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SALC BULLETIN

Newsletter of the South African Law Commission

Working methods

The following is a brief outline of the functioning of the Commission: The Commission's working methods are intended to promote law reform pursuant to its enabling statute. Professional independence, careful and comprehensive research and open procedures are important to that process. Interaction with interested persons and bodies and the maximum involvement of the community at large are indispensable to it. So too is the application of comparative legal analysis.

The Commission has established a working committee to perform the activities assigned to it by the Commission. The working committee serves as the executive committee of the Commission. In accordance with the Commission's directives this committee attends to both routine and urgent matters.

In some instances the Commission follows the practice of instituting a project committee consisting of experts to assist with an investigation and advise the Commission if a specific investigation in the Commission's programme so requires.

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 professional component of the Secretariat consists of State Law Advisers whose task is to perform 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. The administrative staff assists the professional component, as well as the members of the Commission, in all aspects of administration involved in the daily management of the Commission.

The process of law reform begins with the submission to the Commission of a law reform proposal. A proposal may emanate from the Minister of Justice, members of the Government, parliamentarians, State departments, the public or private sector, or members of the general public. Furthermore the Commission itself may initiate law reform proposals. A law reform proposal is first assessed by the professional staff, and then considered by the working committee. If thought appropriate in terms of section 5(2) of the Act, it is included as a project (investigation) in the Commission's programme after approval by the Minister of Justice. To date, all decisions to include investigations in the Commission's programme have been approved at Ministerial level.

After the inclusion of an investigation in the Commission's programme, the Commission determines whether a project committee should be established in respect of the investigation. In appointing a project committee the Commission generally attempts to find candidates who are representative of the population and who are knowledgeable in a particular field. A researcher from the Commission's Secretariat is designated to conduct the necessary research. Research work may also be shared by the members of the project committee.

In order to secure community participation at an early stage, the Commission has decided to introduce, in appropriate circumstances, the publication of an issue paper as the first step in the consultative process. The purpose of such a paper is to announce a particular investigation (already included in the Commission's programme), to elucidate the problems that have given rise to the investigation, to point to possible options available for solving those problems and to initiate and stimulate debate on identified issues. After considering the comment received on an issue paper and further research conducted under the direction and guidance of the project leader or, if applicable, the project committee, the researcher responsible for the investigation prepares a draft discussion paper. The Commission or its working committee considers and approves the discussion paper for publication and distribution among interested persons, bodies and institutions for purposes of eliciting comment on the law reform proposals it contains. It is made clear that the opinions expressed in discussion papers do not represent the Commission's final views and that such documents are merely a

further step in the consultation A further method used to elicit comments and to stimulate debate on discussion papers is the holding of workshops and seminars. The Commission has successfully employed this method in a number of its investigations. It may also be desirable to present information seminars on the Commission's activities in selected centres in the country. Seminars are used to acquaint interest groups and members of the public with the Commission, its objectives and its investigations.

After the comments on a discussion paper have been received and analysed, a draft report is submitted to the full Commission for consideration and approval. Copies of the report are submitted to the Minister of Justice for consideration. It is usually recommended to the Minister that the report be published officially. The existence of the report is made known to members of the general public by means of a media statement and a media conference.

Although it is desirable that a law reform body's discussion papers and reports should be written in language comprehensible by the public at large, the legal issues and proposals contained in those documents are also directed at the legal community, government departments responsible for promoting the proposals for reform and also various parliamentary committees concerned with the examination of draft legislation. In the beginning the Commission published terse reports which gave rise to problems with the implementation of its proposals. At other times more scholarly and often lengthy dissertations have been published. However, a balance has to be struck between the need for easily comprehensible information couched in plain language and for comprehensive analytical process.
discussion of legal problems.

