Vol. 6 No. 1 June 2001

SALC BULLETIN

Newsletter of the South African Law Commission

New Chairperson, Member and Full-Time Member

Judge Y Mokgoro, previous Vice-Chairperson of the Commission, has been appointed as the new Chairperson of the Commission; Judge CT Howie has been appointed as a member of the Commission; and Professor I P Maithufi of the University of Pretoria has been appointed as a full-time member of the Commission.

The Commission is constituted as follows:
* Judge Y Mokgoro (Chairperson)
* Mr J J Gauntlett SC
* Prof C Hoexter (Additional Member)
* Judge C T Howie
* Judge M L Mailula
* Prof I P Maithufi (Full-Time Member)
* Mr P Mojapelo
* Ms Z Seedat

Discussion Papers

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

Simplification of Criminal Procedure: A More Inquisitorial Approach to Criminal Procedure - Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials (Discussion Paper 96)

The Commission has recently approved Discussion Paper 96 dealing with a more inquisitorial approach to criminal procedure as part of its investigation into simplification of criminal procedure.

The Discussion Paper addresses the following issues:

* Police questioning of the suspect/accused, its legitimacy, effectiveness and the right to silence and its consequences. In this regard attention is given to–

° the extent to which a suspect/accused could legitimately be questioned and hence used as a source of evidence at the different stages of the criminal justice process (from pre-trial to the trial phase);
° different options to make police questioning more effective, including by bringing it under control of codes of conduct, or under judicial control, or by legislating police questioning;
° the consequences of and constitutional implications of police questioning having due regard to the right to silence; and
° the different admissibility requirements for admissions and confessions.

* Defence disclosure before and during the trial. Consideration is given to –

° whether or not the defence should be required to disclose relevant evidence, and if so, the extent to which it should be required;
° a review of the provisions of section 115 of the Criminal Procedure Act and its interaction with the right to silence and the consequences of non-disclosure; and
° whether the existing provisions with regard to prosecution disclosure are sufficient and, if not, the extent to which amendments would be justified.

* A greater role in the criminal justice process by judicial officers. The Discussion Paper considers ways of providing the court with access to the docket; the admissibility of statements contained in the docket; the legal status of the docket; the weight to be given to information contained in the docket; and how judicial officers should use the information in the docket.

* Possible ways of enhancing judicial management of trials and case management. It is considered whether provision should be made for pre-trial conferences and, if so, the extent to which legislation is necessary.

In the light of the controversial nature of these issues, the constitutional implications of some of the recommendations and the different views within the project committee on the constitutional implications of some of the recommendations, in particular the permissibility of drawing an adverse inference from the failure of a suspect to disclose information during the course of the police investigation, the Commission has not taken a final position on the issues and proposes that alternative options be considered with the aim to stimulate debate.

Because the issues of police questioning and defence disclosure are interrelated, the question of defence disclosure is discussed with reference to questioning of the suspect in relation to the three separate stages at which the issue might arise: First, from the time that suspicion first falls upon the accused until the time he or she is indicted; second, from the time the accused is indicted until the time he or she is required to plead; and third, during the course of the trial.
The Commission's conclusions and recommendations are briefly the following:

(a) Police questioning and defence disclosure from the time that suspicion first falls upon the accused until the time he or she is indicted

Option 1 – drawing an adverse inference from the reaction of a suspect when confronted with incriminating evidence

The Commission considered the constitutional implications of drawing an adverse inference from silence and submits for comment the conclusion that the Criminal Procedure Act be amended to permit a court to draw an adverse inference from the pre-trial silence of a suspect. In this regard the proposed amendments relate to drawing an inference which may be reasonable and justifiable from an accused's failure to mention certain facts when questioned or charged; from an accused's silence at the trial; from an accused's failure or refusal to account for objects, substances or marks which may implicate the accused in the commission of the offence, found in his or her possession at the time of arrest; and from an accused's failure to account for his or her presence at a particular place which may implicate the accused in the commission of the offence.

