

SOUTH AFRICAN LAW COMMISSION

TWENTY- SIXTH ANNUAL REPORT

1998

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SOUTH AFRICAN LAW COMMISSION

1998 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 19 of 1973, the Commission's report on all its activities during 1998.

Yours sincerely

Justice I Mahomed

Chief Justice of South Africa

Chairperson of the South African Law Commission

(ii)

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1

OVERVIEW

* **Background**

The Commission's three-year term of office expired on 31 December 1998.

When the Commission assumed office on 1 January 1996 it committed itself to law reform that would be open, just, relevant, responsive, effective and accessible. This was a challenging task given the major discrepancies between the ideal of justice and the content of law in existence at the advent of our new constitutional democracy entrenching a justiciable Bill of Rights.

The Commission shared the ideal of the diverse South African population in expecting the legal system to embody justice and to promote respect for the democratic values of their Constitution.

The different socio-economic circumstances of South Africans, the differing patterns of rural and urban life and the multicultural social fabric of our country emphasised the need for new approaches to law reform.

To achieve this ideal the Commission shifted the emphasis in its law reform programme to an approach that was responsive to the emerging needs of the new South African society. The execution of the Commission's mandate depends on establishing a creative and comprehensive process of consultation with South Africans to ensure that its work is responsive and accessible. The Commission has consequently broadened its consultative base. While maintaining close cooperation with academic institutions and the private sector, non-governmental organisations, in particular, have been closely involved in the work of the Commission. The Commission also extended its consultative process by conducting workshops countrywide in urban and rural areas. Inadequacies in the legal system have been approached from a multi-disciplinary perspective in appropriate cases.

To extend the basis for consultation and to involve interested parties and the community at an earlier stage in the process of law reform, the Commission 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 debate and to give direction to the reform which is to follow.

During its three-year term of office the Commission submitted 15 reports and published 17 discussion papers and 14 issue papers. In releasing these documents the Commission has endeavoured to make a positive contribution to the transformation of the legal system.

* **The year under review**

Three issue papers were published during the year under review:

- * Project 90 The harmonisation of the common law and the indigenous law: Succession in customary law (issue paper 12)
- * Project 110 The review of the Child Care Act (issue paper 13)
- * Project 108 Computer related crime: Options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects (issue paper 14)

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

Six discussion papers, previously referred to as working papers, were finalised and published for consultation purposes. They are:

- * Project 111 Constitutional jurisdiction of Magistrates' Courts (discussion paper 75)

- * Project 90 The harmonisation of the common law and indigenous law: Conflicts of law (discussion paper 76)
- * Project 112 Sharing of pension benefits (discussion paper 77)
- * Project 105 Security legislation: The Interception and Monitoring Prohibition Act 127 of 1992 (discussion paper 78)
- * Project 106 Juvenile justice (discussion paper 79)
- * Project 85 Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour (discussion paper 80)

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

Ten reports were approved by the Commission:

- * Project 42 Time limits for the institution of actions against the state (supplementary report)
- * Project 47 Unreasonable stipulations in contracts and the rectification of contracts
- * Project 85 Aspects of the law relating to AIDS: Pre-employment HIV testing (second interim report)
- * Project 85 Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools (third interim report)
- * Project 86 Euthanasia and the artificial preservation of life

- * Project 88 The recognition of class actions and public interest actions in South African law

- * Project 90 Harmonisation of the common law and the indigenous law: Customary marriages

- * Project 94 International arbitration

- * Project 100 Maintenance (interim report)

- * Project 111 Constitutional jurisdiction of magistrates' courts

A summary of the recommendations contained in these reports appears in Chapter 4.

The investigation into domestic violence was also completed during the year under review, although a report has not been published. The research undertaken and draft legislation proposed are to a great extent embodied in the Domestic Violence Act 116 of 1998. Further information appears in Chapter 4.

The Commission was involved in the following Acts which were adopted by Parliament during 1998:

- * Criminal Matters Amendment Act 68 of 1998. (The Act deals with the declaration and detention of persons as state patients and the release of such persons, including the onus of proof regarding the mental condition of an accused or convicted person.)

- * Maintenance Act 99 of 1998.

- * Debt Collectors Act 114 of 1998.

- * Domestic Violence Act 116 of 1998.

- * Recognition of Customary Marriages Act 120 of 1998.
- * Judicial Matters Second Amendment Act 122 of 1998. (The Act, inter alia, amends the Supreme Court Act, 1959, so as to further regulate persons over whom and matters in relation to which High Courts have jurisdiction.)

The following completed investigation embodying the recommendations of the Commission is receiving the attention of Parliament:

- * Project 65 Surrogate motherhood. (The Commission's report is receiving the attention of an ad hoc committee of Parliament.)

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 has been under consideration by the Department of Finance since 1995.)
- * Project 52 Investigation into the legal consequences of sexual realignment and related matters. (The Commission's report has been under consideration by the Department of Justice since 1996.)
- * 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 Bill is on the 1999 legislative programme of the Department of Justice.)
- * Project 104 Money laundering. (The Commission's report has been under consideration by the Department of Finance since 1997.)

A number of new investigations commenced during the year under review. A progress report in this regard appears in Chapter 3.

2

OBJECTS, CONSTITUTION AND FUNCTIONING

*** Establishment of the Commission**

The South African Law Commission was established by the South African Law Commission Act 19 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 expired 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, Nelspruit)

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

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

Ms Z Seedat (Practising attorney, Durban)

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

Annexure A contains a list of 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 and to ensure direct community involvement in the activities of the Commission.

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 consisted of the following members:

- + **Chairperson:**
Mr Justice P J J Olivier

+ **Members:**

Professor R T Nhlapo

Adv J J Gauntlett SC

(Ms Z Seedat was coopted for several meetings 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 project committees consisting of experts to assist with investigations and to 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:

- + Project 73 The simplification of criminal procedure
- + Project 82 Sentencing
- + Project 105 Security legislation
- + Project 115 Review of administrative law

The names of the members of these committees appear in **Annexure B**. In recommending persons to the Minister for appointment, the Commission strove to ensure representativeness of population make-up 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 individuals and members 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 Chief Director, Mr W Henegan, serves as the Secretary to the Commission.

The research component of the Secretariat consists of 17 state law advisers from diverse background. 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)
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)

Mr M F Palumbo also serves as assistant to the Commission's Secretary. Mr T Gwebu (state law adviser) resigned with effect from 1 November 1998. Currently there are five vacancies of state law adviser. The posts will be filled with effect from 1 January 1999.

The administrative component of the Secretariat currently 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

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 generally 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 and administrative levels, carried a considerable workload during the year under review. This was the result of the large number of vacant positions that existed during the greater part of the year as well as the additional work generated by the community-oriented and consultation-based approach adopted by the Commission. This approach necessitated the publication of issue papers and the arrangement of numerous workshops which were conducted countrywide.

The Commission also wishes to express its appreciation to the full-time member, Professor Nhlapo, and the various project leaders (from within and outside the Commission) 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 Secretary is consulted on

the compilation of the draft Vote. The funds made available have up to now been 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 fulfill 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 in 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 1997/98 financial year is R6 261 000, which is made up as follows:

	R
◦ Staff expenditure	3 906 000
◦ Administrative expenditure	916 000
◦ Supplies and printing	412 000
◦ Equipment	590 000
◦ Professional and special services	398 000
◦ Sundry expenditure	39 000

The Commission's resources are supplemented by funding from foreign donors for specific projects. During the year under review the Commission has received financial support from the United Nations Children's Fund (UNICEF), USAID, Swedish Embassy (Rapid Response Fund), Department for International Development (UK), the Carl & Emily Fuchs Foundation, Save the Children Fund (UK), the German Development Co-operation (GTZ) and Rädde Barnen (Save the Children) (SA). The Commission records its deep appreciation to these agencies.

* **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**. 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 inception and indicates the final result or current state of investigations.

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. However, 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 all determine the time spent on each project. Consultation in particular is time-consuming, but the Commission regards it as an indispensable part of the law reform process.

* **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 and project committee, if the latter 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 (since 1996) of compiling issue papers as a first step. 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. Responses to the issue paper and further intensive research form the basis for the preparation of a discussion paper.

Discussion papers contain essential information on the investigation and the Commission's tentative proposals for reform. In particular, a discussion paper will include a statement of the existing legal position and its deficiencies, a comparative survey, and a range of possible solutions; importantly, the discussion paper will also include a draft Bill. 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. Its recommendations are embodied in comprehensive reports which 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 - 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 of a high standard and 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 as reading 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 are well substantiated and are the product of thorough debate. They also facilitate the passage of the Commission's proposed legislation in which its final recommendations are embodied.

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 publishes 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 clarify the aim and extent of the investigation, and suggest the options available for solving existing problems.

- ***Discussion papers***

Discussion papers, previously referred to as working papers, are documents in which the Commission's preliminary research results are contained. In most cases discussion papers also contain draft legislation. The main purpose of these documents is to test public opinion on solutions identified by the Commission.

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. **Annexure D** lists the investigations reported on by the Commission since its establishment.

In addition to the reports on particular 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 widely distributed and also 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 four times during 1998, namely on 17 and 18 April, 10 and 11 July, 28 August and 27 November.

The working committee of the Commission met six times, namely on 23 January, 30 March, 18 April, 11 July, 8 September and 27 November.

Project committees held 46 meetings during the year under review. The following project committees of the Commission met on the dates indicated:

Aspects of the law relating to AIDS	14 March
	3 September
	8 October
	9 November
Arbitration	14 March
Computer related crimes	9 February
	20 April
	1 December
Domestic violence	27 February
	9 March
	5 May
	30 June
	6 August
Harmonisation of the common law and indigenous law	28 March
	8 July
Review of the law of insolvency	3 April
	29 October

	4 December
Juvenile justice	29 January 5-6 February 26 March 15 May 25-26 June 31 August 12 September 8 October
Maintenance	20 February 27 March
Review of the Child Care Act	30 January 29 April 18 May 20 May 7 July 1-2 October 9 December
Security legislation	17 November
Sentencing	26 October 30 November
Sexual offences against children	22 May 17 June 8 July 5 November 14 December

Simplification of the criminal procedure

26 October

26 November

3

THE COMMISSION'S PROGRAMME: INVESTIGATIONS REMOVED AND INCLUDED

Investigation removed

*** 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 was the focus of this project.

A working paper was published in 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.

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

On 4 March 1997 the Head: Ministerial Services addressed letters to SAICA and the Association of Law Societies requesting them to substantiate their request to have their civil liability limited. SAICA furnished a comprehensive response. After several requests the Law Society of South Africa advised on 20 October 1998 that the Attorneys Fidelity Fund had briefed an attorney to prepare a submission for presentation to the Commission at the earliest opportunity. No response has been received from the Law Society to date.

The Commission was informed of the position at its meeting of 27 November 1998. The Commission expressed the view that limitation of liability could not be justified and that it

might be unconstitutional. It was resolved that the Minister should again be requested to remove the matter from the Commission's programme.

On 17 December 1998 the Minister approved the request that the investigation into limitation of civil liability of professional persons be removed from the Commission's programme.

Investigations included

* **Project 114 - Publication of divorce proceedings**

Section 12 of the Divorce Act 70 of 1979 deals with the limitation of publication of particulars of a divorce action. The provision does not purport to have extraterritorial operation and its effect is apparently that -

- foreign media are wholly unrestricted in their reportage of South African divorce proceedings; and
- South African media are wholly prohibited from disclosing any facet of divorce proceedings.

The divorce proceedings are, however, entirely open to the public. No discretion vests in the court to determine whether or in what respects disclosure should be permitted or prohibited.

The Constitution, 1996, entrenches *inter alia* free speech, freedom of information and the right to privacy. The question which arises is whether, in regulating the publication of particulars of divorce proceedings in terms which appear peremptory, inflexible and sweeping, the provision is unconstitutional. There are clear indications that at present section 12 of the Divorce Act is simply being defied.

On 23 January 1998 the Commission resolved to include an investigation into the "publication of divorce proceedings" in its programme. The Minister approved the inclusion on 30 January 1998.

* **Project 115 - Review of administrative law**

In terms of section 33 of the Constitution, 1996, everyone has the right to just administrative action and national legislation must be enacted to give effect to this right before February 2000. In the development of Justice Vision 2000 the review of administrative law was identified as one of the premier projects. The German Development Cooperation (GTZ) indicated its interest to make funds available for it.

It appeared that research under the auspices of the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand in collaboration with the University of Fort Hare had already commenced at the request of the Planning Unit of the Department of Justice. Meetings took place between CALS, the Law Commission and the Planning Unit. In August 1997 it was agreed that the review of administrative law should be placed on the Commission's programme, and a proposal (including a project committee) was put to the Minister.

