to good faith and that the proposed provisions of the Bill should apply to all contracts concluded after the commencement of the Bill and, furthermore, that the Bill should be binding upon the State. Finally, there is the question of waiver of the benefits of the Bill. It was believed that to allow the waiver of the provisions of the Bill would neutralise the efficacy of the Bill. It was therefore proposed that any agreement or contractual term purporting to exclude the provisions of the Bill or to limit its application should be void. The closing date for comment on the discussion paper was 30 September 1996, which was extended to 15 November 1996.

A draft report will be considered by the Commission during the first quarter of 1998.

* **Project 59 - Islamic marriages and related matters**

The object of this investigation is to determine the extent to which provision can be made in South African law for the recognition of Islamic law relating to marriage, matrimonial property, succession, guardianship and related aspects of family law and the law of persons.

The project committee established for the purpose of the investigation met in 1990 and considered a working paper dealing with the nature of Islamic law and the conflict between the common law and Islamic law as well as the observance of Islamic law in South Africa. A comparative legal study received further attention during the year. Further work in the investigation was delayed by, amongst others, the finalisation of the 1996 Constitution.

Section 15(1) of the Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion. Section 15(1) of the Constitution read with section 15(3) does not prevent legislation recognising marriages concluded under any tradition or a system of religious, personal or family law or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion, provided recognition is consistent with section 15 and the other provisions of the Constitution. These provisions now provide the constitutional framework for the future recognition of Islamic marriages and related matters.

The Commission reconsidered the status of the project in 1996 and decided to accord the investigation the highest possible priority rating and to recommend the appointment of a project committee.

During March 1997 two workshops were held in order to involve the public in the planning of the investigation and to elicit nominations for appointment to the project committee. As a result of advertisements in the press and the open invitation extended at the workshops 78 nominations were received. **The appointment of the project committee is under consideration by the Minister.**

*** Project 63 - Review of the law of insolvency**

A project committee has been appointed to assist with the investigation. In the course of the investigation the following seven working papers were distributed for comment:

- Working Paper 29 : Prerequisites for and alternatives to sequestration
- Working Paper 30 : Qualifications, appointment and removal of liquidators
- Working Paper 33 : Effect of insolvency on assets, civil proceedings and contracts
- Working Paper 35 : Insolvency interdicts

- Working Paper 39 : Rehabilitation
- Working Paper 41 : Dispositions that are void or can be set aside and the effect of sequestration on the insolvent's spouse
- Working Paper 61 : Statutory provisions that benefit creditors

The project committee has considered the comments received on all the working papers except working paper 61 and has assumed points of view on appropriate legislation. The names of the project committee members are contained in **Annexure B**.

During 1992 the project committee reconsidered its working method with a view to expediting the completion of the investigation as far as possible. It was decided, for the time being, not to distribute further working papers for comment but to prepare draft legislation on the insolvency of individuals as soon as possible. A comprehensive discussion paper (Discussion Paper 66) which contained a draft Insolvency Bill and Explanatory Memorandum was published for comment. Detailed and well-considered comments on the Draft Insolvency Bill and Explanatory Memorandum have been received. At a meeting of the insolvency project committee held on 21 October 1997 the committee considered a detailed discussion of general comments and comments on the first 32 clauses of the Bill, and gave its views on matters raised by the commentators and the researcher. The consideration of the other comments are receiving attention. **According to current planning the investigation will be concluded in the course of 1998.**

An interim report on trans-national insolvency has been completed but a further report is still to be completed before the project committee considers the matter. Trusts, deceased estates and the consolidation of statutory provisions on insolvency into one Act are still to be considered.

As a result of interim recommendations contained in a number of interim reports in the course of the investigation, the following legislation has been enacted:

- Section 1 of Act 6 of 1991 substituting section 34 of the Insolvency Act, 1936, to regulate the voidable sale of a business;

- section 1(3) to (5) of Act 57 of 1993 dealing with the preference conferred by a special bond over movable property;
- Act 122 of 1993 dealing with insolvency interdicts;
- section 1 of Act 129 of 1993 dealing with appeals against sequestration orders; and
- Act 32 of 1995 dealing with the protection of financial markets in the event of insolvency.

*** Project 70 - Limitation of civil liability of professional persons**

The desirability of the limitation of the delictual liability of professional persons and the possible regulation thereof by legislation are investigated in this project.

A working paper was published during December 1993 for general information and comment. After the comments received had been processed, a draft report was prepared. However, before the draft report could be submitted to the Commission, the South African Institute of Chartered Accountants (SAICA) held discussions with the Minister concerning the reform of auditors' liability. Following these discussions, SAICA made oral representations to the working committee at its meeting on 4 August 1995. The representations can be summarised as follows:

- Auditors and chartered accountants are in a special position. The audit function required by law places auditors in a category that differs from those of other professions. It exposes them more to unlimited liability than for example attorneys and stockbrokers.
- It is very difficult to obtain professional indemnity insurance to cover liability that auditors might incur as a result of negligence or dishonesty in the exercise of their profession.
- It was suggested that the American limited liability partnerships may possibly serve as a model for solving the problem in South Africa. SAICA undertook to do

research on the operation of limited liability partnerships and to approach the Commission with new proposals. These proposals are being awaited.

During the course of 1996 the Commission recommended the removal of the investigation from its programme. During November 1996 the Minister, however, requested the Commission to continue with the investigation.

The Commission is awaiting the response of the professions concerned to enable it to plan the further course of the investigation.

*** Project 73 - The simplification of criminal procedure**

The investigation entails a comprehensive review of the Criminal Procedure Act, 51 of 1977. Owing to the extent thereof, the Commission adopted an incremental approach to the investigation. The objects are to investigate the possibility of shortening and simplifying certain cumbersome procedures that give rise to the unnecessary protraction of trials as well as investigating the influence of the Bill of Rights on the Criminal Procedure Act.

As part of the *first* phase of the investigation the Commission completed a report on appeal procedures and related matters during 1994 and the recommendations contained therein is at present under consideration. In the *second* phase of the investigation the Commission published a discussion paper which addressed the reasons for delays in the completion of criminal trials, abuses of the process, specific provisions of the Criminal Procedure Act that cause delays and problems relating to the administration of the process. During 1995 the Commission completed an interim report which dealt with these matters and legislation emanating from the report was approved by Parliament with the enactment of Criminal Law Amendment Act, 86 of 1996.

During 1996 the Minister appointed a project committee chaired by Judge L van den Heever. The names of the other project committee members are reflected in **Annexure B**. Since its appointment the project committee met on several occasions to plan the completion of the investigation. In the *third* phase of the investigation the project committee approved the publication of an issue paper dealing with access to the criminal justice system and after approval thereof by the working committee during February 1997, the issue paper was published

during April 1997. The return date for comment was 30 June 1996 but was extended until 30 August 1997.

The South African criminal justice system is experiencing a legitimacy crisis, the essence of which lies in the superimposition of a foreign legal system with its concomitant western legal postulations upon those of Africa. Over the years a legal order was created which primarily suited the needs of only a part of our population. The imposition of apartheid laws and their enforcement alienated a large section of our population from the formal legal system. The enforcement of these policies, the limited presence of formal legal structures in the townships, inadequate infrastructure to properly facilitate the investigation of crimes and their successful prosecution contributed to the lack of confidence in the police and the courts as sources of protection. Culturally alienating court procedures, exclusion from participation in the criminal justice system and inaccessibility to legal representation further contributed to the perceived illegitimacy of the criminal justice system. This investigation presents an opportunity to rethink the illegitimacy of the system and to address the prejudices of the past.

The issue paper explores possibilities to improve access to the criminal justice system. Several options to improve access to criminal courts and to restore legitimacy to the criminal justice system are offered. These include improvements to the structure, jurisdiction and availability of criminal courts; physical access to court buildings; equality of access; the promotion of community participation in the criminal justice process through the introduction of the jury system; the extension of the use of assessors in criminal cases, the establishment of community courts and the introduction of courts of petty sessions.

The paper also invites proposals for the improvement of the efficiency of the criminal justice system including proposals for the improvement of control over the administration of the criminal justice system; the introduction of charters for criminal courts; proposals for case management; professional development programmes; improved understanding of the role of the criminal courts and the creation of an accessible and intelligible criminal procedure.

The lack of legal representation in criminal cases has been an important factor inhibiting access to the criminal justice system. In order to address this problem the paper invites proposals on the restructuring of legal aid services including the need to assess the demand for legal services; the

identification of resources available; the role of the legal profession in expanding legal services in criminal cases; equitable use of resources; the role of paralegals in the criminal justice system; the establishment of community legal centres; the role of university and legal aid institutions; the establishment of a telephonic legal aid service; the reduction of the costs of legal representation in criminal cases and proposals to improve access through community legal education.

At its meeting on 9 October 1997 the project committee considered the way ahead and resolved that the preparation of a draft discussion paper should proceed only after completion of a National Conference on Legal Aid which was planned for the beginning of 1998.

At the same time the committee resolved that in the *fourth* phase of the investigation urgent attention should be given to the development of a discussion paper on the problems arising from the application of the Bill of Rights to criminal procedure, the law of evidence and sentencing and that a draft discussion paper should be considered at its next meeting which is planned for the beginning of 1998. The committee also resolved that attention should be given to the introduction of an inquisitorial approach to our criminal procedure and that this should form part of the Commission's current investigation.

* **Project 82 - Sentencing**

The object of the investigation is to investigate all aspects related to sentencing on a continuous basis. During 1996 the Minister appointed a project committee chaired by Judge L van den Heever. The project committee met on several occasions since the members' appointment to plan the investigation. A number of subjects were identified for investigation including, *inter alia*:

- * sentencing guidelines;
- * community participation and individual interests in the sentencing process including compensation for victims of crime and victim empowerment;
- * an evaluation of existing forms of punishment and compulsory sentences. The Minister of Justice also requested the committee to consider the issue of mandatory

minimum sentences and such an investigation has subsequently been included in the committee's planning of the investigation.

At its meeting on 10 January 1997 the committee approved the publication of an issue paper dealing with the issues of compensation for victims of crime and victim empowerment as part of restorative justice. The publication of the issue paper was approved by the Commission's working committee during April 1997 and the issue paper was subsequently published during April 1997. The closing date for comment was 30 June 1997 but was extended until the end of September 1997.

In the issue paper the Commission *inter alia* considers restorative justice as a process which seeks to redefine crime, interpreting it not only as breaking the law, or offending against the State, but also as an injury or wrong done to another person. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process with the State and legal professionals playing the role of facilitators, thus supporting a criminal justice system which aims at offender accountability and full participation of the victim, the offender and the community in making good or putting right the wrong.

As part of this process, restorative justice demands consideration of approaches such as offering compensation, where appropriate, to the victims and empowering victims in their search for recognition through direct participation in the criminal justice system.

Present support services for victims of crime and violence in South Africa seem to be limited, fragmented, uncoordinated, reactive in nature, and therefore ineffective. The planning and establishment of these services is often not community-driven and occurs on an *ad hoc* basis resulting in difficulties. Services do not cater sufficiently for the diversity of the population and certain services such as those focussing on women and children are over-utilized, while others tend to be inaccessible in terms of their location and service fees or are poorly marketed and therefore not used. Many victims go unsupported, remain traumatised, become victims again or even turn to crime and violence themselves.

In order to address these issues the Commission invites comments and suggestions for reform on a number of issues. These include the following:

- ☐ The need for the establishment of a compensation scheme for victims of crime in South Africa.
- ☐ The administration of such a scheme, including the *rationale* for the establishment of such a scheme, the meaning of Avictim@ for the purpose of the scheme, the nature and purview of the scheme, minimum and maximum awards in terms of the scheme, restitution for non-pecuniary loss, compensation for loss of personal property, persons qualifying for compensation, persons excluded from participation in the scheme and general principles which should be provided for in the enabling legislation, if any.
- ☐ The establishment of coordinated victim support services in South Africa.
- ☐ Improved consultation between victims, the police and prosecutors.
- ☐ The enactment of legislation which recognises victim impact statements.
- ☐ The introduction of community participation in the sentencing process by formal recognition of procedures involving victim/offender mediation, including family group conferences, community youth conferences, community aid panels and circle sentencing.

At its meeting on 7 April 1997 the project committee also approved the publication of an issue paper dealing with mandatory minimum sentences. The issue paper was considered and approved by the Commission's working committee and published for general information and comment during July 1997. The closing date for comment was 30 September 1997.

Sentencing practices in South Africa have recently been the focus of much attention in the media. As a result of the unprecedented crime wave that is sweeping our country, there has been an outcry from the community, both for more stringent punishment and that offenders should serve a more realistic portion of the sentences imposed by courts of law. The public also renewed claims for sentences which will give expression to the desire for retribution and which

will demonstrate that concern for offenders must give way to concern for the protection of the public. There appears to be general dissatisfaction with the leniency of sentences imposed by courts of law for serious crimes.