Option 2 - No adverse inference from the failure to disclose by the accused

At common law suspects and accused persons may be questioned by the police but need not reply and no adverse inference from the exercise of the right to remain silent will be drawn. This common law right to remain silent has been reinforced by sections 35(1)(a) and 35(3)(h) of the Constitution. It is submitted that no change be made to the common-law position concerning the drawing of inferences from silence.

(b) Questioning of suspects

It is recommended that a police code of conduct for the treatment of persons in custody be incorporated in regulations published in terms of the Police Act, and that the South African Police Service take responsibility to develop such regulations.

(c) Admissibility of confessions and admissions

It is recommended that the Criminal Procedure Act be amended to provide common requirements for the admissibility of all statements or conduct of the accused which might be self-incriminatory and which -

- will not distinguish between police officers and others;
- will not require any such statement to be reduced to writing; and
- will expressly confer a discretion upon a court to exclude any such statement or conduct which is elicited in substantial breach of the regulations relating to the treatment of persons in custody referred to above.

(d) Defence disclosure from the time the accused is indicted until the plea

Option 1 - no legislative intervention is necessary

Section 115 of the Criminal Procedure Act facilitates defence disclosure if the defence chooses to make such disclosure. Generally disclosures are made by unrepresented accused but not by represented accused, who recognise that there is little advantage to the defence in doing so.

The Commission's provisional view is that no legislative intervention is necessary at this stage in relation to defence disclosure after the accused has been indicted and until the time he or she is called upon to plead.

Option 2 - Disclosure of expert evidence and the intention to raise certain "defences"

The defence would be required to provide notice of the defence's intention to raise the following defences –

- an alibi;
- an allegation that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged;
- statutory or any other ground of justification, for example provocation, duress or self-defence; and
- a defence which excludes *mens rea.*

An accused may not, without leave of the court, raise such a defence unless he has given notice to that effect to the prosecution.

In addition it is contended that an accused may not, without leave of the court, call an expert witness unless the accused, before or during plea proceedings, disclosed the names and addresses of such expert witnesses and copies of the expert reports upon which the defence proposed to rely on at the trial.

(e) Defence disclosure in the course of the trial

The Commission recommends no amendments and is of the view that there is no scope for imposing duties of disclosure upon an accused during the course of the trial which do not already exist at common law and in the rules and practices of cross-examination.

(f) Greater judicial participation in the process of the trial

Option 1 - material to which the defence has access to be placed before the judicial officer

The Commission recommends that the Criminal Procedure Act be amended to allow for the material to which the defence has access from the prosecution docket to be placed before the judicial officer to enable him or her to exercise properly the powers provided for in section 186, but that such information shall not constitute evidence unless and until it becomes admissible in the normal course.

Option 2 - reciprocal defence and prosecution disclosure

An alternative proposal for comment entails reciprocal defence and prosecution disclosure and a continuing duty on each to disclose additional information. The accused may request the prosecution, before evidence has been led, to disclose any prosecution material to him or her and the court may direct the prosecution to disclose such

material. The accused may of his or her own accord, or where the prosecution has complied with such a request or direction, is obliged to, give a written defence statement to the court and the prosecutor which sets out in general terms the nature of the defence and an indication of the matters which are disputed and the reasons therefor. Where the defence has complied with such disclosure there is a duty on the prosecution to disclose additional prosecution material which has not previously been disclosed.

Failure by the defence to disclose, or to disclose within the required time-frame, or when disclosing inconsistent defences or a different defence at the trial, may be taken into account by the court when considering a discharge in terms of section 174 of the Criminal Procedure Act, or when deciding whether the accused is guilty of the offence charged or of an offence which constitutes a competent verdict, and the court may draw such inferences from such failure as may be reasonable and justifiable in the circumstances.

