

SALC BULLETIN

Newsletter of the South African Law Commission

Death of Chairperson of SA Law Commission

The late Chief Justice I Mahomed was appointed as Chairperson of the South African Law Commission on 1 January 1996 for a term of three years. On 1 January 1999 he was re-appointed as Chairperson, an office which he held until his death on 17 June 2000.

Under his leadership the Commission committed itself to law reform that would be open, fair, relevant and responsive. Chief Justice Mahomed was the driving force behind making the Commission a community-orientated institution which could be perceived as a bridge between the people and the law. A Law reform agencies review the past, reform the present and anticipate the future¹ is a phrase coined by Chief Justice Mahomed which became the guiding principle of the South African Law Commission.

Chief Justice Mahomed will be remembered as a Chairperson who passionately shared the ideal of the South African population in expecting the legal system to embody justice and to promote respect for the democratic values of our Constitution. He will be greatly missed by the Commissioners, researchers and administrative staff of the Law Commission.

Issue Papers

Since publication of Issue Paper 14 on Computer Related Crime in August 1998, two Issue Papers have been published for general information and comment:

Islamic Marriages and Related Matters (Issue Paper 15)

The Issue Paper contains the

following proposals on the statutory recognition of Islamic marriages:

* 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 are 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 is required 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 closing date for comment on Issue Paper 15 has been extended to 31 August 2000.

Uniform National Legislation on the Fencing of National Roads (Issue Paper 16)

The Law Commission=s consideration of Uniform National Legislation on the Fencing of National Roads emphasises the need for a single law to regulate the problems currently encountered by broken fences resulting in animals straying into roads which cause accidents to occur.

* The common law raises the question whether a legal duty to erect a fence should in fact be established by circumstances (location, farming activity, whether a danger is created

The following questions are posed in the Issue Paper:

* What should the scope of the investigation be? Should it include both national and provincial roads? Are the problems which the legislation is aimed at remedying not happening on local roads as well? Stock farmers are essentially concerned about the following aspects: who bears the responsibility for the erection of fences and who bears responsibility for the maintenance of existing fences and liability which arises as a consequence of the failure to maintain fences. Would clarity be obtained in respect hereof if the scope of the proposed uniform legislation is restricted to only national roads? Thus should the investigation focus only on national roads or should it be broadened to include other roads as well?

* Does the national government have the legislative competence to promulgate laws in respect of fencing along provincial roads and municipal roads, or is this a matter of exclusive provincial competence? If so, should the contemplated uniform legislation only pertain to national roads and should there also be draft legislation which the provinces could adopt? Would that solve the problems complained of?

* Should any legislation pertaining to fencing along public roads not be contained in the Fencing Act? Should it be administered by the National Roads Agency and/or its provincial counterpart, if any? If so, would this be part of the Agency=s responsibilities in terms of the National Roads Act? Possibly, stock-farmers would prefer a situation where the legislator imposes a statutory duty on the relevant authorities to maintain fences. Were the legislator to impose a statutory duty to maintain (and control) a fence on a specific person or body, such a person or body would generally be held liable for damages etc) which would dictate that a farmer should clearly be obliged to ensure that his activities do not create a new danger or source of danger. Would this require legislation and if so, does it

arising from a failure to comply with this duty. Should this be the case?

* The current provincial road ordinances lack uniformity, but not only in respect of the fencing of public roads. Although in principle this may not be desirable, does this aspect alone necessarily warrant the attention of the legislator? Do conditions differ from province to province requiring the respective relevant agencies to exercise a discretion or should there be uniformity in respect of which roads should be fenced? Is there a need for uniformity in provinces in respect of which party bears the cost and absorbs the liability of the maintenance costs associated with fences along roads? Should this be distinguished depending on whether it is a national, provincial or local road? Also should this be borne solely by the relevant provincial government, the local authority or the national government? Or should this be a shared expense between owner or farmer on the one hand, and the relevant government organ on the other? Furthermore, should one not have regard to how different provinces implement the existing ordinances?