On 23 January 1998 the Commission approved that an investigation into the "review of administrative law" be included in its programme. The Minister approved the inclusion in October 1998, and appointed a project committee in November 1998. Given the need to adopt legislation before February 2000, this project is being conducted on a fast-track basis.

* **Project 116 - The carrying of firearms and other dangerous weapons**

The South African Agricultural Union requested the Commission to investigate certain issues pertaining to the carrying of firearms at gatherings and in public places in terms of the Dangerous Weapons Act 71 of 1968.

It is argued that the terms "place", "area" or "gathering" are given a generous interpretation in our law and that their use in the Dangerous Weapons Act leads to confusion amongst members of the public and especially the farming community. The gist of the problem therefore relates to the uncertainty as to when a person is allowed to carry a firearm in public or at a gathering.

An initial scrutiny of the Dangerous Weapons Act has uncovered additional problems:

- The term "dangerous weapon" is fundamentally tautologous. The essential difficulty is that dangerous weapons may include objects designed to be weapons (e.g. firearms, spears, etc) or objects not designed to be weapons but which may be used as such and are easily capable of causing bodily injury (e.g. scissors, chains, etc and even natural objects such as stones, matches, etc). In short, in terms of the Dangerous Weapons Act, an object qualifies as a weapon not so much by its physical nature but according to the intent with which it is employed.
- Section 2(1) of the Dangerous Weapons Act penalises the possession of two distinct types of objects: a dangerous weapon as defined; and an object resembling a firearm (which object need not necessarily be a dangerous weapon). It appears that there are two distinct forms of the offence which would have to be separately alleged and proved.
- Section 2(2) of the Dangerous Weapons Act empowers the Minister of Law and order to effect certain prohibitions by way of notice in the Gazette. It does not appear necessary to show that the prohibited object was one likely to cause serious bodily injury if used to commit an assault (as is required in terms of section 2(1) of the Act), and the defence that the possessor had no intention of using such object for an unlawful purpose is not available.
- Section 4 prescribes certain penalties when dangerous weapons or firearms are used in the commission of offences involving violence. Although it was held that the definition of a dangerous weapon was the same for section 2(1) and 4(1) (hence something was either a dangerous weapon for all purposes of the Act or not a dangerous weapon for any of them), this appears to have been overlooked in many decisions concerning the application of section 4(1) of the Act.

Various other pieces of legislation regulate the carrying of firearms in public or at gatherings:

- The Arms and Ammunition Act 75 of 1969. (Any person who has in his or her possession any arm, unless licenced to possess such arm, commits an offence. "Arm" is defined as any firearm other than a cannon or machine gun.)
- The Control of Access to Public Premises and Vehicles Act 53 of 1985. (The definition of "dangerous object" in this Act includes any firearm, weapon, etc.)
- The Regulation of Gatherings Act 205 of 1993. (In addition to the conditions that may apply to the holding of a gathering, this Act provides that participants at a gathering or demonstration shall abide by any law in respect of the carrying of dangerous weapons.)

People (including the farming community) are increasingly resorting to the carrying of firearms for a variety of reasons. The problem is compounded by the different legislative enactments, some of which are obscured in legislation.

On 30 March 1998 the Commission approved that an investigation into "the carrying of firearms and other dangerous weapons in public or at gatherings" be included in its programme. The Minister endorsed the inclusion on 21 April 1998.

*** Project 117 - The legal position of voluntary associations**

The South African Agricultural Union requested the Commission to investigate urgently the position of voluntary associations with a view to the possible amendment of sections 30 and 31 of the Companies Act 61 of 1973, or advancing legislation that will take account of the peculiar requirements of voluntary associations.

In *Mitchell's Plain Town Centre Merchants Association v McLeod* 1996 (4) SA 159 (A) the Supreme Court of Appeal denied legal personality to a voluntary association with more than twenty members formed for "the purpose of carrying on any business that has for its objects the acquisition of gain by the ... association ... or by the individual members thereof". As a result of this decision, numerous voluntary associations such as the South African Agricultural Union,

sport clubs, jockey clubs, etc. are uncertain as to their legal personality and consequently their future existence.

The Court held as follows (at 166):

“Leaving aside exceptions and exemptions and dealing only with the formation of the association, the two sections [sections 30 and 31 of the Companies Act, 1973] can be synthesised as follows:

- (1) if the membership of the association exceeds 20, the association must be registered as a company if it is formed for the critical purpose [of carrying on business that had for its object the acquisition of gain by the appellant and or its individual members], failing which it will have no *locus standi in judicio*; if its membership is less than 20, it is not illegal if it is formed for the critical purpose and is to operate as, say, a partnership;**
- (2) whatever its membership, if the association is formed for the critical purpose it must be registered as a company in order to enjoy corporate personality; if it is not formed for the critical purpose it may yet enjoy corporate personality if it possesses the characteristics of a *universitas*, ie if it is to operate as an unincorporated voluntary association.**

In the instant case the plaintiff's membership exceeded 20 and it is not alleged that it was registered as a company. If it was formed for the critical purpose it would therefore be illegal in terms of s 30(1) and not have legal personality in terms of s 31. In either event it would lack *locus standi*: consequently the first exception would be good.

The critical issue is therefore whether the plaintiff was formed for the critical purpose [of carrying on business that had for its object the acquisition of gain by the appellant and or its individual members].”

Legal opinions that have come to the attention of the Commission maintain that the *Mitchell's Plain* decision has the following effects:

- Voluntary associations such as the South African Agricultural Union and the Natal Agricultural Union fall within the ambit of sections 30(1) and 31 of the Companies Act, 1973. The South African Agricultural Union is therefore an illegal organisation in terms of the Companies Act with no *locus standi* or legal personality.

- A voluntary association ceases to exist when its membership exceeds twenty or where it adopts objectives which fall within the ambit of the prohibitions contained in section 30(1) of the Companies Act. Any property it owns at such time will become *bona vacantia* and will vest in the State. Any contracts which may have been purportedly concluded on its behalf would be unenforceable both by and against it.

- Whatever solution is found to the difficulty, provision must be made for carrying assets, liabilities, rights and obligations over into whatever regularised result is decided upon. This cannot be by transfer because that is not an appropriate means to create a new vesting. For example, rights and obligations under the Income tax Act 58 of 1962 cannot be transferred. This is a weighty consideration - it was pointed out that an attorney's client affected by the *Mitchell's Plain* decision had in aggregate an assessed loss of R74 million. An attempt to "transfer" that right would be unsuccessful and disastrous.

On 30 March 1998 the Commission approved that an investigation into "the legal position of voluntary associations" be included in its programme. The Minister approved the inclusion on 21 April 1998.

*** Project 118 - Domestic partnerships**

Media reports have suggested that consideration be given to the adoption of legislation relating to the recognition in South Africa of same sex partnerships. The matter has been rendered particularly acute by a judgment reported in the media (*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)) in which Roux J held *ultra vires* certain provisions of Polmed (the medical aid scheme of the South African Police Service), evidently on grounds related to perceived discrimination in its provisions on the basis of sexual orientation. In the circumstances the working committee at its own initiative examined the need for an investigation.

Section 9 of the Constitution, 1996 (the so-called "equality clause") states:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Bearing in mind that it cannot be said with certainty when the equality clause would have application between persons generally, the essential enquiry is whether the exclusion of domestic partners - whether of the same sex, or of a different sex - from the benefits of schemes such as medical aid schemes, or from other forms of legal recognition, is unconstitutional.

On 17 April 1998 the Commission approved that an investigation into "domestic partnerships" (heterosexual and homosexual) be included in its programme and the inclusion was affirmed by the Minister on 16 July 1998.

*** Project 119 - Uniform national legislation on the fencing of national roads**

The South African Agricultural Union requested the Commission to investigate the possibility of enacting uniform national legislation on the fencing of public roads.

Fences alongside public roads are sometimes wilfully removed or damaged. Where the damage is unintentionally caused by a motor vehicle accident, the farmer is often not informed of the damage. Because of damaged or stolen fencing, farm animals stray onto the roads and cause

accidents. It appears that these days farmers are more often than not held liable for not maintaining the fence. This places a heavy burden on farmers who not only have to incur the expenses to maintain fences and pay insurance premiums, but who also lose life stock.

The problem is compounded by the fact that the Fencing Act 31 of 1963 is obsolete and that the various Provincial Ordinances lack uniformity as regards the fencing of national roads. In some provinces the farmer is held responsible for the fences, while in other provinces this task is assigned to the provincial authority. Arrangements concerning the responsibility for the cost of erection and maintenance of fences also differ from province to province.

On 11 July 1998 the Commission approved that an investigation into “uniform national legislation on the fencing of national roads” be included in its programme. The Minister approved the inclusion on 6 October 1998.

* **Project 120 - Section 63(3) of the Insurance Act 27 of 1943**

Three of the judges (Nienaber, Schutz and Marais JJA) in the Supreme Court of Appeal case of *Clifford v Commercial Union* 1998 (4) SA 150 (SCA) were of the view that it was desirable that consideration be given to the amendment of the law to reverse the effect of the decision in *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A). The other two judges refrained from expressing a view on the matter. The matter was referred to the Law Commission for consideration.

Section 63(3) of the Insurance Act 27 of 1943 provides as follows:

“Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy issued before or after the commencement of this Act, shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited and the obligations of the owner thereof shall not be increased, on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at the time of issue or any reinstatement or renewal thereof.”

In *Qilingele* section 63(3) was interpreted as imposing a subjective test - the materiality of a misstatement in a proposal form therefore depends upon the subjective opinion of the insurer. Concepts of reasonableness were held not to enter the picture. One looks at the particular insurer and seeks to determine as a fact how he would probably have reacted had he known the truth.

The subjective test laid down in *Qilingele* stands in stark contrast to the objective test of the reasonable man. It is suggested that the purpose of section 63(3) was not to disturb the common law's objective test of materiality, but merely to put an end to the abuse of elevating trivialities to the status of materialities by the use of warranties.

Section 63(3) is no model of clarity. If *Qilingele* is to stand, the legislature should consider putting right not merely a discordancy, but even a serious inequity, which was initiated by imprecise legislation. The following example suggested in the *Clifford* case demonstrates the extreme results to which a subjective assessment of materiality may lead:

“Postulate an underwriter who, on finding that a car which was warranted as green is actually blue, claims, honestly and sincerely, hard though that may be to believe, that he would not have insured it had he known the truth, because blue cars are unlucky. Unless some way can be found . . . to avoid the remedial s 63(3) leading to such a result, it seems . . . that his repudiation would have to stand.”

On 8 September 1998 the Commission approved that an investigation into section 63(3) of the Insurance Act 27 of 1943 be included in its programme. The Minister approved the inclusion on 6 October 1998.

REPORTS AND INVESTIGATIONS COMPLETED

During the year under review the following ten reports were completed:

* **Project 42 - Time limits for the institution of actions against the state (supplementary report)**

On 3 October 1985 the Commission reported to the then Minister of Justice on its investigation into time limits for the institution of actions against the State. The report recommended the repeal or amendment of twenty-one provisions that limited the institution of actions against government agencies or persons for whose actions government agencies were liable in law. The report recommended uniform provisions for such actions and gave the court having jurisdiction power to condone failure to comply with the notice requirement if sound reasons existed for the failure or if the defendant was not unreasonably prejudiced by the failure. It was further recommended that the usual requirements for prescription should apply to the debts of government institutions. The legislation was never introduced in Parliament, presumably because of objections by certain government institutions.

A supplementary report was submitted to the Minister on 13 October 1998. Parliament has demonstrated its willingness to relax the strict requirements insisted on previously. Section 57(1) of the South African Police Service Act 68 of 1995 has changed the period within which legal action must commence. Section 57(5) gives a court the right to dispense with the requirements or prohibitions contained in the section where the interests of justice so require.

In the case of *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Constitutional Court declared the provisions of section 113(1) of the Defence Act 44 of 1957 inconsistent with section 22 of the interim Constitution and to be invalid for that reason. The decision of the Constitutional Court has created serious doubt about the validity of many provisions, especially those that agree closely with section 113(1) of the Defence Act. Similar questions will arise under sections 34 and 36 of the Constitution of the Republic of South Africa Act 108 of 1996.

It is highly desirable that a uniform provision should be enacted for actions against all government institutions. The numerous provisions which lay down different requirements in different Acts create uncertainty. This uncertainty is aggravated by the doubts surrounding the constitutionality of some of the provisions.