(g) Case and trial management

The Commission recommends that section 115 of the Criminal Procedure Act be amended to oblige the presiding officer to inform an accused of the right to silence, the consequences of remaining silent, that he or she is not obliged to make any confession or admission, and to ask the accused whether he or she wishes to make a statement indicating the basis of the defence. It is also recommended that the presiding officer be obliged to question an accused where the accused fails to disclose the basis of the defence

The Commission also recommends that statutory provision be made for pre-trial conferences. In terms of the proposal the presiding officer may on application of the prosecutor or the accused or defence direct the prosecutor and the accused or defence to appear before him or her to consider the identification of issues not in dispute; the possibility of obtaining admissions of fact with the aim to avoid unnecessary evidence; to ensure that sufficient details are disclosed where the defence intends to raise a defence of an alibi; and to consider the necessity of calling expert evidence and such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner. In such event the court must record in open court the agreements entered into and concessions made.

The closing date for comment on Discussion Paper 96 is 30 June 2001.

Sentencing: A Compensation Scheme for Victims of Crime in South Africa (Discussion Paper 97)

The Discussion Paper considers the feasibility of establishing a Victim Compensation Scheme (VCS) in South Africa. An overview of the nature and extent of violent crime in the country is given. This is considered critical to understanding the foundation for such a compensation scheme and for realistically costing the endeavor. The Discussion Paper also briefly documents the economic, physical and psychological impacts of violent crime on its victims and discusses the services currently available to victims.
Debates in respect of compensation are raised and an analysis of the motivations for and against the establishment of a VCS is provided. Strong arguments from a victim-centered and moral perspective are made for establishing a VCS. Some potential benefits for the criminal justice system as a whole are also described. Arguments against establishing a VCS are subsequently outlined. These mainly focus on whether providing compensation, in a context of limited resources, should be prioritised over and above other aspects of victim support. The conclusion from the debates is that compensation, either partial or full, should be seen as a complementary component of victim support, which is vital to ensuring the efficacy of the whole criminal justice system. This makes prioritisation difficult.

An overview of the South African law of damages and existing schemes that offer compensation (i.e. compensation to victims of road accidents, occupational injuries and diseases, and political traumas) is provided. The international experience in compensating victims of crime is also considered and the recovery of compensation from the offender is discussed.

The eligibility criteria for compensation from the State, based on comparative international data, are elucidated and specific parameters applied to foreign compensation schemes, which may be appropriate for inclusion in a South African scheme, are highlighted, including the mandate of these schemes, the type of crimes eligible for compensation, as well as who may qualify to apply to the scheme for compensation. This analysis of the parameters of different compensation schemes is considered the skeleton upon which any legislative framework for a South African compensation scheme would be based.

The findings of an analysis of selected police dockets are reported in order to verify information about certain types of violent crimes and their impact on victims. This information is used to make assumptions when costing a VCS, and for shaping possible policy scenarios. In addition, the docket analysis focuses on the usefulness of police information in adjudicating possible claims for victim compensation. It reveals, among other findings, that current police recording practices provide inadequate data on which to base an assessment of compensability, such as may be required in a VCS. Of particular concern is the fact that a medical report was not completed in over 80% of the cases studied.

The variables that would determine the overall cost of a compensation scheme in South Africa are dealt with on the basis of certain assumptions, taking into consideration the estimated financial impact of various policy

permutations and applied eligibility parameters. The Discussion Paper also considers the estimated administrative costs that would be incurred in running a compensation scheme. These, and the costs of different models, vary a great deal (i.e. from incredibly costly to potentially viable in the South African context) depending on the policy parameters used.

Possible funding sources to finance the establishment of a VCS are assessed. Attention is given to the potential of state funding, voluntary sources and the imposition of dedicated taxes. Obstacles that may be encountered in attempting to secure such funding are considered, as are alternative expenditure choices, including the provision of limited and targeted assistance to crime victims in lieu of extensive compensatory support.

The mechanics of administering a victim compensation scheme are briefly defined and some of the administrative processes that would need to be in place if such a scheme were established in South Africa are examined. In particular, steps are detailed which aim to minimise the risks, while maximising the benefits to victims.

