South African Law Reform Commission

**DISCUSSION PAPER 128**

**PROJECT 25**

# STATUTORY LAW REVISION: LEGISLATION ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

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**31 JANUARY 2012**

# Introduction

The South African Law Reform Commission Act, 1973 (Act 19 of 1973) established the South African Law Reform Commission (SALRC).

The members of the SALRC are –

The Honourable Madam Justice Yvonne Mokgoro (Chairperson)
The Honourable Mr Justice Willie Seriti (Vice Chairperson)
Professor Cathi Albertyn
The Honourable Mr Justice Dennis Davis
Mr Thembeka Ngcukaitobi
Advocate Dumisa Ntsebeza SC
Professor PJ Schwikkard
Advocate Mahlape Sello

The Secretary is Mr Michael Palumbo. The project leader responsible for this investigation is Advocate Mahlape Sello. The researcher assigned to this investigation is Mr Pierre van Wyk who may be contacted for any enquiries about this Discussion Paper.

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## Preface

The purpose of this Discussion Paper is to consult with stakeholders on the preliminary findings and proposals contained in this Discussion Paper on the provisionally proposed repeals and amendments made in this paper. The SALRC has liaised with the Department of International Relations and Cooperation (DIRCO) in the phases of this investigation leading to the development of this Discussion Paper. The SALRC acknowledges the valuable assistance it received, particularly from officials in the Legal Services section of the DIRCO. This Discussion Paper will serve as a basis for the SALRC's further deliberations in the development an ultimate report on this review. The paper contains the SALRC's preliminary proposals. The views, conclusions and proposals that follow in this paper must not be regarded as the SALRC's final views or final recommendations.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act, 2000.

Respondents are requested to submit written comment and representations to the SALRC by 31 January 2012 at the address appearing on the previous page. Comment can be sent by e-mail or by post.

This Discussion Paper is also available on the Internet at http://salawreform.justice.gov.za/dpapers.htm

The proposed International Relations and Cooperation Laws Repeal and Related Matters Bill is contained in Annexure A. The Bill sets out the Acts that may require amendment. The Schedule to the Bill lists the Acts proposed for repeal. Annexure B lists the statutes administered by the Department of International Relations and Cooperation.

Mr Pierre van Wyk may be contacted for further information on this Discussion Paper at the contact details listed on page ii above.

## Preliminary findings and proposals

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment of legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution, redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. Furthermore, 14 statutes (11 principal Acts and three amendment Acts) are administered by the Department of International Relations and Cooperation (DIRCO) (see Annexure B).[1]

2. After analysis of these statutes, the SALRC proposes that:

(a) The following two statutes listed in the International Relations and Cooperation Laws Repeal and Related Matters Bill be amended for the reasons set out in Chapter 2 of this Discussion Paper and to the extent outlined in the Bill:

(i) The Foreign State Immunities Act 87 of 1981; and
(ii) The Diplomatic Immunities and Privileges Act 37 of 2001.

(b) The following five statutes listed in the Schedule to the Bill be repealed:

(i) The Treaties of Peace Act 32 of 1921;
(ii) The Treaties of Peace Act 20 of 1948;
(iii) The Diplomatic Mission in United Kingdom Service Act 38 of 1961;
(iv) The Commonwealth Relations (Temporary Provision) Act 41 of 1961;
(v) The Commonwealth Relations Act 69 of 1962.

(c) Given that twenty-three years have passed since the date of assent of the Foreign States Immunities Amendment Act 5 of 1988, the question arises whether this amendment Act has not become redundant and ought to be repealed. The SALRC requested the view of the DIRCO, in particular, to comment on the retention of this Act. The DIRCO advised that due to political considerations the Amendment Act was deemed necessary at the time and the question whether or not to implement this Act will be reconsidered by the Minister soon (see par 2.31).

