

# **SOUTH AFRICAN LAW COMMISSION**

## **2000 ANNUAL REPORT**

**TO: DR P M MADUNA, MP, MINISTER FOR JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

**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 2000**

**YOURS SINCERELY**

**MADAM JUSTICE Y MOKGORO**

***JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA***

***CHAIRPERSON OF THE SOUTH AFRICAN LAW COMMISSION***

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## **OVERVIEW**

### **\* Introduction**

The Commission's three-year term of office expired on 31 December 1998. A new Commission was appointed for a period of three years with effect from 1 January 1999.

### **\* Death of Chairperson of Law Commission**

The Chairperson of the Commission, Chief Justice Ismail Mahomed, passed away on 17 June 2000 after a relatively brief illness. Judge Mahomed was appointed by the President as the first Chairperson of the Commission after the 1994 democratic elections and took office on 1 January 1996. He brought with him a new vision of and perspective on law reform which had a dramatic impact on the activities of the Commission. Under his guidance the Commission changed its course so as to confer particular importance on investigations that would contribute towards enhancing the quality of life of previously disadvantaged groups, such as women and children. To this end he brought about a complete reprioritisation of the investigations that had already been included in the Commission's programme at the time he took office. Judge Mahomed will be remembered for the passion with which he upheld an unshakeable belief in the importance of human rights in a constitutional society and the way in which that belief became evident during deliberations of the Commission. His devotion to the protection of human rights and his confidence in the Constitution can only be described as inspiring.

### **\* Resignation of full-time member**

The full-time member of the Commission, Professor R T Nhlapo, resigned as a Commissioner with effect from 1 October 2000. He started a new career at the Department of Foreign Affairs as Director: Foreign Service with a view to be posted to the embassy in Washington DC as Deputy Chief of Mission. Professor Nhlapo's delight at this new challenge was tempered with a great deal of sadness at leaving the Commission after almost five years of exciting and challenging law-making. As full-time member he played a pivotal role in the management of the Commission. In his capacity as project leader he was instrumental in steering the direction of the investigation into customary law which, as a first step, saw the adoption of the Recognition of Customary Marriages Act 120 of 1998. He also contributed substantially to the investigation into community dispute resolution structures, which is still in progress. Professor Nhlapo will be remembered for his convivial personality which had a unifying effect on the staff of the Commission.

\* **South African Law Commission prize**

At a cocktail ceremony held in Cape Town on 31 March 2000, the South African Law Commission awarded a prize for the best law reform essay of 1999. The prize, in the form of computer equipment and software, was sponsored by Juta & Co and the competition was open to final-year LLB students at South African universities.

The essays were graded by a panel whose membership was as follows:

Professor R T Nhlapo (SA Law Commission; convenor)

Madam Justice K O'Regan (Constitutional Court)

Judge J Steyn (Cape High Court)

Professor C Hoexter (SA Law Commission)

The winner, Mr Richard Moultrie of the University of Cape Town, with an essay entitled *The Instrumental and Moral Rationality of a Good Faith Doctrine in the South African Law of Contract*, was the unanimous choice of the panel.

The Law Commission wishes to thank all those who participated and, in particular, Juta & Co for providing a very rewarding prize. The competition is expected to become an annual event. The prize has been renamed *The Ismail Mahomed Prize for Law Reform* in memory of the former Chairperson of the Commission.

\* **Best practices seminar**

A seminar on best practices in law reform was organised by the Law Reform Commission of Tanzania (LRCT) in Dar es Salaam on 18 and 19 October 2000.

The seminar was attended by representatives of the South African Law Commission and of law reform agencies in Zimbabwe, Malawi, Lesotho, Zambia, Zanzibar, Kenya, Uganda, Namibia and the hosts, Tanzania. The general objective of the seminar was to capture the best business practices in law reform by sharing experiences and exploiting the comparative advantage of sister agencies from countries whose legal systems are similar to Tanzania and are united by a common agenda.

The theme of the seminar was human rights and good governance. The following topics were discussed:

- Human Rights and Good Governance - The Role of Law Reform Agencies
- The Philosophy of Law Reform Agencies
- Best Practices in Law Reform Agencies

The Secretary of the South African Law Commission was requested to prepare a paper on the topic of “Best Practices in Law Reform”. He delivered a paper entitled “Best Practices: The Bricks, Mortar and Domes of Law Reform”.

Acknowledging that African countries face similar challenges such as human rights, democracy, good governance, economic restructuring, globalization of trade, electronic commerce and information technology, it was agreed that there was a need for a forum for law reform agencies to exchange knowledge and experience.

At the end of the seminar a professional body, the **Association of Law Reform Agencies of Eastern and Southern Africa**, was formed to provide a forum for the continuous exchange of best practices in law reform and development. For the purpose of effecting this development, a steering committee comprised of the representatives from South Africa, Malawi, Tanzania, Uganda and Namibia was elected. The South African representatives are Ms Z Seedat (a Commissioner) and the Secretary. The steering committee will meet in Pretoria in March 2001 to work out the legal modalities for the institutionalising of the Association, subject to the approval of the member states at the next meeting towards the end of 2001.

The Commission supports the idea of a regional law reform conference to be organised by the SALC. The best practices seminar in Tanzania created the opportunity to pave the way for such a conference through networking and personal contact.

In the past visitors and interns from the Law Commissions of Malawi, Lesotho, Namibia and Tanzania were received by the SALC. The good relations maintained by the Commission with law reform bodies in other African countries facilitate the evaluation of law reform thinking and comparative law research. The best practices seminar also created the opportunity to bolster existing ties with these law reform bodies.

\* **The year under review**

Two issue papers were published for general information and comment:

- Project 59                      Islamic marriages and related matters (issue paper 15)

- Project 119 Uniform national legislation on the fencing of national roads (issue paper 16)

Issue papers published by the Commission are listed in **Annexure E**.

Seven discussion papers were published for consultation purposes:

- Project 73 Simplification of criminal procedure: The right of the Attorney-General to appeal on questions of fact (discussion paper 89)
- Project 101 The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing (discussion paper 90)
- Project 82 Sentencing: A new sentencing framework (discussion paper 91)
- Project 105 Review of security legislation: Terrorism: Section 54 of the Internal Security Act 74 of 1982 (discussion paper 92)
- Project 90 Customary law: Succession (discussion paper 93)
- Project 73 Simplification of criminal procedure: Sentence agreements (discussion paper 94)
- Project 90 Customary law: Administration of estates (discussion paper 95)

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

Five reports were approved by the Commission:

- Project 63 Review of the law of insolvency
- Project 73 Simplification of criminal procedure: The right of the Director of Public Prosecutions to appeal on questions of fact (third interim report)
- Project 82 Sentencing: A new sentencing framework

- Project 85 Aspects of the law relating to AIDS: Compulsory HIV testing of persons arrested in sexual offence cases
- Project 106 Juvenile justice

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

The following Acts emanating from reports of the Commission were adopted by Parliament in 2000:

- Promotion of Administrative Justice Act 3 of 2000
- Cross-Border Insolvency Act 42 of 2000

The following Bill emanating from a report of the Commission is receiving the attention of Parliament:

- Project 42 Institution of Legal Proceedings Against Organs of State Bill

The following completed investigations and recommendations of the Commission are receiving the attention of the Department of Justice and Constitutional Development (unless otherwise indicated):

- Project 47 Unreasonable stipulations in contracts and the rectification of contracts
- Project 52 Investigation into the legal consequences of sexual realignment and related matters
- Project 63 Review of the law of insolvency (insolvency of individuals)
- Project 65 Surrogate motherhood
- Project 85 Legal aspects of the law relating to AIDS: Non-controversial matters - first interim report (A national policy on testing for HIV is being finalised by the Department of Health for promulgation. Regulations regarding hazardous biological agents are being finalised by the Department of Labour for promulgation)



- Project 86 Euthanasia and the artificial preservation of life (The Commission's report is under consideration by the Department of Health)
- Project 88 The recognition of a class action in South African law
- Project 90 Customary law: Conflicts of law
- Project 94 International arbitration
- Project 100: Family law and the law of persons: Access to minor children by interested persons
- Project 104: Money laundering and related matters (The Commission's report is under consideration by the Department of Finance)
- Project 105 Security legislation: Interception and Monitoring Prohibition Act, 1992
- Project 106 Juvenile justice
- Project 111 Jurisdiction of Magistrates's Courts in constitutional matters
- Project 112 Sharing of pension benefits

Five new investigations were included in the Commission's programme in the year under review:

- Project 121 Consolidated legislation pertaining to international co-operation in civil matters
- Project 122 Incapable adults
- Project 123 Protected disclosures
- Project 124 Privacy and data protection
- Project 125 Prescription periods

A progress report on investigations not yet completed appears in **Chapter 5**.

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**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.

With effect from 1 January 1999 the Commission was constituted for a period of three years as follows:

### **Chairperson**

Judge I Mahomed (Chief Justice; deceased 17 June 2000)

Madam Justice Y Mokgoro (Judge of the Constitutional Court; Chairperson with effect from 3 November 2000)

### **Vice-Chairperson**

Madam Justice Y Mokgoro (Judge of the Constitutional Court; Vice-Chairperson until 2 November 2000)

### **Other members**

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

Judge C T Howie (Judge of the Supreme Court of Appeal of South Africa; member with effect from 3 November 2000)

Madam Justice M L Mailula (Judge of the High Court of South Africa)

Mr P Mojapelo (Practising attorney, Nelspruit)

Professor R T Nhlapo (Honorary Professor in the Department of Private Law, University of Cape Town; resigned with effect from 1 October 2000)

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 until his resignation on 1 October 2000.

In terms of section 3(2) of the Act the President may appoint one or more additional members if he deems it necessary for the investigation of any particular matter by the Commission. The volume of work generated by the research staff has increased considerably over the last few years. This has substantially increased the workload of Commissioners, especially in relation to project leadership. On 27 October 1999 the President

appointed Professor Cora Hoexter, School of Law, University of the Witwatersrand, as an additional member of the Commission for the investigations into statutory law revision, publication of divorce proceedings, the legal position of voluntary associations and domestic partnerships.

**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: committees appointed by the Commission and consisting of members of the Commission only (such as the working committee), and committees 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 committees the Commission had established a working committee which consisted of Professor R T Nhlapo as convenor, and other members of the Commission coopted for meetings according to their availability.

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 working committee may exercise all the functions of the Commission excluding the approval of reports. 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.

The names of the members of the project committees appear in **Annexure B**. The Commission would like to express its appreciation to individuals and 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 backgrounds. 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 issue papers, discussion papers and draft reports and to carry out other assignments of the Commission. These posts are at present filled by the following persons:

Ms D M Clark (State Law Adviser)

Mr M B Cronje (Principal State Law Adviser)

Ms A-M Havenga (Principal State Law Adviser)

Mr G O Hollamby (Principal State Law Adviser)

Ms C P Kimble (State Law Adviser)

Ms A M Louw (Principal State Law Adviser)

Ms P Matshelo-Busakwe (Principal State Law Adviser)

Ms M Moloji (Senior State Law Adviser)

Ms P Moodley (Principal State Law Adviser)

Mr M F Palumbo (Principal State Law Adviser)

Ms L A Stuurman (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 serves as Assistant Secretary of the Commission. Currently there are four vacancies for State Law Advisers. The vacancies will be advertised as soon as the job evaluation, which is in its final stage, has been completed.

The librarian is Ms M A Kgasago.

The administrative component of the Secretariat currently consists of the following persons:

Senior Administrative Officer	:	Ms J M H Oosthuizen
Chief Administration Clerk	:	Ms P J Kotze
Senior Administration Clerk	:	Mr J D Kabini
Senior Administration Clerk	:	Mr A Singh
Administration Clerk	:	Mr R Swart
Senior Typist	:	Ms J M Nkabinde
Typist	:	Ms J A Jackson
Senior Secretary	:	Ms L V Damons
Secretary	:	Ms E M Mashabela
Senior Operator	:	Mr K M Mahlangu
Senior Messenger	:	Ms Z A Mahlangu

As a result of increases in the workload of the administration, the services of a temporary staff member, Ms A J G Kruger, have been obtained.

A work study investigation to assess the establishment of the administration has been completed and the report is awaited. The Commission would like to record its appreciation for the assistance rendered by the Department of Justice and Constitutional Development in striving to ensure that support services at the Commission are adequate.

The Commission wishes to express its appreciation to the members of the secretariat for their outstanding services to the Commission. The Commission wishes to make special mention of the high standard of working documents and reports submitted to the working committee and the Commission by the research staff.

The 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 and Constitutional Development under the Law Reform Subprogramme. The Secretary is consulted on the compilation of the draft Vote. The funds made available so far have 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 fulfil its obligations adequately in the forthcoming financial year unless its budget is increased substantially. Factors necessitating such an increase are the increase both in the number of personnel and in the amount of work done by the Commission. In addition, the implementation of the departmental strategic plan will have a bearing on the Commission's resources.

The Commission's budget for the 1999/00 financial year was R7,525,900, which is made up as follows:

° Personnel expenditure	R5,138,300
° Administrative expenditure	R 900,600
° Inventories	R 461,000
° Equipment	R 350,000
° Professional and special services	R 592,000
° Miscellaneous expenditure	R 84,000

The Commission's resources are supplemented by funding and technical assistance from foreign and local donors for specific projects. During the year under review the Commission has received financial support from the German Technical Co-operation (GTZ); USAID; Save the Children Fund (UK); Rädä Barnen (Swedish Save the Children); the Nelson Mandela Children's Fund; and the Department of Welfare and Population Development. The Commission wishes to record its sincere appreciation to these agencies.