The issue paper deals with sentencing practises in South Africa, criticism of the penal system and possible options for reform of this aspect of the law. To this end the issue paper examines the points of criticism of the penal system and explores possibilities for reform which will restore confidence in the criminal justice system's ability to protect citizens against crime. In this regard a number of possibilities for reform are proposed for consideration. These include:

- ❏ Enactment of sentencing guidelines: presumptive sentencing guidelines
- ❏ Voluntary sentencing guidelines
- ❏ The adoption of legislative guidelines which assist in determining the choice and length of the punishment
- ❏ The enactment of principles of sentencing including guidelines which determine the imposition of imprisonment
- ❏ The enactment of presumptive sentencing guidelines to guide the imposition of custodial and non- custodial sentences
- ❏ The enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions

At its meeting on 11 October 1997 the project committee resolved that the Commission should host an international conference on the development of a structured sentencing policy during 1998 before a discussion paper is developed on the issue. The committee also resolved that an issue paper on the expungement of the criminal record of juveniles should be developed and considered at the committee's first meeting in 1998.

* **Project 85 - Aspects of the law relating to AIDS**

The Commission has been investigating aspects of the law relating to HIV/AIDS since 1993. Since then extensive research has been done. Evidence was heard from interest groups, and a discussion document (Working Paper 58) was published for general information and comment during 1995. The comments on the Working Paper reflected differences of opinion between interest groups, *inter alia* regarding the Commission's basic preliminary conclusion that an AIDS-specific statute (containing a general prohibition against unfair discrimination on the ground of HIV infection) was warranted.

After the appointment of members of the Commission's project committee on HIV/AIDS expired, and the appointment of a new representative Law Commission at the beginning of 1996, new appointments were made to the project committee to reflect various skills and different experiences to assist the Commission with the development of a final report for consideration by the Minister of Justice. In view of the project committee's work on HIV/AIDS and the workplace, additional members were appointed to the project committee during the year under review in order to provide for representation of the interests of labour and business. Mr Justice Edwin Cameron acts as project leader. The names of the other members of the project committee are reflected in **Annexure B**.

The project committee is pursuing a consultative process in an attempt to resolve the differences of opinion reflected in the comments on Working Paper 58. It also follows an adapted approach of dealing with issues incrementally in an attempt to finalise them more swiftly.

The Commission's first interim report on Aspects of the Law Relating to AIDS (which was approved by the Commission during 1996) was tabled in Parliament by the Minister of Justice on 28 August 1997. The National Assembly resolved on 18 September 1997 that the recommendations in the report should be implemented urgently by the Government. The issues covered by the report were agreed by commentators to be relatively non-controversial. The recommendations deal with a limitation on the use of non-disposable syringes, needles, and other hazardous material in health care settings; the implementation, in relevant occupational legislation, of universal precautions in the work place; the statutory implementation of a national compulsory standard for condoms in accordance with international standards; the promulgation of a national policy on testing for HIV infection, and the amendment, finalisation and promulgation of the Draft Regulations Relating to Communicable Diseases and the Notification

of Notifiable Medical Conditions, 1993 (which deschedule AIDS as a communicable disease in respect of which certain coercive measures apply mandatorily). It is to be noted that the latter recommendation does not concern the notification of HIV/AIDS. Draft legislation for the implementation of these recommendations is included in the report.

Present legal practice regarding medical certificates in respect of HIV/AIDS-related deaths has also been identified as a matter to be included in the first interim report. However, strong concerns were expressed over preliminary recommendations in the discussion paper (Discussion Paper 68) that statutory provisions be altered to require that the cause of death should not be noted on the medical certificate in respect of death (which is a public document) but should appear on a separate compulsory form disclosing in an anonymous and unlinked manner the full causes of death. The Commission was also made aware of the establishment, on the initiative of the Directors-General of the Departments of Health and Home Affairs, of an interdepartmental task group who identified the present general procedure on death certificates as unsatisfactory and who has initiated the development of alternatives towards the end of 1996. This issue has therefore not been included in the interim report. It was debated at a workshop hosted by the Commission's project committee during February 1997 where consensus was reached that the registration of death process should incorporate two separate events. Firstly, a public notification of death containing the deceased's full particulars but otherwise specifying only whether the death was from natural causes or not; and secondly, it would involve a further confidential itemisation fully specifying the direct and underlying cause(s) of death. The latter details, which would be linked to the deceased's identity through anonymous coding, would be available for medical research, health care modelling and private contractual purposes. Access to this information would be granted only on grounds of private or public interest, with the previously obtained written consent of the deceased person or with the authorisation of an appropriate statutory body. The Department of Health is attending to new regulations in this regard.

During the year under review two discussion papers were published for comment.

Preliminary proposals and draft legislation for a prohibition against pre-employment HIV testing were included in Discussion Paper 72 which was distributed for public comment in June 1997. In the Discussion Paper it was pointed out that there is at present no specific statutory prohibition

on pre-employment testing for HIV in our law. There is also no clarity as to the circumstances under which an employer could require an applicant for employment to submit to an HIV test. The present constitutional and legislative inhibitions on unfair discrimination in general may seem to be sufficient to prevent irrational pre-employment testing for HIV. However, neither the 1996 Constitution nor the Labour Relations Act of 1995 confers unqualified rights and may therefore countenance an employer testing an applicant for employment for HIV under certain specific circumstances. The project committee proposed that the present legal position needs to be changed by adopting a specific statute in order to regulate those instances where an employer may ask an applicant for employment to take an HIV test, and to prevent an employer from refusing an applicant employment on the grounds of that person's HIV status or perceived HIV status, unless such refusal is deemed fair and justifiable. The closing date for comments on these proposals was 15 August 1997. **A draft interim report will be considered by the Commission during the first quarter of 1998.**

After the well-publicised crisis caused by the application of an eight year old boy with AIDS to be admitted to a public school in Johannesburg early this year, and in view of initial proposals by the Commission regarding the protection of learners with HIV in Working Paper 58 as supported by public comment, the project committee, in a third discussion document (Discussion Paper 73), published a draft national policy for HIV/AIDS in schools. The policy is aimed at creating legal certainty and assisting the prevention of injustice to learners with HIV. The return date for comment was 15 October 1997. Comments are being processed. **A draft interim report will be considered by the Commission in the first quarter of 1998.**

* **Project 86 - Euthanasia and the artificial preservation of life**

The advances made in medical science and especially the application of medical technology have resulted in patients living longer. This signifies a welcome prolongation of meaningful life for many patients, but the prolongation of a poor quality of life for others, which inevitably raises the question whether treatment is a benefit or a burden.

Worldwide, increased importance is being attached to a patient's autonomy and the need has therefore arisen to consider the protection of a patient's right to refuse medical treatment,

particularly where the patient is no longer capable of communicating his or her wishes to the doctor. In this regard the so-called living will is relevant.

A working paper was published on 4 February 1994 for general information and comment. The aim of this investigation was to determine whether and in what circumstances actions that could indirectly end a person's life may be justified; the role that the wishes of the patient should play in this regard and the nature of the conduct that would be acceptable in cases where no instructions or requests were received from such persons.

A workshop on this topic was held on 22 June 1994. It was attended by 80 persons, including experts in the fields of medicine, law, religion and ethics.

On 18 October 1996 a second workshop was held where draft legislation was discussed. It was attended by 20 persons, all of whom were experts in the fields of medicine and law.

In the light of the great interest displayed by the public in this investigation and the evident need for more comprehensive discussion of the whole problem of euthanasia, the artificial preservation of life and the termination of life, a second extensive discussion paper was published during the year under review in which the following proposals for possible law reform were raised:

- The circumstances in which it would be lawful for a medical practitioner to withhold all further life-sustaining treatment from a patient certified as being brain-dead and who is being kept alive artificially.
- The right of a mentally competent person to refuse any life-sustaining medical treatment even though such refusal may cause or hasten his or her death.
- The right of a medical practitioner responsible for the treatment of a terminally ill patient to alleviate pain and distress by increasing the dosage of medication to be given to the patient even if the secondary effect of the medication may be that the patient's life will be shortened.

- Whether it would be lawful for a medical practitioner to actively assist a terminally ill, but mentally competent patient to die by administering or providing a lethal agent.
- Clarification of the legal position with regard to the wishes of the patient as expressed in a so-called advance directive (living will) or power of attorney and the continued validity of a power of attorney after the principal has become mentally incompetent.
- The instances in which the chief medical practitioner of a hospital or clinic may, in the absence of a directive of the patient or his agent, decide to discontinue the treatment of the terminally ill patient.
- The powers of the court with regard to withholding or withdrawing medical treatment or the performance of any medical procedure which would have the effect of terminating a patient's life.

The Commission has stated the above-mentioned issues objectively and neutrally without making specific recommendations.

In addition to the issues discussed in the first working paper, the aim of this discussion paper is to investigate further whether and in what circumstances actions that could directly end a person's life may be justified. A distinction has been made between cases where clinical death has set in, cases where the terminally ill person is mentally competent and cases where the terminally ill person lacks mental competency.

A draft report will be considered by the Commission during 1998.

* **Project 88 - The recognition of a class action in South African law**

As a result of various representations by consumer organisations and a request by the former Minister of Justice in this regard, the Commission included this investigation in its programme.

During August 1995 the working and project committees approved the publication of a working paper which was released during October 1995 for general information and comment. The working paper contained preliminary proposals regarding the possible introduction of class actions and public interest actions in South African law. **A draft report was approved by the project committee and will be considered by the Commission during the first quarter of 1998.**

* **Project 90 - Harmonisation of the common law and indigenous law**

The project committee appointed to assist the Commission in this investigation - the names of the members are reflected in **Annexure B** - identified the following issues for preferential treatment:

- * The recognition of customary marriages
- * Conflict of laws
- * Law of succession
- * Traditional Courts

During August 1997 the Commission published a discussion paper on customary marriages for general information and comment. The discussion paper was preceded by an issue paper on customary marriages which set out the nature of the problem in respect of customary marriages, and a range of proposals for addressing the problem: chief among these was that the law should grant full recognition to customary marriages, with the opportunity being seized at the same time to improve the position of women and children within these marriages.

Marriage and marriage laws are matters of high and immediate significance, morally, socially and economically. The Commission is under an obligation to balance the need for the speedy despatch of its business with the claims of South African society to be widely consulted and to have the issues fully debated. The discussion paper thus opts for a format in which a comprehensive set of recommendations is set out, supplemented with requests for comment on those issues which remain unresolved or appear to be amenable to several solutions.

The following are some of the recommendations made in the discussion paper:

- ☐ In order to remove the anomalies created by many years of discrimination, customary marriage must now be fully recognized. To do so will comply with sections 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect be given to African cultural institutions as to those of the Western tradition.
- ☐ Legislative provision must be made for a minimum set of essential requirements for marriage.
- ☐ The main requirement for a valid customary marriage should be the consent of the spouses.
- ☐ All customary marriages should be registered and more people should be encouraged to register their customary marriages. To this end the traditional authorities should be constituted registering officers.
- ☐ In order to ensure that the spouses' consent is properly informed, a minimum age for marrying should be fixed for all persons in the country. Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act 25 of 1961.
- ☐ For various reasons, especially the difficulty of enforcing a ban and the fact that polygyny appears to be obsolescent, customary marriages should continue to be potentially polygynous.
- ☐ Reform in the area of spousal relations is now needed to harmonise customary law with social changes in South African society and to give effect to the principle of equal treatment contained in section 9 of the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- ☐ Women should be deemed to have contractual capacity, *locus standi* and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore

recommended that section 11(3)(b) of the Black Administration Act 38 of 1927 be repealed. In addition, to cure many years of uncertainty, provision must be made that the Age of Majority Act 57 of 1972 applies to persons subject to customary law.

- ☐ To discharge its obligations under CEDAW and the Constitution, legislation should provide that spouses have equal capacities and powers of decision-making. Such legislation will entail a repeal of section 27(3) in the KwaZulu/Natal Codes, Act 16 of 1985 and Proclamation R151 of 1987 and section 39 of the Transkei Marriage Act 21 of 1978 (which both declare that wives are under the marital power of their husbands).
- ☐ The private regulation of divorce in customary law places women and children at risk. No marriage should therefore be terminated except by decree of a competent court.
- ☐ Only one ground of divorce should be entertained: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives.
- ☐ In accordance with section 28(3) of the Constitution and the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, cultural expectations may be accommodated by the courts. To avoid unfair discrimination against women, mothers should have equal rights to children.

The Commission *inter alia* requests comment on the following questions:

- ☐ Whether bridewealth should have purely social functions;

- ☐ what the effect of bridewealth agreements should be on the validity of marriage, the rights and duties of the spouses or their rights to children;
- ☐ what the effect of bridewealth agreements should be on customary remedies for enforcement of bridewealth;
- ☐ what the minimum age for marriage under customary law should be.