The following are provisions of the draft Bill included in the supplementary report:

- No legal proceedings for the recovery of a debt arising from delict shall be instituted against the State, a government body, a member of the Cabinet or of an Executive Council or other functionary of the State or of a government body in his or her official capacity or a person for whose actions the State or a government body is in law liable, unless the defendant has been given notice in writing of the intention to institute the legal proceedings.
- The notice must be sent within six months from the date upon which the debt became due. A debt is not regarded to be due until the creditor (or his or her tutor or curator if he or she is a minor or under curatorship) has knowledge of the identity of the debtor and the facts from which the debt arises or could have acquired such knowledge by exercising reasonable care.
- The court may condone failure to give notice if good cause exists for the failure by the creditor, tutor or curator or if the defendant was not unreasonably prejudiced by the failure.
- Provision is made for the repeal or amendment of 18 provisions that limit actions against the State or government institutions.
- If any conflict arises between the Bill and the provisions of any other law save the Constitution or any Act expressly amending the Bill, the provisions of the Bill will prevail.
- * **Project 47 - Unreasonable stipulations in contracts and the rectification of contracts**

Some of the problems involved in this area of the law were set out as follows in the discussion paper preceding this report:

“It happens daily that individuals voluntarily enter into contracts with one another, or with banks, building societies, financial institutions, wholesalers or retailers, in the expectation that the contracts will satisfy their needs and aspirations, only to find subsequently that, in practical application, the contracts as a whole or some of their terms are unjust or unconscionable. Common examples of such situations abound, but a few examples will suffice: the head of a homeless family urgently in need of a roof over their heads signs a lease which gives the lessor the right to raise the rent unilaterally and at will, and the lessor doubles the rent within five months; an uneducated man signs a contract of loan in which he agrees to the jurisdiction of a High Court, to find out only later, when he is sued that a lower court also had jurisdiction over the matter and that the case could have been disposed of at a much lower cost to himself; a man from a rural area purchases furniture from a city store on standard, pre-prepared hire-purchase terms, later to find out that he has waived all his rights relating to latent defects in the goods sold; an illiterate and unemployed bricklayer agrees to act as subcontractor for a building contractor on the basis that he must at his own expense procure an assistant, and so on.”

The report was submitted to the Minister on 6 May 1998. The following recommendations are made in the report:

- Contractual unreasonableness, unconscionability or oppressiveness in all contractual phases need to be addressed, namely at the stages when a contract comes into being, when it is executed and when its terms are enforced, is the most viable and expedient method to effect such legal reform.
- There is a need to confer wide powers on the courts to effect justice for contracting parties. These powers should be balanced by confining the proposed criteria to unreasonableness, unconscionability and oppressiveness.
- There is a practical need to give some definition to the concept of unreasonableness, unconscionability or oppressiveness by setting out guidelines in the proposed legislation, so as to enhance legal certainty.

- The proposed legislation should not apply to the following contracts:
 - **Contracts which fall within the scope of the Labour Relations Act, 1995, or which arise out of the application of that Act.**
 - **Contracts falling within the scope of the Bills of Exchange Act, 1964.**
 - **Contracts to which the Companies Act, 1973, or the Close Corporations Act, 1984, apply or which arise out of the application of those Acts.**
 - **Contractual terms in respect of which measures are provided under international treaties to which the Republic of South Africa is a signatory and which depart from the provisions of the proposed Control of Unreasonableness, Unconscionability or Oppressiveness in Contracts or Terms Bill.**
- **The application of the proposed legislation should not be excluded in respect of family law agreements in accordance with the Divorce Act, the Matrimonial Affairs Act, or the Matrimonial Property Act. It does not seem to the Commission that settlements reached under these Acts are in any way satisfactorily regulated and the possibility of judicial review under the proposed legislation seems to be called for.**
- **The proposed legislation should provide that the relevant circumstances to be taken into account are those that existed at the time of the conclusion of the contract. Furthermore, where there is a reasonably unforeseeable change of circumstances which makes performance under the contract excessively onerous, the parties to the contract should be bound to enter into negotiations with a view to adapting the contract or terminating it.**
- There is also a need for a specific provision conferring on the High Court the jurisdiction where it is satisfied, on the application of any organisation, or any body or person, that a person has embarked, or is likely to embark, on a course of conduct leading to the

formation of contracts or terms which are unreasonable, unconscionable or oppressive, that it may, by order, prescribe or otherwise restrict, the terms upon which that person may enter into contracts of a specified class.

- The Office of an Ombudsperson should be established to ensure that standard contract terms comply with the requirements of contractual fairness, thus providing a remedy to ordinary consumers who would not be able to seek redress in the courts. It is proposed that the Ombudsperson should have the following powers and duties:
 - **To negotiate with a person using or recommending the use of pre-formulated standard contracts in order to obtain an undertaking from him or her that he or she will act in accordance with the proposed Act, and if such a party fails to fulfil such an undertaking, the Ombudsperson may issue such orders as may be deemed necessary for ensuring the fulfilment of such an undertaking.**
 - **If having considered a complaint about any contract term that the Ombudsperson considers to be unreasonable, unconscionable or oppressive, s/he may bring proceedings in the High Court for an interdict against any person who appears to use or recommend use of such a term; provided that if s/he decides not to apply for an interdict, the reasons must be furnished to the complainant.**
 - **To prepare draft codes of conduct applying to particular persons or associated persons in a field of trade or commerce, in consultation with such persons, organisations, consumer organisations and other interested parties for the consideration and approval of the Minister.**
 - **If it appears to the Ombudsperson that a person has acted in contravention of a prescribed code of practice applicable to that person, to request the person to execute within a specified time a deed in terms approved by it under which the person gives undertakings as to discontinuance of the conduct; future**

compliance with the code of practice; and the action the person will take to rectify the consequences of the contravention, or any of them.

- **To retain all deeds and to register the deeds in a Register of Undertakings kept by it and containing the prescribed particulars.**
 - **If a person fails to comply with the request by the Ombudsperson for the giving of an undertaking it may on application to the High Court, request that the person be ordered to act in a manner that would have been required; or to refrain from acting in a manner that would have been prohibited.**
- **The question whether the parol evidence rule should be retained or abolished leads to divergent answers not only in South Africa but also in other jurisdictions. The Commission takes the view that evidence of what passed between the parties, or the background or surrounding circumstances, is the best evidence of what the parties had in mind, and if the words the parties used are capable of some other meaning, as is almost invariably the case, justice requires that such evidence should be admissible to prove the contract.**

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

At the request of the Department of Health, the Commission is conducting an investigation into aspects of the law relating to HIV/AIDS. Previous work done in the course of the investigation and work in progress are furnished in **Chapter 5**.

During the year under review the Commission completed two further interim reports: **second interim report on pre-employment HIV testing** and **third interim report on HIV/AIDS and discrimination in schools**. The interim reports were tabled in Parliament on 13 August 1998.

The **second interim report** deals with the question whether statutory intervention to prohibit pre-employment testing for HIV is warranted. 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 take an HIV test. Legislative intervention aims to attain the twin objectives of maintaining otherwise healthy persons with HIV in productive employment, and protecting the rights of persons with HIV in the workplace.

Principles recommended by the Commission for legislative intervention on pre-employment HIV testing are as follows:

- ❑ To create certainty and clarity on the legality or otherwise of HIV testing as a specific form of discrimination in the employment relationship.
- ❑ To prohibit testing where it constitutes unfair discrimination and an unfair labour practice.
- ❑ To balance the rights of persons with HIV and those of employers.
- ❑ To intervene statutorily so as to prohibit HIV testing per se, subject to permissible exceptions.
- ❑ To deal legislatively with both job applicants and existing employees in order to enable the fair allocation of employee benefits.
- ❑ Although the Commission initially aimed for a prohibition on pre-employment HIV testing to cover **all** employees, it was accepted that, given the framework of existing and prospective labour legislation, which excludes them, such legislative intervention could not apply easily to the South African National Defence Force, the South African Secret Service, and the National Intelligence Agency.
- ❑ A prohibition on HIV testing in the workplace should not be absolute but should allow for exceptions where testing is allowed under legislation and in certain circumstances where it is fair and justifiable. Justification for testing should be based on medical facts, employment conditions, social policy, the fair distribution of employee benefits and the

inherent requirements of the particular job. All of these factors should be considered jointly and individually in ascertaining whether testing is fair and justifiable.

- An intervention should provide a flexible standard to allow for the law to develop in accordance with scientific knowledge, society's understanding of the epidemic, changing socio-economic circumstances, and the possible emergence of new rationales for HIV testing in the work place.
- In determining whether or not HIV testing should be allowed, both justifiability and fairness need to be taken into account equally.
- The burden to show that HIV testing under specific circumstances is fair, should rest upon the employer.
- An impartial forum (such as the Labour Courts created by existing labour legislation) should be available to adjudicate whether HIV testing (or an application to authorise such testing) was fair and justifiable.
- The Labour Court, in authorising testing for HIV, should be given wide powers. These would include issuing instructions regarding counselling, confidentiality, and information or submissions regarding medical facts, employment conditions, social policy, the inherent requirements of the job and the fair allocation of employee benefits.
- Judicial appeal procedures should be an integral part of a statutory prohibition.
- Legislation prohibiting HIV testing in the workplace should be accessible and enforceable.
- Statutory intervention need not be HIV/AIDS specific.

Since publication of the second interim report the Department of Labour has finalised the Employment Equity Act, 1998. The Act contains an express prohibition against HIV testing similar to that suggested by the Commission in its discussion paper 72 which preceded the interim report.

The **third interim report** deals with HIV/AIDS and discrimination in schools and recommends that the Minister of Education, under the National Education Policy Act, 1996, determine national policy on HIV/AIDS in schools. A draft national policy for HIV/AIDS in public schools is included in the report:

- A national policy for HIV/AIDS in schools is urgently required in order to protect learners with HIV from unfair discrimination in the school environment. However, such intervention will have to take into account the rights of all learners and should aim for a fair balance between the rights of learners with HIV and those without HIV.
- The policy should apply nationally, it should prevail over any other policy instrument on HIV/AIDS in public schools, and have children of school going age (including children in the pre-primary phase) as its chief focus. In view of the fact that compliance with the proposed policy cannot otherwise be ensured in the case of independent schools, the Commission recommends that Members of Executive Councils responsible for education should in terms of the South African Schools Act, 1996 make compliance with the policy a condition on which registration of independent schools may be granted.
- The national policy should set out broad guidelines in accordance with constitutional principles. In view of the wide variety of circumstances prevailing in South African schools and since the South African Schools Act, 1996 stresses the importance of parent empowerment in the education of their children, it is recommended that a governing body of a school should, in addition, be able to adopt a more specific HIV/AIDS policy at school level to give operational effect to the national policy. The purpose of the school level policy would be to provide a mechanism to express the needs of individual schools and their communities, especially with regard to their ethos and values, within the framework of the national policy's minimum standards and norms. It is intended that the national policy should constitute a set of basic principles from which governing bodies may not deviate.

- In view of the current legal position and the comments received on its preliminary proposals, the Commission included the following basic principles in the draft national policy:
 - Compulsory testing of learners as a prerequisite for admission to any school, or any unfair discriminatory treatment (for instance the refusal of continued school attendance on the basis of the HIV status of the learner), is not justified.
 - However, it is recognised that special measures in respect of learners with HIV may be necessary. These must be fair and justifiable in the light of medical facts, school conditions and the best interests of learners with and without HIV.
 - Learners' rights to privacy are confirmed. Where HIV-related information is disclosed to a member of staff, the policy provides that, except where statutory or other legal authorisation exists, such information may be divulged only with the informed consent of the learner (above the age of 14 years) or in other cases with the consent of his or her parent or guardian.
 - The needs of learners with HIV should, as far as is reasonably practicable, be accommodated within the school environment.
 - "Universal precautions" (standard precautionary measures aimed at the prevention of HIV transmission including instructions concerning basic hygiene and the wearing of protective clothing such as rubber gloves when dealing with blood and body fluids) should be implemented by all schools to exclude effectively the risk of transmission of HIV in the school environment. The policy contains specific provisions on participation in contact sport and contact play.
 - All learners have a right to be educated on HIV/AIDS, sexuality and healthy lifestyles, in order to protect themselves against HIV infection. The policy recognises the need for the involvement - although limited - of parent communities in order to ensure that sexuality education will take into account the community

ethos and values. The policy requires that information on HIV/AIDS be given in an accurate and scientific manner.

- All learners should respect the rights of other learners.
- A school's governing body should be able to adopt an HIV/AIDS policy at school level to give operational effect to the national policy. This would however have to take place within the framework set by the national policy.

The second and third interim reports deal only with the matters set out above. Subsequent interim reports will deal with other matters identified for reform.

*** 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. For some patients this signifies a welcome prolongation of meaningful life, but for others the result is a poor quality of life which inevitably raises the question whether treatment is a benefit or a burden.