\* **Programme**



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

The Commission's present programme appears in **Annexure C**. **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 the 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 which 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 (where one exists) 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 experiences elsewhere in the world. The consultation 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 an 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. In most cases 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 for Justice and Constitutional Development.

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. There appears to be an increasing tendency in the faculties of law of various universities to prescribe the Commission's discussion papers and reports as literature 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 enactment of the Commission's proposed legislation which embodies the recommendations.

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 as well as a variety of other matters are dealt with. The papers are numbered in sequence as they serve 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 to 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. A research paper relating to an empirical study of the sentencing practices in South Africa was published in the year under review. 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 are also obtainable from the Commission's offices. The annual report, papers in the research series and reports on investigations that are published can be purchased from the Government Printer in Pretoria.

\* **Meetings**

The Commission met five times during 2000, namely on 11 February, 31 March, 1 April, 27 July and 17 November.

The working committee of the Commission met four times, namely on 7 April, 8 June, 5 July and 29 September.

The following project committees of the Commission met on the dates indicated:

Aspects of the law relating to AIDS	21 January, 6 - 7 April, 6 May, 9 September, 7 December
Arbitration	25 March, 19 August, 21 and 28 October
Computer-related crime	20 November
Customary law	13 May
Islamic marriages	13 January
Juvenile justice	10 and 20 January, 16 February, 21 June
Review of the Child Care Act	13 - 15 January, 25 - 26 February, 31 March, 19 - 20 May, 11 - 12 August, 11 November
Review of the law of insolvency	14 January
Security legislation	12 February, 29 April
Sentencing	15 - 16 March, 5 May, 26 July

Sexual offences 17 January, 13 April, 5 May, 17and 28 August, 9 and 27  
November

Simplification of criminal procedure 8 May, 25 July

\* **Proposed amendment to the South African Law Commission Act 19 of 1973**

The Commission continues to operate under its founding statute, which was adopted in 1973. In many respects that statute reflects the times in which it was adopted, namely the pre-constitutional era. In some respects, it assumes a small professional body, abstracted from public concerns, and focussing on isolated research. The projects upon which the Commission has been requested by the Minister to embark in the course of the past years testify that the new Commission has adopted a very different focus and approach. As a consequence, it has had to adapt its working methods considerably. For instance, projects involving issues of social concern and the transformation of the legal system require a far wider consultative approach than that adopted in the past. Administratively the Commission has done everything in its power to meet the demands of this paradigm shift, but it has become evident that in certain respects the Commission's founding statute does not serve this new focus, and indeed in some respects hampers the smooth functioning of the Commission.

A proposed amending statute which reflects the restricted changes the Commission has in mind has been submitted to and is under consideration by the Minister for Justice and Constitutional Development.

## 3

**THE COMMISSION'S PROGRAMME: INVESTIGATIONS INCLUDED**

Five new investigations were included in the Commission's programme in the year under review.

**\* Project 121: Consolidated legislation pertaining to international cooperation in civil matters**

In November 1999 a Justice Departmental workshop was held on international cooperation between South Africa and foreign states in civil matters.

There have been no significant developments in the field of international civil matters and there is a need to revisit our legislation with a view to developing consolidated legislation. The workshop concluded that the South African Law Commission should be mandated, in consultation with business, to do a thorough research of existing legislation with a view to preparing consolidated legislation on international cooperation in civil matters.

**The Minister approved the inclusion of the investigation in the Commission's programme on 12 June 2000.**

**\* Project 122: Incapable adults**

The Commission, as far back as 1988, undertook an investigation with a view to improving the plight of mentally incapacitated persons who cannot afford the costs involved in securing a High Court appointed curator. Its recommendations led to the adoption of the Mentally Ill Persons' Legal Interests Amendment Act 109 of 1990, which amended the Mental Health Act 18 of 1973. This amendment enabled an interested person to apply to the Master of the High Court (which entails insignificant costs) for the appointment of a curator to a person who is *not declared* to be mentally ill, but whom the applicant *believes* to be suffering from mental illness to such an extent that the person is incapable of managing his or her own affairs.

Especially elderly persons are often the victims of exploitation by others when they are no longer capable of looking after their own affairs. Diminished legal capacity can be the result of mental illness, inability to communicate because of a physical or other disability, head injury, stroke, learning disability and other causes.

The South African Constitution guarantees the rights of all citizens to have access to health care services and to social security, “including, if they are unable to support themselves and their dependants, appropriate social assistance”. The Constitution, in addition, obliges Government to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

The referral of the investigation into incapable adults to the Law Commission will mean a revival of its previous investigation, but on a wider basis. Additional measures to protect the interests of those whose legal capacity has for some reason been diminished will be researched. The investigation will also not be restricted to elderly persons.

**The Minister approved the inclusion of the investigation in the Commission’s programme on 31 July 2000.**

\* **Project 123: Protected disclosures**

The Portfolio Committee on Justice and Constitutional Development submitted its report on the Protected Disclosures Bill to Parliament on 16 May 2000. The Bill aims to protect employees in both the public and private sectors from suffering any occupational detriment on account of having disclosed information regarding unlawful or irregular conduct by their employers.

The Committee was of the view that the following matters referred to in its report should be investigated fully before a review of the provisions of the Bill could take place:

- The possibility of extending the ambit of the Bill beyond the purview of the employer/employee relationship.
- The possibility that a worker can also make a protected disclosure relating to the conduct of a person other than his or her employer.
- The exclusion of criminal or civil liability for making a protected disclosure.
- The creation of a new course of action for an employee who had been victimised by an employer in contravention of the Bill. (Such course of action could be aimed at the person who acted in contravention of the Bill, or at both the employer and such person, and could also introduce the concept “punitive damages” into our law.)
- The desirability of creating offences in the Bill in terms of which -
  - an employer would be committing an offence by unlawfully subjecting an employee to an occupational detriment; and

- an employee would be committing an offence by making a false disclosure not knowing or believing it to be true.

The Portfolio Committee on Justice and Constitutional Development was of the view that the Law Commission would be best suited to undertake research into these matters and accordingly requested the Minister for Justice and Constitutional Development to consider referring these matters to the Commission for investigation.

**The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000.**

\* **Project 124: Privacy and data protection**

The Ad Hoc Joint Committee on the Open Democracy Bill submitted its report on the Promotion of Access to Information Bill to Parliament on 24 January 2000.

The Committee noted that the Bill only dealt with the aspect of access to private information of an individual, be it access by that individual or another person, and did not regulate other aspects of the right to privacy, such as the correction of and control over personal information.

Foreign jurisdictions with freedom of information regimes enacted separate legislation which, as an important component of democracy legislation, regulates aspects such as the correction of and control over personal information. Privacy legislation generally provides for more detailed mechanisms and provisions dealing with personal information in the hands of another person by empowering that individual, amongst others, to demand the correction of incorrect information.

The Committee requested the Minister for Justice and Constitutional Development to introduce privacy and data protection legislation in Parliament as soon as possible. Since the preparation of this type of legislation will require extensive research, the Minister requested the Law Commission to consider the possible inclusion of such an investigation in its programme.

**The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000.**

\* **Project 125: Prescription periods**



In September 1998 the Commission submitted a supplementary report on the investigation into time limits for the institution of actions against the State to the Minister. As a result of this report the Limitation of Legal Proceedings against Government Institutions Bill was passed by the National Assembly in September 2000.

The Commission's recommendations dealt mainly with notice periods but the Commission also recommended that debts should be extinguished by prescription as provided for in section 344 of the Merchant Shipping Act 57 of 1951, section 2(6)(b) of the Apportionment of Damages Act 57 of 1951 and the Prescription Act 68 of 1969.

The Portfolio Committee on Justice and Constitutional Development recommended in its report on the Bill that, as no comprehensive review of all the provisions providing for different prescription periods - whether of a contractual or delictual nature - has been done, the Minister should be approached to request the Law Commission to include an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods in the Commission's programme.

**The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000.**

## REPORTS COMPLETED

In the year under review the following five reports were completed:

\* **Project 63: Review of the law of insolvency**

A project committee was appointed to assist with the investigation. The committee held 28 meetings. Six interim reports were submitted and seven working papers were published for comment. Discussion papers 66 and 86 with draft Bills and explanatory memoranda were published for comment during 1996 and 1999 respectively. More than 350 pages of comments were received on discussion paper 66 alone.

The principal Act dealing with insolvency in South Africa is the Insolvency Act 24 of 1936. This Act replaced the Insolvency Act of 1916 but did not amend it drastically. The 1936 Act has been amended more than 20 times, but it has never been reviewed as a whole.

The main aim of the investigation was to balance and satisfy the needs of the different stakeholders. The major stakeholders are the commercial community in general (creditors in particular), insolvent debtors, insolvency practitioners and the government. Because of conflicting interests it is often difficult to strike a fair balance between the different interests. Effective, speedy and fair procedures are important needs of stakeholders and formed the basis for the review.

A draft Bill for the insolvency of individuals is contained in Volume 2 of the report. A summary of the changes proposed in the Bill appear on page 14 of Volume 1 of the report. Many of the changes are technical. The following are the more substantive changes:

- Only a person who is a member of a professional body recognised by the Minister may be appointed as liquidator (clause 53(1)(a)).
- The discretion of the Master of the High Court to appoint a liquidator of his or her choice has been limited in cases where creditors nominate or vote for a liquidator (clauses 32, 52, 54, 55, 58 and 60).
- Liquidators may preside at meetings unless questioning is to take place at the meeting or an interested party requests that the Master or a magistrate should preside (clause 41(3)).
- Resolutions can be adopted at the first meeting which is now convened by the initial liquidator as soon as possible after his or her appointment and not by the Master (clause 38).

- A creditor under a financial lease agreement is treated as a secured creditor and must prove a claim (clause 76).
- Many of the preferent claims (for instance for taxes) are abolished in terms of clause 80.
- In respect of dispositions before liquidation that may be set aside, wider provisions apply to associates of the insolvent than to other persons (clauses 18 and 20) and it is presumed for all dispositions, until the contrary has been proved, that a debtor's liabilities exceeded his or her assets at any time within three years before the liquidation of the estate (clause 25(2A)).
- A cap of R200 000 has been placed on the exclusion of pension benefits from the insolvent estate (clause 15(4)) and certain extraordinary contributions to pension funds may be recovered for the benefit of creditors (clause 22).
- Provision is made for a binding composition between a debtor and a majority of creditors without an application to declare a debtor's estate insolvent (Schedule 4).

The value of reforms of a practical or technical nature should not be underestimated. It is in the interest of the economy and society as a whole that insolvency problems should be solved fairly and efficiently. For instance, a seemingly innocuous proposal that directions by creditors should be obtained early in the liquidation process is expected to have a marked effect on finalising insolvencies and limiting the time that funds are caught up in insolvent estates. In difficult economic times it is particularly important that money should be available to generate growth and should not be entangled in protracted procedures.

**The report was submitted to the Minister for Justice and Constitutional Development on 6 April 2000.**

The Commission appreciates the importance of corporate insolvencies and the benefit of uniform legislation for all corporate and individual insolvencies. The Centre for Advanced and Corporate Insolvency Law of the University of Pretoria, on behalf of the Standing Advisory Committee on Company Law, has finalised proposals for uniform legislation, which incorporate the proposals for individuals in the Commission's report. These proposals were submitted to the Minister for Justice and Constitutional Development on 17 October 2000.

**\* Project 73: Simplification of criminal procedure - The right of the Director of Public Prosecutions to appeal on questions of fact**

As the law stands at present, an accused can appeal, subject to certain procedural qualifications, against any aspect of bail, a conviction or sentence in a criminal case. The accused may also have proceedings in lower courts reviewed and, in the case of the High Court, have irregularities dealt with by way of appeal or special entry.

The State, on the other hand, may appeal (also subject to similar procedural qualifications) against the granting of bail, an acquittal on a legal ground and also against an inadequate sentence. Experience has shown that these rights are used sparingly by the State. The State, however, does not have a right to appeal against a finding of not guilty in relation to the facts of the case - the so-called appeal on the merits. The difference between questions of law and fact is often extremely difficult to judge or apply and there are many reported cases dealing with the distinction. The same problem arose in the context of, for instance, tax appeals and because of the ever present difficulty the distinction in tax cases has been abolished without any deleterious effect.

In the present context there are conflicting policy considerations. The one is that an accused person has benefits and protections - some of which are protected by the Constitution - which the prosecution, representing the community and the victims of crime, does not always enjoy. The administration of justice in South Africa (especially with regard to criminal procedure) has followed the English tradition and has always been characterised by liberality and respect for the individual.

On the other hand, there are the interests of society, whose members (not only the victims) also enjoy the rights contained in the Bill of Rights and are entitled to a just and fair decision in criminal cases. They have an interest in the conviction and sentencing of a person who is clearly guilty and who, because of incompetence or obvious errors in the trial court, go free. The Commission concluded that it cannot be doubted that a significant number of criminals go unpunished due to numerous flaws in the administration of the criminal justice system.