The return date for comment on the discussion paper is 19 January 1998.

A number of workshops in collaboration with the Gender Unit of the Department of Justice and the gender units of the Provinces were organised in rural and urban areas to debate the issues contained in the discussion paper. Details are given in Chapter 6. The workshops were funded by the German Government through the German Development Co-operation (GTZ). The workshops will continue early in 1998. **A draft report will be submitted to the Commission during the first half of 1998.**

A discussion paper on conflict of laws and an issue paper on succession will be published for general information and comment during the first quarter of 1998. An issue paper on Traditional Courts will also be published during the course of 1998.

*** Project 94 - Arbitration**

The investigation initially dealt with international and domestic commercial arbitration only, but at the request of the Minister it was broadened to include an investigation into alternative dispute resolution (ADR) at all levels. The project committee was broadened for this purpose. The names of the project committee members are reflected in **Annexure B**.

International commercial arbitration

Political developments in South Africa are currently leading to increased regional trade and economic links with other countries. As parties to international business transactions favour arbitration as a method for dispute resolution, it is important that the country's arbitration law

should be in line with international norms. It is however widely argued that South African law does not currently promote international commercial arbitration.

The Commission believes that an effective legislative framework for the resolution of international trade disputes should be created and it has resolved to adopt a holistic approach to international arbitration legislation. In this process consideration has been given to South Africa's response to the United Nations Commission on International Trade Law (UNCITRAL) Model Law; possible changes to the legislation on the New York Convention (currently set out in Act 40 of 1977); and the proposed accession by South Africa to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

Two discussion papers, one dealing with principles only and the other containing the Project Committee's Draft Bill and commentary, were published. **A final report with proposed legislation was approved by the project committee and will be considered for approval by the Commission early in 1998.**

It seems desirable that all South African legislation on international arbitration should be embodied in a single statute, the International Arbitration Act. This would not only ensure that South Africa's arbitration legislation is readily available to foreign contracting parties, but it would also enable the legislature to deal with all relevant legislation in a single Bill.

Domestic commercial arbitration

A discussion paper on domestic commercial arbitration is at present being developed for consideration by the project committee during the first quarter of 1998. It will consist of a revised version of the existing Arbitration Act 42 of 1965, having regard to certain problems which have been experienced with the existing Act in practice and recent changes to arbitration legislation in other jurisdictions.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) covers all forms of dispute resolution other than litigation or adjudication through the courts. It therefore includes a broad range of mechanisms and

processes designed to assist parties in resolving disputes creatively and effectively. These mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. The most common types of ADR include negotiation, conciliation, mediation and arbitration.

In this investigation the Commission is addressing the question whether the administration of justice would be enhanced if a broader concept of dispute resolution could be accommodated within the formal legal system.

An issue paper dealing with all aspects of ADR was published for information and comment during the year under review. In the issue paper specific areas of investigation were identified and discussed:

- The question whether non-adjudicative dispute resolution may be a less expensive and less conflicting way of resolving disputes and problems.
- An investigation of the existing court structures and services in order to find a specific model of family mediation suitable to South African circumstances.
- The further implementation of community courts in the new dispensation and the proper role of the state in this regard.
- The role of ADR in the criminal sphere was also addressed. The proposed juvenile justice and victim-offender mediation programmes were noted as examples of the increasing importance afforded to ADR in criminal matters. These issues were, however, not dealt with in detail as they are already being addressed in other investigations of the Commission.

A series of workshops on community courts and mediation centres are being planned to be held throughout South Africa during the first quarter of 1998. Three separate discussion papers will then be developed for comments and information. The discussion papers will deal with ADR and the civil law, family mediation and community courts respectively.

* **Project 95 - The admissibility of computer evidence**

The business world relies with confidence on the computer for the keeping and processing of information. However, when it comes to the presentation of evidence in civil and criminal proceedings, the law is reluctant to admit as evidence information produced by computer. The Computer Evidence Act 57 of 1983 sets strict requirements with which computer print-outs must comply in order to be admitted as evidence.

The Commission has decided that the investigation should be kept in abeyance pending the finalisation of its investigation into computer related crimes (Project 108 below) in view of the overlap between the two investigations.

* **Project 96 - The Apportionment of Damages Act, 1956**

With the introduction of the Act in 1956 the common law relating to contributory negligence and joint wrongdoers was amended and the "last opportunity" - rule of avoiding an accident as the test of liability repealed. The Act empowers the courts to determine the degree of fault of each party in an action for damages based on negligence and to apportion the damages accordingly. The Act also makes it possible to sue joint wrongdoers in the same action.

A discussion paper was published in October 1996 for general information and comment. **The preparation of a report is receiving attention and will be finalised during 1998.**

* **Project 100 - Review of family law and the law of persons**

Since the establishment of the Commission, aspects of family law and the law of persons have been investigated on a continuous basis. On the recommendation of the Commission, far-reaching amendments to divorce law, matrimonial property law and domicile have been effected.

There is considerable overlapping between family law and the law of persons and the opinion has been expressed that the inclusion of a single comprehensive investigation in the Commission's programme is justified. The inclusion of the investigation will enable the Commission to

monitor, on a continuous basis, the reform measures that have been implemented in these branches of the law and, if necessary, to make additional recommendations in good time.

The following areas are currently receiving the Commission=s attention:

* **Domestic violence**

Domestic violence is a pervasive and frequently lethal problem that challenges society at every level. Violence of this nature is often hidden from view and devastates its victims physically and emotionally. Directly or indirectly it affects the quality of life of the whole society. Appropriate legislation to reduce and prevent domestic violence is therefore of critical importance.

It is clear that the law does not hold an exclusive position in either the response to, or the prevention of, domestic violence. However, when victims of domestic violence do turn to the law for protection, the law should be effective and efficient in its response. The objective of the recommendations contained in the Commission=s discussion paper, published in February 1997, is to ensure that the substance and procedures of domestic violence legislation are well tailored to the needs of those suffering abuse in a domestic context.

A project committee was appointed during the course of the year under review. The names of the project committee members are reflected in **Annexure B**.

The Commission=s recommendations are progressive and constitute a substantial broadening of the limited scope of the existing Prevention of Family Violence Act 133 of 1993. The most important recommendations are the following:

- Provision should be made for the granting of interim interdicts upon application even though the respondent has not been given prior notice of the application. In granting the interim interdict the court should issue a suspended warrant for the arrest of the respondent.
- Protection should be offered to any victim who is in a Adomestic relationship@ with the abuser. ADomestic relationship@ should include persons (whether of the same

or opposite gender) who live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other. It should also include engagement and dating relationships and persons who share or have shared the same household.

- ☐ “Domestic violence” should be defined as including, but not limited to, physical abuse or threat of physical abuse; sexual abuse or threat of sexual abuse; intimidation; harassment; or destruction of property. Account should be taken of the fact that a number of acts that form part of a pattern of behaviour may amount to domestic violence, even when some or all of those acts, when viewed in isolation, may appear to be trivial.
- ☐ The court should be empowered to prohibit the abuser to physically or sexually abuse the applicant; threaten to physically or sexually abuse the applicant; intimidate the applicant; harass the applicant; damage property in which the applicant may have an interest; threaten to damage property in which the applicant may have an interest; enter, watch, loiter near, prevent or hinder access to or from the applicant=s place of residence, business, employment, educational institution, or any other place that the applicant visits often; follow the applicant or stop or approach the applicant in any place; make any contact with the applicant by telephone or any form of written communication; enlist the help of another person to act in any of the above ways; enter the shared residence; enter a specified part of the shared residence or a specified area in which the shared residence is situated; prevent the applicant or any relevant child who ordinarily lives or lived in the shared residence from entering or remaining in the shared residence or a specified part of the shared residence; commit any other act specified in the interdict.
- ☐ The court should be empowered to order that all or any of the prohibitions or conditions contained in the interdict apply for the benefit of any child whose interests the court considers relevant.
- ☐ In granting an interdict the court should be empowered to make a temporary maintenance, custody or access order.

- The contravention of the conditions of an interdict granted in terms of domestic violence legislation should be an offence which is prosecuted in the criminal court.

The return date for comment on the discussion paper was 30 May 1997. **A draft report will be finalised during the first half of 1998.**

* **Maintenance**

It is widely acknowledged that South Africa's maintenance system is in disarray. Complaints range from the treatment, attitudes and facilities encountered at maintenance courts to the seeming impunity with which persons manage to evade their legal duty to maintain their dependants.

The Commission published an issue paper on the review of the maintenance system during March 1997. The aim of the issue paper is to elicit comments on the issues pertaining to the maintenance system and to use these comments to assist the Commission in identifying the most suitable options for reform.

The issues discussed in the paper range from topics such as the shortage of human resources to the orders made by maintenance courts and their enforcement. The paper also deals with the question whether the judicial system, and especially the criminal law, is the correct vehicle for the implementation of the duty to support one's dependants. In respect of each of these issues the Commission explores certain options for reform. These include the introduction of administrative procedures to effect and enforce maintenance payments, the separation of the offices of public prosecutor and maintenance officer and the enhancement of judicial procedures to execute maintenance orders.

The breakdown of the maintenance system results in an increased reliance on welfare payments which are funded with taxpayers' money. This places a strain on the welfare resources of South Africa and affects South African society as a whole. The Commission is therefore of the view that all options for reform should be debated as thoroughly and as widely as possible.

A project committee has been appointed after the publication of the issue paper. The names of the project committee members are reflected in **Annexure B**.

A discussion paper will be published during the first quarter of 1998.

* **Project 101 - Investigation into the application of the bill of rights to the criminal law, law of criminal procedure and sentencing**

The research is continuing. Matters relating to criminal procedure and sentencing are at present dealt with as part of existing investigations on the Commission's programme. (See project 73 and project 82.)

* **Project 105 - Security legislation**

The previous Commission considered a request received from the Minister of Safety and Security addressed to the Minister of Justice and referred to the Commission. The Minister of Safety and Security proposed that a review and rationalisation of South Africa's security legislation should be undertaken by the Commission. He stated that in view of the history of security legislation and changed circumstances in South Africa, all existing legislation such as the Internal Security Act, 1982, and similar Acts in the former TBVC states should be repealed and a new Act should become operational in the Republic. This Act should be enacted strictly in accordance with international norms, the Constitution and the country's present circumstances and requirements.

The then Chairperson of the Commission, Mr Justice H J O Van Heerden, informed the Minister that the Commission was willing to undertake a review of security legislation and requested logistical support from the Department of Safety and Security or the Department of Justice. The Chairperson also referred to the institution of a sub-committee of experts to advise the Commission and to consider the papers which will be distributed.

At the newly appointed Commission's meeting on 23 and 24 February 1996, both the views expressed by the previous Commission in this regard and the establishment of a project committee composed of suitably qualified experts were endorsed. The Minister was

subsequently approached in connection with the inclusion of the investigation in the Commission=s programme. He approved such inclusion on 22 March 1996.

Research and a comparative survey has commenced. Due to capacity problems and financial restraints the investigation had to be kept in abeyance during the year under review. **The investigation will be resumed early in 1998. The appointment of a project committee is under consideration by the Minister.**

* **Project 106 - Juvenile Justice**

South Africa does not have a cohesive juvenile justice system. Limited provisions providing specifically for the management of young people caught up in the criminal justice system are spread throughout a number of separate statutes such as the Criminal Procedure Act, 1977, the Probation Services Act, 1991, the Child Care Act, 1983, and the Correctional Services Act, 1959.

The drafting of composite juvenile justice legislation was identified as a priority in the National Plan of Action for Children. The Minister of Justice accordingly requested the Commission to include an investigation on juvenile justice in its law reform programme. The project committee on juvenile justice was appointed on 5 December 1996. The names of the members appointed to the project committee appears in **Annexure B**.

An issue paper was published in June 1997 for general information and comment. The issue paper deals with principles to underpin juvenile justice legislation, age and criminal capacity, legal representation, police powers, release policy, diversion, juvenile courts, sentencing, and monitoring mechanisms.

With the financial assistance of UNICEF, a video was produced to place in context the juvenile offender and to introduce the viewer to the various issues raised in the issue paper. To further community outreach, the issues canvassed in the issue paper were summarised in a more reader-friendly questionnaire. The closing date for comments on the issue paper was 30 September 1997 and that for submission of the questionnaire 31 December 1997. Several workshops and briefings on the issue paper were held throughout the country by members of the project committee.

An international drafting workshop on juvenile justice was held in Gordon=s Bay on 4 to 6 November 1997. Ten international experts met with 40 key South African role-players to engage in a comparative discourse around the drafting of legislation for child justice. The United Nations Crime Prevention and Criminal Justice Division, through the United Nations Development Programme, provided financial and technical assistance.

