

SALC BULLETIN

Newsletter of the South African Law Commission

Expiry of Commission's Term of Office

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

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

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

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

To achieve this ideal the Commission shifted the emphasis in its law reform programme to an approach that was responsive to the emerging needs of the new South African society. The execution of the Commission's mandate depends on establishing a creative and comprehensive process of consultation with South Africans to ensure that its work is responsive and accessible. The Commission has consequently broadened its consultative base. While maintaining close cooperation with academic In the Discussion Paper the premise

institutions and the private sector, non-governmental organisations, in particular, have been closely involved in the work of the Commission. The Commission also extended its consultative process by conducting workshops countrywide in urban and rural areas. Inadequacies in the legal system have been approached from a multi-disciplinary perspective in appropriate cases.

To extend the basis for consultation and to involve interested parties and the community at an earlier stage in the process of law reform, the Commission embarked upon a working method in terms of which, in appropriate cases, shorter documents in the form of issue papers - which precede the publication of discussion papers - are compiled for general information and comment. The object is to stimulate debate and to give direction to the reform which is to follow.

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

Appointment of a new Commission

The following persons have been appointed to the Commission by the President for a period of three years with effect from 1 January 1999:

* Chief Justice I Mahomed as Chairperson

that the criminal law is not pre-

* Judge J Y Mokgoro of the Constitutional Court as Vice-Chairperson

* Adv J J Gauntlett SC from the Cape Town Bar

* Judge L Mailula from the Witwatersrand Local Division of the High Court

* Mr P Mojapelo, a Nelspruit attorney

* Prof R T Nhlapo, as a full-time member

* Ms Z Seedat, a Durban attorney

With the exception of Judge P J J Olivier who served as Vice-Chairperson of the previous Commission, all the members have been re-appointed. Judge Olivier has been requested by the Minister of Justice to head a Task Team to advise and to make recommendations on the issue of court management, case management and judicial training.

Judge Mailula whose appointment further advances race and gender representativeness, is welcomed as a new member of the Commission.

Discussion Papers

Since publication of the December 1998 Bulletin, two Discussion Papers were published for general information and comment:

Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour (Discussion Paper 80)

eminently the means by which to

combat the spread of HIV is confirmed: the AIDS epidemic is first and foremost a public health issue and it is internationally accepted that non-coercive measures are the most successful means through which public health authorities can reduce the spread of the disease. However, it is also accepted that where HIV-related behaviour results in harm to others (ie exposure to or transmission of HIV), public health measures in themselves are insufficient and the criminal law undoubtedly has a role to play in protecting the community and punishing those who transgress. The Commission is of the preliminary opinion that this limited role is not necessarily incompatible with any public health strategy against the disease.

Since the Commission is not in a position at this stage to come to any firm conclusion on the need for the creation of a statutory offence, draft legislation has not been included in the discussion paper. In order to facilitate a conclusion on the issues in question, comments on a range of questions highlighting the crucial issues to be debated are invited, inter alia:

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

The closing date for comment on Discussion Paper 80 was extended to 31 March 1999.

Administrative Law (Discussion Paper 81) Juvenile Justice

Discussion Paper 81 relates to the Commission's investigation into the adoption of an Administrative Justice Act, to give effect to the provisions of section 33 of the Constitution of 1996. The project is an urgent one. The Constitution requires an Administrative Justice Act to be in place before 4 February 2000.

Discussion Paper 81 contains the following main recommendations:

- * The key concept "administrative action" in the draft Bill determines its application. The intention is a wide application to public powers.
- * The Bill sets out the grounds on which a court may review administrative action and the procedure for written reasons for administrative action.
- * Courts in proceedings for review are required to grant appropriate relief, and provision is made for an "open list" of the remedies in proceedings for review.
- * The Bill provides procedures in terms of which organs of state make "rules" and "standards".
- * Two special administrative procedures, namely public enquiries and administrative investigations are recommended.
- * The establishment of the Administrative Review Council is recommended.

The Commission is presently planning regional workshops (on its preliminary recommendations on administrative justice) which will be hosted in Pretoria on 8/6/99, Durban on 9/6/99, East London on 10/6/99 and Cape Town on 11/6/99.

The closing date for comments on Discussion Paper 81 was 31 March 1999.

Research Paper on

In the December 1998 Bulletin it was reported that Discussion Paper 79 on

Domestic Violence

Due to Parliamentary time constraints, a draft Domestic Violence Bill emanating from the Project Committee on Domestic Violence was introduced in Parliament by the Minister of Justice prior to finalisation of the Commission's report. The Domestic Violence Act 116 of 1998 largely corresponds to the Bill drafted by the Project Committee, but it also contains provisions advanced by the Commission and developed by the Justice Portfolio Committee with the assistance of the Commission's researcher and the Department of Justice.

On 27 November 1998 the Commission decided that a report should not be published for the following reasons:

- * The main aim of a report was to initiate legislation.
- * Because legislation had already been enacted, the costs to publish a report could not be justified.