The Discussion Paper recommends that a fully-fledged compensation scheme is not possible in the short-term and outlines the preconditions (e.g. reliable police record keeping, sufficient funds, etc.) that would need to exist for such a scheme to be established in South Africa. It is, however, recommended that pilot targeted compensatory assistance be established for certain categories of victims of crime, i.e. disabled crime victims, rape survivors and the dependents of murder victims. In addition, it is recommended that a Victims of Crime Fund be set up and that dedicated taxes on firearm ownership and ammunition purchase, as well as alcohol, be considered as mechanisms for funding pilot targeted compensatory schemes.
Recommendations are also made concerning issues such as witness fees, restitution from offenders, the role of the victim empowerment programme, and the Charter of Victims' Rights. Finally, it is recommended that the development of a compensation scheme should not be dismissed out of hand simply because a full-scale scheme is not feasible in the short-term. The feasibility of the scheme itself should be assessed periodically against a number of suggested criteria and a VCS in South Africa should be developed incrementally.

The closing date for comment on Discussion Paper 97 is 31 July 2001.

Publication of Divorce Proceedings: Section 12 of the Divorce Act 70 of 1979 (Discussion Paper 98)

The South African media are, in terms of section 12 of the Divorce Act 70 of 1979, prohibited from publishing any particulars of a divorce action or any information which comes to light in the course of such an action other than the names of the parties to a divorce action, the fact that a divorce action between the parties is pending in a court of law, and the judgment or order of the court. The prohibition does not apply to the publication of particulars or information for the purposes of the administration of justice, in a bona fide law report, or for the advancement of or use in a particular profession or science.

However, since the provision does not have extra-territorial operation, the foreign media who are allowed to attend proceedings in courts are unrestricted in their reportage of South African divorce proceedings. Since South African citizens have access to the foreign media and the press, the purpose of the prohibition is defeated.

There are cases of non-compliance with section 12 of the Divorce Act. An important reason why the section is not adhered to is that it is seen as being unconstitutional. South Africa has a Constitution with a Bill of Rights which entrenches, inter alia, the right to freedom of speech, freedom of information and the rights to privacy and dignity. These rights are interactive and have to be balanced.

Since section 12 is a pre-constitutional statutory provision, its constitutionality needs to be considered in terms of these rights. Section 12 gives no discretion to the court to determine whether or in what respects the case should be held *in camera* or whether media disclosure should be permitted or prohibited.

It seems undesirable that legitimate areas of non-disclosure (such as aspects involving the interests of minor children) should be compromised by non-compliance with the provision, and also that Acts of Parliament should be viewed as unenforceable and open to impingement.

The Commission's investigation has so far revealed four possible options for reform:

<u>Option one</u>
Option one makes provision for the repeal of section 12 of the Divorce Act. One would thus revert to the position prior to the 1979 Act, where there would be no general prohibition on the publication of divorce proceedings. Any person wanting to prevent the publication of divorce proceedings would have to request the court to close the proceedings in terms of section 16 of the Supreme Court Act 59 of 1959.

Should this option be chosen, the importance of self-regulation by the media would have to be stressed. Ethical responsibilities already laid down for the media in codes of conduct assumed voluntarily or required by statute could be developed or expanded upon. The law could, in protecting the privacy of individuals, aim to incorporate what journalists, editors and other media personnel themselves regard as high standards of reporting in order to enhance respect for legal principles.

<u>Option two</u>
The second option would make provision for the amendment of section 12 of the Divorce Act so that there would be no general

prohibition on publication of proceedings, but in terms of which a court would have the discretion to make an order preventing any person from publishing any particulars of a divorce action or any information or evidence which comes to light in the course of such an action. Such order would not apply for the purposes of the administration of justice, to a bona fide law report or to information published for the advancement of or use in a particular profession or science.

Option three
This option would be the amendment of sec 12 of the Divorce Act to allow a court the discretion to make an order to lift the general prohibition on publication and to grant leave to any party to publish any particulars of a divorce or any information or evidence which comes to light in the course of such an action. The court would in exercising its discretion take into consideration the provisions of section 28(2) of the Constitution, which specifically protects the rights of children.