In considering the question whether a procedure such as the right to appeal should be changed, the Commission also considered whether the system, which denies the State a full right of appeal, satisfies present demands and whether changes may contribute towards achieving justice in the administration of the criminal law. In the end, the question which the Commission essentially had to answer boiled down to this: since the State has a right of appeal in connection with bail, sentence and questions of law, why should it not have a similar right in relation to factual matters? Because that is the issue, the Commission did not reconsider the rights of the convicted to appeal or the existing rights of appeal afforded to the State - all subjects dealt with in earlier reports and, to some extent, in recent legislation - but focussed on the limited issue at hand. The Commission's brief is to simplify criminal procedure and in the course of the investigation it became clear that some changes, which are not directly related to the limited issue at hand, are also necessary. Some of these changes are cosmetic while others are aimed at simplifying criminal appeals generally. The Commission used this opportunity to address these non-contentious issues as well.

After considering a comparative study on the right of the prosecution to appeal, the relevant international human rights documents and the Constitution, the Commission concluded that there was sufficient justification for the extension of the right of the Director of Public Prosecutions to appeal to include an appeal on questions of fact.

**The report was submitted to the Minister for Justice and Constitutional Development on 7 December 2000.**

\* **Project 82: Sentencing - A new sentencing framework**

The report contains recommendations on the enactment of a new Sentencing Framework Act.

An ideal sentencing system should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term. The Commission therefore proposes a framework that in its view can meet all these desiderata to the greatest extent possible.

Such a framework will require the co-operation of the different branches of government. A single branch cannot solve the problem on its own. Reform proposals should combine, as far as possible, the advantages that may be derived from the involvement of all three branches of government in the sentencing process and eliminate the disadvantages inherent in giving any single one of them priority. In the model that the Commission proposes, sentencing decisions will continue to be made by the courts, but these decisions will be informed by new initiatives from the legislative and administrative branches that will meet the need for consistency as well as sensitivity to the seriousness of offences, the needs of victims and the capacity of the system to carry out the sentences that have been imposed.

The key to the proposal is that the different arms of government enter into a new partnership. There will be more guidance for the courts on sentencing. In the first instance this will take the form of sentencing principles that are clearly articulated in legislation. In this way there will be a decisive break with common law, which has recognised divergent sentencing principles without establishing a clear relationship or hierarchy.

These principles will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or sub-category of offence. The Sentencing Council will have to do research and consult widely before developing guidelines. It will have to collect and publish on an annual basis

comprehensive sentencing data including a full list of all sentencing guidelines. The Council will also have to publish reports on the efficacy and cost effectiveness of the various sentencing options provided by legislation, determine the value of fine units and make policy recommendations on the further development of community penalties.

Judicial officers should form a major part of such a Council, both to ensure its independence and for the pragmatic reason that they have considerable practical experience of sentencing. There may be some concern about whether judges should be involved in a policy-making organ, which would generate sentencing guidelines that the judiciary itself would later have to apply. Concerns of this kind were decisively rejected by the Supreme Court of the United States of America in **Mistretta v United States**, which held that although up to that time Congress had delegated an almost unfettered sentencing discretion to judges, the scope of judicial sentencing discretion remained within congressional control. Congress therefore had the constitutional authority to take back this wide discretion and to delegate it, within statutorily defined limits, to an independent commission on which judges may serve.

To allow an appropriate role for the courts the guidelines are to be relatively more flexible. In addition the courts will be able to develop jurisprudence on the grounds for departure from the guidelines that will form a cornerstone of the proposed new sentencing partnership.

The Sentencing Council will be constituted to allow the judiciary to have a major input in the shaping of the guidelines. It will be a relatively small body but will have the statutory duty to consult widely. The cost of the Council will be offset by the efficient use of punishment resources, which should result in savings for the criminal justice system as a whole.

The Sentencing Council will be independent but not isolated from public opinion. Both the Ministers most closely associated with sentencing, viz the Ministers of Justice and of Correctional Services, and Parliament would be able to request the Council to consider the development of guidelines for a category of offences that the public might regard as not being treated with the appropriate degree of seriousness. Cabinet and Parliament would thus be able to take direct steps to bring public opinion to bear on the sentencing framework. However, they would not do so through legislation that might disturb the balance of the sentencing system as a whole or result in sentences that could not be implemented in the long run. The public too would be able to approach the Sentencing Council directly, although not to compel it to act.

A new sentencing framework requires not only a new partnership amongst the different arms of government. It requires also a new partnership between the State and the public in general and victims of crime in particular.

The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. The proposed new Sentencing Framework Bill addresses these issues in various ways.

Careful attention is given to provisions for the major sentences of imprisonment for life or for a fixed period and provisions for the detention of dangerous criminals. Where such persons have committed offences that involved a serious physical injury and continue to present a major risk to the public, they may be detained for extended periods.

Community penalties are expanded by further provision for correctional supervision and community service. Conditions that may be attached to these sentences are spelt out and the procedures for imposing them simplified.

More emphasis is placed on restitution and compensation for victims of crime. To this end a new sentence of reparation is proposed. It includes elements of both restitution and compensation. The sentence may be imposed as an independent sentence, either on its own or together with other sentences. In addition imprisonment or a fine may be suspended on condition of reparation. The proposal is that the sentencing court must consider some form of reparation in every case.

The method of calculating fines has also been overhauled. In the future fines will be more closely related to the means of the offender.

The procedural innovations designed to benefit victims of crime include a requirement that prosecutors, when they intervene on sentence, must consider the interests of victims in every case. There is provision for victim impact statements to be presented to the courts so that they may learn what impact the crime had in practice. Victims must be told when and how they may be involved in the eventual release of sentenced offenders from prison. These innovations are backed by detailed rules to ensure that victims are told of their rights. There are also provisions to ensure that the income of offenders is revealed so that they can be ordered to make reparation for their crimes in an appropriate way.

The various changes that are proposed will be combined in a new piece of legislation, the Sentencing Framework Act. The Commission is putting forward a draft proposal for such a new Act. The new legislation will contribute to legal certainty by bringing together in one easily accessible law all the provisions dealing with the imposition of sentence. The general principles applicable to sentencing will be clearly stated. The publication of normative sentencing guidelines will simplify the task of the courts, thus contributing to speedy and effective

justice and ensuring that offenders know what to expect. Simplified procedural rules will make it clear to the public what is happening in the sentencing process and encourage public participation in the administration of justice.

**The report was submitted to the Minister for Justice and Constitutional Development on 7 December 2000.**

**\* Project 85: Aspects of the law relating to AIDS - Compulsory HIV testing of persons arrested in sexual offence cases**

The report, which contains proposals for legislative intervention, deals with compulsory HIV testing of persons arrested in sexual offence cases. The purpose of the intervention is to provide a speedy and uncomplicated mechanism whereby the victim of a sexual offence can apply to have an arrested person tested for HIV and to have information regarding the test result disclosed to the victim. This will provide the victim with peace of mind regarding whether he or she has been exposed to HIV during the attack.

The current recommendations were preceded by a discussion paper with preliminary proposals distributed for public comment during 1999. There was overwhelming support for legislative intervention. The proposed legislation has been developed by the Commission in close liaison with experts and interested parties, including the Department of Justice and Constitutional Development.

Recently there has been mounting public concern and pressure on the authorities to take appropriate action regarding deliberate or knowing transmission of HIV infection. This has come about largely in response to a number of widely publicised incidents of deliberate transmission of HIV, accompanied by the very real concern that it is in most part women and young girls who are being exposed to HIV infection in this manner.

In general, our law at present provides for HIV testing only with the informed consent of the person concerned. Every person is entitled to privacy regarding medical information, and no general legislation exists which allows for disclosure of such information. Furthermore, neither currently available public health law nor criminal procedure makes provision for compulsory HIV testing of persons arrested for sexual offences with a view to disclosing their HIV status to victims.

The Commission concluded that there is a need for statutory intervention. Intervention is necessary in the light of women's undoubted vulnerability in South Africa today to widespread sexual violence amidst a nationwide epidemic of HIV and in the absence of adequate institutional or other victim support measures. In these



circumstances there is a compelling argument for curtailing an arrested person's rights of privacy and bodily integrity to a limited extent to enable his or her accuser to ascertain speedily whether he or she has HIV. The benefit to alleged victims of the knowledge is not only immediately practical in that it enables them to make life decisions and choices for themselves and people around them; it is also profoundly beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life threatening disease. That the arrested person's rights are infringed must be acknowledged and this must be reflected in procedural and substantive safeguards built into the process created.

It is therefore suggested that the proposed change to the law should be based on the following principles:

- The process should be victim-initiated (which should include initiation by a person acting on the victim's behalf where the victim is too traumatised to bring the application, or lacks legal capacity to act on his or her own). This will ensure that only a person with a material interest in the arrested person's HIV status may apply for a compulsory testing order.
- A specified standard of proof should be required on which to base an order for compulsory HIV testing. The Commission is of the opinion that this should be *prima facie* evidence reflected in depositions on oath that a sexual offence has been committed against the victim by the arrested person; that in the course of the offence the victim may have been exposed to the body fluids of the arrested person; and that no more than 50 calendar days have lapsed from the date on which it is alleged that the offence in question took place. (The latter forms part of a total period of 60 calendar days allowed for execution of an order for compulsory HIV testing).
- Compulsory HIV testing of an arrested person should take place only on authorisation by a court. This should be a discretionary power resting with the presiding officer hearing the application.
- In order to ensure an uncomplicated and speedy process and to protect the victim from a potentially further traumatising confrontation with his or her attacker, the arrested person (or his or her legal representative) should not be allowed to be present or give evidence in an application for compulsory HIV testing. The arrested person should retain his or her right to apply to the High Court for review in the event that an order for compulsory testing is not properly granted in accordance with the prescribed requirements.
- The procedure should provide for the confidentiality of the arrested person's HIV test result so as to ensure that this information is disclosed only to the victim (or the person acting on his or her behalf) and to the arrested person.
- A limited period of time should be allowed for bringing an application and executing it. This period should coincide with the period during which a victim's own HIV test would not clearly indicate whether

he or she had been infected with HIV (the "window period"). The Commission considers a time limit of 60 days to be appropriate.

- The State should be responsible for all costs related to the proposed procedure.
- The use of information relating to the HIV status of an arrested person obtained under the proposed legislation should not be admissible as evidence in criminal or civil proceedings.
- Malicious activation of the proposed procedure or the malicious disclosure of the test results should be punishable.

**The report was submitted to the Minister for Justice and Constitutional Development on 7 December 2000.**

**\* Project 106: Juvenile justice**

The report contains final recommendations and a draft Bill on a proposed new child justice system. The recommendations relate to a new structure to govern children under the age of 18 years who are accused of having committed offences.

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 formal 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 imprisonment of children awaiting trial will be permissible in certain defined circumstances, but the proposals accord with the constitutional provisions that imprisonment of children should be a measure of last resort and for the shortest appropriate period of time.

The recommendations 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 specialisation 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 is proposed. Further, specialisation 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 specialisation 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 maximise 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 specialised 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 report was submitted to the Minister for Justice and Constitutional Development on 8 August 2000.**

## PROGRESS REPORT

In this Chapter the position regarding uncompleted investigations on the Commission's programme is discussed. Reports completed 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 has resolved that this project should enjoy a 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 permanently simplified, coherent and generally accessible statute book. It is a task of immense proportions and deals with, *inter alia*, the constitutionality of legislation; the rectification of discriminatory legislation and gender insensitive provisions; the repeal of obsolete and redundant provisions and the systemisation of the statute book by grouping provisions that belong together.

Cabinet has considered a submission on the Commission's involvement submitted by the Minister on 11 May 2000. Cabinet endorsed the investigation into statutory law revision and indicated that the investigation should be extended to include an audit of the statute book to eliminate inconsistencies with the right to equality.

During the last two weeks of July a project team from Germany evaluated the current participation and technical assistance as well as the possibility of extending the participation for a second phase until 2003. Funding was obtained to do a needs assessment, a strategic plan for implementation and the costing of the latter on statutory law revision. **The planning of the needs assessment and related issues is currently receiving attention.**

The Law Review Project (a section 21 Association) is undertaking the “Good Law Project” which overlaps with the Law Commission’s investigation into statutory law revision. The Minister has indicated that ways to coordinate the efforts should be undertaken, including the possibility of taking the statutory law revision process forward under the auspices of the Law Commission.

\* **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 names of the project committee members appointed for the investigation are contained in **Annexure B**.

An issue paper on Islamic marriages and related matters was published for general information and comment in May 2000. The closing date for comment was extended to 31 August 2000. The issue paper contained the following proposals:

- It is proposed that couples contemplating a marriage should have the right to choose a marital system which is compatible with their religious beliefs and with the Constitution. This implies that the marriage could, by way of contract, be governed by Muslim Personal Law, or by secular law, having regard to constitutional and political constraints in the present circumstances.
- To the extent that legislation is to give effect to the recognition of Islamic marriages, it is suggested that the new statute ought to provide for both new marriages and existing marriages.
- In the case of new marriages, it is proposed that the legislation should provide at least for the following matters:
  - The age of consent, which should be 18 years.
  - Actual and informed consent to the conclusion of a marriage in written form.
  - The designation of marriage officers who are entitled to perform Islamic marriages.
  - The registration of marriages by the signing of a marriage register.
  - The formalities pertaining to the time, place and manner of solemnisation of Islamic marriages.
  - The appropriate marriage formula for the solemnisation of an Islamic marriage.
  - A prohibition on marriages within certain prohibited degrees of relationship. including the rules relating to fosterage according to Muslim Personal Law.
  - A standard contractual provision in terms of which a Muslim Personal Law system is established in the event of parties contemplating a Muslim marriage.
  - The prescription of penalties for false representations or statements.