(d) Given also that more than seventeen years have passed since the date of assent of the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993, the question arises whether this Act has not become redundant and ought to be repealed. The SALRC requested the view of the DIRCO, in particular, to comment on the retention of this Act too. The DIRCO advised that it is foreseen that

[1] The list of statutes was provided by the Department of International Relations and Cooperation in April 2010.

this Act could be amended to accommodate the implementation of Security Council measures and that this will be addressed by the DIRCO in due course (see par 2.34).

(e) Since the South African Development Partnership Agency Bill will in future repeal the African Renaissance and International Co-operation Fund Act there is no purpose in effecting amendments to the outdated definitions in section 1 of the African Renaissance and International Co-operation Fund Act which refer to "'Department' as meaning Department of Foreign Affairs" and "'Minister' as meaning Minister of Foreign Affairs". Since the DIRCO will repeal the African Renaissance and International Co-operation Fund Act when promoting the South African Development Partnership Agency Bill, the SALRC does not include the repeal of the African Renaissance and International Co-operation Fund Act in the Schedule to the Bill (see par 2.28).

3. The SALRC would appreciate receiving comment from the general public and stakeholders by 31 January 2012.

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# CHAPTER ONE

# BACKGROUND AND SCOPE OF PROJECT 25

## A INTRODUCTION

### 1 The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (the SALRC) are set out as follows in the South African Law Reform Commission Act 19 of 1973: to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including —

(a) the repeal of obsolete or unnecessary provisions;

(b) the removal of anomalies;

(c) the bringing about of uniformity in the law in force in the various parts of the Republic; and

(d) the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

### 2 History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7 that dealt with the review of pre-Union legislation. This resulted in the repeal of approximately 1 200 ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act No 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4 In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would

result in discrimination as defined by section 9 of the Constitution. This section prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation will be on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit, by the SALRC, of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

# B WHAT IS STATUTORY LAW REVISION?

1.7 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.[2] Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

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[2] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008.

1.8 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.[3] Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.9 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.10 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:[4]

(a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
(b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
(c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
(d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
(e) repealing provisions e.g. “Section 33 is repealed/shall cease to have effect”;
(f) commencement provisions once the whole of an Act is in force;
(g) transitional or savings provisions that are spent;
(h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
(i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.11 The Law Commission of India notes that in England the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded”, and “obsolete” were defined in memoranda to Statute Law Revision Bills as follows: [5]

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3 See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008.

4 See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008.

5 Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from http://lawcommissionofindia.nic.in/51-100/Report96.pdf on 28 May 2008.

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.12 Statutory provisions usually become redundant as time passes.[6] Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.13 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of

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[6] *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008.

England and Wales.[7] Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
> (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.14 The methodology adopted in this investigation is to review the statute book by Department – the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

# C THE INITIAL INVESTIGATION

1.15 In the early 2000s the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsoleteness. CALS pursued four main avenues of research in their study conducted in 2001:[8]

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7 *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008.

8 "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand available upon request from pvanwyk@justice.gov.za.

(a) First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.

(b) Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of legislative provision were identified, and an analysis made of the Constitutional Court's jurisdiction in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

(c) Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.

(d) Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

1.16 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions —

(a) the Recognition of Customary Marriages (August 1998);

(b) the Review of the Marriage Act 25 of 1961(May 2001);

(c ) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);

(d) Traditional Courts (January 2003);

(e) the Recognition of Muslim marriages (July 2003);

(f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);

(g) Customary Law of Succession (March 2004); and

(h) Domestic Partnerships (in March 2006)

# D SCOPE OF THE PROJECT

1.17 This investigation focuses not only on obsolescence or redundancy of provisions but also on the question of the constitutionality of provisions in statutes. In 2004 Cabinet endorsed that the

highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation will be limited to those statutes or provisions in statutes that:

(a) differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or

(b) unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or

(c) unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process.

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.[9] However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is not foreseen that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

# E ASSISTANCE BY GOVERNMENT DEPARTMENTS AND STAKEHOLDERS

1.21 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot

[9] Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This will ensure that all relevant provisions are identified during this review, and dealt with responsively and without creating unintended negative consequences.