Worldwide increased importance is furthermore being attached to patient autonomy. The need has therefore arisen to consider the protection of a mentally competent patient's right to refuse medical treatment or to receive assistance, should he or she so require, in ending his or her unbearable suffering by the administering or supplying of a lethal substance to the patient. The position of the mentally incapacitated patient, as well as the patient who is clinically dead, has to be clarified as well.

There is some degree of uncertainty in the minds of the general public and medical personnel about the legal position in this regard. Doctors and families want to act in the best interests of the patient, but are unsure about the scope and content of their obligation to provide care. Doctors are furthermore afraid of being exposed to civil claims, criminal prosecution and professional censure should they withhold life-support systems or prescribe drugs which may shorten the patient's life, even if they are merely complying with the wishes of the patient.

A report was approved by the Commission on 27 November 1998 and will be submitted to the Minister early in 1999. In its report the Commission recommends the enactment of legislation to give effect to the following principles:

- A medical practitioner may, under specified circumstances, cease or authorise the cessation of all further medical treatment of a patient whose life functions are being maintained artificially while the person has no spontaneous respiratory and circulatory functions or where his or her brainstem does not register any impulse.
- A person who is not mentally incapacitated may refuse any life-sustaining medical treatment with regard to any specific illness from which he or she may be suffering, even though such refusal may cause the death or hasten the death of such a person.
- A medical practitioner or, under specified circumstances, a nurse may relieve the suffering of a terminally ill patient by prescribing sufficient drugs to control the pain of the patient adequately even though the secondary effect of this conduct may be the shortening of the patient's life.
- A medical practitioner may, under specified circumstances, give effect to an advance directive or continuing power of attorney of a patient regarding the refusal or cessation of medical treatment or the administering of palliative care, provided that these instructions have been issued by the patient with mental capacity.
- A medical practitioner may, under specified circumstances, cease or authorise the cessation of all further medical treatment with regard to terminally ill patients who are unable to make or communicate decisions concerning their medical treatment, provided that his or her conduct is in accordance with the wishes of the family of the patient or authorised by a court order.

As regards active voluntary euthanasia, the Commission does not make a specific recommendation. The Commission sets out different options to deal with this issue. These options were identified through comments received:

□ Option 1: Confirmation of the present legal position

The arguments in favour of legalising euthanasia are not sufficient reason to weaken society's prohibition of intentional killing since it is considered to be the cornerstone of the law and of all social relationships. Whilst acknowledging that there may be individual cases in which euthanasia may seem to be appropriate, these cannot establish the foundation of a general pro-euthanasia policy. It would furthermore be impossible to establish sufficient safeguards to prevent abuse.

□ Option 2: Decision-making by the medical practitioner

The practice of active euthanasia is regulated through legislation in terms of which a medical practitioner may give effect to the request of a terminally ill patient with mental capacity to make an end to the patient's unbearable suffering by administering or providing a lethal agent to the patient. The medical practitioner has to adhere to strict safeguards in order to prevent abuse.

□ Option 3: Decision-making by a panel or committee:

The practice of active euthanasia is regulated through legislation in terms of which a multi-disciplinary panel or committee is instituted to consider requests for euthanasia according to set criteria.

* **Project 88 - The recognition of class actions and public interest actions 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 the investigation in its programme. Class actions and public interest actions are part of the worldwide movement to make access to justice a reality by broadening *locus standi* (standing in court). Traditionally the South African law of standing has been relatively restrictive: the courts have required a direct, personal and sufficient interest in the action before a person could institute or defend an action. If the traditional notion of standing is strictly adhered to, public spirited individuals or representative organisations and associations are prevented from claiming relief in the public interest or in the

interests of persons who for various reasons are unable to enforce their rights. Furthermore, the Constitution of the Republic of South Africa Act 108 of 1996, specifically provides for class actions and public interest actions (sections 38(c) and (d)) and it is logical that the same principles should apply in non-Bill of Rights issues.

Class actions and public interest actions are ideal procedural mechanisms to use in situations where a large number of persons have the same or similar claims or defences. One example should suffice. Should a plane, bus, or taxi crash, the claims of the injured passengers are usually pursued and tried as separate and individual cases, even though the individual cases are based on the same cause of action. A class action will make it possible to bring a single action for damages based on the negligence of the pilot, the bus or taxi driver on behalf of all the injured passengers. The finding of the court will bind all injured passengers (the members of the class). This is seen as a means of fostering both judicial economy and social utility as the courts will no longer be inundated with numerous claims relating to a common subject matter, and individual plaintiffs with claims too small for individual pursuit are provided access to the courts.

A report was submitted to the Minister on 12 October 1998. The Commission concludes in the report that statutory intervention is necessary to recognise and regulate class actions and public interest actions and proposes a draft Bill to give effect thereto.

* **Project 90 - Harmonisation of the common law and indigenous law: customary marriages**

The report forms part of the extended investigation into the harmonisation of the common law and the indigenous law. Background is furnished in **Chapter 5**. The report sets out the background to the question of marriages entered into by African customary rituals and the refusal by the common law of South Africa to recognize these marriages. It also recommends certain changes to the customary law of marriage in order to bring the relationship between spouses in line with constitutional requirements.

The report was submitted to the Minister on 30 September 1998. Some of the most important recommendations in the report are:

- ❑ Customary marriages, both existing and future unions, must now be fully recognized.
- ❑ In order to define customary marriage it is recommended that legislative provision be made for a minimum set of essential requirements, chief amongst which should be the consent of the prospective spouses.
- ❑ The giving of lobolo should not be prohibited nor should any restrictions be imposed on the amount payable.
- ❑ Customary marriages should be registered to ensure that marital status is made more certain and easier to prove.
- ❑ Customary marriages should continue to be potentially polygynous.
- ❑ Women should have contractual capacity, *locus standi* and proprietary capacity (and in consequence delictual capacity) on a par with men.
- ❑ Clear provision should be made that the Age of Majority Act applies to persons subject to customary law.
- ❑ Legislation should be passed to provide that spouses have equal capacities and powers of decision-making.
- ❑ The spouses of customary marriages should be deemed to be married in community of property, subject to their freedom to alter this regime by antenuptial contract and subject to the current statutory rules permitting courts to order an equitable distribution of their estates on divorce.

- ❑ It is recommended that all marriages may be terminated only by decree of a competent court.
- ❑ All divorce actions and actions about other family-law issues should be processed by the family courts.
- ❑ Before a divorce action is instituted in the family courts, traditional authorities should be entitled to attempt a reconciliation of the spouses.
- ❑ Only one ground of divorce should be available: irretrievable breakdown of the marriage.
- ❑ Either spouse should be competent to apply for divorce.
- ❑ The child's best interests should govern all aspects of custody, guardianship and access to children.

Since the passage of the Recognition of Customary Marriages Act 120 of 1998 through Parliament in November 1998, the report should be seen as providing an important record of the Commission's views, arguments and processes during the preparation of the legislation.

* **Project 94 - International arbitration**

The report forms part of an extended investigation into arbitration. Background is furnished in **Chapter 5**. The report contains important new legislation aimed at bringing the country's arbitration law in line with international norms. It proposes the alignment of South Africa's international arbitration law with that of several of its important trading partners in Africa and elsewhere. **The report was submitted to the Minister on 12 October 1998.**

Parties to international business transactions favour arbitration as a method for dispute resolution. It is however widely argued that South African law does not currently promote international commercial arbitration. The Arbitration Act 42 of 1965 contains no provisions which expressly deal with international arbitration, while the Recognition and Enforcement of

Foreign Arbitral Awards Act 40 of 1977 is limited to the enforcement of foreign awards only. It is also generally considered that the court's statutory powers of supervision during the arbitral process are inappropriate, given in particular the inherently expeditious nature of that process.

The Commission proposes that international arbitration legislation be regulated in a single statute. In this process consideration has been given firstly to South Africa's response to the UNCITRAL Model Law; secondly to possible changes to the legislation on the New York Convention (currently set out in Act 40 of 1977); and thirdly to the proposed accession by South Africa to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States(ICSID).

The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985. It provides a framework within which international commercial arbitrations can be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy. Its aim is to promote the harmonisation and uniformity of national laws pertaining to international arbitration procedures. It is intended for adoption by individual countries with a minimum of adaptation. Delegates from developing countries played a prominent role in the drafting process of the Model Law; it has been adopted by many Commonwealth and other countries, including important trading partners of South Africa, both within SADEC and beyond it.

The Recognition and Enforcement of Foreign Arbitral Awards, Act 40 of 1977 attempted to give effect to the New York Convention of 1958. It has however been subject to criticism.

The Washington Convention is focussed on the resolution of investment disputes between a contracting state or government entity of the state and a national of another contracting state. The Convention established the International Centre for Settlement of Investment Disputes (ICSID) which has its seat at the principal office of the World Bank in Washington. Its paramount aim is to promote a climate of mutual confidence between states and investors, thereby increasing the flow of resources to developing countries under reasonable conditions.

In its report the Commission recommends the adoption of a draft International Arbitration Bill embodying all South African legislation on international arbitration in a single statute. It provides for the following:

- The compulsory application of the Model Law to international commercial arbitration.
- The repeal of Act 40 of 1977 and its replacement by legislation which deals expressly with both the recognition and enforcement of foreign arbitral awards and rectifies certain other defects in the wording of the existing legislation.
- The ratification of the Washington Convention, following the example of most of the other African countries, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region.

* **Project 100 - Maintenance**

The report forms part of an extended investigation into family law and the law of persons. Background is furnished in **Chapter 5**.

The Commission published an issue paper on the review of the maintenance system in 1997. The comments received in respect of the issue paper indicated that while there is a need for further investigation into the long term measures, the problems currently experienced in relation to maintenance are so pressing that the implementation of solutions should not be delayed until these long term measures have been fully investigated.

An interim report was submitted to the Minister on 6 May 1998. The problems discussed in the interim report relate to two parts of the maintenance process where many practical problems arise. The first is the procedure leading up to the making of a maintenance order where repeated visits to the office of the maintenance officer and numerous postponements of maintenance enquiries are common complaints. The second is the enforcement of maintenance orders by way of the conviction of a person for the failure to comply with such an order, which is widely accepted to be ineffective.

The solutions recommended by the Commission to solve the problems experienced in these two areas are:

- **That a statutory basis be provided for the appointment of maintenance investigators.**
- **The extension of the court's power to make a maintenance order in the absence of a person who is under an obligation to pay maintenance.**
- The introduction of a procedure for the automatic recovery of maintenance payments from the income of a person who is under an obligation to pay maintenance.
- The introduction of a procedure for the execution of maintenance orders which will function independently from a prosecution for the failure to comply with a maintenance order.
- The extension of the definition of "maintenance order" to include payment of non-periodical expenses, made towards a person's maintenance.

Most of the Commission's recommendations are embodied in the Maintenance Act 99 of 1998.

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

In 1998 the Commission published a discussion paper in which it proposed certain amendments to sections 170 and 172 of the Constitution, 1996, section 110 of the Magistrates' Courts Act, 1944 and the Magistrates' Courts Rules. The main objectives of the amendments were to confer constitutional jurisdiction on magistrates' courts and to effect harmony between their constitutional jurisdiction and their *ultra vires* jurisdiction. A number of responses to the Commission's proposals were received. Although most respondents supported the aims of the amendments, opposing views were expressed on the following two aspects:

- That magistrates be precluded from ruling on the validity of Acts of Parliament, legislation passed by the provincial legislatures after 27 April 1994 and any conduct of the President.
- That confirmation by a Full Bench of a High Court be required before any order of constitutional invalidity made by a magistrate has any force.

A report was approved by the Commission on 27 November 1998 and it will be submitted to the Minister during February 1999.

As regards the suggestion that magistrates be permitted to rule on the validity of Acts of Parliament, legislation passed by the provincial legislatures after 27 April 1994 and any conduct of the President, the report notes that the Constitution affords a measure of procedural protection to Acts of Parliament and conduct of the President. Section 172 provides that a High Court may rule on their constitutional validity, but a ruling of invalidity must be confirmed by the Constitutional Court. The view is held that the jurisdictional and procedural scheme established by the Constitution suggests that magistrates' courts are precluded from ruling on the constitutionality of Acts of Parliament and conduct of the President. The Commission also considers it appropriate that magistrates be precluded from ruling on the constitutional validity of legislation passed after 27 April 1997 by the provincial legislatures, since they are representative legislatures with significant constitutional status and a range of exclusive legislative powers.

The Commission accepts the argument that in view of the inapplicability of *stare decisis* in the lower courts the compulsory referral to a Full Bench of a High Court of all rulings of constitutional invalidity by magistrates will result in unnecessary inconvenience, costs and delays. It accordingly proposes that the suggested compulsory referral mechanism be replaced with a requirement that magistrates' courts making orders of constitutional invalidity forthwith notify the relevant state institutions. The state institutions would then be in a position to seek a *declarator* from a High Court in appropriate cases, for example where there is no appeal, the state institutions have a sufficient interest in the matter, and the other requirements for declaratory relief are met. Amendments are proposed to the High Court Rules for the granting of declaratory relief in such circumstances.