The Commission, however, agreed that the report contained valuable research which could be made available to interested persons and institutions. It was subsequently decided to adapt the report and to make it available as a Research Paper in the Commission's research series. (The Research Paper is already available on the Internet.)

The Discussion Papers and Research Paper are obtainable free of charge from the Commission on request.

Correspondence should be addressed to:

**The Secretary
SA Law Commission
Private Bag X668
PRETORIA
0001**

Tel: (012) 322-6440 (Mr J Kabini)

Juvenile Justice was published for general information and comment.

The consultation phase on the draft Bill contained in the Discussion Paper commenced with workshops for specific focus groups:

- * Correctional Services - 8/2/99
- * NGOs, Commissions -15/2/99
- * Safety and Security - 16/2/99
- * Department of Justice- practitioners -1/3/99
- * Department of Justice - policy makers - 2/3/99
- * NICRO - 11/3/99
- * Department of Education -16/3/99
- * Inter-sectoral, Umtata -18/3/99
- * Inter-sectoral, George - 18/3/99
- * Legal Representation -24/3/99
- * Inter-sectoral, Pietermaritzburg - 30/3/99

The Portfolio Committees of Social Welfare and Justice were briefed on 10 February 1999 and 24 February 1999 respectively. The Juvenile Justice project committee held a joint briefing for the Portfolio Committees on Safety and Security and Correctional Services on 10 March 1999. A briefing was also held on 1 April 1999 at the Durban Magistrate's Court. A workshop with the Department of Welfare is due to take place on 29 May 1999.

In the draft Bill three options on the minimum age of criminal capacity are presented. In an attempt to resolve the crucial issue of the setting of a minimum age of criminal capacity, the project committee, together with the Centre for Child Law at the University of Pretoria, will be presenting a seminar on 5 and 6 May 1999.

Project 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

- * Mr P M Shabangu (Justice Regional Office, KwaZulu-Natal)

- * Prof R T Nhalpo (Commission member)

requires. In recommending persons to the Minister for appointment, the Commission strives to ensure representativeness of population make-up.

On 3 March 1999 the Minister of Justice appointed the following persons as members of the project committee for **Project 59 - Recognition of Islamic Marriages and Related Matters:**

- * Judge M S Navsa (Project leader)
- * Dr Najma Moosa (Lecturer, Faculty of Law, UWC)
- * Sheikh Ebrahim Essop (Darul Waqaf Islamic Trust, Port Elizabeth)

- * Sheikh Mogamad Faaik Gamiieldien (Muslim Judicial Council - Cape)

- * Moulana Abbas Ali Jeena (United Ulama Council, Erasmia)

- * Ms Farida Mahomed (Member of Parliament)

- * Dr R A M Salojee (Member of Parliament)

- * Mr M S Omar (Practising attorney, Durban; United Ulama Council)

- * Adv J J Gauntlett SC (Commission member)

Other project committees appointed for investigations in the Commission's research programme are the following:

Project 63: Review of the Law of Insolvency

- * Judge R H Zulman (Project leader)

- * Mr N Coetzer (Attorney)

- * Dr E De la Rey (Financial Services Board)

- * Prof M M Katz (Nominee of the

Project 85: Aspects of the Law Relating to AIDS

- * Judge E Cameron (Project leader)

- * Prof R T Nhalpo (Commission

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)

Project 73: Simplification of Criminal Procedure

- * Vacant (Project leader)

- * Judge A E B Dhlodlo

- * Adv M Hanon SC (Jhb Bar)

- * Adv P A J Kotze (Jhb Bar)

- * Prof B Majola (Director, LRC)

- * Prof N C Steytler (UWC)

- * Judge Y Mokgoro (Commission member)

Project 82: Sentencing

- * Prof D Van Zyl Smit (Project leader, UCT)

- * Ms L Camerer (Institute for Security Studies)

- * Mr K Govender (State Attorney)

- * Mr N Kollapen (Human Rights Commission)

- * Mr V Peterson (Dept of Welfare, Mpumalanga)

- * Ms M E M Ramagoshi (National Network on Violence Against Women)

member)

- * Mr Z Achmat (Gay and Lesbian Coalition)

- * Ms A E Strode (LHR,

Pietermaritzburg)

* Prof C W Van Wyk (UNISA)

* Ms L Seftel (Labour Relations)

* Ms M Makhalemele (Community representative)

* Dr M J Matjila (Dept of Community Health, MEDUNSA)

* Dr G Mtshali (Dept of Health)

* Dr P J Haasbroek (Group economist, Barlows)

Project 90: Harmonisation of the Common Law and Indigenous Law

* Prof R T Nhlapo (Project leader, Commission member)

* Ms L G Baqwa (Attorney)

* Prof T W Bennett (UCT)

* Adv F Bosman SC (Former Chief Family Advocate)

* Prof C R M Dlamini (Rector, University of Zululand)