# F CONSULTATION WITH STAKEHOLDERS

1.22 The methodology adopted in this investigation is to review the statute book by Department — the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC’s preliminary findings and proposals. The next step the SALRC undertakes is the development of a discussion paper in respect of legislation of each Department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

1.23 In February 2011 the SALRC submitted its Consultation Paper containing the SALRC’s preliminary findings and proposals to the Department of International Relations and Cooperation (DIRCO) and requested the DIRCO to confirm whether it supports the provisionally proposed repeals and amendments.

1.24 On 30 May 2011 the DIRCO submitted its comments on the Consultation Paper to the SALRC. This Discussion Paper reflects the comments it received from the DIRCO. The SALRC acknowledges the valuable assistance it received, particularly from officials in the Legal Services section of the DIRCO.

1.25 The Commission considered this Discussion Paper at its meeting held on 22 October 2011 and approved its publication for general information and comment. The closing date for comment is 31 January 2012.

# CHAPTER TWO

# EVALUATION OF LEGISLATION ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION

## A INTRODUCTION

2.1 The Department of International Relations and Cooperation is the ministry of foreign affairs for the South African government. In addition to managing and overseeing South Africa's diplomatic missions, the Department is responsible for South Africa's relationships and representations with foreign countries and international organisations. In his statement on the appointment of the new Cabinet on 10 May 2009, President Jacob Zuma, among others, referred to changes in government structures. One such change included the name change of the *Department of Foreign Affairs* to the *Department of International Relations and Cooperation*.[10]

2.2 The strategic objectives of the Department are listed as follows:[11]

- Through bilateral and multilateral interactions protect and promote South African National interests and values.
- Conduct and co-ordinate South Africa's international relations and promote its foreign policy objectives.
- Monitor international developments and advise government on foreign policy and related domestic matters.
- Protect South Africa's sovereignty and territorial integrity.
- Contribute to the formulation of international law and enhance respect for the provisions thereof.
- Promote multilateralism to secure a rules based international system.

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10 In a statement by Minister Maite Nkoane-Mashabane on 14 May 2009, she stated: "The name change to the Department of International Relations and Cooperation is in line with international trends and is informed by the need to give greater clarity on the mandate of the department. In this regard, over and above its normal functions the department will also engage in dynamic partnerships for development and cooperation. ... The renaming of the Department as the Department of International Relations and Cooperation is a deliberate decision on the part of government to ensure a holistic approach to foreign relations which reflects on developmental agenda.

11 See "About the Department" at http://www.dfa.gov.za/department/index.html accessed on 8 August 2011.

- Maintain a modern, effective and excellence driven department.
- Provide consular services to South African nationals abroad.
- Provide a world class and uniquely South African State Protocol service.

# B GENERAL OBSERVATIONS

2.3 Having regard to scope of project 25 within the context of this Consultation Paper reviewing legislation administered by the Department of International Relations and Cooperation, it is important to note the following:

(a) The SALRC has a limited review mandate to conduct this investigation and it remains important to be clear that this Consultation Paper forms part of a narrowly focused and text-based statutory review process as indicated in chapter 1 above.

(b) The Department of International Relations and Cooperation participated in the SALRC audit of legislation September 2003 and October 2005. In April 2010, the Department provided the SALRC with a list primary legislation that is the focus of review in this Consultation Paper. On 06 December 2010, the Department confirmed that there were no further amendments to the original list provided in April 2010.

(c) While a statute administered by the Department of International Relations and Cooperation appears to be free from provisions, if any, that contradict or violates section 9 of the Constitution of the Republic of South Africa, 1996, it is not to say that the execution of such statute is necessarily in line with the protections afforded by section 9 (the equality clause). Therefore, this Consultation Paper does not reflect any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed.