Appointment of project committee members

The following appointments have been made to project committees:

Maintenance

Mr P Mojapelo: Member of the Commission.
Ms Z Seedat: Member of the Commission.
Prof S Burman: Centre for Socio-Legal Research (Western Cape).
Ms B Makhene: Ministry of Justice.
Ms M Motsei: Agisanang Domestic Abuse Prevention & Training (Alexandra).
Ms A Ramlal: Magistrate (maintenance), Johannesburg.
Mr E Rasefate: Department of Justice.
Prof I Schäfer: Editor, Family Law Service (Grahamstown).
Prof J Sinclair: University of Pretoria.
Ms D Singh: Family Advocate, Durban.
Ms A Thorton: Department of Health and Welfare.

Domestic Violence

Ms Z Seedat: Chairperson and member of the Commission.
Ms H Combrinck: University of the Western Cape.
Ms J Fedler: Tshwaranang Legal Advocacy Centre to End Violence Against Women (Jhb).
Ms L A Foster: Masimanyane Women's Support Centre (East London).
Mr K-H Kuhn: Magistrate, Pietermaritzburg.
Ms L Makhura: Northern Province Rural Development Forum.
Ms R Manjoo: KwaZulu Natal Network on Violence Against Women.
Ms M Monakali: Ilitha LaBantu (Western Cape).
Ms M Motsei: Agisanang Domestic Abuse Prevention & Training (Alexandra).
Ms F Stewart: Attorney, Cape Town.
Ms P Zikalala: Lawyers for Human Rights (Durban).

Review of the Child Care Act

Prof B Van Heerden: University of Cape Town (Chairperson)
Ms Z Seedat: Member of the Commission
Ms J Loffell: Johannesburg Child Welfare Society
Ms M Mabetoa: Department of Welfare
Mr M Masutha: Department of Welfare
Dr C Matthias: University of Durban-Westville
Ms B Mbambo: Social Development Consultant
Mr M Mtshali: Child Welfare Commissioner, Pietermaritzburg
Ms A Skelton: Lawyers for Human Rights, Pietermaritzburg
Ms J Sloth-Nielsen: University of the Western Cape Community Law Centre
Ms H Starke: Department of Welfare
Prof N Zaal: University of Durban-Westville

Computer related crimes

Prof D Van Der Merwe: University of South Africa (Chairperson)
Prof R T Nhlapo: Member of the Commission:
Capt J B Grobler: SAPS Commercial Crime Unit
Adv L W Mahlati: Office for Serious Economic Offences
Mr I M Melamed: Business System Solutions (Johannesburg)
JusticeC O'Regan: Constitutional Court
Prof S H Von Solms: Department of Computer Science, Rand Afrikaans University
Justice R H Zulman: Chairperson of the Rules Board for Courts of Law

Issue papers

Mandatory minimum and maximum sentences

During July 1997 the Commission published an issue paper on mandatory minimum and maximum sentences for general information and comment. The issue paper forms part of the Commission's comprehensive review of sentencing in South Africa.

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

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

Comments are invited on the following options for reform:

- Enactment of sentencing guidelines: presumptive sentencing guidelines

One option is to set up a sentencing commission to develop sentencing guidelines in respect of certain offences. In this regard the best example is the Minnesota sentencing guidelines in the USA where the enabling statute directed the sentencing commission to develop guidelines which were to specify presumptively correct prison commitment and prison duration rules. Specific principles are used as determinants of the presumptive correct sentence, for example the severity of the offence and the accused's criminal record. The court is allowed to depart from the presumptive correct sentence if special circumstances exist.

- Voluntary sentencing guidelines

This option requires the development of sentencing guidelines which are not required by law to be followed, but which simply guide the courts in the exercise of their discretion. Such policies are based on past sentencing practices but may be elaborated either by appelate courts or more formally by a sentencing commission or council.

- The adoption of legislative guidelines which assist in determining the choice and length of the punishment

This option is based on the Swedish model which provides that the legislature determine the nature of punishment and the penal value attributed to the particular offence. The penal value is determined with special regard to the harm, offence or risk which the conduct involved and what the accused realized or should have realized about the conduct including his intentions or motives.