* **Project 100 - Domestic violence**

The investigation into domestic violence was also completed during the year under review, although a report has not been published.

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.

A comprehensive discussion paper on domestic violence was published for general information and comment during February 1997. The return date for comment on the discussion paper was 30 May 1997. A project committee was appointed during September 1997. The names of the project committee members are reflected in **Annexure B**.

Due to Parliamentary time constraints, a draft Domestic Violence Bill emanating from the project committee was introduced in Parliament by the Minister prior to finalisation of the Commission's report. The most important provisions in the Bill are the following:

- * Protection is offered to any victim who is in a "domestic relationship" with the abuser.
- * "Domestic violence" is broadly defined.
- * A duty is placed on a member of the South African Police Service to inform a victim of his or her rights at the scene of an incident of domestic violence.
- * A peace officer may without warrant arrest any person at the scene of an incident of domestic violence whom he reasonably suspects of having committed an offence containing an element of violence.
- * An application for a protection order may be brought on behalf of the applicant by any other person who has a material interest in the well-being of the applicant.

- * Provision is made for the *ex parte* granting of an interim protection order.
- * The terms which may be contained in a protection order are clearly spelled out.
- * The Bill contains provisions regarding seizure of arms and dangerous weapons in domestic violence situations.
- * In granting an interim protection order, the court must issue a suspended warrant for the arrest of the respondent which remains in force unless the interim protection order is set aside. The respondent is criminally charged for breaching the protection order.
- * Proceedings must be held *in camera*, but any party to the proceedings may request the presence of specified persons.
- * The period of imprisonment for a person found guilty of breaching the protection order is increased to a period not exceeding five years.

The recently approved Domestic Violence Act 116 of 1998 largely corresponds to the Bill drafted by the project committee, but it also contains provisions advanced by the Commission and developed by the Justice Portfolio Committee with the assistance of the researcher and the Department of Justice.

5

PROGRESS REPORT

In this chapter the position regarding uncompleted investigations on the Commission's programme is discussed. At present there are 29 uncompleted investigations on the Commission's programme. Investigations completed as well as interim reports submitted to the Minister are discussed in **Chapter 4**.

*** 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 have 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.

In order to give due consideration to all facets of this wide-ranging investigation the outcome of a workshop on the rationalisation of laws hosted by the Department of Constitutional Development (with the assistance of the Venice Commission) was awaited. The workshop took place on 13 and 14 October 1998.

During the year under review donor funding from USAID for the establishment of a Unit for Statutory Law Revision has been obtained. However, in view of curtailments to funds made available for the project and the deliberations of the workshop on rationalisation of laws, an adjusted implementation plan needs to be developed and approved by the Commission. This will receive a high priority early in the new year.

*** 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. **On 17 December 1998 the Minister indicated that a project committee should be appointed under the chairmanship of Judge M S Navsa. The appointment of a project committee is awaited.**

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

A project committee was appointed to assist with the investigation. The names of the project committee members are contained in **Annexure B**. 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 considered the comments received on all the working papers and assumed points of view on appropriate legislation.

During May 1998 a proposed adaptation of UNCITRAL's Model Law on Cross-Border Insolvency for enactment in South Africa was distributed for comment. The project committee considered the comments and is of the view that the adaptation, with minor amendments, should

be enacted as a separate chapter in new insolvency legislation.

As a result of recommendations contained in a number of interim reports in the course of the investigation, the following legislation was 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.
- * Act 32 of 1995 dealing with the protection of financial markets in the event of insolvency.

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 were received. The insolvency project committee considered detailed discussions of general comments and comments on the first 79 clauses of the Bill, and gave its views on matters raised by the commentators and the researcher. The project committee is scheduled to consider a discussion of the remaining comments and a draft report on insolvency legislation for individuals early in 1999.

The Standing Advisory Committee on Company Law agreed to investigate the undermentioned subjects:

- * Disqualification and personal liability of directors.
- * Judicial management.

- * Compromises and arrangements.
- * The position of related companies.
- * Dissolution and deregistration of companies.
- * Provisions in respect of close corporations.
- * Provisions in respect of other legal persons.

In April 1998 the Standing Advisory Committee on Company Law agreed that the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria should undertake a project aimed at merging the liquidation provisions of the Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984 into the draft Insolvency Bill drawn up by the Commission. The Centre produced a working document that was discussed at a symposium presented by the Centre and the Transvaal Law Society on 23 October 1998. The Centre held workshops during December 1998 to refine the proposals in the working document and plans to submit a report to the Standing Advisory Committee on Company Law during the first half of 1999.

According to current planning the investigation will be concluded in the course of 1999.

* **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 are 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 the Criminal Law Amendment Act 86 of 1996.

During 1996 the Minister appointed a project committee chaired by Judge L van den Heever. Since its appointment the project committee has met on several occasions to plan the completion of the investigation. In the third phase of the investigation an issue paper on access to the criminal justice system was published during April 1997. The return date for comments was extended until 30 August 1997.

The terms of office of the project committee members expired during March 1998. The Minister appointed a new project committee with effect from 24 July 1998. The names of the project committee members are contained in **Annexure B**. A project committee meeting was held on 26 November 1998 at which the planning of the investigation was considered.

The previous project committee approved the publication of an issue paper on access to the criminal justice system. Subsequent to the publication of the issue paper the Minister appointed a task team to report to him on the transformation of the legal aid system. This subject covered a large part of the Commission's issue paper and in view thereof the new project committee reconsidered the need to proceed with the investigation. In view of a decision to proceed with an investigation into the establishment of a dual system for defended and undefended accused persons (which forms part of the problem of access to justice) it was resolved not to proceed with the publication of a discussion paper on access to justice but to keep it in abeyance pending the finalisation of the first-mentioned investigation.

The project committee resolved to proceed as follows during 1999:

- * An investigation into the question whether or not to allow the Attorney-General to appeal on a question of fact relating to the merit of the case. **The drafting of a**

discussion paper is receiving attention.

- * An investigation into the viability of the establishment of a dual system of criminal procedure for defended and undefended accused persons and the incorporation of inquisitorial elements in the procedure. **The committee requested Professor NC Steytler, a member of the project committee, to conduct research in this regard and to prepare a discussion paper and a report for consideration by the committee.** The German Technical Cooperation (GTZ) will provide financial assistance in respect of the farming out of the research and the development of a discussion paper and final report.
- * **A discussion paper on the application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing is being prepared by a researcher for consideration by the project committee.**

* **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 has met on several occasions since its 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 had also requested the committee to consider the issue of mandatory minimum sentences and such an investigation was subsequently included in the committee's planning of the investigation.

An issue paper dealing with compensation for victims of crime and victim empowerment as part of restorative justice was published during April 1997. The closing date for comments was extended until the end of September 1997. The following issues were expounded in the issue paper:

- * 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 “victim” 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.

An issue paper on mandatory minimum sentences was published for general information and comment during July 1997. The closing date for comments was 30 September 1997. The issue paper dealt with sentencing practises in South Africa, criticism of the penal system and possible options for reform. A number of possibilities for reform were proposed for consideration:

- * Enactment of sentencing guidelines; presumptive sentencing guidelines.

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

The terms of office of the project committee members expired during March 1998. A new project committee was appointed during September 1998. The names of the project committee members are reflected in **Annexure B**. A meeting to define terms of reference was held on 26 October 1998. The objective of the committee is to develop a comprehensive Sentencing Act that would provide a permanent framework for sentencing in South Africa. In doing so the committee plans to adopt a holistic approach to all issues related to sentencing, which would include placing victims at the centre of the criminal justice system. The process of developing a structured sentencing policy should be as inclusive as possible of all the relevant stake holders. The committee also considered the Criminal Law Amendment Act 105 of 1997 and noted that it was a temporary measure and that its sentencing provisions would cease to have effect at the end of April 2000. On 30 November 1998 the committee met to formulate principles of a broad sentencing policy and to consider a broad framework for empirical research to assess the impact of the Criminal Law Amendment Act 105 of 1997.

A discussion paper on a comprehensive Sentencing Act will be developed during 1999.

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

The Commission has been investigating aspects of the law relating to AIDS since 1993. Since then extensive research has been done, evidence has been heard from interest groups, and a discussion document (working paper 58) was published for general information and comment during 1995. Comments on the working paper reflected differences of opinion between interest groups which have to be resolved. A project committee representative of divergent interests under the chairmanship of Judge E Cameron has been assisting the Commission in this task and developing final recommendations on several issues regarding HIV/AIDS since August 1996. The names of the other members of the project committee are reflected in **Annexure B**.

The project committee adopted an incremental approach in dealing with its mandate. During the past two and a half years the Commission published three discussion papers and three interim reports. These dealt with health care related issues (discussion paper 68 and first interim report); pre-employment HIV testing (discussion paper 72 and second interim report); and HIV/AIDS in schools (discussion paper 73 and third interim report). The Commission's 1997 annual report contains full details on the first interim report. More information on the other two interim reports is contained in **Chapter 4**.

During the year under review the Commission also completed a fourth discussion paper dealing with the need for a statutory offence aimed at harmful HIV-related behaviour. The discussion paper will be published for general information and comment in January 1999. The closing date for comments is 28 February 1999. In this discussion paper the premise that the criminal law is not pre-eminently the means by which to combat the spread of HIV is confirmed: the AIDS epidemic is first and foremost a public health issue and it is internationally accepted that non-coercive measures are the most successful means through which public health authorities can reduce the spread of the disease. However, it is also accepted that where HIV-related behaviour results in harm to others (ie exposure to or transmission of HIV), public health measures in themselves are insufficient and the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress. The Commission is of the preliminary opinion that this limited role is not necessarily incompatible with any public health strategy against the disease.

Since the Commission is not in a position at this stage to come to any firm conclusion on the need for the creation of a statutory offence, draft legislation has not been included in the discussion paper.

In order to facilitate a conclusion on the issues in question, comments on a range of questions highlighting the crucial issues to be debated are invited, inter alia:

- * The possible prosecutorial difficulties in applying the common law crimes.
- * The counter-productive effect the creation of a new offence may have on public health efforts in curbing the spread of HIV.
- * The viability of utilising public health measures as an alternative to taking recourse to the criminal law.
- * Specific questions relating to the formulation of a statutory offence should it prove to be pertinent.

An interim report on the need for a statutory offence aimed at harmful HIV-related behaviour will be finalised during the first half of 1999. A fifth discussion paper dealing with the question of HIV testing of sexual offenders and persons accused of having committed sexual offences will also receive attention during 1999.

* **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.

Information regarding the report on customary marriages appears in Chapter 4.

A discussion paper on conflict of laws was published for general information and comment during April 1998 and the closing date for comments was 30 June 1998. The following are some of the recommendations made in the discussion paper:

- * Application of customary law should remain a matter of judicial discretion, but more exact guides to choice of law are needed to bring certainty to an issue that is currently vague and confused. These guides should be precise, flexible, simple and in keeping with the way courts have been used to solving problems.
- * The repugnancy proviso no longer has a useful role to play and it should be repealed.
- * Race should be irrelevant as a criterion for applying customary law and for determining the jurisdiction of traditional courts. Hence, section 12(1) of the Black Administration Act should be amended to delete any reference to “Blacks”.
- * Section 23(1) of the Black Administration Act should be amended to provide that only the testator’s personal interests in property may be disposed of by will. The current regulations on land held under quitrent tenure should be amended to remove elements of gender discrimination.
- * Choice of law rules contained in regulations issued under the Black Administration Act and in the Act itself should be considered and amended. The special rule for foreigners in regulation 2(a) should be deleted. If the proposal to abolish exemption from customary law is accepted, then regulation 2(b) should also be deleted. The position of people who die partially testate and partially intestate should be clarified. If persons subject to customary law are to benefit from various reforms in common law, customary marriages must be given full recognition on a par with civil marriages.
- * Section 1(3) of the Law of Evidence Amendment Act should be replaced by a new section. Recognition should be given to the litigants’ freedom to choose the applicable

law, and in the absence of an agreement the courts should apply the law with which the case has its closest connection.

- * Section 1(3) of the Law of Evidence Amendment Act must be amended to exclude conflicts involving foreign systems of law.

A draft report on conflict of laws was considered by the Commission on 27 November 1998. An amended draft report will be considered by the Commission at its next meeting.