# C EVALUATION OF LEGISLATION

2.4 The Department of International Relations and Cooperation administers 14 statutes. The 11 principal statutes and three amendment statutes presently administered by the Department are evaluated in this Consultation Paper. The SALRC conducted this investigation to determine whether any of these statutes or provisions therein may be repealed as a result of redundancy, obsoleteness or infringing section 9 of the Constitution. The SALRC has identified five statutes that should be repealed, as well as four Acts that should be amended. The provisionally proposed repeal and amendment of these statutes are set out in the draft International Relations and

Cooperation Laws Repeal and Related Matters Bill attached as Annexure A to this Consultation Paper. The discussion below provides motivation for these proposals and why the relevant statutes or provisions were identified for repeal or amendment.

2.5 In this chapter, the statutes provisionally proposed for repeal include the following:

(a) The Treaties of Peace Act 32 of 1921;

(b) The Treaties of Peace Act 20 of 1948;

(c) The Diplomatic Mission in United Kingdom Service Act 38 of 1961;

(d) The Commonwealth Relations (Temporary Provision) Act 41 of 1961; and

(e) The Commonwealth Relations Act 69 of 1962.

2.6 The statutes provisionally proposed for amendment include the following:

(a) The Foreign State Immunities Act 87 of 1981; and

(b) The Diplomatic Immunities and Privileges Act 37 of 2001.

# D LEGISLATION REDUNTANT, OBSOLETE OR UNCONSTITUTIONAL AND PROPOSED TO BE REPEALED

2.7 It is provisionally proposed that the following legislation be repealed and subsequently be removed from the statute book as they have become redundant and obsolete, namely the Treaties of Peace Act, 1921 (Act No. 32 of 1921); the Treaties of Peace Act, 1948 (Act No. 20 of 1948); the Diplomatic Mission in United Kingdom Service Act, 1961 (Act No. 38 of 1961; the Commonwealth Relations (Temporary Provision) Act, 1961 (Act No. 41 of 1961; and the Commonwealth Relations Act, 1962 (Act No. 69 of 1962). Commenting to the Consultation Paper the DIRCO commented that they concur with the Commission that the five statutes could be repealed since they are redundant and/or obsolete.

## 1. Treaties of Peace Act 32 of 1921

2.8 The Treaties of the Peace Act 32 of 1921 was assented to on 30 June 1921 and commenced on 05 July 1921. Coming into operation soon after the end of World War I, the object of the Act was to provide for the carrying out of treaties of peace with certain countries where there was no reason to continue with a state of war and where a state of peace has been declared. The Act gave powers to the Governor-General “in so far as concerns the Union of South Africa of

certain treaties of peace between His Majesty the King and certain other powers";[12] namely, Austria, Bulgaria, Hungary, and Turkey.

2.9 The Act also sought to extend the operation of the Treaty of Peace and South West Africa Mandate Act 49 of 1919.[13] The latter Act gave effect to the Mandate for South West Africa established pursuant to the Treaty of Versailles by delegating authority for the administration of South West Africa to the Governor-General of South Africa. It was to cease to have effect on 1 July 2010 by its own terms (section 5),[14] but it was extended by section 2 of the Treaties of Pact Act 32 of 1921 until such time as it is repealed. In 1993, the Treaty of Peace and South West Africa Mandate Act 49 of 1919 was repealed in its entirety in South Africa by section 36 of the General Law Amendment Act 108 of 1993.[15]

2.10 The SALRC proposes that the Treaties of the Peace Act 32 of 1921 should be repealed since the Act has fulfilled the purpose for which it was enacted. The Act dealt with a specific international situation at the conclusion of World War I. Also, by giving legislative effect to the previously colonial relationship between the "Union of South Africa" and Britain, including references to obsolete mandates, expressions and designations such as the "Union of South Africa", "the Governor–General" and of "His Majesty the King", that are no longer in existence, irrelevant and have otherwise ceased to serve any purpose in present day South Africa, renders the Treaties of Peace Act 32 of 1921 redundant and obsolete. In its comment to the SALRC on the Consultation Paper the DIRCO supported the repeal of this Act.