Option four
Option four would entail the amendment of section 12 to ensure the anonymity of parties. The facts of the case and court decisions would therefore be published without mentioning the names of the parties, their residential or business addresses, the suburb, town, township or village or any other information which would make it easy to identify the parties. The name of the presiding officer and the court where the case was held could, however, be publicised.

The closing date for comment on Discussion Paper 98 is 8 June 2001.

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 (Discussion Paper 99)

Computers play an integral part in the functioning of society. They are relied upon to perform functions upon which human life as well as the economic and industrial functioning of society are dependent. There is very serious potential danger if computers performing these functions are interfered with. The Commission therefore proposes that these activities be made subject to criminal sanction.

The activities of obtaining unauthorised access to computer data and software applications and of unauthorised modification of computer data and software applications cannot be dealt with satisfactorily in terms of the present provisions of our criminal law. The introduction of new offences by way of legislation should therefore be considered seriously and it is proposed that a "Computer Misuse Act" be developed for this purpose.

The offences that should be contained an such an Act are:

* Unauthorised access to applications or data in computer system.
* Unauthorised modification of applications or data in computer system.
* Development and trafficking in devices or applications primarily used to obtain unauthorised access.
* Trafficking in computer passwords.
* Interference with use of computer system.

It is also proposed that a Computer Misuse Act make provision for procedural matters such as search and seizure, admissibility of evidence and jurisdiction.

The closing date for comment on Discussion Paper 99 is 2 July 2001.

The Discussion Papers are available on request and are free of charge.

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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 five reports were submitted to the Minister for Justice and Constitutional Development on 6 June 2001:

Report on Simplification of Criminal Procedure: Sentence Agreements

The Commission concludes that the Criminal Procedure Act, because it gives a wide discretion to the prosecution, directly and indirectly, provides for plea agreements. What it does not provide for, however, is sentence agreements. There are studies which show that plea (and even sentence) negotiation takes place in South Africa and performs an important part 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 and 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 problem in the criminal justice

system 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 allow 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 therefore make an important contribution to the acceleration of the process. Statutory measures are 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 legal principles.

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

* The prosecutor, subject to the directives of the National Director of Public Prosecutions, 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 be binding on both the accused and the prosecution once accepted by the court;
* The agreement must be in writing and must state that, before conclusion of the agreement, the accused has been informed that he or she has the right to be presumed innocent and to put the State to task of proving his or her guilt beyond reasonable doubt; to remain silent and not to testify during the proceedings; and not to be compelled to give self-incriminating evidence.

* The agreement must state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made.

* The presiding officer must ensure 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 an agreement is reached, the sentence agreement is disclosed to the court and once the court is satisfied that the agreed sentence is appropriate the accused is requested to plead.

* The court, before convicting the accused, must 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.

* If the court accepts the agreement, 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 or heavier sentence than the agreed sentence, the court must inform the parties of the lesser or heavier sentence which it considers to be appropriate.

* Where the parties have been informed of the lesser or heavier sentence, the prosecutor or the accused, as the case may be, may abide by the agreement or withdraw from the agreement, and in the latter event the trial must proceed *de novo* before another presiding officer. In such a case the agreement is to be regarded *pro non scripto*; no admissions contained in the statements are admissible against the accused; the prosecutor and the accused may not enter into a similar agreement and the prosecutor may proceed on any charge against the accused.

* The judicial officer may 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 sentence. Review would be the proper remedy in the event of undue influence or the like.

Report on the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing

The report focuses primarily on those sections which are clearly unconstitutional and which need urgent consideration. The premise is that the Commission should not usurp the function of the Constitutional Court and decide 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. The constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation is, however, also dealt with.

The report deals *inter alia* 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 section154 (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, 213 (the unrepresented accused).

Report on Domestic Arbitration

Arbitration is increasingly recognized as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system. Arbitration needs to be supported by appropriate legislation. The objects of a modern arbitration statute are the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the arbitral proceedings effectively. The existing Arbitration Act 42 of 1965 fails to meet these objectives adequately.