An issue paper on succession was published for general information and comment on 28 April 1998. The closing date for comments was 30 June 1998. Now that the Constitution recognises customary law as a component of the legal system on a par with common law, it is necessary to clarify the rules of succession in customary law. In addition, ways must be found to harmonise those rules (and those of the common law) with the provisions of the Constitution. For this reason, the issue paper raised important questions in the following areas:

- * The purpose and nature of rules of succession.
- * Succession to the head of a family.
- * Underage heirs.
- * Widows.
- * Succession to women.
- * Wills.
- * Burial and funeral ceremonies.
- * Administration of estates.

The development of a discussion paper on succession will receive attention during 1999.

Research on traditional courts has been completed and a Bill is being drafted for inclusion in a discussion paper during 1999.

*** 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

The contents of a report on international commercial arbitration is summarised in Chapter 4.

Domestic commercial arbitration

A discussion paper on domestic commercial arbitration is at present being developed for consideration during the first quarter of 1999. 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 general information and comment during 1997. 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 legal forum held on 11 March 1998 launched a national consultative process of ten workshops on "Access to Justice: Community Structures" which were held in the nine provinces from 17 March 1998 to 12 May 1998. Invitations were extended to a range of stakeholders so as to ensure that a diverse pool of knowledge and experience would be represented.

The process was concluded with a national legal forum on 2 - 3 July 1998 to develop an action

plan for promoting community justice structures in South Africa. Issues on which consensus was reached, and those which remained contentious, were noted. In most of the provinces there are community-based justice structures, under different names, that are functional. There is broad consensus that communities need these structures to resolve disputes through mediation.

The consultation process was made possible by financial assistance from USAID. The details of the process appear in **Chapter 6**.

The information gleaned from the workshops and legal forums forms the basis for a discussion paper which will be finalised during the first quarter of 1999.

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

The business world relies with confidence on computers 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 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. The investigation entails the review of the Act in question with special reference to the meaning of "fault" which is defined in the Act and the joinder of parties.

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 early in 1999.**

* **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 were effected.

There is considerable overlapping between family law and the law of persons and it is submitted that the inclusion of a single comprehensive investigation in the Commission's programme is justified. 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.

Maintenance is currently receiving the Commission's attention:

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 for general information and comment during March 1997. A project committee was appointed after the publication of the issue paper. The names of the project committee members are reflected in **Annexure B.**

The project committee resolved not to publish a discussion paper, but to proceed with the publication of an interim report. A summary of the recommendations contained in the interim report appears in Chapter 4.

A number of the Commission's recommendations are embodied in the Maintenance Act 99 of 1998.

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

Research is continuing. Matters relating to criminal procedure and sentencing are at present dealt with as part of other 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 so as to ensure that the legislation is in accordance with international norms, the Constitution and present requirements of the country.

The present Commission supported the inclusion of the investigation in the Commission's programme and it was approved by the Minister on 22 March 1996. Due to capacity problems and financial restraints the investigation had to be kept in abeyance for a considerable period of time.

A project committee was appointed by the Minister on 2 September 1998. The names of the members of the project committee appear in **Annexure B**.

During November 1998 a discussion paper on the Interception and Monitoring Prohibition Act 127 of 1992 was published for general information and comment.

It is recommended that the Interception and Monitoring Prohibition Act be amended to reflect, inter alia, the following amplifications:

* An obligation on telecommunication service providers to ensure interceptability/

monitoring of all communications.

- * Making it clear that the general position is that the interception or monitoring without the knowledge or permission of the parties to a conversation or communication so as to gather confidential information concerning any person, body or organisation, is prohibited
- * The designation of a judge in each division to consider applications for interception and monitoring in cases relating to serious offences and the designation of one judge to consider applications in regard to security and national interest matters.
- * A judge may issue a directive if he or she is convinced that a serious offence is concerned that cannot be properly investigated in another less intrusive manner.
- * Generally no communication between a legal representative and his or her client may be intercepted or monitored.
- * No person, body or organization rendering a telecommunication service, may provide any such service which is not capable of being monitored.
- * The use of any information obtained through the application of the Act, or any similar Act in another country, as evidence in any prosecution, is subject to guide-lines issued by the Director of Public Prosecutions or Investigating Director concerned.
- * The information regarding the commission of any criminal offence, obtained by means of any interception or monitoring in terms of the Act, may be admissible as evidence in criminal proceedings.
- * A person who intentionally and without the knowledge or permission of the dispatcher intercepts a communication which has been or is being or is intended to be transmitted by telephone or in any other manner over a telecommunications line, or intentionally monitors a conversation by means of a monitoring device so as to gather confidential

information concerning any person, body or organization, is guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment not exceeding two years.

- * If any person who is or was concerned in the performance of any function in terms of the Act, discloses any information which he or she obtained in the performance of such a function, such person is guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment not exceeding five years.

A matter which is alarming in South Africa, is the large number of advertisements by private investigators, sometimes even in law journals, offering to deliver services which include “bugging”. The Commission therefore requests comment particularly on the question of whether the manufacture, distribution, possession and advertising of wire or oral communication intercepting devices should be regulated, and if so, the measures which should be adopted.

The closing date for comments on the discussion paper is 25 January 1998. The project committee will consider other areas of the law relating to security during 1999.

* **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 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 dealt with principles to underpin juvenile justice legislation, age and criminal capacity, legal representation, police powers, release policy, diversion, juvenile courts, sentencing, and monitoring mechanisms. 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.

A discussion paper containing proposals relating to a new structure to govern children under the age of 18 years who are accused of having committed offences was published for general information and comment during November 1998.

In essence, the proposed system aims to ensure that children accused of less serious offences will be afforded the opportunity to pay their debts to society without obtaining a criminal record through a process known as diversion. Diversion is the referral of cases away from the criminal justice system to an approved programme or plan. The Commission therefore envisages a cohesive child justice system which strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions by means of various diversion options and programmes. These options and programmes embody restorative justice principles, which focus on reconciliation and restitution rather than on retribution and punishment, and lay emphasis on compensation to the victim by the offender with the object of successfully reintegrating both victim and offender as productive members of safe communities. The proposed system does, however, provide for the criminal prosecution of children who are accused of serious or violent offences as well as those who repeatedly commit offences. The system also allows for the secure containment of children who are assessed to be a danger to others.

The proposals are based on international human rights standards and constitutional principles. The proposed draft Bill contains a body of principles to guide those who will be tasked with the implementation of this legislation in the future.

The proposed system further aims to encourage a degree of specialization in child justice practice. In so doing, the Commission is giving effect to a long-standing call from service

providers and non-governmental organisations for a distinct and unique system of criminal justice that treats children differently, in a manner appropriate to their age and maturity, and which develops mechanisms and processes designed to achieve that goal. For instance, a specialised child justice court at the district court level, with increased sentencing jurisdiction so as to draw a wider range of cases within its ambit is proposed. Further, specialization in relation to the role of the probation officer builds on practical developments in the field of child justice since 1994. It has become increasingly clear that probation officers will be pivotal to the future child justice system, and this notion accords with views expressed by policy-makers as well as with the views of probation workers concerning their own conceptualisation of their duties in a future child justice system.

Some degree of specialization is also proposed in the area of legal representation (through a system of registration), as advocacy for children entails a heightened responsibility and commitment to serve the best interests of children, as well as an ability to communicate in a manner that a child can understand.

The proposed child justice system hinges on a new process which aims to address effectively the problems that have been experienced in the administration of child justice, particularly in relation to diversion and pre-trial release of children from custody. This is the insertion of the proposed preliminary inquiry as a compulsory pre-trial procedure presided over by a magistrate at district court level. The preliminary inquiry provides a formal step, prior to charge and plea, to maximize the use of diversion and to provide safeguards regarding the use of pre-trial detention.

The draft Bill finally aims to extend the range of sentencing options available to the proposed specialized child justice court and to other courts in which child offenders are tried, and to create mechanisms to ensure the effective monitoring of the legislation, both at district and national level.

The Commission's proposals strive to encompass a vision for, and define the characteristics of a coherent and self contained child justice system, as distinct from a series of procedural provisions which spell out powers and duties for various role-players who can nevertheless

operate in isolation from one another.

The closing date for comments on the discussion paper is 31 March 1999. A draft report will be developed during the course of 1999.

*** Project 107 - Sexual offences**

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 provided 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 Rädga Barnen (SA), several workshops on the issue paper were held throughout the country by members of the project committee during 1997.

From the investigation and comments received on the issue paper it is clear that a variety of problems such as the cautionary rule and the definition of rape cannot be satisfactorily addressed within the ambit of "sexual offences against children" since these problems are not confined to cases where children are the victims of sexual offences. The Justice Portfolio Committee also

expressed the view that the Department of Justice should consider research to regulate all aspects of sexual offences. The Deputy Minister of Justice presented broad terms of reference for consideration. On 18 May 1998 the Minister approved that the terms of reference of the investigation be extended to “sexual offences”.

A discussion paper with draft legislation will be published during 1999.

* **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**.

Six objectives have been set which the Commission aims to investigate :

- * The criminalisation of unauthorised access to computers as well as the unauthorised modification of computer data and software applications.
- * The possibility of providing for the procedural aspects associated with the investigation and prosecution of the above-mentioned offences.
- * The use of computers to commit offences such as theft and fraud.
- * Offences committed by means of the Internet.
- * Matters relating to encryption in order to protect information.

- * The continuing education of the investigating and prosecuting authorities as well as the judiciary to understand and correctly apply the legislation which may be forthcoming from the this investigation.

Because of the wide scope of the investigation an incremental approach will be followed. **The first issue paper on options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects was published during August 1998. The closing date for comments was 26 October 1998.** The first stage explores two questions, namely -

- * whether unauthorised access to computers and the unauthorised modification of computer data and software applications can be dealt with in terms of our criminal law and if not, whether it is desirable that these activities be criminalised; and
- * the desirability of introducing procedural provisions aimed at enhancing the investigation and prosecution of these activities.

Respondents to the issue paper were invited to comment on the following aspects:

- * The perceived scope of the investigation and the objectives set for the project.
- * The need for legislative intervention to create offences relating to unauthorised access to computers and the unauthorised modification of computer data and software applications.
- * Procedural provisions specifically to be applied in relation to computer related offences.

A discussion paper will be published during the first half of 1999.

- * **Project 109 - Review of the Marriage Act 25 of 1961**

The Department of Home Affairs approached the Commission during 1996 with a request to

investigate and recommend legislation relating to a new marriage dispensation for South Africa. The Minister approved the inclusion of the investigation in the Commission's programme on 27 January 1997. The investigation focuses mainly on whether the provisions contained in the Marriage Act are adequate or whether they should be amended. 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;
- * 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 followed in order to contract a valid marriage, including 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 Commission invited comments from all parties who 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 was 20 February 1998. **Based on the outcome of these comments a discussion paper setting out the issues and containing preliminary recommendations and draft legislation is being prepared and will be published for general information and comment during the first half of 1999.**

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

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 from 26 to 28 September 1996 was that the Commission 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 on 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 of the project committee are reflected 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.

An issue paper was published in May 1998 for general information and comment. The closing date for comment was 31 July 1998. The scope of the issue paper was extremely wide, including a review of the common law rules and a variety of statutes affecting children, as well as a discussion of the position of children under customary law and various religious laws. The issue paper also focussed attention on the law as it relates to the many marginalised children in South Africa society: street children, children infected and affected by HIV/AIDS, children with

disabilities, children in residential care, to mention but a few examples.

With the financial assistance of the Department for International Development in Southern Africa, Rädda Barnen (SA), the Carl & Emily Fuchs Foundation, and UNICEF, 19 workshops and several dedicated briefings on the issue paper were held throughout the country by members of the project committee. Active steps were taken to involve people with disabilities in the consultation process and sign language interpreters were used at several of the workshops. Details are contained in Chapter 6.

To enable the project committee to proceed to a discussion paper with draft legislation, the members of the project committee and contract researchers are preparing consultation papers on ten selected issues as background documents to stimulate debate with specific focus groups. **This consultative research process will take place early in 1999 and will be followed by the preparation of a discussion paper and draft legislation later in the year.** At the same time, it is envisaged that a children's participation process planned in conjunction with Save the Children (UK) and South African partner organisations will feed into the drafting process.

* **Project 112 - 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 sharing 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 remained 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 Minister endorsed the inclusion of the investigation in the Commission's programme on 17 June 1997. Mr Smit was contracted to assist the Commission in the investigation.

A discussion paper containing draft legislation was published for general information and comment on 6 May 1998. The closing date for comment was 31 July 1998.

In the discussion paper the following recommendations were made:

- * Separate legislation should be enacted to regulate the sharing of retirement fund benefits between spouses on their divorce.
- * The spouse of a member of a retirement fund should on the divorce of the member and the said spouse acquire a right to share in the member's retirement fund benefits when they become payable.
- * A partner in a marriage relationship entered into in accordance with customary law or a recognised religion should for purposes of the proposed legislation be regarded as a spouse.
- * A non-member spouse's share of the retirement fund benefits should be paid direct from the member's fund by way of deferred retirement benefits. The rules operating in respect of the member's retirement fund benefits must, in so far as they can be applied, also be

applicable to the non-member's share of the said benefits.