The following international experts delivered papers on the following topics at the workshop:

- * Professor Geraldine van Bueren (UK) - Legislating for the inclusion of principles in juvenile justice legislation
- * Mr Dan van Ness (USA) - Legislating for restorative justice
- * Ms Mary-Ann Kirvan (Canada) - Prosecutorial discretion
- * Ms Estelle Appiah (Ghana) - Legislating for juvenile justice in Africa: The Ghana experience
- * Judge Michael Corriero (USA) - Juvenile Courts
- * Judge Renate Winter (Austria) - Sentencing and alternative sentencing
- * Ms Bernadine Dohrn (USA) - Effective legal representation
- * Ms Allison Morris (New Zealand) - Legislative measures to involve children, families and communities
- * Mr Patrick Kakama (Uganda) - Legislating to ensure equal application of juvenile justice legislation in rural and urban areas
- * Mr Gopalan Balagopal (Bangladesh) - Legislating for juvenile justice in developing countries

A discussion paper with draft legislation will be published during June 1998.

* **Project 107 - Sexual offences by and against children**

The drafting of legislation to combat the sexual exploitation and abuse of children was another priority identified in the National Plan of Action for Children. The Minister of Justice accordingly requested the Commission to include an investigation into sexual offences by and against children in its law reform programme. A project committee was appointed on 4

December 1996. The names of the members appointed to the project committee appear in **Annexure B**.

An issue paper was published in May 1997 for general information and comment. The closing date for comment was 30 September 1997. The issue paper provides a comprehensive overview of the common law relating to sexual offences against children; legislation relating to the sexual abuse of children, including child pornography and child prostitution; the customary law; and aspects of the process and procedural law affecting children as victims of sexual abuse. The latter includes disclosure, reporting and registration of child sexual abuse, investigation procedures, the court process, children giving evidence, making it easier for children to give evidence in court, the treatment of victims and offenders, and sentencing options for the sexual offender. The issue paper did not deal with sexual offences **by** children so as to avoid overlap with the investigation into juvenile justice (Project 106).

With the financial assistance of Rädde Barnen (SA), several workshops on the issue paper were held throughout the country by members of the project committee. Details are contained in Chapter 6.

A discussion paper with draft legislation will be published during 1998.

* **Project 108 - Computer related crimes**

This investigation is aimed at addressing problems experienced in the field of criminal law and criminal procedure with respect to the investigation and prosecution of computer related crime. These problems stem mainly from the intangible nature of information stored on or used by computers. Current statutory and common law offences are not wide enough to include many of the offensive activities carried out in respect of computers. Furthermore, procedures for the gathering and presentation of evidence were not designed to function in a computerised society.

A project committee for this investigation was appointed during September 1997. The names of the project committee members are reflected in **Annexure B**.

The project committee held its first meeting on 1 December 1997. The committee has set the following objectives for this investigation:

- ▢ Legislation to criminalise unlawful access to computers as well as the unauthorised planting of a computer code.
- ▢ Legislation providing for the procedural aspects associated with the investigation and prosecution of the above-mentioned offenses.
- ▢ Investigate the use of computers to commit offences such as theft and fraud.
- ▢ Investigate offenses committed by means of the Internet such as the publication of pornography.
- ▢ Investigation of encryption in order to protect information.
- ▢ Orientation of the judiciary and investigating and prosecuting authorities in respect of the application of the above-mentioned legislation.

The project committee has decided to take an incremental approach to the investigation. The first stage of the investigation comprises the criminalisation of unlawful access to computers and the planting of computer codes, as well as procedural provisions aimed at enhancing the investigation and prosecution of these offenses. **An issue paper dealing with these aspects will be published during the first half of 1998.**

* **Project 109 - Review of the Marriage Act**

The background to this investigation is outlined in Chapter 4.

The investigation will focus mainly on whether the provisions contained in the Marriage Act 25 of 1961 are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.

The Commission wishes to draw attention to two of its investigations which have a direct bearing on this project, namely *Customary Marriages* and *Islamic Marriages*. The investigation into *Customary Marriages* has already resulted in an issue paper and a discussion paper containing preliminary recommendations, whereas the investigation into *Islamic Marriages* is still in its planning stage.

The Commission has invited comments of all parties who feel that they have an interest in the topic concerned or may be affected by the type of measures set out in the Marriage Act. The closing date for comments is 20 February 1998. **Based on the outcome of these comments a discussion paper setting out the issues and containing preliminary recommendations and draft legislation will be prepared and distributed for general information and comment during the course of 1998.**

* **Project 110 - Review of the Child Care Act**

The background to this investigation is outlined in Chapter 4.

A project committee in respect of this investigation was appointed by the Minister on 17 June 1997. The names of the project committee members are reflected in **Annexure B**.

Research has commenced and the first issue paper on the scope of the investigation and its underlying principles will be considered by the working committee early in 1998. Two further issue papers are planned for 1998.

* **Project 111 - Jurisdiction of Magistrates' Courts in constitutional matters**

The background to this investigation is outlined in Chapter 4.

A discussion paper and draft legislation will be published for general information and comment during the first half of 1998.

* **Project 112 - Sharing of pension benefits**

The background to this investigation is outlined in Chapter 4.

A discussion paper and draft legislation will be published during the first quarter of 1998.

* **Project 113 - The use of electronic equipment in court proceedings**

The background to this investigation is outlined in Chapter 4.

In view of several investigations with a higher priority it was not possible to commence with research during the year under review. **The investigation will commence early in 1998.**

PUBLIC RELATIONS

For the efficient performance of its functions, the Commission depends on the co-operation of institutions and persons that have an interest in its investigations. In order to ensure the best possible involvement of interested parties, therefore, it is the Commission's policy to inform the public as far as possible of new investigations undertaken and of discussion papers published for general information and comment. Issue papers and discussion papers of the Commission are released by way of press statements so as to ensure good coverage. However, the Commission also of its own accord submits issue papers and discussion papers to institutions, of which it is aware, that have an interest in the investigation concerned. The reaction to these documents is an indispensable link in the process of law reform and it plays an important role in the eventual recommendations made by the Commission in its reports.

The Commission publishes a quarterly Bulletin. The aim of the Bulletin is to inform people about and interest them in the work of the Commission. The Bulletin contains information on the activities of the Commission, an update on current projects and items on new and completed investigations.

To promote the image of the Commission as a community orientated organisation, a brochure introducing the Commission was published and distributed in all official languages.

*** Interaction with foreign law reform bodies**

The good relations that the Commission maintains with foreign law reform bodies makes the exchange of working papers, reports and other information possible. In this way valuable information is exchanged that facilitates and expedites comparative law research. It is significant how various legal systems are often faced with similar problems. The exchange of documents enables the Commission to evaluate ways of thinking elsewhere in the world. During the year under review the Commission was privileged to receive delegations from the newly established law reform agencies in Malawi and Lesotho - the latter on two occasions. Closer links were forged between the Commissions. There was an extremely useful exchange of ideas and the

delegations were particularly interested in the working methods of the Commission and the structure of its Secretariat.

Two Commissioners also had the opportunity to visit other law reform agencies. Commissioner Gauntlett SC attended the Australian Law Reform Agencies Conference in Melbourne on 15 and 16 September 1997. Commissioner Seedat visited the Law Reform Commissions in England, Scotland and Ireland. The opportunity created by these visits to compare working methods and to discuss matters of mutual concern have been of great value to the Commission.

* **Electronic/printed media and liaison**

The Commission maintains good relations with the electronic and the printed media. Information that, in the Commission's opinion, is newsworthy is supplied to the media and enquiries are replied to fully and promptly. The Commission wishes to express its gratitude for the interest displayed by the media in investigations conducted by the Commission.

The Commission hosted three media conferences in Cape Town and two in Pretoria at which issue papers and discussions papers issued during the course of the year were released. The media conferences in Cape Town were attended by both the Minister and the Deputy Minister while the one in Pretoria was attended by the Deputy Minister. Invitations were extended to role players working in the areas concerned. There was good attendance and a live interest in the work of the Commission was shown. The conferences received television coverage. The full-time member and the secretary were interviewed on radio.

The full-time member participated in the following programmes:

- * Interview with SABC-TV news on the customary marriages Discussion Paper.
- * Interview on Bop-TV on the functioning of the Commission.
- * SAFM interview on customary law and the role of the Commission.
- * SABC-Radio news on customary marriages.

The full-time member also took part in the following interviews:

- * The Star on customary marriages.
- * American PBS-TV on customary law and women=s rights.
- * The Baltimore Sun on customary law and the dual system.

The full-time member and the secretary participated in a one hour programme on Radio Canni in which the Commission, its working methods and investigations were discussed.

The full-time member and the secretary deal with enquiries on the work of the Commission virtually on a daily basis. These include enquiries from the media, the professions, the universities, NGOs and members of the public.

Apart from routine enquiries which are dealt with on a regular basis by the researchers, they also participated in the following programmes and discussions:

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON
Arbitration	Researchers participated in numerous radio interviews and phone-in programmes: Punt Radio; Radio Mmabatho; Kaya; Bisho; Soweto Radio.	Researcher had discussions with an international delegation of the US Citizen Ambassador Programme.
Euthanasia and the Artificial Preservation of Life	<p>Researcher participated in numerous radio interviews and phone-in programmes: Radio 702, Radio Highveld , Radio SA FM, Radio Sonder Grense, Radio KFM, SABC Radio News, Radio Jacaranda, Radio 5, Radio Africa and Radio Sotho.</p> <p>Researcher supplied background information for two TV programmes.</p> <p>Researcher had newspaper interviews with journalists for Sunday Times, Daily News,</p>	<p>Researcher had a discussion with Natasha Cica, an Australian legislative drafter concerned with the Northern Territories Act on Euthanasia.</p> <p>Researcher had a telephone conference with representatives of the Catholic Church.</p>

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON
	Pretoria News, Star, New Nation, Cape Times, Readers Digest, Beeld.	
Maintenance	Researcher was involved in interviews with reporters for TV News and Radio Highveld.	<p>Researcher had numerous discussions with Michael Horton, a barrister from the UK who serves as an advisor to the Deputy Minister.</p> <p>Researcher attended various meetings of the Maintenance Forum at the JHB Maintenance Court.</p>
Insolvency		<p>Researcher had a discussion with Anthony Smits of the American firm of Hebb & Gitlin.</p> <p>Researcher had discussions with an international delegation of the US Citizen Ambassador Programme.</p>
Aspects of the Law Relating to AIDS	The project leader was interviewed on Radio Highveld and Radio Sonder Grense.	<p>Project leader and members of the project committee attended a meeting of NEDLAC's Labour Market Chamber.</p> <p>Project leader and researcher met with the Director-General and senior officials of the Department of Health.</p> <p>Ms Ann Strode, a project committee member, attended a branch meeting of the Department of Education.</p> <p>The project leader, members of the project committee and the researcher met with representatives of the Department of Labour on two occasions.</p>
Domestic Violence	Researcher was interviewed on K FM, SA FM and Radio Sonder Grense.	<p>Researcher had numerous discussions with Michael Horton, a barrister from the UK who serves as an advisor to the Deputy Minister.</p> <p>Researcher attended a number of meetings at Tshwaranang Legal Advocacy Centre to End Violence Against Women.</p> <p>Researcher had discussions with</p>

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON
		an international delegation of the US Citizen Ambassador Programme.
Sentencing	Researcher was interviewed on Radio 702 and Radio Highveld.	Researcher attended all the meetings of the National Programme Team on Victim Empowerment established in terms of the NCPS. Researcher attended the launch of a pilot project on victim empowerment hosted by NICRO.
Muslim personal law	Researcher and designated project leader had radio and newspaper interviews with journalists for the Cape Times, the Argus, the Star, Beeld, and SABC Radio News.	
Sexual offences against children	Researcher and Project Committee members participated in numerous radio and newspaper interviews.	Researcher contacted the Law Reform Commission of the Solomon Islands on the issue of rape law reform. Researcher established contact with Rädä Barnen and UNICEF (donors). Project leaders briefed international community and the media.
Juvenile justice	Researcher and Project Committee members participated in numerous radio and newspaper interviews.	Researcher and project committee members had several discussions with various international experts on juvenile justice. Project leaders briefed international community and the media.
Review of the Child Care Act	Researcher and Project Committee members participated in several radio and newspaper interviews.	Project leaders briefed international community and the media.
The legal consequences of sexual realignment and related matters	Researcher was interviewed on Radio Punt.	

In line with the Commission's policy to broaden its consultation base the following workshops and briefings were held:

*** Briefing of Parliamentary Committee on the Improvement of the Quality of Life and Status of Women**

The *Ad Hoc* Joint Committee on the Improvement of the Quality of Life and Status of Women requested a briefing on what the Law Commission was doing to ensure that the Commission is made accessible to women in South Africa, particularly in the rural areas. The Commission was also asked to assess its successes and failures in this regard. The request was in the context of a series of hearings that the Committee was holding with various government departments and sections.