* Are the farmers experiencing increasing claims for damages caused by broken or stolen fences? Is the owner of the farm more likely than not the person who is in control of the fence? Where the owner of the land is not in control of the fence, (does not farm the land) should the farmer be held liable for broken fences? In other words should there be a differentiation between the liability of the owner and that of the farmer?

* Would each and every public road require fencing? What should the criteria be to exempt certain roads from being fenced? Is control synonymous with ownership or should it mean factual control?

have to be uniform legislation throughout the country or should the substance of the legislation be dictated by regional considerations?

* Would the farmer/owner/tenant not fulfil his or her legal duty if he or she periodically inspected the fence and repaired damaged sections? What about areas where there are no fences? Who should erect them? The local, provincial or national authorities or the person in control of the land? Or are they not required? In light of the foregoing does the common law in respect of liability and the legal duty imposed on a person in control of the fence impose an unduly onerous burden on such a person?

* Why should the government (provincial or national) bear the costs of erection and maintenance of fencing and by implication be liable for damages arising from damaged and broken fencing?

The closing date for comment on Issue Paper 16 is 29 September 2000.

Discussion Papers

Since publication of the April 2000 Bulletin, two Discussion Papers have been published for general information and comment:

Review of Security Legislation: Terrorism - Section 54 of the Internal Security Act 74 of 1982 (Discussion Paper 92)

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, The question of succession in customary law has been a burning issue for some time, reaching its climax in June with the decision of the

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 deals mainly with the following issues:

* Terrorist acts should under no circumstances be justifiable, even under the guise of the label Apolitical offence@.

* Those actions which constitute Aterrorist acts@ and the meaning of Aterrorist 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 an 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

Supreme Court of Appeal in the case of **Mthembu v Letsela**. The contested positions involve, on the one side, the need to honour the Bill of Rights by

following issues need to be considered in relation to detention of suspects for interrogation:

\$ Judicial assessment of applications for warrants for interrogation.

\$ Furnishing to the detainee of reasons founding the warrant for detention.

\$ Appearances 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 the 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.

The closing date for comment on Discussion Paper 92 is 29 September 2000.

Customary Law: Succession (Discussion Paper 93)

The Discussion Paper contains recommendations and a draft Bill.

removing laws that discriminate against women in matters of inheritance and, on the other, the recognition of customary law in the

same constitution as part of the law of the land. The difficult task of trying to reconcile these provisions is complicated in any case by the need to be alive to practical realities and to intervene in ways which do not worsen the situation of people in their daily lives.

These complexities have already seen a draft Bill introduced in Parliament and then withdrawn (1998), and three court cases culminating in the Supreme Court decision. It is worth noting that both the High Court and the Supreme Court of Appeal endorsed the Law Commission's process of consultation as the best guarantee of the participation of all stakeholders in this sensitive legislative experiment. Against this background, the Discussion Paper makes proposals -

- * to reform the order of succession to provide a material basis of support for the deceased's surviving spouse and immediate descendants;

- * specifically, to amend the Intestate Succession Act (81 of 1987) to cover the estates of deceased persons who were subject to customary law; to ensure the inheritance of surviving spouses and children (and in some cases, parents); and to remove the disqualification of out-of-wedlock children;

- * to secure the right of the surviving spouse to the matrimonial home and its contents especially in small estates where fragmentation serves no useful purpose;

- * to recognise the changed role of the customary heir by removing his liability in customary law for the debts of the deceased; and

- * to exclude succession to traditional office from the ambit of the Act.

In addition, the Discussion Paper invites specific comment on particular issues of customary law and asks whether these should be incorporated. The proposed system further aims to encourage a degree of specialisation in child justice practice. In so doing,

or codified in the Act. Some of the issues involve -

- * the protection of certain dependent members of the deceased's extended family where a written will exists;

- * the question of oral wills;

- * variations in the order of succession and disinheritance;

- * the right to decide burial and funeral ceremonies; and

- * the role of traditional courts

The closing date for comment on Discussion Paper 93 is 22 September 2000.