- In the case of existing marriages, and in view of the recent decision in **Amod & Another v Multilateral Motor Vehicle Accidents Fund**, in which the Court gave legal recognition to a Muslim marriage for purposes of the duty of support, little difficulty arises in affording recognition to *de facto* monogamous marriages. It is suggested that such marriages would require registration upon satisfactory proof to a designated marriage officer that there is an existing Islamic marriage. Proposals were invited concerning the affording of recognition to polygamous marriages entered into before the commencement of a new statute, particularly in regard to potential complications such as existing proprietary rights, maintenance, succession and social welfare benefits.
- Regarding the consequences of registration of existing Islamic marriages, it is suggested that parties who choose to register existing Islamic marriages must reach agreement as to the appropriate matrimonial property regime. Again no particular difficulties are envisaged in respect of *de facto* monogamous marriages. The recognition and registration of existing polygamous marriages would, it is suggested, have to take account of the special position of the wives to such a marriage and the special need to provide protection of their proprietary rights and interests as well as the interests of the children born of the various marriages.
- The difficulties arising when there is an existing civil marriage and a subsequent Islamic marriage, or *vice versa*, need to be addressed.
- Regarding divorce and the issue of dissolution of a marriage by *Talaq*, it is submitted that whilst a *Talaq* takes effect upon pronouncement, it should be confirmed by a court to avoid abuse and to protect the interests of minor children. Moreover, it is suggested that legislation which recognises aspects of Muslim Personal Law must also provide for an effective system of dispute resolution in accordance with the *Qur'anic* directive providing for mediation in matrimonial matters.
- In order to deal with constitutional concerns, it is suggested that any proposed legislation stipulating the grounds on which the conclusion of a polygamous marriage would be permissible, has to be contractually regulated in recognition of the limitations set out by the *Qur'an* itself. Comment was requested on whether a judge should or should not decide that the circumstances prescribed by the *Qur'an* exist justifying a second marriage.
- In view of the fact that wives and children frequently require special protection to ensure their continued welfare upon the dissolution of a marriage, it is proposed that appropriate protections should be included in any statute giving recognition to Muslim Personal Law.

**The project committee will meet in January 2001 to consider the comment on the issue paper and to plan the future course of the investigation.**

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

The investigation entails a comprehensive review of the Criminal Procedure Act 51 of 1977. Owing to the extent of the task 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 to investigate the influence of the Bill of Rights on the Criminal Procedure Act.

The names of the project committee members appointed for the investigation are reflected in **Annexure B**.

Discussion paper 89 on the right of the Director of Public Prosecutions to appeal on questions of fact was published for general information and comment in January 2000. **Particulars of the report appear in Chapter 4.**

On 24 November 1999 the project committee approved in principle that attention should be given to the incorporation of inquisitorial elements in the procedure. Professor P J Schwikkard and Judge Nugent were contracted by the German Technical Co-operation to prepare a draft discussion document. A draft discussion paper was approved by the project committee on 21 November 2000. **The discussion paper will be considered by the Commission early in 2001.**

**A discussion paper on sentence agreements, which deals with the notion of plea bargaining in South African criminal law, was published for general information and comment in December 2000. The closing date for comment is 31 January 2001.**

The Commission concludes that the Criminal Procedure Act, because it gives a wide discretion to the prosecution, directly and indirectly, does provide for plea agreements. What it does not cover, however, is sentence agreements. Studies show that plea (and even sentence) negotiation is active in South Africa and plays an important role in our criminal justice system.

There are two types of sentencing agreements. The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law. The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, so does the sentence. The Commission concludes that there is no reason why this procedure should be dealt with by way of legislation. The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed. In the Commission's view it is this type of agreement that should be legalised and regulated.

A procedure which provides for sentence agreements will have important advantages for the criminal justice system. A serious concern is the backlog in courts and the inability of the Legal Aid Board to finance the defence of the indigent. A system which formalises plea agreements and which makes the outcome of the case more predictable will make it easier for practitioners to permit their clients who are guilty to plead guilty. Protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure. The practice of plea negotiation in South Africa could make an important contribution to the acceleration of the process. Statutory measures could be provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established principles.

The Commission therefore recommends that sentence agreements be statutorily recognised and that legislation provide for the following principles and procedure:

- The prosecutor and an accused may enter into an agreement in respect of a plea of guilty to the offence charged or to an offence of which the accused may be convicted on the charge and an appropriate sentence to be imposed by the court if the accused is convicted of that offence.
- The agreement must be reached before the plea.
- Such an agreement will become binding on both the accused and the prosecution as soon as the plea is entered, but it does not bind the court.
- The agreement must be in writing and must set out the rights of the accused, for example that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts, which rights have to be explained to the accused before the agreement is concluded.
- If the agreement is reached, the accused pleads guilty and the sentence agreement is then disclosed to the court.
- The court, before convicting the accused, has to question the accused to ascertain whether the accused understood his or her rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, a procedure similar to that provided for in section 112(1)(b) and (2) of the Criminal Procedure Act comes into operation. This will enable the court to assess whether the agreed sentence is appropriate or inappropriate.
- The court then accepts or rejects the agreement. If it is accepted, the accused is found guilty in terms of the plea and the agreed sentence is imposed. If the court is of the view that it would have imposed a lesser sentence than the agreed sentence, it may likewise find the accused guilty but impose the lesser sentence. If it rejects the agreement, the accused must be informed accordingly. The accused then has a choice: he or she may abide by the plea and the matter will proceed as usual. He or she is, however,



entitled to withdraw the plea, in which event the matter has to begin *de novo* before another judicial officer. No reference may then be made to the plea agreement or the proceedings before the first court.

- The judicial officer should not instigate or take part in any negotiations.
- Once a person is convicted and sentenced in terms of an agreement, he or she should not have a right of appeal against either. Review would be the proper remedy in the event of undue influence or such like.

\* **Project 82 - Sentencing**

The objective is to develop a comprehensive Sentencing Act that would provide a permanent framework for sentencing in South Africa. The project committee appointed for the investigation 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 names of the project committee members are reflected in **Annexure B**.

The project committee 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. The Institute for Criminology (UCT) and the Institute for Security Studies were contracted by the German Technical Co-operation to do the research which was completed in February 2000. **In July 2000 the empirical study of the sentencing practices in South Africa was published in the Commission's research series.**

Discussion paper 91 on a new sentencing framework was published for general information and comment in April 2000. The report on a new sentencing framework is discussed in **Chapter 4**.

On 10 September 1999 a subcommittee on victim empowerment was established and it was resolved to outsource research in respect of a compensation fund for victims of crime. Financial assistance is being provided by the German Technical Co-operation. The contract was awarded to the Centre for the Study of Violence and Reconciliation and a draft discussion document was completed on 15 September 2000. The project committee approved a draft discussion paper on 9 November 2000. **The discussion paper will be considered by the Working Committee early in 2001.**

\* **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. 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 three and a half years the Commission published five 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 information regarding the first interim report. Information regarding the other two interim reports is contained in the Commission's 1998 annual report.

In 1998 the Commission completed a fourth discussion paper (discussion paper 80) dealing with the need for a statutory offence aimed at harmful HIV-related behaviour. The discussion paper was published in January 1999. Information regarding the discussion paper is contained in the 1998 annual report. The project committee has since considered the comment on the discussion paper, proceeded with additional research, and received inputs from the Commission's sexual offences project committee. In view of the divergent comments received, a consultative meeting with experts and interested parties was held. The compilation of a draft report has been kept in abeyance until the completion of work on the report dealing with compulsory HIV testing of persons arrested in sexual offence cases. A draft report on the need for a statutory offence aimed at harmful HIV-related behaviour was considered by the project committee on 7 December 2000. **The report will be considered by the Commission early in 2001.**

A fifth discussion paper (discussion paper 84) dealing with the question of compulsory HIV testing of persons arrested in sexual offence cases was published for general information and comment in September 1999. **The report on compulsory HIV testing of persons arrested in sexual offence cases is discussed in Chapter 4.**

\* **Project 90 - Customary law**

On 22 October 1999 the Commission decided that the name of the project should be changed from "Harmonisation of the common law and indigenous law" to "Customary law", since the name would be a more appropriate description of the work in which the project committee is presently engaged.

The aim of the investigation is to ensure the orderly development of customary law as a component of the plural legal system in a way that is compatible with the Constitution. 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
- \* Conflicts of law
- \* Law of succession
- \* Traditional courts

A report on customary marriages was submitted to the Minister in 1998, and a report on conflicts of law submitted in September 1999.

An issue paper on succession was published for general information and comment in April 1998. The development of a discussion paper was receiving attention when the Department of Justice introduced a Bill in Parliament entitled the "Customary Law of Succession Amendment Bill". As this Bill has since been withdrawn, the then Acting Director-General indicated on 14 September 1999 that the investigation should be resubmitted to the Law Commission as a matter of urgency. The Minister agreed. A discussion paper (which includes a draft Bill) on succession in customary law was published for general information and comment in August 2000. The closing date for comment on the discussion paper was 22 September 2000. **In the light of the project leader's resignation with effect from 1 October 2000, contingency arrangements for the completion of the project are receiving attention.**

A discussion paper on the judicial powers of traditional leaders was published for general information and comment in May 1999. The compilation of the final report has been delayed as a result of the resignation of the researcher. **The project leader, who has resigned as indicated above, has agreed to remain involved in the finalisation of the report.**

**A discussion paper on the administration of estates was published in December 2000. The closing date for comment is 28 February 2000.**

The main objective of the Commission's investigation is to evaluate the different systems of administration of estates historically reserved for different sectors of the community. Historically the administration of estates of black persons was governed by the Black Administration Act 28 of 1927 and its attendant regulations. The administration of estates of white persons and other sectors of the community was governed by the

Administration of Estates Act 66 of 1965 and regulations. The Administration of Estates Act 1965 also accommodated the administration of estates of black persons provided they had executed a will during their lifetime. The purpose of this review is to consider a unitary system of administration of estates for all South Africans. If there is any value in preserving certain rules of distribution of estates which certain sectors of the community follow, the possibility of applying them across the board will be considered.

The discussion paper addresses the system under the Black Administration Act, and evaluates the systems of administration of estates in Zambia and Zimbabwe. This is followed by recommendations regarding estates under the Black Administration Act. Next the position under the Administration of Estates Act is discussed, followed by the recommendations. The last part is the formulation of recommendations for a unified system.

*Recommendations concerning the administration of black estates*

Assuming that a different system should be retained for the administration of estates of blacks, comments are invited on the following proposals:

- Estates of blacks who did not leave a will need not be reported to any government institution unless the value of the estate exceeds R100 000 or an interested party objects to the administration of an estate.
- Estates in other cases should be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death. The magistrate may, on application by an aggrieved party, instruct the family of the deceased to report the estate if the magistrate is of the opinion that minors or persons without full legal capacity may be prejudiced. The existing procedure should be followed if estates are reported.
- An interested party who is dissatisfied with any decision of a magistrate may appeal to the Master for a review of the decision.
- If the customary law of succession is retained, a regimen similar to the above proposals may be retained for estates that devolve according to customary law.
- Comment is invited on a proposal that a magistrate may certify that a person is a guardian of a minor according to customary law, and that the Master may thereupon treat such a person as a natural guardian in terms of the Administration of Estates Act.

*Recommendations concerning estates in terms of the Administration of Estates Act 66 of 1965*

- The Master should be authorised to dispense with formalities and control measures.
- As a first alternative, the Master should be given authority to exempt an executor from compliance with any or all the provisions of the Act, once estate duty has been paid or satisfactory provision has been made for its payment. Comment is invited on the question whether the Master should in all cases insist

on a simple statement of assets at market value, liabilities and proposed distribution. The Master should have authority to revoke exemptions and direct an executor to comply with any or all the provisions of the Act if in the opinion of the Master circumstances justify it. Section 50 will have to be amended so that an executor is not liable for distribution otherwise than in accordance with an advertised account. The executor should not be liable merely for this reason if the Master authorised the representative to distribute the estate. Comment is invited on a provision that an executor authorised by the Master to distribute the estate may be held liable if he or she is unable subsequently to account for the liquidation and distribution of assets.

As a second alternative, in estates with assets above a prescribed value all executors should lodge accounts and advertise the accounts in the *Government Gazette*, without a requirement that the Master should examine the accounts.