The full time member and the secretary addressed the Committee.

The briefing covered the history and objectives of the Commission, its composition and its vision. In addition the Committee was briefed on the following points:

- * Measures implemented to develop public participation in the Commission's activities.
- * The Commission's research programme.
- * Project committees.
- * Workshops.
- * Overall success achieved.
- * Main challenges faced by the Commission.

The main thrust of the briefing was to indicate the Commission's contributions to the enhancement of the status of women in its personnel policies, its operations, the composition of its project committees and its programme. The briefing was well received, with several speakers expressing satisfaction at the efforts of the Commission.

*** Briefing of the Human Rights Commission**

At the invitation of the Human Rights Commission (HRC) the full-time member and the secretary addressed that Commission on the activities and working methods of the Law Commission. Ways of establishing closer co-operation was also discussed.

* **Briefing of the Commission on Gender Equality**

At the invitation of the Commission on Gender Equality (CGE) the full-time member attended a meeting at the offices of the CGE in Pretoria on 28 October 1997. Although the request had been triggered by the need to be briefed on Discussion Paper 74: Customary Marriages, an opportunity was afforded to discuss closer links between the two commissions. The possibility of the CGE running workshops on Law Commission proposals in the future was discussed, and the parties resolved to maintain close contact.

* **Briefing of the Portfolio Committee**

The full-time member accepted an invitation from the Portfolio Committee on to address them (on 10 February 1997) on what the Law Commission was doing about violence against women and children. This was part of a series of public hearings on domestic violence. The full-time member reported fully on the Domestic violence Discussion Paper and on the progress of the investigation into Sexual Offences Against Children.

* **Briefing of American Judges**

The full-time member also participated in a Departmental exercise to brief a visiting group of judges from the United States of America on South African justice system. The visiting judges were addressed on law reform in South Africa, outlining the history, structure and functioning of the SA Law Commission.

* **Workshops and briefings hosted by the Commission**

The following workshops and briefings were organised in respect of issue papers that were published for general information and comments:

□ **Sexual offences against children (Workshops)**

Province	Venue	Date
KwaZulu-Natal	University of Zululand	11 August 1997
Mphumalanga	Nelspruit	14 August 1997
Northern Cape	Kimberley	14 August 1997
Eastern Cape	Port Elizabeth	18 August 1997
Western Province	Atlantis	19 August 1997
Eastern Cape	University of Transkei	19 August 1997
Western Cape	University of Western Cape	20 August 1997
Eastern Cape	Oudtshoorn	21 August 1997
Northwest Province	Mmabatho	21 August 1997
Gauteng	Pretoria	22 August 1997
KwaZulu-Natal	Westville Prison	28 August 1997
Free State	Bloemfontein	15 September 1997
Gauteng	Soweto	17 September 1997
Northern Province	Pietersburg	18 September 1997

□ **Juvenile justice**

An international workshop on the drafting of juvenile justice legislation was held in Gordon's Bay on 4 to 6 November 1997. The workshop used as starting point the issue paper on juvenile justice. Papers on various issues such as legislating for restorative justice, prosecutorial and magisterial discretion, and effective legal representation, were presented by 10 highly acclaimed international experts.

In addition, the following workshops and briefings took place:

WORKSHOPS/ BRIEFINGS	CENTRE/TARGET AUDIENCE	DATE
Workshop	Durban (Inter-sectoral)	22 September 1997
Workshop	East London (Inter-sectoral)	23 September 1997
Workshop	Western Cape (Reform schools)	23 September 1997
Workshop	UNITRA (Inter-sectoral)	25 September 1997
Briefing	Legal Aid Board	
Briefing	Department of Correctional Services	
Briefing	Human Rights Commission	
Briefing	Youth Commission	
Briefing	Justice College	

□ **Harmonisation of the common law and the customary law**

Province	Venue	Date
North-West	Mmabatho	28 November 1997
Northern Cape	Upington	8 December 1997
Eastern Cape	Bisho	11 December 1997

The workshops will continue early in 1998.

The Commission's doors are open to visitors who wish to obtain information concerning its activities or who wish to discuss matters that are of interest to the Commission. During the year, numerous foreign visitors from different countries visited the offices of the Commission. The majority of visitors were interested in the changes taking place in South Africa and the role of the Commission in this process.

* **Participation of researchers in activities not initiated by the Commission**

In some instances researchers of the Commission are invited by Government Departments, non-governmental organisations and other institutions to attend seminars or conferences and to participate in workshops relating to investigations on the Commission's programme. This inter-sectoral approach facilitates co-operation between the Commission and other role players, serves to publicise the Commission's activities and ensures that duplication of initiatives is avoided. Researchers participated in the following activities not initiated by the Commission:

PROJECT	WORKSHOPS, CONFERENCES, ETC	BRIEFINGS, DISCOURSES, ETC
Arbitration	Researcher attended seminar on International Arbitration hosted by the Association of Arbitrators entitled "The Resolution of International Trade and Investment Disputes in Africa". (Sandton.)	
Surrogate Motherhood		Researcher briefed ad hoc Parliamentary Committee.
Euthanasia and the Artificial Preservation of Life	Researcher participated in a workshop with representatives of the South African Council of Churches. (Johannesburg.)	Researcher delivered address on "Euthanasia v Palliative Care". (University of the North.)
Maintenance	Researcher attended a workshop held by the Department of Justice's Task Team on Maintenance. Researcher attended a workshop on the establishment of Family Courts.	
Insolvency	Researcher attended Multinational Judicial Colloquium and the World Congress of INSOL International. (New Orleans.)	Researcher gave a lecture at the Assistant Master of the High Court Seminar, Justice College.
Aspects of the Law Relating to AIDS	The project committee hosted a workshop on "Medical Certificates in respect of HIV/AIDS related Deaths".	
Domestic Violence	Researcher participated in a workshop hosted by the Centre for Legal Services, University of Zululand, in association with the National Human Rights Trust. Researcher participated in an information and evaluation workshop hosted by the Commission on Gender Equality. (Johannesburg.) Researcher participated in a workshop hosted by the Institute for Multi-Party	Researcher briefed the Portfolio Committee on Justice during a public hearing on domestic violence. Researcher briefed the Chief Magistrates.

PROJECT	WORKSHOPS, CONFERENCES, ETC	BRIEFINGS, DISCOURSES, ETC
	Democracy. (Cape Town.)	
Sentencing	<p>Researcher attended a workshop on the Issue Paper on Restorative Justice. (Department of Safety and Security.)</p> <p>Researcher attended a workshop on the Issue Paper on Restorative Justice hosted by the Centre for Criminal Justice, Pietermaritzburg.</p> <p>Researcher attended a conference on "Criminal Justice and the Constitution" hosted by the Verloren van Themaat Centre, UNISA.</p>	
Interest on damages		Researcher briefed and assisted the Portfolio Committee on Justice in its deliberations on the Prescribed Rate of Interest Amendment Bill.
Fathers' rights in respect of children born out of wedlock	Researcher participated in a workshop conducted by the Department of Welfare on the Report and Bill (Pretoria).	
The detention and release of State patients	Researcher participated in a workshop conducted by the Department of Health on the Report and Bill (Pretoria).	
Sexual offences against children	<p>Researcher participated in meetings of the Inter-sectoral Committee to Prevent and Combat the Commercial Exploitation of Children</p> <p>Researcher and Project Committee members participated in meetings of the National Committee on Child Abuse and Neglect (NCCAN)</p> <p>Researcher and Project Committee members participated in meetings of the Protocol Development Team for the Management of Child Abuse and Neglect</p> <p>Researcher attended the conference "Crimes against children: The CPU and specialised individuals" (Nylstroom)</p> <p>Researcher participated in the workshop on the decriminalisation of sex work (Pretoria)</p> <p>Researcher attended the launch of the</p>	<p>Researcher briefed the Portfolio Committee on Welfare on the initiatives taken by the Department of Justice in combatting child abuse.</p> <p>Researcher presented on the issue paper at the Tlhaole High School, Lehurutse, North-West Province.</p> <p>Researcher part of an inter-sectoral task team to investigate the possible introduction of a register for sexual offenders at the request of the Minister of Welfare</p>

PROJECT	WORKSHOPS, CONFERENCES, ETC	BRIEFINGS, DISCOURSES, ETC
	<p>National Policy Guidelines for Victims of Sexual Abuse (Soweto)</p> <p>Researcher participated in the workshop on young sexual offenders (Cape Town)</p> <p>Researcher participated in the pilot project on programmes for convicted juvenile sexual offenders</p>	
Juvenile Justice	<p>Researcher and Project Committee members participated in an international workshop on the drafting of juvenile justice legislation (Gordon's Bay)</p>	
Review of the Child Care Act	<p>Researcher participated in a workshop conducted by the Department of Welfare and Population Development on the 1996 Amendments (Pietersburg)</p> <p>Researcher participated in the national conference on the social mobilisation for the fulfilment of children's rights (UWC, Bellville)</p>	
Group and Human Rights		<p>Researcher delivered address on "Human rights and obligations" at the East Rand Farm Schools Debating League finals in Sundra (close to Delmas).</p>

*** Internet**

An internet site has been administered for the Commission free of charge by the Wits Law School since March 1997. A copy of the Commission's home page and the index page for issue papers are attached in order to illustrate the appearance of pages on the site.

Any person with access to the internet can subscribe to a free notification service. Subscribers are informed of the publication of new documents on the site. At the end of November 1997 there were approximately 100 subscribers with new subscriptions being received all the time.

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ACKNOWLEDGEMENTS

During the year under review a substantial number of persons and bodies responded to specific or general invitations by the Commission to comment on particular matters or to assist it with its activities in some respect or other. These contributions and comments received by the Commission in respect of its issue and discussion papers are indispensable links in the process of law reform. It is impossible, within the scope of this report, to mention all such individual bodies. However, the Commission wishes to avail itself of this opportunity to express its sincere thanks to all concerned - without their goodwill and assistance it would not be able to perform its duty satisfactorily.

During the year under review the Commission hosted a number of workshops in respect of its investigations into juvenile justice, sexual offences against children and the recognition of customary marriages. The particulars of the workshops appear in Chapter 6. The Commission would like to extend its appreciation to all those who participated and who favoured the Commission with their inputs and active participation in the discussions and deliberations.

Mention has already been made elsewhere in the report of the assistance of the donor community without whose support the workshops would not have been possible. The Commission would like to express its sincere appreciation for the generous assistance given by the German Government through the German Development Co-operation in respect of the customary law, the United Nations Crime Prevention and Criminal Justice Division through the United Nations Development Programme for the hosting of an international drafting workshop on juvenile justice and Rätta Barnen (SA) for its assistance with the investigation into sexual offences against children. The Commission would also like to express its appreciation to UNICEF for sponsoring the production of a video on juvenile justice which was utilised at the workshops as well as the publication of a questionnaire to supplement the issue paper.

The Commission would also like to thank the Government Printer and his staff who are responsible for the printing of the Commission=s reports for their professional supporting service.

In conclusion, the Commission also wishes to thank the Minister and Deputy Minister of Justice for their personal interest in and support of the Commission=s work. The Commission wishes to thank, too, the Department of Justice for its co-operation and goodwill.

ANNEXURE A

PRESENT AND FORMER MEMBERS OF THE COMMISSION IN ORDER OF APPOINTMENT

(Present members marked with an asterisk, see Chapter 3.)