- * The formulae for determining the non-member spouse's share of the member's retirement fund benefits in respect of the various types of retirement schemes and the various categories of benefits should be clearly set out.
- * The division of retirement fund benefits on divorce should not be dependant upon the matrimonial property system which applies to the marriage of the spouse.
- * The proposed legislation should not have retrospective effect but spouses falling outside the ambit of the proposed legislation should be able to make the proposed legislation applicable to their marriage by agreement between them.

Comments received are being evaluated and a draft Bill was debated at a workshop. **A draft report will be finalised early in 1999.**

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

During November 1996 the Minister requested the Commission to consider a proposal by Judge 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 since 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. In certain instances inspections *in loco* could also be eliminated.

A letter by Mr D Dalling MP, directed to the Minister and dealing with electronic trials, was also referred to the Commission. Mr Dalling highlights 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 costs are 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.

The Minister endorsed the inclusion of the investigation in the Commission's programme on 14 June 1997.

In view of several investigations with a higher priority and a lack of personnel due to vacancies, it was not possible to commence with research during the year under review. **The investigation will commence early in 1999.**

* **Project 114 - Publication of divorce proceedings**

The background to this investigation is outlined in **Chapter 3**.

In view of several investigations with a higher priority and a lack of personnel due to vacancies, it was not possible to commence with research during the year under review. **The investigation will commence early in 1999.**

* **Project 115 - Review of administrative law**

The background to this investigation is outlined in **Chapter 3**.

During October 1998 the Minister appointed a project committee on administrative law. The names of the members of the project committee are reflected in **Annexure B**.

It is envisaged that a discussion paper will be published for general information and comment during the first half of 1999.

- * **Project 116 - The carrying of firearms and other dangerous weapons in public or at gatherings**

The background to this investigation is outlined in **Chapter 3**.

It was decided that the research in respect of the investigation should be given out on contract due to a lack of available researchers. On 17 December 1998 the Minister approved the employment of a senior lecturer in law at the University of Natal to assist the Commission in the relevant research.

The investigation will commence early in 1999.

- * **Project 117 - The legal position of voluntary associations**

The background to this investigation is outlined in **Chapter 3**.

Research has commenced and a discussion paper will be published for general information and comment during the first half of 1999.

- * **Project 118 - Domestic partnerships**

The background to this investigation is outlined in **Chapter 3**.

Research has commenced and it is envisaged that an issue paper will be published during the first half of 1999.

- * **Project 119 - Uniform national legislation on the fencing of national roads**

The background to this investigation is outlined in **Chapter 3**.

It was decided that the research in respect of the investigation should be given out on contract

due to a lack of available researchers. On 14 December 1998 the Minister approved the employment of a member of the Cape Bar to assist the Commission in the relevant research.

The investigation will commence early in 1999.

* **Project 120 - Section 63(3) of the Insurance Act 27 of 1943**

The background to this investigation is outlined in **Chapter 3**.

The investigation will commence early in 1999.

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 submits issue papers and discussion papers of its own accord to institutions 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 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. The Commission was privileged to receive a delegation from the Law Reform and Development Commission of Namibia on 27 October 1998. Closer links were forged between the Commissions. There was an extremely useful exchange of ideas and the delegation was particularly interested in the working

methods of the Commission and the structure of its Secretariat.

The chairperson of the project committee on sexual offences against children, Ms J Van Niekerk, also had the opportunity to visit the New Zealand Law Commission and the Malaysian Commissioner of Law Revision. The discussions she had on the various approaches and changes to child abuse legislation have been of great value to the project committee.

* **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.

During the year under review the Commission hosted two media conferences in Cape Town and one in Pretoria. The assistant secretary was interviewed on radio after the media conference hosted in Pretoria.

The full-time member participated in the following programmes and interviews:

- | | |
|----------------|---------------------------------------|
| * 11 January: | Radio 702 |
| * 5 February: | Ligwalagwala FM (Customary marriages) |
| * 2 May: | Publicity video on victim empowerment |
| * 2 September: | Drum Magazine (Customary marriages) |
| 27 October: | SAFM (Customary marriages) |
| * 8 November: | SABC-TV (Domestic violence) |
| * 15 December: | SABC-TV (Security legislation) |

The full-time member also participated in a number of the legal fora and workshops on community courts (see below).

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
Domestic Violence	Interviews with reporters: Saturday Star, Sunday Independent	
Community courts	Radio interviews: Radio Ciskei, Mmbatho Radio, Radio Motsweding, Voice of Soweto, Radio Bop, Radio Sunshine, Kaya FM, Thobela FM, Lesedi FM. Telephonic TV interviews: SABC TV, Bop TV. Interviews with reporters: Business Day, Pretoria News, Readers Digest, Mirror of Mmbatho, Star, Sowetan, City Press, Saturday Star, Baltimore Sun.	Discussions with the following persons: Adam Stapleton of Penal Reform International (London), David Berger of the Centre for Innovation and Productivity, Jeanette Szabo of the International Committee of the Red Cross.
Security legislation	Interview with reporter: Beeld. Radio interview: Radio Punt	

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

* **Workshops and briefings initiated by the Commission**

- **Review of the Child Care Act**

Workshops consequent upon publication of first issue paper on review of the Child Care Act:

Location	Venue	Date
Bellville	University of the Western Cape	8 June 1998
George	George Museum	9 June 1998
Soweto	Baragwanath Hospital	10 June 1998
Vereeniging	Leeuhof Community Centre	12 June 1998
Umtata	Transkei College of Education	17 June 1998
Durban	Durban Exhibition Centre	18 June 1998
Witbank		18 June 1998
Ulundi	Mandleni Camp	19 June 1998
Bloemfontein	Technikon Free State	22 June 1998
Welkom	Goldfields Regional Hospital	23 June 1998
Kimberley	Old Perseverance College	23 June 1998
Upington	Township Community Centre	25 June 1998
Nelspruit	Old Drum Rock Hotel	1 July 1998
Potchefstroom	Abraham Kriel Children's Home	2 July 1998
Port Elizabeth		8 July 1998
Pietersburg	Mimosa Club	9 July 1998
Thohoyandou		15 July 1998
Rustenburg	Civic Centre	28 July 1998
Pietermaritzburg	Natal Children's Home	25 August 1998

Briefings consequent upon publication of first issue paper on review of Child Care Act:

Target Audience	Date
National NGOs	28 May 1998
Human Rights Commission and Youth Commission	
NPA Steering Committee	18 August 1998
Council of Traditional Leaders	6 August 1998
National Interim Consultative Council (NICC)	
DEAFSA	25 November 1998

- **Community courts**

Legal fora and workshops:

Location	Venue	Date
Soweto (Legal forum)	VISTA University	11 March 1998
Athlone	Luthern Church Centre	17 March 1998
East London	City Hall	18 March 1998
Pietersburg	Department of Education Hall	24 March 1998
Mmabatho	Civic Centre	26 March 1998
Soweto	Baragwanath Hospital	7 April 1998
Durban	UNISA Hall	15 April 1998
Nelspruit	Drum Rock Conference Centre	21 April 1998
Bloemfontein	University of the Free State	23 April 1998
Kimberley	City Hall	12 May 1998
Pretoria (Legal forum)	Sinodale Conference Centre	2-3 July 1998

- **Harmonisation of the common law and the indigenous law: Customary marriages**

Workshops

Location	Date
Durban	28 January 1998
Lebowakgomo	2 February 1998
Bloemfontein	4 February 1998
Bisho	6 February 1998
Nelspruit	12 February 1998
Pretoria	13 February 1998
Cape Town	16 February 1998
National (Legal profession)	18 February 1998
National (Organised labour)	19 February 1998
National (Traditional leaders)	20 February 1998
National (Religious leaders)	23 February 1998

Briefings

Target audience	Date
House of Traditional Leaders (Eastern Cape - Bisho)	13 January 1998
Parliamentary Committee on the Improvement of the Quality of Life and Status of Women	20 May 1998
House of Traditional Leaders (Mpumalanga - Nelspruit)	16 October 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, the Commission played host to numerous visitors from different countries. 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 and project committee members in activities not initiated by the Commission**

In some instances researchers of the Commission and project committee members 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 and project committee members participated in the following activities not initiated by the Commission:

PROJECT	WORKSHOPS, CONFERENCES, ETC	BRIEFINGS, DISCOURSES, ETC
Review of the Child Care Act	<p>Researcher and project committee members attended CINDI conference: "Raising the Orphan Generation", Pietermaritzburg, 9-12 June 1998.</p> <p>Researcher attended triennial general meeting of SA National Council for Child and Family Welfare, Braamfontein, 14-15 September 1998.</p> <p>Researcher and project committee members participated in the Child Labour Intersectoral Group child labour enforcement policy workshop, Roodepoort, 12-13 October 1998.</p> <p>Researcher and project committee members participated in the international conference on "Children's Rights in a Transitional Society", Centre for Child Law, Pretoria, 30 October 1998.</p> <p>Researcher and project committee members participated in a research</p>	Project committee members briefed Portfolio Committees on Welfare and Population Development and on Justice, 25 May 1998.

PROJECT	WORKSHOPS, CONFERENCES, ETC	BRIEFINGS, DISCOURSES, ETC
	meeting on "Children's Rights to Health: A Legislative Review", Child Health Unit, UCT, 2 November 1998.	
Domestic violence	<p>Researcher attended SADC conference on the prevention of violence against women, 5-8 March 1998.</p> <p>Researcher participated in Natal Women's Resource Centre workshop on gender policy considerations, 30 April 1998.</p> <p>Researcher participated in Malibongwe gender policy workshop, Pretoria, 6-7 May 1998.</p> <p>Researcher participated in Justice Portfolio Committee public hearings 17-18 August 1998.</p> <p>Researcher assisted Justice Portfolio Committee in finalisation of Domestic Violence Bill, 10-18 September 1998.</p>	Researcher briefed Justice Portfolio Committee on 22 July 1998 and NCOP Select Committee on Justice on 9 September 1998.
Community courts	<p>Researcher was one of the speakers at the Provincial Crime Summit on Alternative Justice, 28 July 1998.</p> <p>Researcher attended launch of Technikon SA's Institute of Human Rights & Criminal Justice Studies, 11 August 1998.</p> <p>Researcher attended the International Conference on Crime Prevention Partnerships to Build Community Safety, Johannesburg, 29 October 1998.</p> <p>Researcher participated in a workshop on community courts, Mamelodi Vista Campus, 30 October 1998.</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.

ACKNOWLEDGEMENTS

During the year under review a substantial number of persons and institutions responded to specific or general invitations by the Commission to comment on particular issues or to assist it with its activities in some respect or other. The 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 contributors. However, the Commission expresses 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 the review of the Child Care Act, community courts and the recognition of customary marriages. The particulars of the workshops appear in Chapter 6. The Commission extends its appreciation to all who participated and favoured the Commission with their inputs.

The Commission would like to express its sincere appreciation for the generous assistance given by the following foreign donors and contributors:

- * *The German Government through the German Development Co-operation*
Legislative Drafting Project (customary law, simplification of criminal procedure, sentencing, administrative law)
- * *USAID*
Workshops on community courts
- * *Swedish Embassy (Rapid Response Fund)*
Research in respect of juvenile justice
- * *Rädda Barnen (SA)*
National inter-sectoral workshop on the review of the Child Care Act

- * *UNICEF*
Workshops on the issue paper on the review of the Child Care Act
- * *Department for International Development (UK)*
Workshops on the issue paper on the review of the Child Care Act
- * *The Carl & Emily Fuchs Foundation*
Workshops on the issue paper on the review of the Child Care Act
- * *Save the Children Fund (UK)*
Technical assistance in the person of Mr John Errington

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

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

ANNEXURE A

MEMBERS OF THE COMMISSION IN ORDER OF APPOINTMENT

Title/Name	Term of office
Chairpersons	
The Honourable D H Botha, Judge of Appeal	1973-09-28 to 1975-12-28

Title/Name	Term of office
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, Chief Justice	1996-01-01 to 1998-12-31
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 1998-12-31
Full-time members	
Adv G G Smit	1982-01-01 to 1995-12-31
	1986-02-01 to 1995-03-

Title/Name	Term of office
The Honourable Mr Justice P J J Olivier	31
Professor R T Nhlapo	1996-01-01 to 1998-12-31
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

Title/Name	Term of office
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 Delpont	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
Justice Y Mokgoro	1996-01-01 to 1998-12-31
Adv J J Gauntlett SC	1996-01-01 to 1998-12-31

Title/Name	Term of office
Mr P Mojapelo	1996-01-01 to 1998-12-31
Ms Z Seedat	1996-01-01 to 1998-12-31

ANNEXURE B

**PROJECT COMMITTEES OF THE
COMMISSION AND THEIR MEMBERS**

(Chairpersons of committees are marked with an asterisk.)