- The proposals regarding the level of control by the Master entail the abolition of appointments in terms of sections 18 and 25.
- Ordinary letters of executorship in terms of section 13 should be issued for all "foreign" estates, and special provision should not be made in section 21 for certain proclaimed states.
- If no estate duty is payable and a representative of the estate declares that there are no creditors, beneficiaries or immovable property in the Republic, the Master should have authority to dispense with all further requirements at the time of the appointment of the foreign executor to deal with the estate in South Africa or at any time after the appointment.
- Something similar to the affidavit in terms of regulation 4 should be retained for all cases where a person not ordinarily resident in South Africa dies leaving assets in South Africa. Such a requirement can be set out in a provision similar to section 25 of the 1965 Act.
- Something similar to an Estate Duty Return is required to satisfy the Master that no estate duty is due.
- Information on the next of kin should be called for in the death notice. Consideration can be given to having the death notice signed under oath or making it an offence to sign a false death notice.
- Subject to the provisions below or the provisions of an order of court every person shall, before letters of executorship are granted in his or her favour and thereafter as the Master may require, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his or her functions as executor.
- A person shall not be required to furnish security if he or she will be assisted by or is -
  - any person duly admitted to practise as an attorney in any part of the Republic;
  - any accountant or auditor registered under the Public Accountants and Auditors Act 80 of 1991;
  - any associate general accountant of the South African Institute of Chartered Accountants;
  - any board of executors or trust company which, on 27 October 1967, was licensed as such under the Licences Act, 1962 (Act 44 of 1962), and carrying on business of which a substantial part

- consisted of the liquidation or distribution of the estates of deceased persons;
  - any bank or mutual bank registered in of the Banks Act 94 of 1990 or the Mutual Banks Act 124 of 1993; or
  - any person exempted by the Minister in the light of the person's capabilities, financial standing and trustworthiness.
- Regulation 910 should be repealed; no attempt should be made to amend it.
- It does not seem to be advisable to authorise the Master to call for security at any time in the light of the Master's powers to remove an executor or call for security as set out above.
- The support for more Masters' Offices should be taken into account when a new regimen is considered.
- Routine estate notices in newspapers should be done away with.

#### *Combination of the two systems*

- Estates need not be reported to any government institution unless the value of the estate is more than R100 000 or unless an interested party objects to, or there is a dispute regarding the administration of an estate. A person who deals with an estate without being appointed as executor must, before liquidation or distribution of the estate, allow creditors who will not be paid in full and heirs 14 days to comment on a plan of liquidation and distribution. A person who liquidates or distributes an estate without letters of executorship may be held liable if he or she fails to comply with this requirement or is subsequently unable to account for the liquidation or distribution of the estate or to produce a will in terms of which the distribution was made.
- Estates in cases not covered by the previous paragraph must be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death by submitting a death notice and inventory. The magistrate may instruct the family of the deceased to report any estate if the magistrate is of the opinion that minors or persons without full legal capacity may be prejudiced. Wills must be transmitted to the Master if the estate is reported.
- In any estate reported to the magistrate, an executor must be appointed who shall lodge an estate duty return and a liquidation and distribution account with the magistrate. The account need not be examined, but must be advertised for inspection in the *Government Gazette*. An executor must furnish security in appropriate cases. Provision should be made for objections against accounts and consideration of the objections by the Master. An executor should be liable for distribution other than distribution in accordance with an advertised account.
- An interested party who is dissatisfied with any decision of a magistrate may, with notice to the magistrate, appeal to the Master who has jurisdiction for a review of the decision of a magistrate.
- The magistrate shall forward all documentation regarding an estate to the Master when an account has

lain for inspection. The Master must deal with objections against accounts and matters of estate duty, as is the position at present.

- Certain proposals made in respect of the administration of black estates and estates in terms of the Administration of Estates Act should be considered in the event of a combination of the two systems.

\* **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**.

*Domestic arbitration*

A discussion paper on domestic arbitration was published for general information and comment in September 1999. Workshops on the discussion paper were held in Pretoria, Durban, Cape Town and East London on 20, 21, 22 and 23 September 2000. **A draft report will be considered by the Commission at its first meeting in 2001.**

*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.

A discussion paper on community dispute resolution structures was published for general information and comment in September 1999. A national workshop on the discussion paper was held in Pretoria on 27 - 28

October 1999. Comments received on the discussion paper have been collated, and a draft report, with inputs from Prof W Schärf and Prof C Shearing was considered by the project committee on 28 October 2000.

**It is envisaged that the draft report will be considered by the Commission in the first quarter of 2001.**

\* **Project 95 - The admissibility of computer-generated 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 computer-produced information as evidence in trials. 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**

The investigation entails the review of the Act in question with special reference to the meaning of “fault” and the concept of “contributory negligence” as used in the Act.

A discussion paper was published in October 1996 for general information and comment. The finalisation of a report has been deferred in the light of the researcher’s involvement in more urgent investigations.

Toward the end of 1999 Judge P J J Olivier, former Vice-Chairperson of the Commission, kindly indicated that he would finalise a report. However, other pressing commitments precluded him from doing so. **A draft report will be considered by the Commission during 2001.**

\* **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. Maintenance is currently receiving the Commission’s attention.



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 in 1998.

The Maintenance Act 99 of 1998 came into operation on 26 November 1999. **The position under the new Act is being assessed with a view to determining whether further reform is necessary.**

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

A discussion paper on the application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing was published for general information and comment in January 2000.

The discussion paper focuses only on those sections which are clearly unconstitutional and which need urgent consideration. The Commission concluded that neither the Commission nor the project committee dealing with the investigation should usurp the function of the Constitutional Court by deciding on the constitutionality of those sections of the Criminal Procedure Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop the case law step by step. While the discussion paper primarily focuses on provisions which are considered to be clearly unconstitutional, the constitutionality of some other provisions and whether they should be amended in the scope of the investigation, are also dealt with. In these instances the provisions and suggestions for amendment are included in the discussion paper for purposes of inviting comment.

The discussion paper deals among other things with provisions of the Criminal Procedure Act which are in conflict with -

- ° the presumption of innocence, for example, section 55 (failure of accused to appear on a summons); section 60 (failure of an accused on bail to appear in court); section 74 (failure of accused on warning to appear in court); sections 78(1A) and (1B) (mental defect and criminal responsibility); section 170 (failure of accused to appear after adjournment); section 174 (discharge of accused after case for the prosecution); section 212 (proof of certain facts by affidavit); section 217 (confessions); section 219A (admissions) section 37(evidence on charge of bigamy); section 240 (evidence on charge of receiving

- stolen property); section 243 (evidence of receipt of money or property and general deficiency on charge of theft); section 245 (evidence on charge of which false representation is an element) and section 332 (prosecution of corporation and members of association);
- the constitutional provisions of equality and access to courts, for example, section 7 (private prosecution on certification of *nolle prosequi*); section 29 (search to be conducted in orderly manner); section 190 (impeachment or support of credibility of witness); section 191 (payment of expenses of witness) and section 269 (sodomy);
  - the right to a fair trial which includes the right to appeal, for example, section 302 (sentences subject to review in the ordinary course and transmission of record);
  - the right to a public trial, for example, section 153 (circumstances in which criminal proceedings shall not take place in open court) and section 154 (prohibition of publication of certain information relating to criminal proceedings);
  - the right to adduce and challenge evidence and adequate facilities to prepare defence, for example, section 166 (cross-examination); section 179 (process for securing attendance of witnesses); section 182 (witnesses from prison) and section 190 (impeachment or support of credibility of witness);
  - the right to freedom and security of person, for example, section 185 (detention of witness) and section 286 (declaration of certain persons as dangerous criminals) and section 286B (imprisonment for an indefinite period);
  - the right to be brought before a court after arrest, for example, section 50 (arrest);
  - the right to a fair trial (including the right to be informed in detail of charge), for example, section 95 (housebreaking with intent to commit an offence);
  - the right to a fair trial (unconstitutionally obtained evidence), for example, section 225 (evidence of prints or bodily appearance of accused) and section 252A (authority to make use of traps and undercover operations and admissibility of evidence so obtained); and
  - the right to a fair trial, for example, section 213 (proof of written statement by consent) and sections 105, 119, 126 and 213 (the unrepresented accused).

**Comments received on the discussion paper are being evaluated and it is envisaged that a draft report will be finalised for consideration by the project committee early in 2001.**

**\* 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 the current requirements of the country.

The names of the members of the project committee appointed for the investigation appear in **Annexure B**.

A report on the Interception and Monitoring Prohibition Act was submitted to the Minister in November 1999.

Other areas of the law relating to security were provisionally identified by the project committee:

- The review of the crimes of terrorism and sabotage.
- The protection of classified information in the possession of the State.
- Regulation of private intelligence companies.
- Economic espionage as a threat to national security.
- Protection of the property and personnel of foreign governments and international organisations, including protection from intimidation, obstruction, coercion and acts of violence committed against foreign dignitaries, foreign officials and their family members.
- Hostage-taking in order to compel any government to do or abstain from doing any act.

A discussion paper on terrorism was published for general information and comment in August 2000. The closing date for comment was extended to 27 October 2000.

The discussion paper contains provisional recommendations and a draft Anti-Terrorism Bill. The current South African statutory and common law provisions criminalising conduct constituting terrorism are analysed and compared with legislation enacted in foreign jurisdictions to deal with the phenomenon of terrorism.

Arguably any act of terrorism can be prosecuted in terms of the existing law as such an act would constitute an offence, whether under statute or the common law. The worldwide trend, however, is to create specific legislation based on international instruments relating to terrorism. It is imperative that South Africa sign, ratify or accede to the respective instruments relating to terrorism as soon as possible. For this purpose two options are available. One is for the government departments involved to amend present legislation pertaining to nuclear energy, civil aviation, etc on the basis of the relevant international instruments. The other is to draft an omnibus Act addressing the issue of terrorism on a broader basis. The discussion paper reflects the second option.

The discussion paper and proposed draft Bill deal mainly with the following issues:

- Terrorist acts should under no circumstances be justifiable, even under the guise of the label “political offence”.
- Those actions which constitute “terrorist acts” and the meaning of “terrorist organisation are defined.
- Provision is made for offences relating to the provision of material, logistical or organisational support or any resources; membership of a terrorist organisation; hijacking of aircraft; endangering the safety of maritime navigation; terrorist bombings; taking of hostages; safety of internationally protected persons; protection of property occupied by internationally protected persons; platforms fixed to the seabed; nuclear terrorism, such as possession of radioactive devices, unlawful use of radioactive material or devices, and causing damage to a nuclear facility.
- The jurisdiction of South African courts in relation to offences under the Bill.
- The Bill empowers the police to stop and search vehicles and persons.
- Compelling evidence needs to be presented to justify detention for interrogation of persons suspected of withholding information relating to terrorist acts. Should adequate justification be presented the following issues need to be considered in relation to detention of suspects for interrogation:
  - Judicial assessment of applications for warrants for interrogation.
  - Furnishing the detainee with the reasons founding the warrant for detention.
  - Appearance before a judge within 48 hours of detention and again after 5 days.
  - The onus to establish justification for further detention of the detainee.
  - Detention to be for a period no longer than 14 days.
  - A detainee’s entitlement to consult with a legal practitioner of his or her choice.
  - The legal practitioner’s right to be present when the detainee is interrogated.
  - A detainee’s entitlement to be visited and treated by a medical practitioner of his or her choice.
  - A detainee’s right to communicate with and be visited by a spouse or partner, next of kin and chosen religious counsellor.
  - The admissibility of evidence obtained during interrogation from the detainee.
  - The factors to be considered for motivating the need for detention or further detention of a detainee.
  - People possessing information which may be essential for investigating any terrorist act to report such information. The Bill empowers Directors of Public Prosecution to indemnify such persons from being prosecuted in respect of the offences concerned.

**A draft report on terrorism will be finalised in the first quarter of 2001.**

**\* 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. It became clear during the course of the investigation that any proposed changes to the law relating to sexual offences would have far-reaching effects on the position not only of children, but also of adults. Consequently, and as a result of various other requests, the Commission decided to expand the scope of the investigation to include sexual offences against adults.

The names of the project committee members appointed for this investigation appear in **Annexure B**.

An issue paper was published in May 1997 for general information and comment.

A discussion paper on sexual offences: the substantive law, was published in September 1999 for general information and comment. An extensive consultation process on the discussion paper was launched. Submissions received have been collated and the preparation of a draft report is receiving attention. **It is envisaged that a draft report will be finalised by the second quarter of 2001.**

A discussion paper on sexual offences: process and procedure is receiving attention. This discussion paper addresses issues such as bail for sexual offenders, making it easier for victims of sexual offences to testify in court and the sentencing of persons convicted of sexual offences. **It is envisaged that a draft discussion paper will be finalised by the end of February 2001.**

A third discussion paper on prostitution is also receiving attention. **It is envisaged that a draft discussion paper will be finalised by the end of April 2001.**

**The preparation of a discussion paper on adult pornography will receive attention when the draft on prostitution has been finalised.**

\* **Project 108 - Computer-related crime**

The purpose of this investigation is to develop legislation to combat the use of computers to commit crimes. The names of the project committee members appointed for the investigation 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 this investigation.

Because of the wide scope of the investigation an incremental approach is adopted. 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 for general information and comment in August 1998.

Work in this project was suspended for a substantial period as a result of the researcher's involvement in other urgent investigations and activities.

A draft discussion paper on computer-related crime: preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects was approved by the project committee in November 2000. **The discussion paper will be considered by the Commission early in 2001.**

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

The investigation focuses mainly on the question whether the provisions contained in the Marriage Act are adequate or whether they should be amended.

A discussion paper was published for general information and comment in September 1999.

Evaluation of the comment on the discussion paper for purposes of a draft report commenced in August 2000 after the researcher had finalised the discussion paper on terrorism. The project leader resigned on 1 October 2000 but he had agreed to remain involved in the finalisation of a draft report. **A draft report will be considered by the Commission early in 2001.**

\* **Project 110 - Review of the Child Care Act, 1983**

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. The names of the members of the project committee appointed for the investigation are reflected in **Annexure B**.

An issue paper was published in May 1998 for general information and comment.

To enable the project committee to prepare a discussion paper with draft legislation, the members of the project committee and contract researchers have prepared consultation papers on selected issues as background documents to stimulate debate within specific focus groups.