## 3 Treaties of Peace Act 20 of 1948

2.11 The Treaties of Peace Act 20 of 1948 was assented to on 25 March 1948 and commenced on 09 April 1948.[16] The object of the Act is to provide for the carrying out of treaties of peace between the "Government of the Union of South Africa" and Bulgaria, Finland, Hungary, Italy and Roumania (as it was then named).[17] In terms of section 2, the Governor-General is given the

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12 See long title to Act 32 of 1921.

13 In the long title of the Act, it is stated: "For carrying into effect, in so far as concerns of the Union of South Africa, the treaty of Peace between His Majesty the King and certain other Powers; and for carrying into effect any Mandate issued in pursuance of the Treaty to the Union of South Africa with reference to the territory of South West Africa, lately under the sovereignty of Germany".

14 In terms of section 5: "The provisions of this Act shall cease to have effect on the first day of July, nineteen hundred and twenty: Provided, however, that by resolution of both Houses of Parliament the operation of such provisions may be extended for any period mentioned in the resolution".

15 See summary by Legal Assistance Centre – Namibia at http://www.lac.org.na/namlex/Intnl.pdf accessed on 30 November 2010.

16 See Assembly Debates, Second Reading of Treaties of Peace Bill, 19 March 1948.

17 See long title of the Act.

power “by proclamation make such regulations” for the carrying out of any peace treaty ratified by the Government. In terms of section 3, the Governor-General is also given similar powers “whenever a treaty of peace is concluded between the Government of the Union and any power ... between whom and the Union a state of war exists at the date of commencement of this Act”.

2.12 The SALRC proposes that the Treaties of Peace Act 20 of 1948 should be repealed since the Act has fulfilled the purpose for which it was enacted. It dealt with a specific international situation existing at the time, the conclusion of World War II. It refers to obsolete mandates, designations and expressions such as “Government of the Union of South Africa” and “Governor-General” that are no longer in existence, irrelevant and have otherwise ceased to serve any purpose in present day South Africa. The Treaties of Peace Act 20 of 1948 is therefore redundant and obsolete. The DIRCO supported the repeal of this Act in its comment to the Consultation Paper.

## 3 Diplomatic Mission in United Kingdom Service Act 38 of 1961

2.13 The Diplomatic Mission in United Kingdom Service Act 38 of 1961 was assented to on 18 May 1961 and commenced on 31 May 1961. At the time of its passage and in view of South Africa’s expected departure from the Commonwealth of Nations at the end of May 1961, the Act as one of the enactments consequential on the establishment of the Republic provides in its long title: “To provide for the appointment of locally recruited staff for the office of the Union’s diplomatic mission in the United Kingdom, for the repeal of the High Commissioner’s Act, 1911, and for matters incidental thereto; and to amend the Government Service Pensions Act, 1955”.

2.14 The *Annual Survey of South African Law*[18] summarises the objectives of the Act as follows:[19]

> The imminent departure of the country from the Commonwealth at the end of May, which called for a change in designation of the heads of diplomatic missions in Commonwealth countries, made its passage necessary early in 1961. The Act repeals the High Commissioner’s Act, No. 3 of 1911, which provided for the appointment, duties and remuneration of the Union’s High Commissioner in the United Kingdom, and the appointment of members of his staff. ... There was, however, need to retain portions of the 1911 Act because of the large body of locally recruited staff in London, some 225 persons, serving a number of Government departments, but, their salaries being borne by the Treasury, appointed under the Direction of the Minister of Finance. Their conditions of service were determined after consultation with the Public Service Commission, though the 1911 Act did not require it. The 1961 Act seeks to preserve the *status quo* in relation to them. Section 1 enables the Minister of Finance or his delegate to appoint

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18 (1961) at p 14-15.