The issues have been debated thoroughly. Responses from many interested bodies and individuals have been elicited, and regional workshops have been held. The comments of all parties which felt that they had an interest in this topic or may be affected by the type of measures discussed in this report were scrutinised by the Commission.

The Commission's investigation has revealed that there are three basic options for a new domestic arbitration statute.

The first is to improve the existing statute while retaining its basic provisions. In view of the dramatic improvements to arbitration legislation in other jurisdictions during recent years, notably England, this option does not appear to be practical.

The second is to follow the approach adopted by several other countries and to adopt the UNCITRAL Model Law on International Commercial Arbitration of 1985 for both domestic and international arbitration. In July 1998 the Commission published a report which recommended that the UNCITRAL Model Law should be adopted by South Africa for international commercial arbitrations. However, because of the need, in the context of international arbitration, to keep changes to the content and language of the Model Law to a minimum, this approach also appears to be inappropriate for the needs of a new domestic arbitration statute for South Africa.

The third approach, and that recommended by the Commission in this Report, is to have a new statute combining the best features of the Model Law and the English Arbitration Act of 1996, while retaining certain provisions of the 1965 Act which have worked well in practice. The Commission therefore recommends that the existing Arbitration Act 42 of 1965 should be repealed and replaced with a comprehensive new arbitration statute for domestic arbitration, based on the principles set out below.

It is notorious that the potential advantages claimed for arbitration compared to litigation, as a more expeditious and cost-effective method of resolving disputes, are often not achieved in practice, particularly in complex commercial disputes and in the construction industry. The Commission therefore recommends that a statutory duty should be imposed on the arbitral tribunal to adopt procedures which, while fair, in the particular circumstances of the dispute will avoid unnecessary delay and expense. Increased powers are recommended for the tribunal to enable it to comply with this duty. These powers include the power to rule on its own jurisdiction, the power to depart from the ordinary rules of evidence, the power to decide whether or not there should be an oral hearing, a limited power to order interim measures and security for costs, the power to call

witnesses, more effective powers to deal with a party in default and the power to limit recoverable costs. To address the problem posed by multi-party disputes, the Commission recommends that the tribunal should have a limited power to permit a third party to join the arbitral proceedings in certain circumstances. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

The Commission recommends that the powers of the court pertaining to arbitration should be reviewed and generally brought into line with the powers of the court under the Model Law, while retaining certain powers of the court in the 1965 Act not found in the Model Law, but in modified form. Particular attention has been given to the need to prevent applications to court being abused by unscrupulous parties intent on delaying the arbitration process. The Draft Bill annexed to the Report also contains certain provisions designed to facilitate the use of mediation by the parties to an arbitration agreement. In the interests of consumer protection, it is recommended that a consumer, as defined in the Draft Bill, who enters into an arbitration agreement relating to future disputes should be able to cancel that arbitration agreement within a specified period.

In view of the procedural safeguards in the Draft Bill and the protection provided by it for consumers, arbitration agreements should be expressly exempted from the legislation recommended in 1998 by the Commission in its ***Report on Unreasonable Stipulations and the Rectification of Contracts***, which will enable the High Court to render unreasonable, unconscionable or oppressive contracts inoperative.

The report follows the South African Law Commission's ***Report and draft Bill on International Arbitration*** submitted to the Minister of Justice in July 1998.

Report on Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour

The Report deals with harmful (i e unacceptable) sexual behaviour by persons with HIV or AIDS that could transmit HIV or expose others to HIV, current measures available to address such behaviour, and whether there is a need for statutory intervention. The recommendations cover only *consensual* sexual activity. Transmission of or exposure to HIV can also occur during *non-consensual* sexual acts such as rape. The need for further measures in the latter regard will be dealt with under the Commission's investigation into sexual offences.

The Commission concluded that the creation of a statutory offence is neither necessary nor desirable and recommended that the current legal position be maintained. The Commission is of the view that arguments against legislative intervention override arguments supporting such step. Moreover, the Commission believes that strong indications from the entire process of research and deliberation (including the distribution of a discussion paper for public comment and a consultative meeting with a wide range of experts, representing diverse interests) weigh against legislative intervention and that recommending new legislation under these circumstances would not be principled.