* Judge Y Mokgoro (Commission member)

Project 94: Arbitration

International arbitration

* Judge J Steyn (Project leader)

* Prof D W Butler (University of Stellenbosch)

* Mr R H Christie QC

* Adv J J Gauntlett SC (Commission member)

Additional members for ADR

* Prof R Choudree (University of Durban-Westville)

* Ms B Hechter (Family Advocate)

* Mr A Jooste (Chief Magistrate, Cape Town)

* Ms N Mkefa (Community Peace Foundation)

* Adv P Pretorius (Jhb Bar)

Project 100: Maintenance

* Prof S S Burman (Project leader, UCT)

* Ms B Makhene (Ministry of Justice)

* Mr P Mojapelo (Commission member)

* Ms A Ramlal (Magistrate, Jhb)

* Mr E Rasefate (Dept of Justice)

* Prof I D Schäfer (Rhodes University)

* Ms Z Seedat (Commission member)

* Prof J Sinclair (University of Pretoria)

* Ms D Singh (Family Advocate)

* Ms A Thornton (Dept of Health and Welfare, Western Cape)

Project 105: Security Legislation

* Judge C T Howie (Project leader)

* Ms P Jana (Member of Parliament)

* Adv G J Marcus SC (Jhb Bar)

* Judge Y Mokgoro (Commission member)

* Mr D Tabata (Attorney)

* Mr D Nkadimeng (Attorney)

Project 106: Juvenile Justice

* Ms A Skelton (Project leader, LHR Pietermaritzburg)

* Ms P Moodley (Researcher, Law Commission)

* Ms Z Seedat (Commission member)

* Prof J Sloth-Nielsen (UWC)

* Mr T Thipanyane (Human Rights Commission)

* Ms M Tserere (LHR)

Project 107: Sexual Offences

* Ms J van Niekerk (Project leader, Childline)

* Ms Z Seedat (Commission member)

* Ms C McClain (Community Law Centre, UWC)

* Ms E H Mthombeni (Dept of Correctional Services)

* Judge T Pillay (Attorney)

* Ms E M Schurink (HSRC)

* Dr R L September (Institute for Child Family Development, UWC)

Project 108: Computer related crimes

* Prof D P van der Merwe (Project leader, UNISA)

* Capt B Grobler (SAPS, Computer Crime Investigations)

* Capt J B Grobler (SAPS, Commercial Crime Unit)

* Adv L W Mahlati (Office of the Attorney-General, Port Elizabeth)

* Mr I M Melamed (Computer Systems Consultant)

* Prof R T Nhlapo (Commission member)

* Judge C O'Regan

* Prof S H von Solms (Department of Computer Science, RAU)

* Judge R H Zulman

Project 110: Review of the Child Care Act

* Prof B van Heerden (UCT)

* Dr J Loffell (Jhb Child Welfare Society)

* Dr M Mabetoa (Dept of Welfare)

* Dr C Matthias (University of Durban -Westville)

* Ms B Mbambo (Social Worker)

* Mr M Mtshali (Magistrate, Pietermaritzburg)

* Ms A Skelton (LHR, Pietermaritzburg)

* Prof N Zaal (University of Durban-Westville)

* Prof J Sloth-Nielsen (UWC)

* Ms Z Seedat (Commission member)

Project 115: Review of Administrative Law

* Mr J J Gauntlett SC (Project leader, Commission member)

* Prof P Iya (University of Fort Hare)

* Prof H Corder (UCT)

Tel: (012) 322-6440

Fax: (012) 320-0936

* Ms C Hoexter

Programme of the Commission

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

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

59 Islamic marriages and related matters

63 Review of the law of insolvency

73 The simplification of criminal procedure

82 Sentencing

85 Aspects of the law relating to AIDS

86 Euthanasia and the artificial preservation of life

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

101 The application of the Bill of Rights on the criminal law, criminal procedure and sentencing

105 Security legislation

106 Juvenile Justice

107 Sexual offences

E-mail: lawcom@salawcom.org.za

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

113 The use of electronic equipment in court proceedings

114 Publication of divorce proceedings

115 Review of administrative law

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

117 The legal position of voluntary associations

118 Domestic partnerships

119 Uniform national legislation on the fencing of national roads

120 The materiality of non-disclosures in insurance law

Invitation

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

The Commission is housed in the Sanlam Centre (12th Floor), c/o Andries and Schoeman Streets, Pretoria.

The postal address is Private Bag X668, Pretoria 0001.

The Commission's office hours are from 07:15 to 15:45 on Mondays to

Fridays.

Internet

Most of the Commission's documents are also available on the Internet. The site address is:

<http://www.law.wits.ac.za/salc/salc.html>

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.)

Send e-mail to **majordomo@sunsite.wits.ac.za**.

Leave the Subject line **blank**, and type in **subscribe salcnotify** in the body of the message. Type **end** on a **new line**, then send the message.

You will soon receive a welcome message from the listserv.