The preparation of a draft discussion paper is receiving attention. Mr G G Smit, a former Commissioner, was contracted to draft the legislation. He assumed duty on 1 October 1999. **It is envisaged that a draft discussion paper and draft legislation will be finalised by the middle of 2001.**

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

The objective of the investigation is to determine whether or not the use of electronic equipment in court proceedings is a viable option to save costs or prevent delays in civil and criminal trials.

In view of several investigations with a higher priority, it has not yet been possible to commence with research. **The identification of a project leader and an outside researcher to assist with the research on a contractual basis is receiving attention.**

\* **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 objective of the investigation is to determine whether or in what respects disclosure of divorce proceedings should be permitted or prohibited.

The researcher allocated to the project was transferred to the Magistrate: Mankweng and another researcher had to take over the project.

**A draft discussion paper was submitted to the project leader in December 2000.**

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

The investigation is aimed at clarifying the uncertainty surrounding the carrying of firearms in public or at gatherings. The problem is compounded by different legislative enactments.

Professor R W Palmer of the University of Natal was appointed as a consultant to assist with the research. The completion of an issue paper was delayed pending the finalisation of the new Firearms Control Bill which greatly limits the issues to be researched.

**A meeting with the consultant to assess whether the investigation should remain on the Commission's programme will be held early in 2001.**

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

The investigation is aimed at clarifying the legal position of voluntary associations following a judgment of the Supreme Court of Appeal which denied legal personality to a voluntary association comprising more than twenty members.

Research has been kept in abeyance because of the researcher's involvement in other urgent investigations.

\* **Project 118 - Domestic partnerships**

The purpose of the investigation is *inter alia* to determine whether legal recognition should be given to same-sex and opposite sex partnerships and if so, what criteria should be used in determining the permanence of the relationship. Consideration will also be given to the question as to whether the criteria should be status or contract based.

The following options will be considered in the investigation:

- The legalisation of same-sex marriages.
- The introduction of a scheme of registered partnerships.
- The granting of recognition to partnership contracts and the enforceability of such contracts against third parties.
- The formal extension of rights and obligations of partnership to adults living in an interdependent



relationship but which is not a conjugal relationship.

**On 17 November the Commission decided that the Minister should be approached to approve the establishment of a project committee under the leadership of Judge CT Howie.**

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

The Fencing Act 31 of 1963 is obsolete and various Provincial Ordinances lack uniformity as regards the fencing of national roads. Problems arise where fences are removed or damaged and where farm animals stray onto roads and cause accidents.

Ms N Bawa, a member of the Cape Bar, was appointed as a consultant to assist with the research. An issue paper was published for general information and comment in June 2000.

**Comments received on the issue paper were forwarded to Ms Bawa in November 2000 with a view to preparing a draft discussion paper.**

**\* Project 121 - Consolidated legislation pertaining to international co-operation in civil matters**

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

**Research will commence as soon as a researcher can be made available.**

**\* Project 122 - Incapable adults**

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

**Research will commence as soon as a researcher can be made available.**

**\* Project 123 - Protected disclosures**

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

**Research will commence as soon as a researcher can be made available.**

\* **Project 124 - Privacy and data protection**

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

**Research will commence as soon as a researcher can be made available.**

\* **Project 125 - Prescription periods**

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

**Research will commence as soon as a researcher can be made available.**

## **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 which 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.

A brochure introducing the Commission is made available to the public at workshops and on other occasions.

### **\* Interaction with law reform bodies in other countries**

The good relations maintained by the Commission with law reform bodies in other countries 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.

Three members of the Law Reform Commission of Tanzania visited the South African Law Commission on 10 - 14 July 2000 to apprise themselves of the working procedures, best practices, and the environment of law reform. Aspects related to investigations on the programme of the Commission were also discussed.

On 10 August 2000 the Secretary of the Law Reform and Development Commission of Namibia had discussions with two researchers of the South African Law Commission on the practical effect of the Domestic Violence Act, 1998.

Ms Z Seedat (Commissioner), Mr W Henegan (Secretary) and Mr T D Rudman (Deputy Director-General: Legislation Research) visited the Law Commissions of England and Scotland in September 2000. The comprehensive discussions relating to working methods and statutory law revision were of great assistance to the Commission. The opportunity was also utilised to discuss the costing of legislation with the relevant authorities in the United Kingdom. The Commission would like to express its sincere appreciation for the assistance and the warm reception extended to the delegation.

An administrative officer and the librarian of the Law Commission of Malawi were part of a work attachment programme at the South African Law Commission from 9 - 20 October 2000. The officers were fully acquainted with functioning of the administrative component and the library of the Commission. Their affirmed learning experience enabled them to make suggestions to improve their own system at the Law Commission of Malawi.

On 21 November the Head of Administration and the Head of the Accounts Section of the Law Commission of Malawi were briefed on relevant aspects of the administration and financial management of the South African Law Commission.

\* **Electronic/printed media and liaison**

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

On 13 April, 8 August and 7 December 2000 the Commission hosted media conferences in Pretoria at which occasions discussion papers and reports were released for publication.

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 dealing with routine enquiries on a regular basis, researchers and project committee members also participated in the following programmes and discussions:

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON (Interviews, discussions, meetings, etc)
63: Review of the law of insolvency	Interviews with Radio Sonder Grense and Punt Radio.	
82: Sentencing	Interviews with Radio Sonder Grense, SA FM, Punt Radio and Cape Talk. Extracts from the press conference on the discussion paper on the new sentencing framework were broadcast on E TV.	
85: Aspects of the law relating to AIDS: Compulsory HIV testing of persons arrested in sexual offence cases		Discussion with Prof PWW Coetzer (Head: Department of Community Health, Medunsa) on his suggestions for legislation.  Discussions regarding draft legislation and regulations with Directorate: Subordinate Legislation, Department of Justice and Constitutional Development.
90: Customary marriages	Interviews with Radio Motswedding, Thobela FM and Lesedi.	
94: Community courts		Discussions with Mr Bidaguren, a student from the University of the Basque Country, Bilbao, Spain, to assist him with information for his PhD research.
105: Terrorism	Interviews with PM Live, Monitor Spectrum, East Coast Radio, Classic FM, Kaya Radio, Cape Talk and Punt Geselsradio.	
106: Juvenile justice	Interviews with Natal Mercury, Sowetan, Sunday Independent, Business Day, "Newsmaker" TV programme, PM Live, AM Live, 5FM, Cape Talk Radio.	
107: Sexual offences  Commercial sex work	Interview with Sunday Times.	
110: Review of the		Meeting with Social

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON (Interviews, discussions, meetings, etc)
Child Care Act		<p>Security Task Team of the Department of Welfare to discuss social security for children.</p> <p>Submission on social security for children to the Taylor Committee of Inquiry.</p> <p>Briefing of delegates from the Law Reform Commission of Tanzania.</p>

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**

PROJECT	VENUE/LOCATION	TARGET AUDIENCE	DATE
63: Review of the law of insolvency	Law Commission	Media briefing: Printed and electronic media representatives.	13 April
82: Sentencing	Law Commission	Media briefing: Printed and electronic media representatives.	13 April
	Law Commission	Workshop involving all sentencing role players.	12 June
	Durban	Workshop involving all sentencing role players.	13 June
	Cape Town	Workshop involving all sentencing role players.	14 June
	Bloemfontein	Workshop involving all sentencing role players.	15 June
	Cape Town	International experts on the law of sentencing.	28 - 30 June

PROJECT	VENUE/LOCATION	TARGET AUDIENCE	DATE
85: Aspects of the law relating to AIDS	Law Commission	Consultative meeting between HIV/AIDS project committee and 30 experts in the fields of criminal law; women's rights; victims' rights; police practice; prosecuting and judicial practice; and HIV/AIDS and behavioural science.	3 Feb
The need for a statutory offence aimed at harmful HIV-related behaviour	Law Commission	Consultative meeting between HIV/AIDS project committee and 29 experts in the fields of criminal procedure; law of evidence; constitutional law; human rights and HIV/AIDS; prisoners' rights and correctional health practice; victims' rights and victim support and counselling services; children's rights; forensic practice and responsibility; police practice; prosecuting and judicial practice; and medical aspects relating to HIV/AIDS.	4 Feb
Compulsory HIV testing of persons arrested in sexual offence cases	Law Commission	Consultative meeting between HIV/AIDS project committee and 29 experts in the fields of criminal procedure; law of evidence; constitutional law; human rights and HIV/AIDS; prisoners' rights and correctional health practice; victims' rights and victim support and counselling services; children's rights; forensic practice and responsibility; police practice; prosecuting and judicial practice; and medical aspects relating to HIV/AIDS.	4 Feb
90: Customary law of succession	Law Commission	Media briefing: Printed and electronic media representatives.	8 August
105: Terrorism	Law Commission	Media briefing: Printed and electronic media representatives.	8 August
106: Juvenile justice	Parliament, Cape Town	Briefing of Deputy Minister and senior officials of Department of Justice and Constitutional Development on costing of Juvenile Justice draft Bill.	17 March
	Law Commission	Media briefing: Printed and electronic media representatives.	8 August
107: Sexual offences	Law Commission	Briefing of SAPS forensic nurses.	12 June
Process and procedure	National Director of Public Prosecutions, Pretoria	Briefing of National Director of Public Prosecutions Sexual Offence Unit	6 July
Substantive law			
110: Review of the Child Care Act			

PROJECT	VENUE/LOCATION	TARGET AUDIENCE	DATE
Early childhood development	Law Commission	Focus group workshop with identified experts.	30 March
Residential care	Durban	Focus group workshop with identified experts.	29 - 30 May
Foster care and adoption	Cape Town	Focus group workshop with identified experts.	27 - 28 June
Community project			
Rights and responsibilities in terms of the Domestic Violence Act	Law Commission	Department of Justice and Constitutional Development employees.	27 Sept 1 Nov
Rights and responsibilities in terms of debt legislation	Law Commission	Department of Justice and Constitutional Development employees.	22 Nov
Children and family rights information session	Sunnyside Primary School	Learners and teachers.	24 Nov
Violence against women	Department of Health	Employees of Department of Health and Welfare	27 Nov
Family rights information session	Zoe Bible Church, Soweto	Congregants	10 Dec

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. Apart from the interaction with foreign law reform agencies alluded to above, the Chief Justice of Liberia, Madame Justice Gloria Scott, visited the Law Commission on 13 October 2000. She displayed a keen interest in the Commission's work relating to women and children.

**\* 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, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
82: Sentencing	<p>Workshop on the new sentencing framework: Centre for the Study of Violence and Reconciliation, Johannesburg, 21 June.</p> <p>Conference on crime and human rights: University of Western Cape, 29 July.</p> <p>Workshop on victims and their treatment in the criminal justice system: CSV, Johannesburg, September.</p> <p>10<sup>th</sup> international symposium on victimology: Montreal, Canada, 3 -8 August.</p> <p>International conference on human rights and the administration of criminal justice: International Society for the Reform of Criminal Law, 3 - 8 December.</p>	
85: Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour	<p>Round-table plenary session of the 13<sup>th</sup> international conference on HIV/AIDS (AIDS2000): Durban, 10 July.</p> <p>AIDS legal network workshop on criminal law and HIV/AIDS: University of Natal, Durban, 13 July.</p>	Staff seminar on HIV/AIDS and Criminal Law, Department of Health, Pretoria, 5 May.
94: Community courts	<p>Conference on reviewing justice to prevent crime at local level - diversion and reintegrative shaming: Kyalami Metropolitan Council, NASREC, 23 - 24 March.</p> <p>Workshop on community participation in the administration of justice: Centre for Study of Violence and Reconciliation, 8 July.</p>	
100: Domestic violence	Seminar on protection of victims of violence: UNISA empowerment	

PROJECT	WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
	<p>events, 27 October.</p> <p>Men's summit on violence against women: National Director of Public Prosecutions, Pretoria, 7 December</p>	
105: Terrorism	<p>International conference on countering terrorism through enhanced international cooperation: International Scientific and Professional Advisory Council of the United Nation's Crime Prevention and Criminal Justice Programme (ISPAC), Courmayeur, Mont Blanc, Italy, 21 - 24 September.</p>	
106: Juvenile justice	<p>Workshop on promoting informed debate in civil society about child justice issues: Child Rights Project, Pretoria, 28 - 29 November.</p>	
107: Sexual offences	<p>Workshop on commercial sexual exploitation of children: Department of Welfare, 19 July.</p> <p>Seminar on the role of statistics and research in combating rape: CSIR, 14 August.</p>	<p>Briefing of delegates from the Law Reform Commission of Tanzania, 11 July.</p> <p>Briefing of delegates from the Law Reform and Development Commission of Namibia, 9 August.</p>
110: Review of the Child Care Act	<p>10<sup>th</sup> world conference of the International Society of Family Law: Brisbane, Australia, 9 - 13 July.</p> <p>International conference on child abuse and neglect: International Society for the Prevention of Child Abuse and Neglect and the South African Society for the Prevention of Child Abuse and Neglect, Durban 3 - 6 September.</p> <p>Conference on protection of the rights of the child: Free State University, 21 - 23 August.</p>	<p>Briefing of Welfare Portfolio Committee on the status of the project, 12 April.</p> <p>Briefing of Welfare Portfolio Committee on the possibility of effecting interim amendments to the Child Care Act, 4 October.</p>

\* **Internet**

An Internet site has been administered for the Commission free of charge by the Wits Law School since March 1997 (<http://www.law.wits.ac.za/salc/salc.html>). 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.