In concert with this recommendation, the Commission identifies a pivotal need for the development of practical mechanisms by government departments to utilise effectively the existing common law crimes in cases of harmful HIV-related behaviour; and to encourage a culture of responsibility regarding HIV status.

These mechanisms may include:
* Making the public aware of applicable common law crimes coupled with the assurance that our existing law will indeed be used in respect of harmful HIV-related behaviour.

* Introducing practical measures to establish a standard of policing, investigation and prosecution that would ensure successful prosecutions of harmful HIV-related behaviour under the existing law.

* Maintaining and improving public health measures relating to awareness about HIV and its prevention, and public access to HIV testing and counselling. Such activities should be aimed at encouraging a culture of responsibility.

Major reasons for the Commission's conclusion are the following:
* Lack of scientific, empirical or even informal evidence that the behaviour to be targeted by intervention is occurring to such an extent that the creation of a statutory offence is necessary.

* Enactment of a statutory offence will have no or little practical utility and could be largely symbolic, especially in view of the existence of an array of common law crimes that could be utilised against harmful HIV-related behaviour.

* The social costs entailed in creating an offence targeting *negligent* behaviour (in the form of negligent transmission of or exposure to HIV - which is not covered by existing common law), is not justified. Negligence in the HIV/AIDS context would involve an individual who is not aware that he or she has HIV and in this state of ignorance unknowingly transmits HIV or exposes another to HIV. The Commission is convinced that where the majority of persons in South Africa with HIV are unaware of their HIV status and where there are insufficient resources for the widespread HIV testing that would be required to enable a change of behaviour, it is not just and right that persons who are ignorant of their health status (but ought perhaps ideally to know that they are infected), should be punished. In effect such individuals would be punished for their failure to know their HIV status - which may lie outside their control.

* The extent of intrusion into sexual privacy that will be inherent in any HIV-specific statutory offence is not justified.

Report on the Review of the Marriage Act 25 of 1961

The Report focuses mainly on whether the provisions contained in the Marriage Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.

Some of the issues addressed and recommendations made in the report are the following:

* The Commission is presently dealing with three interrelated family law themes in separate investigations: the review of the Marriage Act (project 109), Islamic Marriages and Related Matters (project 59) and Domestic Partnerships (project 118). It also finalised its report on Customary Marriages in 1998. It has been suggested that these investigations should first be finalised with a view to ultimately regulating all marriages in one Marriage Act. The Commission is, however, of the view that amendments which are identified in this investigation should
* Any nomination by a recognised body of a person for designation by the Minister as a marriage officer must set out particulars as to whether the person nominated is a religious representative ordained or appointed according to the rites and usages of the body concerned; and that nominated person is, as a religious representative, recognised by the religious body to which he or she belongs as authorised to conduct marriages according to its rites and usages.

* A religious body should state in its nomination for the appointment of a person as a marriage officer that adequate notice of the nomination has been given to its members in order to afford them an opportunity
☠ that at least one of the parties to the intended marriage is a South African citizen;
☠ where one party to the intended marriage is not a South African

be implemented and the Marriage Act consolidated in future to address civil, religious and customary marriages in one Marriage Act.

* The Marriage Act should provide for the Minister of Home Affairs to designate countries whose consular or diplomatic officers may conduct marriages in South Africa. The Act should require that neither of the parties contemplating marriage should be a South African citizen, that the marriage should not be void because either of the parties is lawfully married to some other person, that the parties are within a prohibited relationship, or that either of the parties is under marriageable age. The marriage should also be recognised as a valid marriage by the law or custom of the foreign country, and the marriage should be registered in terms of the Act.

* The Act should set out the circumstances under which marriages are void and voidable.

* The Act should reflect the present position regarding the designation of Commissioners and special justices of the peace as marriage officers.

* Ambassadors, High Commissioners and Consuls should, by virtue of their office and as long
to raise objections.

* The Marriage Act provides for the “solemnisation” of marriages. “Conduct a marriage” or “join parties in marriage” are recommended as substitutes.