- The enactment of principles of sentencing including guidelines which determine the imposition of imprisonment

This option is based on the proposals of the Canadian Sentencing Commission which recommended the enactment of the principles of sentencing. Provision is inter alia made for principles governing the determination of the sentence, i.e that the sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender for the offence. In addition a number of factors are listed which the court has to consider in determining the sentence and it includes aggravating and mitigating circumstances, the need for consistency in sentencing of offenders for similar offences committed, the need not to impose excessive sentences, the fact that imprisonment should not be imposed solely for the purpose of rehabilitation, and the circumstances under which imprisonment should be imposed.

- The enactment of presumptive sentencing guidelines to guide the imposition of custodial and non- custodial sentences

Presumptive guidance is statutory orders which impose a predetermined sentence range to the judge. Although presumptive guidelines are statutory in nature they can allow the continued existence of a sentencing discretion if the judge is allowed to deviate from the adopted range under certain circumstances.

- The enactment of mandatory minimum sentences combined with a discretion to depart from the sentences under certain conditions

This option implies the enactment of a mandatory minimum sentence for example 15, 20 and 25 years imprisonment for a first, second and third conviction respectively coupled with a discretion to the sentencing officer to depart from the prescribed sentence if special circumstances exist. In such circumstances the

sentencing court is required to record the circumstances and to give written reasons for departure from the prescribed sentence.

The return date for comment on the issue paper was 30 September 1997, but requests for extension will be entertained.

Discussion papers

Aspects of the law relating to AIDS - HIV/AIDS and discrimination in schools

During August 1997 a discussion paper on HIV/AIDS and discrimination in schools was published for general information and comment. The Commission was assisted in this task by a project committee representative of divergent interests under the leadership of Mr Justice Edwin Cameron.

In its Working Paper 58, released in 1995, the Commission made preliminary recommendations on HIV/AIDS in schools based on the negligible risk of transmission of HIV in the school setting and the principle of non-discrimination enunciated in the 1993 interim Constitution. The Commission at the time emphasised the lack of a uniform national policy dealing with the issue of HIV/AIDS in schools. The responses received to these preliminary recommendations were generally supportive. They reflected a large measure of consensus on the need for, and contents of, a national policy on HIV/AIDS for schools.

The recent well-publicised crisis caused by the application by Nkosi Johnson, an eight-year-old boy with AIDS, to be admitted to a public school in Johannesburg, the reaction of some members of the public and the apparent lack of a national education policy on this issue, underscore the lesson that the situation has not improved since 1995. This despite the fact that the South African Schools Act, which gives effect to the spirit and letter of the final Constitution, was passed in 1996.

Since the Nkosi Johnson incident and in view of the Commission's initial recommendations, the project committee has offered the Department of Education its assistance in advancing resolution of the matter. The present proposals and policy have been developed in a joint consultative process with the Department. The Department will also be included in the project committee's work when comment on these proposals is processed and final recommendations are formulated.

The project committee is of the view that a precisely directed and clearly targeted policy would create legal certainty and help prevent injustice to learners with HIV. It thus provisionally recommends the adoption of a national policy on HIV/AIDS in schools that will constitute a set of basic principles from which the governing bodies of schools may not deviate. Provision is made for the governing body, in addition, to adopt an HIV/AIDS school-level policy to give operational effect to the national policy. The school-level policy may reflect the needs, ethos and values of the specific school and community, though it may not deviate from the national policy's basic principles. In the absence of a school-level policy the national policy will apply.

The proposed policy - which would apply to public as well as independent schools - includes the following principles:

- Compulsory testing of learners as a prerequisite for admission to any school, or any unfair discriminatory treatment (for instance by refusing continued school attendance solely on the basis of the HIV status of the learner), is not justified.
- However, it is recognised that special measures in respect of learners with HIV may be necessary. These must be medically indicated or in the learner's best interests.
- Learners' rights in respect of privacy are confirmed. Where AIDS-related information is disclosed to the educational authorities, the policy provides that, except where statutory or other legal authorisation exists, it may be divulged only with the written consent of the learner (if above the age of 14 years) or in other cases with that of his or her parent or guardian.
- The needs of learners with HIV should, as far as is reasonably practicable, be accommodated within the school environment.
- All learners have a right to be educated on AIDS, sexuality and healthy lifestyles in order to protect themselves against HIV infection. The policy recognises the need for consultations with parent communities in order to ensure that sexuality education will accord with the community ethos and values. The policy requires that information be given in an accurate and scientific manner.
- Universal precautions should be implemented by all schools to further minimise the negligible risk of transmission of HIV in the educational setting. The policy contains specific provisions on participation in contact sports.