19 See also *House of Assembly Debates*, vol. 108, col. 6056 (8th May 1961).

> such staff, subject to the law governing the public service; and section 3 and 4 contain consequential provisions to preserve retirement and pensions benefits. As regards the High Commissioner himself, the contractual rights of the present incumbent are protected in terms of section 12(2) of the Interpretation Act, No. 33 of 1957; and future appointments will be made to a post on the fixed establishment of the public service, created by the Public Service Commission in terms of the Public Service Act.[20]

2.15 The SALRC proposes that the Diplomatic Mission in United Kingdom Service Act 38 of 1961 should be repealed since the Act has fulfilled the purpose for which it was enacted. The main purpose of the Act was a consequential enactment to South Africa's withdrawal from the Commonwealth of Nations and to regulate appointment of "locally recruited staff in the United Kingdom",[21] and more importantly to repeal the High Commissioner's Act, No. 3 of 1911, which provided for the appointment, duties and remuneration of the Union's High Commissioner in the United Kingdom and members of his staff. The Act is redundant, obsolete and has ceased to serve any purpose in present day South Africa. In addition, references to obsolete mandates, designations and expressions such as "Union's diplomatic mission" and "head of the Union's diplomatic mission" renders the Diplomatic Mission in United Kingdom Service Act 38 redundant and obsolete. The DIRCO supported the repeal of this Act in its comment to the Consultation Paper.

## 4 Commonwealth Relations (Temporary Provision) Act 41 of 1961

2.16 The Commonwealth Relations (Temporary Provision) Act 41 of 1961 was assented to on 26 May 1961 and commenced on 30 May 1961. The Act was intended to deal with the situation arising after 31 May 1961 regarding South Africa's withdrawal from the Commonwealth of Nations.[22] The Act provides that references to any Commonwealth country or countries in laws in force in South Africa or South West-Africa immediately prior to 31 May 1961 "shall not be affected by reason of the establishment of the Republic of South Africa or of the fact that the Republic is not a member of the Commonwealth".[23]

2.17 Section 1 of the Act was amended by the General Law Amendment Act 49 of 1996,[24] by the deletion of the expression "or the territory of South-West Africa". In addition, section 3 was

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20 Sections 3 and 4 have since been repealed by section 27(1) of the Government Service Pensions Act 62 of 1965.

21 Section 1.

22 See Assembly Debates, Second Reading Commonwealth Relations (Temporary Provision) Bill, 18 May 1961.

23 Section 1.

24 The long title of the Act provides: "To amend or repeal South African legislation, so as to substitute or delete all references to 'South-West Africa'; and to provide for matters connected therewith".

repealed by the General Law Amendment Act 49 of 1996. The Act currently consists of three sections, namely section 1, 2, and 4.

2.18 The Act was specifically intended to deal with the situation after 31 May 1961, when South Africa was no longer a member of the Commonwealth of Nations. The position is no longer the same and it is a known fact that following the end of apartheid in 1994, South Africa rejoined the 'Commonwealth of Nations'. The Act also contains references to obsolete mandates, designations and expressions such as "or of the fact that the Republic is not a member of the Commonwealth"[25]; "Governor-General"[26]; "House of Assembly"[27]; "resolution of the Senate"[28] and "Table in the Senate"[29] that are no longer in existence, irrelevant and have otherwise ceased to serve any purpose in present day South Africa. The Commonwealth Relations (Temporary Provision) Act 41 of 1961 is therefore redundant and obsolete. The DIRCO supported the repeal of this Act in its comment to the Consultation Paper.

## 5 Commonwealth Relations Act 69 of 1962

2.19 The Commonwealth Relations Act 69 of 1962 was assented to on 15 June 1962 and commenced on 31 May 1962. In order to give effect to South Africa's withdrawal from the Commonwealth of Nations, a number of enactments were repealed or amended by the Commonwealth Relations Act 69 of 1962. The long title of the Act provides for the amendments of a collection of twelve statutes as follows:

> To amend the Admission of Persons to the Union Regulation Act, 1913, the Companies Act, 1926, the Aliens Act, 1937, the Aliens Registrations Act, 1939, the Work Colonies Act, 1949, the South African Citizenship Act, 1949, the Population Registration Act, 1950, the Merchant Shipping Act, 1951, the Diplomatic Privileges Act, 1951, the Departure from the Union Regulation Act, 1955, the Land Settlement Act, 1956, and the Children's Act, 1960, and to provide for matters incidental thereto.