Committee	Members	
Administrative law	Adv J J Gauntlett SC*	Member, Law Commission
	Prof H Corder	Professor of law, University of Cape Town
	Ms C Hoexter	Law lecturer, University of the Witwatersrand
	Prof P Iya	Professor of law, University of Fort Hare
AIDS	Judge E Cameron*	Judge of the Transvaal Provincial Division
	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

Committee	Members	
	Ms M Makhalemele	Community representative
	Dr J Matjila Dr G J Mtshali	Department of Community Health, MEDUNSA Chief Director, National Programmes, Department of Health
	Prof R T Nhlapo	Full-time member, Law Commission
	Judge P J J Olivier	Vice-Chairperson, Law Commission
	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
Arbitration	<i>International arbitration:</i>	

Committee	Members	
	Judge J Steyn*	
	Prof D W Butler	Professor of law, 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 (Resigned) <i>Additional members for ADR:</i>	Land Claims Court
	Prof R Choudree	Professor of law, Department of Mercantile law, University of Durban-Westville
	Ms B Hechter Mr A Jooste	Office of the Family Advocate Chief Magistrate, Cape Town
	Ms N Mkefa	Community Peace Foundation
	Adv P Pretorius	Johannesburg Bar
Computer related crimes	Prof D P van der	Professor of law, University

Committee	Members	
	Merwe*	of South Africa
	Capt B Grobler	SAPS, Computer Crime Investigations
	Capt J B Grobler	SAPS, Commercial Crime Unit
	Adv L W Mahlali	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 Supreme Court of Appeal
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,

Committee	Members	
		University of the Witwatersrand
	Mr E Makgoba	Attorney
	Ms S Meer	Attorney, Legal Resources Centre, Cape Town
	Mr P Mojapelo	Member, Law Commission
	Mr D Nkadimeng	Attorney
Domestic violence	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

Committee	Members	
	Ms M Motsei	ADAPT
	Ms F Stewart	Attorney
	Ms P Zikalala	Lawyers for Human Rights/Gender Commission
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	Member, 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 of law, University of South Africa

Committee	Members	
	Prof M M Katz	Attorney and nominee of the Standing Advisory Committee on Company Law
	Mr N Matlala	Attorney
	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
Juvenile justice	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

Committee	Members	
	Ms M Tserere	Lawyers for Human Rights, Umtata
Maintenance	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 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
Review of the Child Care Act	Prof B van Heerden*	Department of Private law, University of Cape Town

Committee	Members	
	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
	Ms H Starke	Department of Welfare
	Prof N Zaal	Department of Private law, University of Durban/Westville
Security legislation	Judge C T Howie*	Judge of the Supreme Court of Appeal
	Ms P Jana	Member of Parliament
	Adv G J Marcus SC	Johannesburg Bar
	Judge Y Mokgoro	Member, Law Commission
	Mr D Tabata	Attorney

Committee	Members	
	Mr D Nkadameng	Attorney
Sentencing	Prof D van Zyl Smit*	Professor of law, University of Cape Town
	Ms L Camerer	Institute for Security Studies
	Mr K Govender	State Attorney
	Mr N Kollapen	Human Rights Commission
	Judge P J J Olivier	Vice-Chairperson, Law Commission
	Mr V Peterson	Department of Welfare, Mpumalanga
	Ms M E M Ramagoshi	National Network on Violence against Women
	Mr P M Shabangu	Chief Magistrate, Durban
Sexual offences by and against children	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
	Mr T Pillay	Attorney

Committee	Members	
	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
Simplification of criminal procedure	Judge P J J Olivier (acting chairperson)	Vice-Chairperson, Law Commission
	Judge A E B Dhlodlo	Ciskei High Court
	Adv M Hanon SC	Johannesburg Bar
	Adv P A J Kotze	Johannesburg Bar
	Prof B Majola	Director, Legal Resources Centre
	Prof N C Steytler	Professor of law, University of the Western Cape

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
59	Islamic marriages and related matters
63	Review of the law of insolvency
73	Simplification of criminal procedure
82	Sentencing
85	Aspects of the law relating to AIDS
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 * Domestic violence * Maintenance
101	The application of the bill of rights to the criminal law, the law of criminal procedure and sentencing
105	Security legislation

Project number	Title
106	Juvenile justice
107	Sexual offences
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
114	Publication of divorce proceedings
115	Review of administrative law
116	The carrying of firearms and other dangerous weapons in public or at gatherings
117	The legal position of voluntary associations
118	Domestic partnerships
119	Uniform national legislation on the fencing of national roads
120	Section 63(3) of the Insurance Act 27 of 1943

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 G
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 projects 100 and 114
13	Investigation into the right of recourse of spouses in respect of contributions towards necessities for the joint household	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 enforce-	1975	Not published	Act 40 of 1977 passed

Project number	Title	Year of report	Reference number of published report	Result
	ability of foreign arbitration			
	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, see also project 115
	° Supplementary report	1994	Not published	Implementation of recommendations under consideration by the Minister of Justice, see also project 115
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
27	Abolition of civil imprisonment	1976	Not published	Act 2 of 1977 passed, see

Project number	Title	Year of report	Reference number of published report	Result
				also project 54
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	Referred back to the Commission for consideration of constitutional issues, see project 112
42	Investigation into time limits for the institution of actions against the State:			
	° Report	1985	Not published	Recommendations not implemented.
	° Supplementary report	1998	ISBN 0 621 28862 4	See Chapter 4
	Investigation into the advance-		ISBN 0 621	

Project number	Title	Year of report	Reference number of published report	Result
43	ment of the age of majority	1985	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 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	1998	RP 133/1998 ISBN 0 621 28678 8	See Chapter 4
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:			

Project number	Title	Year of report	Reference number of published report	Result
	° 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 and related matters	1995	RP 32/1996 ISBN 0 621 17334 7	Implementation of recommendations under 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	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			

Project number	Title	Year of report	Reference number of published report	Result
	° Interim report	1991	Report: ISBN 0 621 14128 3 Summary: ISBN 0 621 14127 5	Act 200 of 1993 passed
	° Final report	1994	RP 66/1995 ISBN 0 621 16727 4	Made available to the Constitutional 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	Recommendations not implemented
	° Supplementary report on section 138 of the Companies Act 61 of 1973	1994	RP 152/1995 ISBN 0 621 16847 5	Recommendations not implemented
63*	Review of the law of insolvency:			

Project number	Title	Year of report	Reference number of published report	Result
	° Interim report on section 34 of the Insolvency Act, 1936 (Act 24 of 1936)	1990	(Unpublished/ Informal)	Section 1 of the Insolvency Amendment 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
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	-	-	Struck off, see Chapter 3
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
	◦ First interim report on the simplification of the criminal procedure	1995	RP 70/1996 ISBN 0 621 17405 X	Act 86 of 1996 passed
	Debt collecting:			

Project number	Title	Year of report	Reference number of published report	Result
74	° 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	Acts 81 of 1997 and 114 of 1998 passed
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 16706 1	Act 86 of 1997 passed
80	Accession to the Hague Convention on the Civil Aspects of In-	1992	Not published	Act 72 of 1996 passed

Project number	Title	Year of report	Reference number of published report	Result
	ternational Child Abduction			
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 Distri-butors and Donelly 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
	° First interim report (Health-related aspects)	1997	RP 106/1997 ISBN 0 621 27345 7	Implementation of recommen-dations receiving attention of Department of Health
	° Second interim report (Pre-employment HIV testing)	1998	RP 120/1998 ISBN 0 621 28049 6	Tabled in Parliament on 13 August 1998
	° Third interim report (HIV/AIDS and discrimination in schools)	1998	RP 121/1998 ISBN 0 621 28048 8	Tabled in Parliament on 13 August 1998

Project number	Title	Year of report	Reference number of published report	Result
86	Euthanasia and the artificial preservation of life	-	-	See Chapter 4
87	Jurisdictional lacuna in the Supreme Court Act, 1959	1994	RP 64/1995 ISBN 0 621 16723 1	Act 122 of 1998 passed
88	The recognition of a class action in South African law	-	-	See Chapter 4
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	Act 68 of 1998 passed
90*	Harmonisation of the common law and indigenous law:			
	° Customary marriages	1998	-	Act 120 of 1998 passed, see Chapters 4 and 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

Project number	Title	Year of report	Reference number of published report	Result
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			
	◦ International arbitration	1998	-	See Chapters 4 and 5
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		RP	On 1999

Project number	Title	Year of report	Reference number of published report	Result
	interested persons	1996	107/1996 ISBN 0 621 17515 3	legislative programme
	° Domestic violence	-	-	Act 116 of 1998 passed, see Chapter 5
	° Maintenance			
	Interim report	1998	RP 137/1998 ISBN 0 621 28685 0	Act 99 of 1998 passed, see Chapters 4 and 5
101*	The application of the Bill of Rights to the criminal law, the law of criminal procedure and sentencing	-	-	See Chapter 5
102	The civil jurisdiction of courts	-	-	Struck off
103	Capping of claims against the Multilateral Motor Vehicle Accidents Fund	-	-	Struck off
104	Money laundering and related matters	1996	RP 31/1997 ISBN 0 621 17621 4	Implementation of recommendations under consideration by the Minister of Finance
105*	Review of security legislation	-	-	See Chapter 5
106*	Juvenile Justice	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
107*	Sexual offences by and against children	-	-	See Chapter 5
108*	Computer related crimes	-	-	See Chapter 5
109*	Review of the Marriage Act	-	-	See Chapter 5
110*	Review of the Child Care Act	-	-	See Chapter 5
111*	Jurisdiction of magistrates' courts in constitutional matters	-	-	See Chapter 4
112*	Sharing of pension benefits	-	-	See Chapter 5
113*	Use of electronic equipment in court proceedings	-	-	See Chapter 5
114*	Publication of divorce proceedings	-	-	See Chapters 3 and 5
115*	Review of administrative law	-	-	See Chapters 3 and 5
116*	The carrying of firearms and other dangerous weapons	-	-	See Chapters 3 and 5
117*	The legal position of voluntary associations	-	-	See Chapters 3 and 5
118*	Domestic partnerships	-	-	See Chapters 3 and 5
119*	Uniform national legislation on the fencing of national roads	-	-	See Chapters 3 and 5
120*	Section 63(3) of the Insurance Act 27 of 1943	-	-	See Chapters 3 and 5

ANNEXURE E**ISSUE PAPERS PUBLISHED BY THE COMMISSION**

(In order to actively involve the community at an earlier stage, the Commission decided to publish issue papers in 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.)

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
1	104	Money laundering and related matters	0 631 17404 1 May 1996
2	100	Family 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

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
		powerment)	April 1997
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
12	90	Harmonisation of the common law and the indigenous law: Succession in customary law	0 621 8 008 9 April 1998
13	110	The review of the Child Care Act	0 621 28026 April 1998
14	108	Computer related crime: Options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects	0 621 28710 5 August 1998

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	Not published

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		relating to theft and house-breaking	
10	51	Marriages and customary unions of Black persons	13 September 1985
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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
20	60	Domicile	0 7970 1435 7 26 August 1988
21	62	The protection of a purchaser of securities	0 7970 1460 8 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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
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
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	0 7970 2638 X July 1992

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		effect of sequestration on the spouse of the insolvent	
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 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	0 621 15039 8 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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
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
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 Sep- tember 1995

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
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 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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
			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: HIV/AIDS and discrimination in schools	0 621 27697 9 August 1997
74	90	Harmonisation of the common law and indigenous law: Customary marriages	0 621 27723 1 September 1997
75	111	Constitutional jurisdiction of magistrates's courts	0 621 27997 8 March 1998
76	90	Harmonisation of the common law and the indigenous law: Conflicts of law	0 621 28007 0 April 1998
77	112	Sharing of pension benefits	0 621 280208 April 1998
78	105	Review of security legislation: The Interception and Monitoring Prohibition Act 127 of 1992	0 621 28847 0 November 1998

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Pub- lication date
79	106	Juvenile justice	0 621 28851 9 November 1998
80	85	Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour	0 621 28854 3 December 1998

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-	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

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
		W)	0 621 10295 4 Vol 6: ISBN 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-Jo-	ISBN 0 621 10722 0

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
11	Prof R Whitaker	seph Pothier <i>Quaestiones juris privati</i> by Cornelius van Bijkershoek	Vol 1: ISBN 0 621 10657 7 Vol 2: ISBN 0 621 10675 5
12	Profs J T Delpont 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