* The Marriage Act should not make provision for the designation of marriage officers other than those presently provided for.

* If a religious body changes the name whereby it was known, or amalgamates with any other religious body, or changes its objects, or if there is a material change in its circumstances, it must immediately advise the Minister who may revoke its recognition for any of
citizen, that that party is not a subject or citizen of the foreign country or sufficient facilities do not exist for conducting the marriage in the foreign country in accordance

as they hold such office, be *ex officio* marriage officers for the area in which they hold office.

* The Marriage Act is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion". Provision should be made that any religious organisation or denomination may apply to the Minister of Home Affairs for recognition, and that they may nominate persons for designation by the Minister as marriage officers. Such applications for recognition should contain information setting out whether-
☠ the religious body professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;
☠ the rites and usages of the marriage ceremony followed by the religious body meet the requirements of South African marriage law; and
☠ the religious body is sufficiently established, both in respect of continuity of existence and recognised rites and usages, to warrant the designation of its religious representatives as marriage officers.

these reasons.

* The grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Act.

* The Act should provide that any person who is authorised to conduct any marriage in any country outside the Republic of South Africa, may conduct a marriage between parties of whom at least one is a South African citizen and domiciled in the Republic, and such marriage is for all purposes deemed to have been conducted in the Republic. It should be provided that a marriage shall not be conducted in a foreign country unless the marriage officer is satisfied -
with the law of that country;
☠ where one party to the intended marriage is a subject or citizen of the foreign country, that the authorities of that country will not object to the

intended marriage being conducted in that country; or
- that a marriage in the foreign country between the parties in accordance with the law of that country would not be recognised in South Africa.

* The provision that a marriage may be conducted by a marriage officer only should remain.

* The Act prohibits the joining of parties in marriage without the production of an identity document or the making of the prescribed declaration by the parties. The Act should state that failure to comply strictly with the provision does not affect the validity of the marriage provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act; that there were no other lawful impediments to the marriage; that such marriage was not dissolved or declared invalid by a competent court; and that neither of the parties to such marriage had after such marriage and during the life of the other, lawfully married another.

* The party raising objections to a marriage should provide a copy of his or her objection in writing to the parties contemplating marriage at least 24 hours prior to the co0ntemplated marriage being conducted.

* The Act prohibits a marriage officer from conducting the marriage of a minor if the required consent is not furnished to him or her in writing. The Act should set out fully what is meant by “legally required consent”.

* The minimum age for marriage should be 18 years of age for males and females.

* The Act should provide that the permission of the Minister of Home Affairs should be sought when parties related by affinity wish to marry provided both parties have reached the age of 18 years. The Act should also clearly set out which marriages between parties closely related are void.

* The Act presently prescribes the following places for the conducting of marriage ceremonies: churches, other buildings used for religious services, public places and private dwelling-houses with open doors. There should be no limitations with regard to places where marriages may be conducted.

*Provision must be made that a marriage officer who is a minister of religion or a person holding a responsible position in a religious body may follow the marriage formula usually observed by that body, provided that the marriage formula includes the words presently prescribed in the Act (subject to minor proposed amendments).

* The Act should provide that a minister of religion or a person holding a responsible position in a religious denomination or organisation may receive such fees or payments as the religious body may from time to time determine for conducting marriages.

* South African courts have jurisdiction to try persons who contravene the provisions of the Marriage Act in any country outside the Republic of South Africa. This position should remain.

* The Transkei Marriage Act of 1978, the Bophuthatswana Marriage Act of 1980 and the Ciskei Marriage Act of 1988 should be repealed.

The reports will be made available on the Internet at the following site: http://www.law.wits.ac.za/salc/salc.html

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
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
101	The application of the Bill of Rights to the criminal law, criminal procedure and sentencing
105	Security legislation
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
121	Consolidated legislation pertaining to international cooperation in civil matters
122	Incapable adults
123	Protected disclosures
124	Privacy and data protection
125	Prescription periods

Invitation

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

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