A draft policy including the above principles is attached to the discussion paper for comment.

The return date for comment on the discussion paper was 30 September 1997, but was extended to 15 October 1997.

Customary marriages

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

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

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

- In order to remove the anomalies created by many years of discrimination, customary marriage must now be fully recognized. To do so will comply with ss 9, 15, 30 and 31 of the Constitution, provisions which suggest that the same effect be given to African cultural institutions as to those of the western tradition.
- In accordance with s 28(3) of the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Women should be deemed to have contractual capacity, locus standi and proprietary capacity (and in consequence delictual capacity) on a par with men. It is therefore recommended that section 11(3)(*b*) of the Black Administration Act 38 of 1927 be repealed. In addition, to cure many years of uncertainty, provision must be made that the Age of Majority Act 57 of 1972 applies to persons subject to customary law.
- Legislative provision must be made for a minimum set of essential requirements for marriage.
- The main requirement for a valid customary marriage should be the consent of the spouses.
- All customary marriages should be registered and more people should be encouraged to register their customary marriages. To this end the traditional authorities should be constituted registering officers.
- In order to ensure that the spouses' consent is properly informed, a minimum age for marrying should be fixed for all persons in the country. Underage children should nevertheless be permitted to contract a marriage on terms prescribed in the Marriage Act 25 of 1961.
- For various reasons, especially the difficulty of enforcing a ban and the fact that polygyny appears to be obsolescent, customary marriages should continue to be potentially polygynous.
- Reform in the area of spousal relations is now needed to harmonize customary law with social changes in South African society and to give effect to the principle of equal treatment contained in s 9 of the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).
- To discharge its obligations under CEDAW and the Constitution, legislation should provide that spouses have equal capacities and powers of decision-making. Such legislation will entail a repeal of section 27(3) in the KwaZulu/Natal Codes, Act 16 of 1985 and Proclamation R151 of 1987 and section 39 of the Transkei Marriage Act 21 of 1978 (which both declare that wives are under the marital power of their husbands).
- The private regulation of divorce in customary law places women and children at risk. No marriage should therefore be terminated except by decree of a competent court.
- Only one ground of divorce should be entertained: irretrievable breakdown of the marriage. In exercising their discretion under this principle, courts should take into account pre-divorce conciliation procedures available in customary law and appropriate cultural norms governing marital behaviour. They should not, however, favour husbands at the expense of wives.

United Nations Convention

on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the best interests principle has no specific content, cultural expectations may be accommodated by the courts. To avoid unfair discrimination against women, mothers should have equal rights to children.

Amongst those issues on which the Commission requests comment are the following:

- Concerning bridewealth:

  Should bridewealth have purely social functions: as a token of appreciation or a mark of the cultural attributes of a marriage, and optional, analogous to the solemnization of marriages by religious rights?

  What effect should bridewealth agreements have on the validity of marriage, the rights and duties of the spouses or their rights to children?

  What effect should bridewealth agreements have on customary remedies for enforcement of bridewealth, ie `impounding' the wife and/or withholding guardianship of children?

- Minimum ages should be fixed at which prospective spouses may be presumed mature enough to give their consent to marriage. The minimum ages established in the Marriage Act are 18 for men and 15 for women. Differentiation between the ages at which males and females can marry may be considered to constitute unfair discrimination on the ground of sex; in the past this differentiation was justified by the commonly held belief that boys and girls mature physically at different ages. Whether valid or not, this justification will be superseded if South Africa decides to ratify the African Charter on the Rights and Welfare of the Child (which specifies a minimum age of 18 for both men and women). What should be the minimum age for marriage under customary law?