Title/Name	Term of office
Chairpersons	
The Honourable D H Botha, Judge of Appeal	1973-09-28 to 1975-12-28
The Honourable Chief Justice P J Rabie DMS	1976-02-27 to 1982-05-31
The Honourable G Viljoen, OMSG, Judge of Appeal	1982-09-30 to 1988-11-30
The Honourable H J O van Heerden, Judge of Appeal	1988-12-01 to 1995-12-31
The Honourable Justice I Mahomed*, Vice-President of the Constitutional Court and Chief Justice designate	1996-01-01 to date
Vice-Chairpersons	
The Honourable Judge President N James DMS	1973-09-28 to 1977-07-13
The Honourable G Viljoen, OMSG, Judge of Appeal	1977-09-22 to 1982-09-27
The Honourable H J O van Heerden, Judge of Appeal	1982-09-30 to 1988-11-30
The Honourable P J J Olivier*, Judge of Appeal	1988-12-01 to date
Full-time members	
Adv G G Smit	1982-01-01 to 1995-12-31
The Honourable Mr Justice P J J Olivier	1986-02-01 to 1995-03-31

Title/Name	Term of office
Professor R T Nhlapo*	1996-01-01 to date
Members	
Mr D J du P Geldenhuys	1973-09-28 to 1975-10-31
Adv C P Joubert SC	1973-09-28 to 1974-08-20
Mr J E Knoll OMSS	1973-09-28 to 1995-12-31
Adv D D van Niekerk SC	1973-09-28 to 1979-01-31
Prof A D J van Rensburg	1973-09-28 to 1982-08-30
Adv H J O van Heerden SC	1974-09-30 to 1976-08-11
Adv J C Ferreira SC	1975-09-22 to 1979-10-31
Adv M Bliss QC	1976-10-07 to 1977-02-24
Adv F H Grosskopf SC	1977-07-01 to 1980-11-21
Adv G G Smit	1979-02-01 to 1982-01-01
Mr P A J Kotzé	1979-11-01 to 1988-10-30
Adv P M Nienaber SC	1981-06-14 to 1982-07-27
Adv P J J Olivier SC	1982-09-30 to 1988-12-01
Prof J T Delport	1982-09-30 to 1987-05-27
Prof D J Joubert	1987-12-21 to 1995-12-31
Dr W G M van Zyl	1988-11-01 to 1991-10-31
Adv R P McLaren SC	1989-07-24 to 1990-10-31
Prof C R M Dlamini SC	1991-05-08 to 1995-12-31
Mr J A Venter	1992-03-12 to 1995-12-31

Title/Name	Term of office
Justice Y Mokgoro*	1996-01-01 to date
Adv J J Gauntlett SC*	1996-01-01 to date
Mr P Mojapelo*	1996-01-01 to date
Ms Z Seedat*	1996-01-01 to date

ANNEXURE B

PROJECT COMMITTEES OF THE COMMISSION AND MEMBERS THEREOF

(Chairpersons of committees are marked with an asterisk.)

Committee	Members	
AIDS	Judge E Cameron*	
	Mr Z Achmat	Former Head, AIDS Law Project, Centre for Applied Legal Studies at the University of the Witwatersrand
	Dr P J Haasbroek	Group economist, Barlows Ltd
	Ms M Makhalemele	Community representative
	Dr J Matjila	Department of Community Health, MEDUNSA
	Dr G J Mtshali	Chief Director, National Programmes, Department of Health
	Prof T Nhlapo	Full-time member, Law Commission
	Judge P J J Olivier	Vice-Chairperson, Law Commission

Committee	Members	
Arbitration	Ms L Seftel	Chief Director, Minimum Standards, Department of Labour
	Ms A Strode	National Co-ordinator, Lawyers for Human Rights: AIDS and Human Rights Programme
	Prof C van Wyk	Professor of law, Department of Jurisprudence, UNISA
	Judge J Steyn*	
	Prof D W Butler	Professor: Law Faculty, University of Stellenbosch
	Mr R H Christie QC	Formerly Professor of law; University of Zimbabwe
	Adv J J Gauntlett SC	Member, Law Commission
	Judge Y S Meer	Land Claims Court
	Prof R Choudree	Professor of law, Department of Mercantile law, University of Durban-Westville
	Ms B Hechter	Office of the Family Advocate
Mr A Jooste	Chief Magistrate, Cape Town	

Committee	Members	
Computer Related Crimes	Ms N Mkefa	Community Peace Foundation
	Adv P Pretorius	Johannesburg Bar
	Prof D P van der Merwe*	Professor of law, University of South Africa
	Capt J B Grobler	SAPS, Commercial Crime Unit
	Adv L W Mahlati	Office of the Attorney-General, Port Elizabeth
	Mr I M Melamed	Computer Systems Consultant
	Prof R T Nhlapo	Full-time member, Law Commission
	Judge C O=Regan	Judge of the Constitutional Court
	Prof S H von Solms	Department of Computer Science, Rand Afrikaans University
	Judge R H Zulman	Judge of the Appeal Court
Class actions	Judge P J J Olivier*	Vice-Chairperson, Law Commission
	Adv J J Gauntlett SC	Member, Law Commission
	Prof C Loots	Professor in Civil Procedure and Environmental law, University of the

Committee	Members	
Domestic Violence		Witwatersrand
	Mr E Makgoba	Attorney
	Ms S Meer	Attorney, Legal Resources Centre, Cape Town
	Mr P Mojapelo	Member, Law Commission
	Mr D Nkadimeng	Attorney
	Ms Z Seedat*	Member, Law Commission
	Ms H Combrinck	Department of Public and Adjective law, University of the Western Cape
	Ms J Fedler	Tshwaranang Legal Advocacy Centre to End Violence Against Women
	Ms L A Foster	Masimanyane Women=s Support Centre
	Mr H Kuhn	Magistrate, Pietermaritzburg
	Ms L Makhura	Northern Province Rural Development Forum
	Ms R Manjoo	Campus Law Clinic, University of Natal
	Ms M Monakali	Ilitha LaBantu
Ms M Motsei	ADAPT	
Ms F Stewart	Attorney	
Ms P Zikalala	Lawyers for Human Rights	

Committee	Members	
Harmonisation of the common law and indigenous law	Prof T Nhlapo*	Full-time member, Law Commission
	Ms L G Baqwa	Attorney
	Prof T W Bennett	Law Faculty, University of Cape Town
	Adv F Bosman SC	Former Chief Family Advocate
	Prof C R M Dlamini SC	Rector of the University of Zululand
	Judge Y Mokgoro	Judge of the Constitutional Court and member of the Law Commission
Insolvency	Judge R H Zulman*	Judge of the Supreme Court of Appeal
	Mr N Coetzer	Attorney
	Dr E de la Rey	Department Legal Services, Financial Services Board, formerly Professor: Law Faculty, University of South Africa
	Prof M M Katz	Attorney and nominee of the Standing Advisory Committee on Company Law
	Mr N Matlala	Attorney

Committee	Members	
Juvenile justice	Mr S S Moodley	Master of the High Court, Grahamstown
	Mr B C Nel	Master of the High Court, Pretoria
	Mr L F Pereira	Attorney and nominee of the Association of Insolvency Practitioners of Southern Africa
	Ms A Skelton*	Lawyers for Human Rights, Pietermaritzburg
	Ms P Moodley	Researcher, Law Commission
	Ms Z Seedat	Member, Law Commission
	Ms J Sloth-Nielsen	Community Law Centre, University of the Western Cape
	Mr T Thipanyane	S A Human Rights Commission
Maintenance	Ms M Tserere	Lawyers for Human Rights, Umtata
	Prof S S Burman*	Centre for Socio-Legal Research, University of Cape Town
	Ms B Makhene	Ministry of Justice
	Mr P Mojapelo	Member, Law Commission
	Ms A Ramlal	Magistrate, Maintenance

Committee	Members	
Review of the Child Care Act		Section, Johannesburg
	Mr E Rasefate	Department of Justice
	Prof I D Schäfer	Professor Emeritus, Rhodes University
	Ms Z Seedat	Member, Law Commission
	Prof J Sinclair	Executive Director, University of Pretoria
	Ms D Singh	Office of the Family Advocate, Durban
	Ms A Thornton	Department of Health and Welfare, Western Cape
	Prof B van Heerden*	Department of Private law, University of Cape Town
	Dr J Loffell	Johannesburg Child Welfare Society
	Dr M Mabetoa	Department of Welfare
	Mr M Masutha	Department of Welfare
	Dr C Matthias	Department of Social Work, University of Durban/Westville
Ms B Mbambo	Social Worker (Private Consultant)	
Mr M Mtshali	Magistrate, Pietermaritzburg	
Ms A Skelton	Lawyers for Human Rights, Pietermaritzburg	

Committee	Members	
Sentencing	Ms H Starke	Department of Welfare
	Prof N Zaal	Department of Private law, University of Durban/Westville
	Ms Justice L van den Heever*	
	Mr K Govender	Attorney
	Adv M R Hellens SC	Johannesburg Bar
	Mr N Kollapen	SA Human Rights Commission
	Mr M A Makume	Attorney
	Ms P Moodley	Researcher, Law Commission
	Judge P J J Olivier	Vice-Chairperson, Law Commission
Sexual offences by and against children	Prof D van Zyl Smit	Professor of law, Department of Criminal and Procedural law, University of Cape Town
	Ms Z Seedat*	Member, Law Commission
	Ms C McClain	Community Law Centre, University of the Western Cape
	Ms E H Mthombeni	Department of Correctional Services, Durban-Westville

Committee	Members	
Simplification of criminal procedure	Mr T Pillay	Attorney
	Ms E M Schurink	Centre for Social Welfare Policy, HSRC
	Ms R L September	Institute of Child Family Development, University of the Western Cape
	Ms J van Niekerk	Childline, Durban
	Ms Justice L van den Heever*	
	Judge A E B Dhlodhlo	Bisho High Court
	Adv M R Hellens SC	Johannesburg Bar
	Mr P A J Kotze	Retired Regional Court President
	Prof B Majola	Director, Legal Resources Centre
	Mr K J Mloi	Attorney
	Judge P J J Olivier	Vice-Chairperson, Law Commission
Ms A Ramgobin	Director of the Legal Aid Centre, UND and associate member of the Durban Bar	

ANNEXURE C

PRESENT PROGRAMME OF THE COMMISSION

Project number	Title
8	Steps aimed at making the common law more readily available
25	Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book
47	Unreasonable stipulations in contracts and the rectification of contracts
59	Islamic marriages and related matters
63	Review of the law of insolvency
70	Limitation of civil liability of professional persons
73	The simplification of criminal procedure
82	Sentencing
85	Aspects of the law relating to AIDS
86	Euthanasia and the artificial preservation of life
88	The recognition of a class action in South African law
90	Harmonisation of the common law and indigenous law
94	Arbitration
95	The admissibility of computer evidence
96	The Apportionment of Damages Act, 1956
100	Family law and the law of persons <ul style="list-style-type: none">* Domestic violence* Maintenance

Project number	Title
101	The application of the bill of rights on the criminal law, the law of criminal procedure and sentencing
105	Security legislation
106	Criminal juvenile justice system
107	Sexual offences committed by and against children
108	Computer related crimes
109	Review of the Marriage Act, 1961
110	Review of the Child Care Act, 1983
111	Jurisdiction of Magistrates= Courts in constitutional matters
112	Sharing of pension benefits
113	The use of electronic equipment in court proceedings

ANNEXURE D

INVESTIGATIONS INCLUDED IN THE COMMISSION'S PROGRAMME SINCE ITS ESTABLISHMENT: RESULT

(Current investigations marked with an asterisk,
see Chapter 5.)

Project number	Title	Year of report	Reference number of published report	Result
1	The codification of certain crimes against the State	1974	RP 17/1976	Recommended legislation not implemented
2	Investigation into a proposed new process for the administration of certain estates	1974	Not published	No new legislation recommended
3	The submission of questions of law in civil cases to the Appellate Division of the Supreme Court	1974	Not published	Section 36 of Act 94 of 1974 enacted
4	Investigation into the element of fault in <i>injuria</i>	1978	Not published	No legislation recommended, see also project 44
5	The safeguarding of money held in trust by an agent on behalf of a client	1974	Not published	No legislation recommended
6	Review of the law of evidence:			
	☐ The admissibility in civil pro-	1982	RP 95/1982	Act 57 of 1983 passed

Project number	Title	Year of report	Reference number of published report	Result
	ceedings of evidence generated by computers			
	Final report	1986	ISBN 0 621 11348 4	Act 45 of 1988 passed
7	Revision of pre-Union statutes:			
	Repeal of certain pre-Union statutes	1975	Not published	Act 36 of 1976 passed
	Repeal of certain pre-Union statutes	1976	Not published	Act 43 of 1977 passed
	Retention of certain pre-Union statutes	1977	Not published	Act 24 of 1979 passed
8*	Steps aimed at making the common law more readily available	-	-	Several works published, see previous annual reports, Chapter 5 and Annexure F
9	Review of the law of trusts	1986	June 1987	Act 57 of 1988 passed
10	Draft convention for a uniform law of agency of an international character in respect of the sale of goods	1974	Not published	No legislation recommended
11	Investigation into the common law rule that interest may not accrue beyond the principal debt	1974	RP 18/1975	Recommendations not implemented, but see section 68A of the Insurance Act 27 of 1943 in respect of policy loans

Project number	Title	Year of report	Reference number of published report	Result
12	Review of the law of divorce			
	☐ Report	1977	RP 57/1978	Act 70 of 1979 passed, see also project 40
	☐ Section 7(3) of Act 70 of 1979	1991	ISBN 0 621 14140 2	Act 44 of 1992 passed, see also project 100
13	Investigation into the right of recourse of spouses in respect of contributions towards necessities for the joint house-hold	1974	RP 79/1975	Act 13 of 1976 passed, see also project 15
14	The prescribing of a rate of interest in respect of debts where no rate of interest applies in law	1974	Not published	Act 55 of 1975 passed
15	The matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses	1982	RP 26/1982	Act 88 of 1984 passed, see also projects 41 and 51
16	Investigation into the application of set-off in insolvency	1975	Not published	No legislation recommended, see project 63
17	Examination of the convention on the form of an international will	1975	Not published	No legislation recommended, see project 22
18	Investigation into the enforceability of foreign arbitration	1975	Not published	Act 40 of 1977 passed