The Discussion Papers are available on request and are free of charge (contact Mr J Kabini).

Correspondence should be addressed to:

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The Discussion Papers are also available on the Internet at www.law.wits.ac.za/salc/salc.html.

Reports

The following report has been completed by the Law Commission:

Report on Juvenile Justice

The report contains final recommendations and a draft Bill on a proposed new child justice system. The report will be handed to the Minister for Justice and Constitutional Development for consideration of the recommendations relating to a new

the Commission is giving effect to a long standing call from service providers and non-governmental

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.

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 relief provided is not limited to property or business. The Incapable Adults Bill makes provision for the property, financial affairs and personal

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 and draft Bill are available on the Internet at the following site : www.law.wits.ac.za/salc/salc.html

New Investigations

The following investigations have been included in the Commission's programme:

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 SA 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.

On 7 April 2000 the Commission recommended that the investigation be included in its research programme and the Minister approved the inclusion on 12 June 2000.

Incapable Adults

The problem does not only relate to the elderly or persons with welfare of incapable adults.

The August 1999 Newsletter of *Alzheimer Scotland - Action on*

Alzheimer's disease, but to any so-called Incapable adult@.

In 1988 the Law Commission published a Report on Enduring Powers of Attorney and the Appointment of Curators to Mentally Incapacitated Persons. The Mentally Ill Persons= Legal Interests Amendment Act 109 of 1990, which amended the Mental Health Act 18 of 1973, was adopted as a result of the Report.

In terms of section 56 of the Mental Health Act 18 of 1973 the court may appoint a curator to perform or exercise on behalf of a person **declared to be mentally ill** any particular act in respect of such person's **property** or to take care of or administer such person's **property** or to carry on any **business** or **undertaking** of such person. In terms of section 56A of the Mental Health Act 18 of 1973 a person may apply to the Master 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 a degree that such person is incapable of managing his or her own affairs. The Master may then appoint a curator to perform the functions as stipulated above.

In September 1995 the Scottish Law Commission published a comprehensive Report on Incapable Adults (Scot Law Com No 151). The Incapable Adults Bill (comprising 69 clauses) contained in the Report differs from our Mental Health Act in two important respects:

* It is not limited to mental illness. In terms of the Incapable Adults Bill Incapable@ means incapable of - acting; or making decisions; or communicating decisions, by reason of mental disorder or of inability to communicate because of physical or other disability.

Dementia reports that the Incapable Adults Bill has been introduced into the Scottish Parliament. It is stated that this Bill will make a real

difference to lives of 100 000 Scots with incapacity due to dementia, head injury, stroke, learning disability or severe mental illness:

* For the first time the law will recognise the right of people with dementia to be involved in decisions affecting their lives and to have their past and present wishes taken into account.

* New provisions will make it easier for Acarers@ to manage the finances of the person they care for and to make welfare decisions on their behalf when they can no longer do so for themselves.

* The Bill will give Acarers@ a right to be informed and consulted by doctors about treatment decisions; and to give consent to treatment and therapeutic research where they have been appointed the person=s Awelfare attorney@ or guardian.

On 8 June 2000 the Commission recommended that an investigation into Aincapable adults@ be included in the Commission=s programme. The Minister approved the inclusion of the investigation on 31 July 2000.

Programme of the Invitation 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
- 73 The simplification of criminal procedure
- 82 Sentencing
- 85 Aspects of the law relating to AIDS
- 90 Customary 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 to the criminal law, criminal procedure and sentencing
- 105 Security legislation
- 106 Juvenile justice
- 107 Sexual offences
- 108 Computer related crimes
- 109 Review of the Marriage Act
- 110 Review of the Child Care Act
- 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
- 120 Consolidated legislation pertaining to international cooperation in civil matters
- 121 Incapable adults

The public are invited to submit proposals for law reform to the Commission and to give information in respect of any of the projects of the Commission.

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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>

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