## 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. 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 the Commission would not be able to perform its duty satisfactorily.

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 Technical Co-operation (GTZ)*  
 Customary law  
 Simplification of criminal procedure  
 Sentencing  
 Assistance with training of personnel and organisational development measures
- *USAID*  
 Community courts
- *Rädda Barnen (SA)*  
 Review of the Child Care Act  
 Sexual offences
- *Save the Children Fund (UK)*  
 Review of the Child Care Act
- *Nelson Mandela Children's Fund*  
 Review of the Child Care Act
- *Department of Welfare and Population Development*  
 Review of the Child Care Act

The Commission wishes to extend a special word of gratitude to Mr Rainer Pfaff, resident expert of the German Technical Co-operation (GTZ), for his contributions to and involvement in a variety of the Commission's investigations.

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 for Justice and Constitutional Development for their personal interest in and support for the Commission's work. The Department of Justice and Constitutional Development as a whole is thanked for its co-operation and goodwill.

## ANNEXURE A

## MEMBERS OF THE COMMISSION

## IN ORDER OF APPOINTMENT

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

Title/Name	Term of office
<b>Chairpersons</b>	
Judge D H Botha, Judge of Appeal	1973-09-28 to 1975-12-28
Chief Justice P J Rabie DMS	1976-02-27 to 1982-05-31
Judge G Viljoen, OMSG, Judge of Appeal	1982-09-30 to 1988-11-30
Judge H J O van Heerden, Judge of Appeal	1988-12-01 to 1995-12-31
Chief Justice I Mahomed	1996-01-01 to 2000-06-17
Madam Justice Y Mokgoro*, Judge of the Constitutional Court	2000-11-03 to date
<b>Vice-Chairpersons</b>	
Judge President N James DMS	1973-09-28 to 1977-07-13
Judge G Viljoen, OMSG, Judge of Appeal	1977-09-22 to 1982-09-27
Judge H J O van Heerden, Judge of Appeal	1982-09-30 to 1988-11-30
Judge P J J Olivier, Judge of Appeal	1988-12-01 to 1998-12-31
Madam Justice Y Mokgoro, Judge of the Constitutional Court	1999-01-01 to 2000-11-02
<b>Full-time members</b>	

Title/Name	Term of office
Mr G G Smit	1982-01-01 to 1995-12-31
Judge P J J Olivier	1986-02-01 to 1995-03-31
Prof R T Nhlapo	1996-01-01 to 2000-09-30
<b>Members</b>	
Mr D J du P Geldenhuys	1973-09-28 to 1975-10-31
Mr C P Joubert SC	1973-09-28 to 1974-08-20
Mr J E Knoll OMSS	1973-09-28 to 1995-12-31
Mr 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
Mr H J O van Heerden SC	1974-09-30 to 1976-08-11
Mr J C Ferreira SC	1975-09-22 to 1979-10-31
Mr M Bliss QC	1976-10-07 to 1977-02-24
Mr F H Grosskopf SC	1977-07-01 to 1980-11-21
Mr G G Smit	1979-02-01 to 1982-01-01
Mr P A J Kotzé	1979-11-01 to 1988-10-30
Mr P M Nienaber SC	1981-06-14 to 1982-07-27
Mr P J J Olivier SC	1982-09-30 to 1988-12-01
Prof J T Delport	1982-09-30 to 1987-05-27
Prof D J Joubert	1987-12-21 to 1995-12-31
Dr W G M van Zyl	1988-11-01 to 1991-10-31
Mr R P McLaren SC	1989-07-24 to 1990-10-31

Title/Name	Term of office
Prof C R M Dlamini SC	1991-05-08 to 1995-12-31
Mr J A Venter	1992-03-12 to 1995-12-31
Judge Y Mokgoro	1996-01-01 to 1998-12-31
Mr J J Gauntlett SC*	1996-01-01 to date
Judge M L Mailula*	1999-01-01 to date
Mr P Mojapelo*	1996-01-01 to date
Ms Z Seedat*	1996-01-01 to date
Judge C T Howie*	2000-11-03 to date



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

(Chairpersons of committees are marked with an asterisk.)

<b>Committee</b>	<b>Members</b>	
AIDS	Judge E Cameron*	
	Mr Z Achmat	Former Head, AIDS Law Project, Centre for Applied Legal Studies at the University of the Witwatersrand
	Dr P J Haasbroek	Group economist, Barlows Ltd
	Ms M Makhalemele	Community representative
	Dr M J Matjila	Department of Community Health, MEDUNSA
	Prof R T Nhlapo	Full-time member, Law Commission
	Ms L Seftel	Chief Director, Labour Relations, Department of Labour
	Dr N Simelela	Director, HIV AIDS/STDs, Department of Health
	Ms A Strode	National Co-ordinator, Lawyers for Human Rights: AIDS and Human Rights Programme
	Prof C van Wyk	Faculty of law, University of South Africa

Committee	Members	
Arbitration	<i>International arbitration:</i> Judge J Steyn*	
	Prof D W Butler	Faculty of law, University of Stellenbosch
	Mr R H Christie QC	Formerly Professor of law, University of Zimbabwe
	Mr J J Gauntlett SC	Member, Law Commission
	<i>Additional members for domestic arbitration:</i> Prof D A Ailola Judge J M Hlophe Ms S Pather Mr C M Sardiwalla Mr N Singh SC	
	<i>Additional members for ADR:</i> Mr R Choudree	
	Ms B Hechter	Office of the Family Advocate
	Mr A Jooste	Chief Magistrate, Cape Town
	Ms N Mkefa	Cape Town Metropolitan Council
	Mr P Pretorius	Johannesburg Bar
Computer related crimes	Prof D P van der Merwe*	Faculty of law, University of South Africa

Committee	Members	
	Capt B Grobler	SAPS, Computer Crime Investigations
	Capt J B Grobler	SAPS, Commercial Crime Unit
	Mr L W Mahlali	Office of the Director for Public Prosecutions, Kimberley
	Mr I M Melamed	Computer Systems Consultant
	Prof R T Nhlapo	Full-time member, Law Commission
	Judge C O'Regan	
	Prof S H von Solms	Department of Computer Science, Rand Afrikaans University
	Judge R H Zulman	
Customary law	Prof T Nhlapo*	Full-time member, Law Commission
	Ms L G Baqwa	Attorney
	Prof T W Bennett	Faculty of Law, University of Cape Town
	Ms F Bosman SC	Former Chief Family Advocate
	Prof C R M Dlamini SC	Rector of the University of Zululand
	Judge Y Mokgoro	Chairperson, Law Commission
Insolvency	Judge R H Zulman*	

Committee	Members	
	Mr N Coetzer	Attorney
	Dr E de la Rey	Department Legal Services, Financial Services Board, formerly Professor of law, University of South Africa
	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
Islamic marriages and related matters	Judge MS Navsa*	
	Sheikh M F Gamielien	Muslim Judicial Council, Cape
	Moulana A A Jeena	United Ulama Council, Erasmia
	Ms F Mahomed	Member of Parliament
	Prof N Moosa	Faculty of Law, University of the Western Cape
	Mr M S Omar	Attorney, Durban; United Ulama Council
	Dr R A M Salojee	Member of Parliament
	Ms Z Seedat	Member, Law Commission

Committee	Members	
Juvenile justice	Ms A Skelton*	Child Justice Project
	Ms P Moodley	Researcher, Law Commission
	Ms Z Seedat	Member, Law Commission
	Prof J Sloth-Nielsen	Community Law Centre, University of the Western Cape
	Mr T Thipanyane	S A Human Rights Commission
	Ms M Tserere	Office of the National Director of Public Prosecutions
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

Committee	Members	
Review of the Child Care Act	Prof N Zaal*	Faculty of law, University of Durban-Westville
	Ms J Cronje	Department of Welfare
	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 Z Seedat	Member, Law Commission
	Ms A Skelton	Child Justice Project
	Prof J Sloth-Nielsen	Community Law Centre, University of the Western Cape
	Dr E Harvey	Department of Welfare
	Mr A Theron	Department of Welfare
	Judge B van Heerden	
	Ms E Swanepoel	Department of Welfare
Security legislation	Judge C T Howie*	
	Ms P Jana	Member of Parliament
	Mr G J Marcus SC	Johannesburg Bar
	Judge Y Mokgoro	Chairperson, Law

Committee	Members	
		Commission
	Mr D Tabata	Attorney
	Mr D Nkadimeng	Attorney
Sentencing	Prof D van Zyl Smit*	Faculty of law, University of Cape Town
	Ms L Camerer	Institute for Security Studies
	Mr K Govender	State Attorney
	Mr N Kollapen	Human Rights Commission
	Mr V Peterson	Department of Welfare, Mpumalanga
	Ms M E M Ramagoshi	National Network on Violence Against Women
	Mr P M Shabangu	Magistrate, Durban
Sexual offences	Ms Z Seedat (Chairperson)	Member, Law Commission
	Ms J van Niekerk (Project leader)	Childline, Durban
	Ms L Malepe	Tshwaranang Legal Advocacy Centre
	Ms C McClain	Commissioner, Human Rights Commission
	Prof J Milton	Faculty of law, University of Natal (Pietermaritzburg)
	Ms E H Mthombeni	Department of Correctional Services, Durban-Westville
	Judge T Pillay	

Committee	Members	
	Ms B Pithey	Public prosecutor, Cape Town
	Ms E M Schurink	Centre for Social Welfare Policy, HSRC
	Ms R L September	Institute of Child Family Development, University of the Western Cape
Simplification of criminal procedure	Judge L T C Harms*	
	Judge A E B Dhlodlo	
	Mr P A J Kotze	Johannesburg Bar
	Prof B Majola	Director, Legal Resources Centre
	Prof N C Steytler	Faculty 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
73	Simplification of criminal procedure
82	Sentencing
85	Aspects of the law relating to AIDS
90	Customary law
94	Arbitration
95	The admissibility of computer-generated evidence
96	The Apportionment of Damages Act, 1956
100	Family law and the law of persons * Maintenance
101	The application of the Bill of Rights to the criminal law, the law of criminal procedure and sentencing
105	Security legislation
107	Sexual offences
108	Computer-related crimes
109	Review of the Marriage Act, 1961
110	Review of the Child Care Act, 1983

Project number	Title
113	The use of electronic equipment in court proceedings
114	Publication of divorce proceedings
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
121	Consolidated legislation pertaining to international co-operation in civil matters
122	Incapable adults
123	Protected disclosures
124	Privacy and data protection
125	Prescription periods

## ANNEXURE D

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

(Current investigations marked with an asterisk,  
see Chapters 3 and 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 proceedings of evidence generated by computers	1982	RP 95/1982	Act 57 of 1983 passed
	° Final report	1986	ISBN 0 621 11348 4	Act 45 of 1988 passed
7	Revision of pre-Union statutes:			

Project number	Title	Year of report	Reference number of published report	Result
	° 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
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	1974	Not published	Act 55 of 1975 passed

Project number	Title	Year of report	Reference number of published report	Result
	in law			
15	The matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses	1982	RP 26/1982	Act 88 of 1984 passed, see also projects 41 and 51
16	Investigation into the application of set-off in insolvency	1975	Not published	No legislation recommended, see project 63
17	Examination of the convention on the form of an international will	1975	Not published	No legislation recommended, see project 22
18	Investigation into the enforceability of foreign arbitration awards in the Republic	1975	Not published	Act 40 of 1977 passed
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,	1991	ISBN 0 621 14189 5	Act 43 of 1992 passed

Project number	Title	Year of report	Reference number of published report	Result
	substitution and the succession rights of adopted children			
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			
	° Report	1992	ISBN 0 621 15356 7	See project 115
	° Supplementary report	1994	Not published	See 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 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	1976	RP 73/1977	No legislation

Project number	Title	Year of report	Reference number of published report	Result
	right of appeal for convicted persons in criminal proceedings			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 position of illegitimate children	1985	ISBN 0 621 10205 9	Act 82 of 1987 passed
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
			RP 158/1995	Referred back to the

Project number	Title	Year of report	Reference number of published report	Result
	° Supplementary report	1994	ISBN 0 621 16869 6	Commission, 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	Institution of Legal Proceedings Against Organs of State Bill currently under consideration by Parliament
43	Investigation into the advancement of the age of majority	1985	ISBN 0 621 10246 6	No legislation recommended
44	A comprehensive and comparative inquiry into the protection of all rights of personality	-	-	Struck off
45	Women and sexual offences in South Africa	1985	ISBN 0 621 09609 1	Acts 103 of 1987, 39 of 1989 and 113 of 1993 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	Report being considered by the Department of Justice and Constitutional Development
48	Examination of the limits of criminal defamation	1983	Not published	No legislation recommended



Project number	Title	Year of report	Reference number of published report	Result
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	Recommendations not implemented
51	Marriages and customary unions of black persons:			
	° Problems relating to the acquisition of leasehold	1985	Not published	Section 1 of Act 90 of 1985 enacted
	° Final report	1986	-	Act 3 of 1988 passed
52	Investigation into the legal consequences of sexual realignment and related matters	1995	RP 32/1996 ISBN 0 621 17334 7	Report being considered by the Department of Justice and Constitutional Development
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			
	° Interim report	1991	Report: ISBN	Act 200 of 1993 passed