Project number	Title	Year of report	Reference number of published report	Result
	awards in the Republic			
19	Investigation into the shifting of the onus of proof in bribery charges	1975	Not published	No legislation recommended, see project 75
20	Investigation into the substitution of petition proceedings in superior courts	1975	Not published	Act 35 of 1976 passed
21	Limitation of the institution of legal actions against the State	1977	Not published	No legislation recommended, see also project 42
22	Review of the law of succession:			
	☐ Intestate succession	1985	ISBN 0 621 09611 3	Act 81 of 1987 passed
	☐ Legitimate portion or right to maintenance	1987	Not published	Act 27 of 1990 passed
	☐ Formalities of a will, alteration and revocation of wills, disqualification from inheriting, substitution and the succession rights of adopted children	1991	ISBN 0 621 14189 5	Act 43 of 1992 passed
23	Risk as a ground for liability in delict	1985	ISBN 0 621 10202 4	No legislation recommended
24	Investigation into the courts= powers of review of administrative acts			

Project number	Title	Year of report	Reference number of published report	Result
	☐ Report	1992	ISBN 0 621 15356 7	Implementation of recommendations under consideration by the Minister of Justice
	☐ Supplementary report	1994	Not published	Implementation of recommendations under consideration by the Minister of Justice
25*	Statute law: The establishment of a permanently simplified, coherent and generally accessible book:			See Chapter 5
	☐ Repeal of Laws Act	1980	Not published	Act 94 of 1981 passed
	☐ Investigation into certain aspects of the Prescription Act 68 of 1969	1983	Not published	Act 11 of 1984 passed
	☐ Investigation into further aspects of the Prescription Act 68 of 1969	1984	Not published	No legislation recommended
26	Criminal law consolidation: Theft and house-breaking	1977	Not published	Recommendations regarding legislation not implemented, now forms part of project 25
27	Abolition of civil imprisonment	1976	Not published	Act 2 of 1977 passed, see also project 54

Project number	Title	Year of report	Reference number of published report	Result
28	Investigation into leases in respect of movables	1976	Not published	No legislation recommended
29	Investigation into the application of <i>mens rea</i> in statutory offences	1982	GP-S 300	No legislation recommended
30	Investigation into an unlimited right of appeal for convicted persons in criminal proceedings	1976	RP 73/1977	No legislation recommended
31	Investigation into the law relating to presumption of death	1977	Not published	Act 23 of 1979 passed
32	Review of the law of admiralty	1982	RP 12/1983	Act 105 of 1983 passed
33	Review of the law of prize	1987	-	Recommendations not implemented
34	Examination of the legal consequences of artificial insemination and the duty of support in respect of certain adulterine children	1978	Not published	No legislation recommended, see also project 38
35	Negligent use of fire-arms	1978	Not published	No legislation recommended
36	Investigation into delictual liability in cases of misrepresentation	1983	Not published	No legislation recommended
37	Review of preferent claims in insolvency	1984	ISBN 0 621 090840 X	Recommendations not implemented, see project 63
38	Investigation into the legal posi-	1985	ISBN 0 621	Act 82 of 1987 passed

Project number	Title	Year of report	Reference number of published report	Result
	tion of illegitimate children		10205 9	
39	Investigation into the legal consequences of suspensive conditions in contracts of sale	1985	ISBN 0 621 11350 6	No legislation recommended
40	Evaluation of the effect of the Divorce Act 70 of 1979	1983	Not published	No legislation recommended
41	The division of pension benefits on divorce			
	☐ Report	1986	ISBN 0 621 11357 3	Act 7 of 1989 passed
	☐ Supplementary report	1994	RP 158/1995 ISBN 0 621 16869 6	Implementation of recommendations under consideration by the Minister of Justice
42	Investigation into time limits for the institution of actions against the State	1985	Not published	Recommendations not implemented. See Chapter 5
43	Investigation into the advancement of the age of majority	1985	ISBN 0 621 10246 6	No legislation recommended
44	A comprehensive and comparative inquiry into the protection of all rights of personality	-	-	Struck off
45	Women and sexual offences in South Africa	1985	ISBN 0 621 09609 1	Acts 103 of 1987, 39 of 1989 and 113 of 1993

Project number	Title	Year of report	Reference number of published report	Result
				passed
46	The giving of security by means of movable property:			
	☐ Report	1991	ISBN 0 621 14544 0	Act 57 of 1993 passed
	☐ Supplementary report	1993	Not published	Act 57 of 1993 passed
47*	Unreasonable stipulations in contracts and the rectification of contracts	-	-	See Chapter 5
48	Examination of the limits of criminal defamation	1983	Not published	No legislation recommended
49	Offences committed under the influence of liquor or drugs	1985	ISBN 0 621 10207 5	Act 1 of 1988 passed
50	Investigation into the payments system in South African law	1994	RP 105/1995 ISBN 0 621 16776 2	Implementation of recommendations under consideration by the Minister of Finance
51	Marriages and customary unions of black persons:			
	☐ Problems relating to the acquisition of leasehold	1985	Not published	Section 1 of Act 90 of 1985 enacted
	☐ Final report	1986	-	Act 3 of 1988 passed
52	Investigation into the legal consequences of sexual realignment	1995	RP 32/1996 ISBN 0 621	Implementation of recommendations under

Project number	Title	Year of report	Reference number of published report	Result
	and related matters		17334 7	consideration by the Minister of Justice
53	Investigation into the amendment of section 26 of the Insolvency Act 24 of 1936	1983	Not published	Act 84 of 1984 passed, see also project 63
54	Committal to prison in respect of debt	1985	ISBN 0 621 11346 8	Implementation of recommendations under consideration by the Minister of Justice, see project 74
55	Removal of certain restrictions in respect of land	1984	Not published	No legislation recommended
56	Submission of a question of law to the Appellate Division of the Supreme Court relating to the calculation of finance charges under the Limitation and Disclosure of Finance Charges Act 73 of 1968	1976	Not published	<i>Ex parte Minister of Justice</i> 1978 2 SA 572 (A)
57	Anton Piller type of orders	1987	Not published	Recommendations not implemented
58	Group and human rights			
	☐ Interim report	1991	Report ISBN 0 621 14128 3 Summary: ISBN 0 621	Act 200 of 1993 passed

Project number	Title	Year of report	Reference number of published report	Result
			14127 5	
	☐ Final report	1994	RP 66/1995 ISBN 0 621 16727 4	Made available to the Consti-tutional Assembly
59*	Islamic marriages and related matters	-	-	See Chapter 5
60	Domicile	1991	ISBN 0 621 14255 7	Act 3 of 1992 passed
61	Enduring powers of attorney and the appointment of curators for mentally incapacitated persons	1988	ISBN 0 621 12107 X	Act 108 of 1990 passed
62	The protection of a purchaser of shares			
	☐ Report	1993	ISBN 0 621 16287 6	Implementation of recommen-dations under consideration by the Minister of Finance
	☐ Supplementary report on section 138 of the Companies Act 61 of 1973	1994	RP 152/1995 ISBN 0 621 16847 5	Implementation of recommen-dations under consideration by the Minister of Finance
63*	Review of the law of insolvency:			
	☐ Interim report on section 34 of the Insolvency Act, 1936 (Act	1990	(Unpublished/ Informal)	Section 1 of the Insolvency Amendment

Project number	Title	Year of report	Reference number of published report	Result
	24 of 1936)			Act 6 of 1991 en-acted, see also Chapter 5
	☐ Interim report on insolvency interdicts	1992	ISBN 0 621 14964 0	Act 122 of 1993 passed, see also Chapter 5
	☐ Interim report on appeals against sequestration orders	1993	ISBN 0 621 15421 0	Section 1 of Act 129 of 1993 enacted, see also Chapter 5
	☐ Interim report on the protection of the financial markets in the event of insolvency	1994	RP 63/1995 ISBN 0 621 16721 5	Act 32 of 1995 passed, see also Chapter 5
64	The legal protection of information	-	-	Struck off
65	Surrogate motherhood	1992	ISBN 0 621 15353 2	Implementation of recommendations under consideration by a Select Committee of Parliament
66	Reform of the South African law of bail:			
	☐ Report	1992	Not published	Referred back for consideration, <i>inter alia</i> , in the light of the provisions of the Constitution Act 200 of 1993
	☐ Report	1994	RP 82/1995 ISBN 0 621 16746 0	Act 75 of 1995 passed

Project number	Title	Year of report	Reference number of published report	Result
67	The Usury Act and related matters	-	-	Struck off, see Chapter 4
68	Access to police dockets	1992	ISBN 0 621 15349 4	Not implemented in view of the interpretation of the subsequent provision in section 23 of the Constitution Act 200 of 1993
69	The acquisition and loss of ownership of game	1991	ISBN 0 621 14138 0	Act 105 of 1991 passed
70*	Limitation of civil liability of professional persons	-	-	See Chapter 5
71	The protection of child witnesses	1991	ISBN 0 621 14139 9	Act 135 of 1991 passed
72	The alienation of personal servitudes	-	-	Struck off
73*	The simplification of criminal procedure:			
	☐ Interim report on appeal procedures	1994	-	Under consideration by the Minister of Justice following the report of the Hoexter Commission of Inquiry, see Chapter 5
	☐ First interim report on the simplification of the criminal	1995	RP 70/1996 ISBN 0 621	Act 86 of 1996 passed

Project number	Title	Year of report	Reference number of published report	Result
	procedure		17405 X	
74	Debt collecting:			
	☐ Interim report on imprisonment for debt	1994	RP 199/1995 ISBN 0 621 16956 0	Act 81 of 1997 passed
	☐ Final report	1995	RP 198/1995 ISBN 0 621 16960 9	Act 81 of 1997 passed, Debt Collectors Bill under consideration by the Justice Portfolio Committee
75	Bribery	1991	ISBN 0 662 15184 43	Act 94 of 1992 passed
76	Jewish divorces	1994	RP 56/1995 ISBN 0 621 16707 X	Act 95 of 1996 passed
77	Constitutional models	1991	Report (3 Volumes): ISBN 0 621 14239 5 Summary: ISBN 0 621 14197 6	No legislation recommended
78	Interest on damages	1994	ISBN 0 621 16231 0	Act 7 of 1997 passed
79	Natural fathers of children born out of wedlock	1994	RP 55/1995 ISBN 0 621	Act 86 of 1997 passed

Project number	Title	Year of report	Reference number of published report	Result
			16706 1	
80	Accession to the Hague Convention on the Civil Aspects of International Child Abduction	1992	Not published	Act 72 of 1996 passed
81	Submission of a question of law to the Appellate Division of the Supreme Court concerning certificates under instruments of debt as conclusive proof of liability	1991	Not published	<i>Ex parte Minister of Justice in re: Nedbank v Abstein Distributors and Donnelly v Barclays National Bank</i> 1995 3 SA 1 (A)
82*	Sentencing	-	-	See Chapter 5
83	Review of the Moratorium Act, 1963	-	-	Struck off
84	Application of the trapping system	1994	RP 174/1995 ISBN 0 621 16896 3	Act 85 of 1996 passed
85*	Aspects of the law relating to AIDS	-	-	See Chapter 5
	☐ Interim report	1996	-	Implementation of recommendations under consideration by the Minister of Health
86*	Euthanasia and the artificial preservation of life	-	-	See Chapter 5
87	Jurisdictional lacuna in the Supreme Court Act, 1959	1994	RP 64/1995 ISBN 0 621	Implementation of recommendations under

Project number	Title	Year of report	Reference number of published report	Result
			16723 1	consideration by the Justice Portfolio Committee
88*	The recognition of a class action in South African law	-	-	See Chapter 5
89	Declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person	1995	RP 100/1996 ISBN 0 621 17494 7	Implementation of recommendations under consideration by the Justice Portfolio Committee
90*	Harmonisation of the common law and indigenous law	-	-	See Chapter 5
91	The review of the offences created by sections 36 and 37 of the General Law Amendment Act 62 of 1955, and section 1 of Act 50 of 1956 and related matters	-	-	Struck off
92	The re-evaluation of the offence created by section 1 of Act 1 of 1988	-	-	Struck off
93	Speculative and contingency fees	1996	-	Act 66 of 1997 passed
94*	Arbitration	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
95*	The admissibility of computer evidence	-	-	See Chapter 5
96*	Apportionment of Damages Act, 1956	-	-	See Chapter 5
97	Unjustified enrichment	-	-	Struck off
98	International co-operation in criminal prosecutions	1995	RP 47/1996 ISBN 0 621 17357 6	Acts 75 of 1996, 76 of 1996 and 77 of 1996 passed
99	The application of the rule <i>huur gaat voor koop</i> with reference to the question whether a lessee has a choice to continue the lease with a new lessor after the sale of the leased property	-	-	Struck off
100*	Family law and the law of persons			
	☐ Access to minor children by interested persons	1996	RP 107/1996 ISBN 0 621 17515 3	Implementation of recommendations under consideration by the Minister of Justice
	E Domestic violence	-	-	See Chapter 5
	E Maintenance	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
101*	The application of the bill of rights on the criminal law, the law of criminal procedure and sentencing	-	-	See Chapter 5
102*	The civil jurisdiction of courts	-	-	See Chapter 5
103*	Capping of claims against the Multilateral Motor Vehicle Accidents Fund	-	-	See Chapter 5
104	Money laundering and related matters	1996	-	Implementation of recommendations under consideration by the Minister of Finance
105*	Review of security legislation	-	-	See Chapter 5
106*	Juvenile Justice	-	-	See Chapter 5
107*	Sexual offences by and against children	-	-	See Chapter 5
108*	Computer related crimes	-	-	See Chapter 5
109*	Review of the Marriage Act	-	-	See Chapters 4 and 5
110*	Review of the Child Care Act	-	-	See Chapters 4 and 5
111*	Jurisdiction of Magistrates' Courts in constitutional matters	-	-	See Chapters 4 and 5
112*	Sharing of pension benefits	-	-	See Chapters 4 and 5
113*	Use of electronic equipment in court proceedings	-	-	See Chapters 4 and 5

ANNEXURE E

ISSUE PAPERS PUBLISHED BY THE COMMISSION

(In order to actively involve the community at an earlier stage, the Commission decided during the year under review to publish issue papers in appropriate investigations in future as the first step in the consultation process.