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

Tabling of Reports

The following report has been Tabled in Parliament recently:

First Interim Report on Aspects of theLaw Relating to AIDS

These report is available from the Government Printer.

Workshops

Workshops are an important part of the process of law reform. It is a particularly valuable tool to create awareness of an investigation, disseminate information and encourage community participation.

In the previous Bulletin (Vol 2 No 2) reference was made to the publication of an issue paper on sexual offences against children. A series of one day workshops to discuss the issue paper were held in all of the nine provinces at the following venues: University of Zululand; Nelspruit; Kimberley; Port Elizabeth; Atlantis; University of Transkei; University of Durban-Westville; Oudtshoorn; Mmabatho; Pretoria; Westville Prison; Bloemfontein; Soweto; and Pietersburg.

Invitations were extended to all interested parties and relevant role players in a particular area. The workshops were well attended and afforded the participants the opportunity to interact with other disciplines in the child care field. The workshops also generated interest in other investigations, particularly those into juvenile justice and the review of the Child Care Act.

Members of the Commission

The Chairperson is Chief Justice Ismail Mahomed, former Vice-President of the Constitutional Court. The Vice-Chairperson is Judge Pierre Olivier, a Judge of the Appeal Court. The full time member is Professor Thandabantu Nhlapo. The other members are Judge Yvonne Mokgoro, a judge of the Constitutional Court, Advocate Jeremy Gauntlett SC from the Cape Bar, Ms Zubeda Seedat, an attorney practising in Durban, and Mr Phineas Mojapelo, an attorney practising in Nelspruit.

Programme of the Commission

The following projects on the Commission’s programme are currently receiving attention:

59 Islamic marriages and related matters

63 Review of the law of insolvency

73	The simplification of criminal procedure
82	Sentencing
85	Aspects of the law relating to AIDS
86	Euthanasia and the artificial preservation of life
88	The recognition of a class action in South African law
90	Harmonisation of the common law and indigenous law
94	Arbitration
96	The Apportionment of Damages Act, 1956
100	Family law and the law of persons: * Maintenance * Domestic violence
101	The application of the Bill of Rights on the criminal law, criminal procedure and sentencing
102	The civil jurisdiction of courts
105	Security legislation
106	Juvenile Justice
107	Sexual offences by and against children
108	Computer related crimes
109	Review of the Marriage Act
110	Review of the Child Care Act
111	Jurisdiction of Magistrates' Courts in constitutional matters
112	Sharing of pension benefits

Participation in Conferences

One of the commissioners, Mr J J Gauntlett SC, attended the Australasian Law Reform Agencies Conference, Melbourne, 15-16 September, with the theme "Combating Discrimination through Law Reform". Dr Bhadra Ranchod, High Commissioner in Canberra, and formerly Dean of the Faculty of Law at the University of Durban-Westville, delivered a paper on "Overcoming Discrimination against Indigenous People". A paper entitled "Human Rights and Beyond in New Zealand Law Reform" is of particular interest to the Commission. The SALC was invited to maintain its participation in ALRAC, together with India, and it was proposed that the name of the body should in the circumstances be changed to the Associated Law Reform Agencies. Mr Gauntlett had discussions with most of the delegates and it was evident that many of the Commission's papers had been studied with great interest.

Another commissioner, Ms Z Seedat, attended the 9th International Symposium on Victimology, Amsterdam, 25-29 August, with the theme "Caring for Victims". She also visited the Law Commissions of England, Scotland and Ireland. More information on Ms Seedat's visit will appear in the next Bulletin.

Invitation

Interested parties are invited to submit proposals for law reform and information in respect of projects to the Commission.

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Internet

Some of the Commission's documents are also available on the Internet. The site address is: **http://www.law.wits.ac.za/salc/salc.html**

A new notification service has been introduced. Subscribe to listserv on the site address to be notified by email whenever there are new SA Law Commission publications. (Note that this is not a discussion group.)
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