Project number	Title	Year of report	Reference number of published report	Result
			0 621 14128 3 Summary: ISBN 0 621 14127 5	
	° 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	Act 35 of 1998 passed
63*	Review of the law of insolvency:			
	° Interim report: 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: Insolvency interdicts	1992	ISBN 0 621 14964 0	Act 122 of 1993 passed, see also Chapter 5
	° Interim report: Appeals against sequestration orders	1993	ISBN 0 621 15421 0	Section 1 of Act 129 of 1993 enacted, see also Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
	° Interim report: 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
	° Interim report: The enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency	1999	Not printed	Act 42 of 2000 passed (not promulgated yet)
	° Report: The review of the law of insolvency	2000	RP 89/2000 ISBN 0 621 30069 1	Report being considered by the Department of Justice and Constitutional Development
64	The legal protection of information	-	-	Struck off
65	Surrogate motherhood	1992	ISBN 0 621 15353 2	Legislation being prepared by the Department of Justice and Constitutional Development
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
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

Project number	Title	Year of report	Reference number of published report	Result
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
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:			
	° First interim report: Appeal procedures	1994	-	Recommendations to be dealt with in conjunction with proposed legislation on superior courts
	° Second interim report: The simplification of the criminal procedure	1995	RP 70/1996 ISBN 0 621 17405 X	Act 86 of 1996 passed
	° Third interim report: The right of the Director of Public Prosecutions to appeal on questions of fact	2000	Currently being printed	Under consideration by the Department of Justice and Constitutional Development
74	Debt collecting:			
	° Interim report on imprisonment for debt	1994	RP 199/1995 ISBN 0 621 16956 0	Act 81 of 1997 passed
	° Final report	1995	RP 198/1995 ISBN 0 621 16960 9	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

Project number	Title	Year of report	Reference number of published report	Result
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 International Child Abduction	1992	Not published	Act 72 of 1996 passed
81	Submission of a question of law to the Appellate Division of the Supreme Court concerning certificates under instruments of debt as conclusive proof of liability	1991	Not published	<i>Ex parte Minister of Justice in re: Nedbank v Abstein Distri-butors and Donelly v Barclays National Bank</i> 1995 3 SA 1 (A)
82*	Sentencing:  Report on a new sentencing framework	2000	Currently being printed	Under consideration by the Department of Justice and Constitutional Development
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	For status of implementation of

Project number	Title	Year of report	Reference number of published report	Result
			27345 7	recommendations by Departments of Health and Labour see Chapter 1 of fourth interim report
	° Second interim report: Pre-employment HIV testing	1998	RP 120/1998 ISBN 0 621 28049 6	Recommendations incorporated in the Employment Equity Act 55 of 1998
	° Third interim report: HIV/AIDS and discrimination in schools	1998	RP 121/1998 ISBN 0 621 28048 8	Department of Education promulgated Commission's draft National Policy on HIV/AIDS for Learners in Public Schools on 10 August 1999
	° Fourth interim report: Compulsory HIV testing of persons arrested in sexual offence cases	2000	Currently being printed	Under consideration by the Department of Justice and Constitutional Development
86	Euthanasia and the artificial preservation of life	1998	RP 186/1999 ISBN 0 621 29831 X	Report submitted to Minister for Justice and Constitutional Development on 25 May 1999, referred to Department of Health
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	1998	RP 181/1999 ISBN 0 621 29818 2	Under consideration by the Department of Justice and Constitutional Development
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

Project number	Title	Year of report	Reference number of published report	Result
90*	Customary law:			
	° Customary marriages	1998	RP 170/1998 ISBN 0 621 28755 5	Act 120 of 1998 passed
	° Conflicts of law	1999	RP 81/2000 ISBN 0 621 30061 6	Report being considered by the Department of Justice and Constitutional Development
91	The review of the offences created by sections 36 and 37 of the General Law Amendment Act 62 of 1955, and section 1 of Act 50 of 1956 and related matters	-	-	Struck off
92	The re-evaluation of the offence created by section 1 of Act 1 of 1988	-	-	Struck off
93	Speculative and contingency fees	1996	RP 37/1997 ISBN 0 621 17648 6	Act 66 of 1997 passed
94*	Arbitration:			
	° International arbitration	1998	RP 30/1999 ISBN 0 621 28861 6	Cabinet approval for introduction in Parliament obtained. Introduction pending
	° Domestic arbitration	-	-	See Chapter 5
	° Community dispute resolution structures	-	-	See Chapter 5
95*	The admissibility of computer-generated evidence	-	-	See Chapter 5
96*	Apportionment of Damages Act, 1956	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
97	Unjustified enrichment	-	-	Struck off
98	International co-operation in criminal prosecutions	1995	RP 47/1996 ISBN 0 621 17357 6	Acts 75 of 1996, 76 of 1996 and 77 of 1996 passed
99	The application of the rule <i>huur gaat voor koop</i> with reference to the question whether a lessee has a choice to continue the lease with a new lessor after the sale of the leased property	-	-	Struck off
100*	Family law and the law of persons:			
	° Access to minor children by interested persons	1996	RP 107/1996 ISBN 0 621 17515 3	Access to Minor Children Bill to be submitted to Cabinet in April 2000
	° Domestic violence	-	See Annexure G	Act 116 of 1998 passed
	° Maintenance:  Interim report	1998	RP 137/1998 ISBN 0 621 28685 0	Act 99 of 1998 passed, see Chapter 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. Draft Bill published for comment



Project number	Title	Year of report	Reference number of published report	Result
				by that Department
105*	Review of security legislation			
	° Monitoring and Interception Prohibition Act 127 of 1992	1999	RP 203/1999 ISBN 0 621 29897 2	Report being considered by the Department of Justice and Constitutional Development
	° Terrorism	-	-	See Chapter 5
106	Juvenile Justice	2000	Currently being printed	Report being considered by the Department of Justice and Constitutional Development
107*	Sexual offences	-	-	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	1999	RP 80/2000 ISBN 0 621 30062 4	Recommendations not implemented yet
112	Sharing of pension benefits	1999	RP 82/2000 ISBN 0 621 30060 8	Report being considered by the Department of Justice and Constitutional Development
113*	Use of electronic equipment in court proceedings	-	-	See Chapter 5
114*	Publication of divorce proceedings	-	-	See Chapter 5
115	Review of administrative law	1999	ISBN 0 621 29881 6	Promotion of Administrative Justice Act 3 of 2000 passed
116*	The carrying of firearms and	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
	other dangerous weapons			
117*	The legal position of voluntary associations	-	-	See Chapter 5
118*	Domestic partnerships	-	-	See Chapter 5
119*	Uniform national legislation on the fencing of national roads	-	-	See Chapter 5
120	Section 63(3) of the Insurance Act 27 of 1943	-	-	Struck off
121*	Consolidated legislation pertaining to international co-operation in civil matters	-	-	See Chapters 3 and 5
122*	Incapable adults	-	-	See Chapters 3 and 5
123*	Protected disclosures	-	-	See Chapters 3 and 5
124*	Privacy and data protection	-	-	See Chapters 3 and 5
125*	Prescription periods	-	-	See Chapters 3 and 5

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

(In order to involve the community actively 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 empowerment)	0 621 17718 0 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

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
			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
15	59	Islamic marriages and related matters	0 621 30089 6 May 2000
16	119	Uniform national legislation on the fencing of national roads	0 621 30188 4 July 2000

**ANNEXURE F****DISCUSSION PAPERS PUBLISHED BY THE COMMISSION**

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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
1	37	Preference on insolvency	18 March 1983
2	22	Law of succession: Intestate succession	17 February 1984
3	9	Law of trusts	24 February 1984
4	41	Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband	21 September 1996
5	49	Offences committed under the influence of liquor or drugs	10 August 1984
6	43	Investigation into the advancement of the age of majority	15 February 1985
7	38	Investigation into the legal position of illegitimate children	22 February 1985
8	33	Review of the law of prize	12 April 1985
9	25	Statute law: Investigation into the law relating to theft and house-breaking	Not published
10	51	Marriages and customary unions of Black persons	13 September 1985

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
11	6	Review of the law of evidence	25 April 1986
12	57	Anton Piller type of orders	Not published
13	22	Review of the law of succession: The introduction of a legitimate portion or the granting of a right to maintenance to a surviving spouse	8 August 1986
14	22	Review of the law of succession: Formalities of a will	17 October 1986
15	24	Investigation into the courts' powers of review of administrative acts	2 January 1987
16	62	The protection of a purchaser of securities	27 April 1987
17	22	Review of the law of succession: Amendment and repeal of wills	23 September 1987
18	61	Enduring powers of attorney and the appointment of curators for mentally incapacitated persons	0 7970 1381 4 18 March 1988
19	22	Review of the law of succession: Disqualification from inheriting, substitution and the succession rights of adopted children	0 7970 1401 2 26 February 1988
20	60	Domicile	0 7970 1435 7 26 August 1988
21	62	The protection of a purchaser of securities	0 7970 1460 8 31 March 1988

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
22	50	Proposals for the reform of the Bills of Exchange Act	0 621 1198 9 X 19 December 1988
23	46	The giving of security by means of movable property	0 7970 1558 2 7 October 1988
24	52	Investigation into the legal consequences of sexual realignment and related matters	0 7970 1589 2 17 June 1994
25	58	Group and human rights	GPS 003 9160 10 March 1989
26	12	Amendment of section 7(3) of the Divorce Act, 1979	0 7970 1667 8 1 March 1989
27	69	The acquisition and loss of ownership of game	0 7970 1727 5 29 May 1989
28	71	The protection of child witnesses	0 7970 1826 3 12 June 1989
29	63	Insolvency: Requirements for and alternatives to sequestration	0 7970 1854 9 7 August 1989
30	63	Insolvency: Qualifications, appointment and discharge of trustees	0 7970 1954 5 10 November 1989
31	66	Reform of the South African law of bail	0 7970 2078 0 December 1990
32	75	Bribery	0 7970 2126 4 March 1990
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	0 7970 2292 9

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		review of administrative acts	December 1991
35	63	Insolvency: Insolvency interdicts	0 7970 2296 1 May 1991
36	62	The protection of a purchaser of securities	0 7970 23003 September 1991
37	68	Access to police dockets	0 7970 2316 X July 1991
38	65	Surrogate motherhood	0 7970 2381 X September 1991
39	63	Insolvency: Rehabilitation	0 7970 2490 5 April 1992
40	78	Interest on damages	0 7970 2607 X May 1992
41	63	Insolvency: Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent	0 7970 2638 X July 1992
42	73	Simplification of the criminal procedure: Working paper on appeal procedure	0 7970 2641 X July 1992
43	41	Investigation into the possibility of 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 illegiti-	0 621 15329 X



Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
		mate child	February 1993
45	76	Jewish divorces	0 621 15331 1 January 1993
46	67	The Usury Act and related matters	0 621 15021 5 April 1993
47	87	Jurisdictional lacuna in the Supreme Court Act 59 of 1959	0 621 15429 6 April 1993
48	62	The protection of a purchaser of shares	0 621 15848 8 October 1993
49	73	Simplification of criminal procedure	0 621 15923 9 November 1993
50	74	Debt collecting	0 621 15933 6 November 1993
51	70	Limitation of professional liability	0 621 15955 7 December 1993
52	84	Application of the trapping system	0 621 15959 X December 1993
53	86	Euthanasia and the artificial preservation of life	0 621 15994 8 February 1994
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	0 621 16358 9 December 1994

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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
	63	Review of the law of insolvency: Draft Bill and explanatory memorandum: Executive summary	0 621 17510 2 August 1996
67	96	Apportionment of Damages Act, 1956	0 621 17543 9 October 1996
68	85	Aspects of the law relating to AIDS	0 621 17550 1 October 1996
69	94	International commercial arbitration	0 621 176028 December 1996
70	100	Family law and the law of persons: Domestic violence	0 621 17650 8 February 1997
71	86	Euthanasia and the artificial preservation of life	0 621 17724 5 April 1997
72	85	Aspects of the law relating to AIDS: Pre-employment HIV testing	0 621 27350 3 June 1997
73	85	Aspects of the law relating to AIDS: 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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
78	105	Review of security legislation: The Interception and Monitoring Prohibition Act 127 of 1992	0 621 28847 0 November 1998
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
81	115	Administrative law	0 621 28895 0 January 1999
82	90	Customary law: Traditional courts and the judicial function of traditional leaders	0 621 29273 7 May 1999
83	94	Arbitration: Domestic arbitration	0 261 29371 7 September 1999
84	85	Aspects of the law relating to AIDS: Compulsory HIV testing of persons arrested in sexual offence cases	0 621 29372 5 September 1999
85	107	Sexual offences: The substantive law	0 621 29374 1 September 1999
86	63	Review of the law of insolvency	0 621 29377 6 September 1999
87	94	Arbitration: Community dispute resolution structures	0 621 29381 4 September 1999
88	109	The review of the Marriage Act 25 of 1961	0 621 29428 4 September 1999

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
89	73	Simplification of criminal procedure: The right of the Attorney-General to appeal on questions of fact	0 621 29935 9 January 2000
90	101	The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing	0 621 29936 7 January 2000
91	82	Sentencing: A new sentencing framework	0 621 30070 5 April 2000
92	105	Review of security legislation: Terrorism: Section 54 of the Internal Security Act 74 of 1982	0 621 30184 1 July 2000
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## ANNEXURE G

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