The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues.)

Serial number of issue paper	Project number	Title of investigation	ISBN/ date	Publication
1	104	Money laundering and related matters	0-631-17404-1	May 1996
2	100	Domestic violence	0-621-17495-5	July 1996
3	90	Harmonisation of the common law and the indigenous law: Customary marriages	0-621-17531-5	September 1996
4	90	Harmonisation of the common law and the indigenous law: The application of customary law: Conflict of personal laws	0-621-17532-3	September 1996
5	100	Family law and the law of persons: Review of the maintenance system	0 621 17652 6	January 1997
6	73	Simplification of the criminal procedure: Access to the criminal justice system	0 621 17705 9	April 1997
7	82	Sentencing: Restorative justice (compensation for victims of crime and victim em-	0 621 17718 0	April 1997

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
		powerment)	
8	94	Arbitration: Alternative dispute resolution	0 621 27319 8 May 1997
9	106	Juvenile Justice	0 621 27335 X June 1997
10	107	Sexual offences against children	0 621 27352 X June 1997
11	82	Sentencing: Mandatory minimum sentences	0 621 27353 8 July 1997

ANNEXURE F

DISCUSSION PAPERS PUBLISHED BY THE COMMISSION

(Since March 1983 a serial number has been assigned to all discussion papers - previously referred to as working papers - and only these are listed below. Discussion papers are numbered consecutively.)

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
1	37	Preference on insolvency	18 March 1983
2	22	Law of succession: Intestate succession	17 February 1984
3	9	Law of trusts	24 February 1984
4	41	Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband	21 September 1996
5	49	Offences committed under the influence of liquor or drugs	10 August 1984
6	43	Investigation into the advancement of the age of majority	15 February 1985
7	38	Investigation into the legal position of illegitimate children	22 February 1985
8	33	Review of the law of prize	12 April 1985
9	25	Statute law: Investigation into the law relating to theft and house-breaking	Publication deferred
10	51	Marriages and customary unions of Black	13 September 1985

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		persons	
11	6	Review of the law of evidence	25 April 1986
12	57	Anton Piller type of orders	Not published
13	22	Review of the law of succession: The introduction of a legitimate portion or the granting of a right to maintenance to a surviving spouse	8 August 1986
14	22	Review of the law of succession: Formalities of a will	17 October 1986
15	24	Investigation into the courts= powers of review of administrative acts	2 January 1987
16	62	The protection of a purchaser of securities	27 April 1987
17	22	Review of the law of succession: Amendment and repeal of wills	23 September 1987
18	61	Enduring powers of attorney and the appointment of curators for mentally incapacitated persons	0 7970 1381 4 18 March 1988
19	22	Review of the law of succession: Disqualification from inheriting, substitution and the succession rights of adopted children	0 7970 1401 2 26 February 1988
20	60	Domicile	0 7970 1435 7 26 August 1988 0 7970 1460 8

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
21	62	The protection of a purchaser of securities	31 March 1988
22	50	Proposals for the reform of the Bills of Exchange Act	0 621 1198 9 X 19 December 1988
23	46	The giving of security by means of movable property	0 7970 1558 2 7 October 1988
24	52	Investigation into the legal consequences of sexual realignment and related matters	0 7970 1589 2 17 June 1994
25	58	Group and human rights	GPS 003 9160 10 March 1989
26	12	Amendment of section 7(3) of the Divorce Act, 1979	0 7970 1667 8 1 March 1989
27	69	The acquisition and loss of ownership of game	0 7970 1727 5 29 May 1989
28	71	The protection of child witnesses	0 7970 1826 3 12 June 1989
29	63	Insolvency: Requirements for and alternatives to sequestration	0 7970 1854 9 7 August 1989
30	63	Insolvency: Qualifications, appointment and discharge of trustees	0 7970 1954 5 10 November 1989
31	66	Reform of the South African law of bail	0 7970 2078 0 December 1990
32	75	Bribery	0 7970 2126 4 March 1990

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
33	63	Insolvency: Effect of insolvency on assets, civil proceedings and contracts	0 7970 2185 X November 1990
34	24	Investigation into the courts= powers of review of administrative acts	0 7970 2292 9 December 1991
35	63	Insolvency: Insolvency interdicts	0 7970 2296 1 May 1991
36	62	The protection of a purchaser of securities	0 7970 23003 September 1991
37	68	Access to police dockets	0 7970 2316 X July 1991
38	65	Surrogate motherhood	0 7970 2381 X September 1991
39	63	Insolvency: Rehabilitation	0 7970 2490 5 April 1992
40	78	Interest on damages	0 7970 2607 X May 1992
41	63	Insolvency: Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent	0 7970 2638 X July 1992
42	73	Simplification of the criminal procedure: Working paper on appeal procedure	0 7970 2641 X July 1992
43	41	Investigation into the possibility of	0 621 15039 8

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		making provision for a divorced woman to share in the pension benefits of her former husband: Matters relating to the Divorce Amendment Act 7 of 1989	December 1992
44	79	A father=s rights in respect of his illegitimate child	0 621 15329 X February 1993
45	76	Jewish divorces	0 621 15331 1 January 1993
46	67	The Usury Act and related matters	0 621 15021 5 April 1993
47	87	Jurisdictional lacuna in the Supreme Court Act 59 of 1959	0 621 15429 6 April 1993
48	62	The protection of a purchaser of shares	0 621 15848 8 October 1993
49	73	Simplification of criminal procedure	0 621 15923 9 November 1993
50	74	Debt collecting	0 621 15933 6 November 1993
51	70	Limitation of professional liability	0 621 15955 7 December 1993
52	84	Application of the trapping system	0 621 15959 X December 1993
53	86	Euthanasia and the artificial preservation of life	0 621 15994 8 February 1994

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
54	47	Unreasonable stipulations in contracts and the rectification of contracts	0 621 16038 5 May 1994
55	89	Declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person	0 621 16358 9 December 1994
56	98	International co-operation in criminal prosecutions	0 621 16820 3 May 1995
57	88	The recognition of a class action in South African law	0 621 16928 5 September 1995
58	85	Aspects of the law relating to AIDS	0 621 16964 1 September 1995
59	94	Arbitration	0 621 16971 4 September 1995
60	95	Investigation into the Computer Evidence Act 57 of 1983	0 621 17259 6 October 1995
61	63	Review of the law of insolvency: Statutory provisions that benefit creditors	0 621 17297 9 November 1995
62	100	The granting of visitation rights to grandparents of minor children	0 621 17344 4 March 1996
63	93	Speculative and contingency fees	0 621 17353 3

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
			March 1996
64	104	Money laundering and related matters	0 621 17453 X June 1996
65	47	Unreasonable stipulations in contracts and the rectification of contracts	0 621 17503 X August 1996
66	63	Review of the law of insolvency: Draft Bill and explanatory memorandum	0 621 17509 9 August 1996
	63	Review of the law of insolvency: Draft Bill and explanatory memorandum: Executive summary	0 621 17510 2 August 1996
67	96	Apportionment of Damages Act, 1956	0 621 17543 9 October 1996
68	85	Aspects of the law relating to AIDS	0 621 17550 1 October 1996
69	94	International Commercial Arbitration	0 621 176028 December 1996
70	100	Family law and the law of persons: Domestic Violence	0 621 17650 8 February 1997
71	86	Euthanasia and the artificial preservation of life	0 621 17724 5 April 1997
72	85	Aspects of the law relating to AIDS: Pre-employment HIV testing	0 621 27350 3 June 1997
73	85	Aspects of the law relating to AIDS:	0 621 27697 9

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
74	90	HIV/AIDS and discrimination in schools	August 1997
		Harmonisation of the common law and indigenous law: Customary marriages	0 621 27723 1 September 1997

ANNEXURE G

PAPERS PUBLISHED BY THE COMMISSION IN ITS RESEARCH SERIES

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
1	Adv J P J Coetzer SC	A critical legal comparative study of law reform in South Africa (translation)	ISBN 0 621 09442 0
2	Prof Ellison Kahn	The life and works of Hugo Grotius (1583-1645)	GP-S 3 00344
3	Mrs M A Olwage (ed)	Women and sexual offences in South Africa: Proceedings of a seminar held by the Institute for Criminology at the University of South Africa in conjunction with the South African Law Commission, Pretoria, 18 October 1984 (translation)	ISBN 0 621 09779 9
4	Adv S I E van Tonder SC (ed)	Index to the Opinions of the Roman-Dutch Lawyers and the Decisions of the Courts of the Netherlands which have been digested in the Algemeen Beredeneerd Register of Nassau La Leck (1741-1795), by Dr A A Roberts, Vols 1(A-B), 2(C-D), 3(E-H), 4(I-L), 5(M), 6(N-R), 7(S-T) and 8(U-W)	Vol 1: ISBN 0 621 09382 3 Vol 2: ISBN 0 621 09646 6 Vol 3: ISBN 0 621 09778 0 Vol 4: ISBN 0 621 10254 7 Vol 5: ISBN 0 621 10295 4 Vol 6: ISBN

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
			0 621 10686 0 Vol 7: ISBN 0 621 10710 7 Vol 8: ISBN 0 621 10709 3
5	Profs F J Bosman, J Th de Smidt, H W van Soest & P van Warmelo	Observations on decided cases concerning antenuptial contracts written by Cornelius Neostadius	ISBN 0 621 09855 8
6	Profs R Feenstra, P van Warmelo & D T Zeffertt	Some cases heard in the Hooge Raad reported by Willem Pauw	ISBN 0 621 09715 2
7	Mr P J J Viljoen	South African Noter-up to the Institute of Justinian	ISBN 0 621 09743 8
8	Prof P van Warmelo and Adv C J Visser	Aantekeninge van Johannes Voet oor die Inleidinge van Hugo de Groot (text and translation)	Vol 1: ISBN 0 621 10641 0 Vol 2: ISBN 0 621 10642 9
9	Prof L J du Plessis	Translation of Vinnius= <i>Tractatus de Pactis</i>	ISBN 0 621 10277 6
10	Prof W J Hosten (ed and transl), Mrs C van Soelen and Mr P Ellis	Treatise on the quasicontract called <i>promutuum</i> and on the <i>condictio indebiti</i> by Robert- Joseph Pothier	ISBN 0 621 10722 0
11	Prof R Whitaker	<i>Quaestiones juris privati</i> by Cornelius van Bijnkershoek	Vol 1: ISBN 0 621 10657 7

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
			Vol 2: ISBN 0 621 10675 5
12	Profs J T Delpport and C R M Dlamini	Two lectures on law reform	ISBN 0 621 10670 4
13	Adv H C Smuts (ed)	Report on the Fourth International Congress with the theme <i>Law and Computers</i> , which was held in Rome from 16 to 21 May 1988	ISBN 0 621 12639 X
14	Mr P J J Viljoen	South African Noter-up to the <i>Corpus Juris Civilis</i> of Justinian including the Institutes of Gaius	ISBN 0 621 13088 5
15	Margaret Hewett (transl)	<i>Censura Forensis</i> Part I Book V by Simon van Leeuwen	ISBN 0 7970 2231 7