2.20 The most important changes effected by the Act related to the law of citizenship:[30]

> The 1962 Act brings citizens of Commonwealth countries and Ireland into the definition of alien, and eliminates citizenship by registration which formerly applied to them. Naturalization will henceforth be the only avenue to the acquisition of citizenship by all who are not South African

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25 Section 1.

26 Section 1.

27 Section 2.

28 Section 2.

29 Section 2.

30 E Kahn 'Departure from the Commonwealth: Final Terms' (1961) *Annual Survey of South African Law* p 1.

> citizens by birth or descent. The requirements for naturalization have been eased, however, by a general reduction of one year in the minimum residence requirements: in the normal case five and not six years' of residence is called for. Finally, the Minister is empowered to grant immediate naturalization to a person admitted for permanent residence who or whose father, paternal grandfather or paternal great-grandfather was born before 1st September, 1900, in any part of South Africa, or was a burgher before that date of the late South African Republic or Orange Free State Republic.

2.21 In promoting its Bill, the South African government at the time stated unequivocally that it expected undivided loyalty of citizens to the Republic:[31]

> To this end section 19*bis* of the main Act has been amended to allow the Minister of the Interior to deprive a citizen with dual nationality of his South African citizenship if, after 30 May, 1963, he performs some voluntary act which in the Minister's opinion indicates that he has made use of his other nationality. The Minister may later reinstate the lost citizenship.
> ...
> The second step to ensure undivided loyalties was the replacement of section 16 of the principal Act, which has dealt with renunciation of South African citizenship in some detail but had not provided for the cases of all dual citizens. ... On a person's loss of citizenship by renunciation his minor children also seize to be South African citizens if the other parents is not or does not remain a citizen.
> ...
> The last measure to promote purely local loyalty was the change in the oath of allegiance prescribed for naturalization, requiring of the dependent *inter alia* that he 'unreservedly renounce all allegiance and fidelity to any foreign State or Head of State of whom I heretofore have been a citizen or subject, or to any other External Authority to whom I have heretofore owed any form of allegiance.

2.22 In its current form, only certain provisions of the Commonwealth Relations Act 69 of 1962 remain. These are the long title, section 71 (date of commencement) and section 72 (short title). Those provisions (sections 31-60) referring to amendments of the Merchant Shipping Act 5 of 1951 are now mostly superseded by further provisions and amendments of the latter Act.

2.23 The SALRC proposes that the Commonwealth Relations Act 69 of 1962 should be repealed since the Act has fulfilled the purpose for which it was enacted. Having regard to the fact that the main purpose of the Act was intended to deal with South Africa's withdrawal from the Commonwealth of Nations and to regulate citizenship laws thereof as a consequence, the existence of the Act is irrelevant and has ceased to serve any purpose in present day South Africa. The Commonwealth Relations Act 69 of 1962 is therefore redundant and obsolete. Laws relating to citizenship and ancillary matters are now governed by legislation administered by the Department of Home Affairs. The DIRCO supported the repeal of this Act in its comment to the Consultation Paper.

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31 E Kahn 'Departure from the Commonwealth: Final Terms' (1961) *Annual Survey of South African Law* p 2.

# 6 African Renaissance and International Co-operation Fund Act 51 of 2000

2.24 The African Renaissance and International Co-operation Fund Act 51 of 2000 was assented to on 21 November 2000 and commenced on 22 January 2001. As a confirmation of South Africa's commitment to Africa, the Act provides for the establishment of African Renaissance and International Co-operation Fund for the purpose of enhancing international co-operation with an on the African continent.[32] In terms of the long title, the Act is intended:

> To establish an African Renaissance and International Co-operation Fund in order to enhanced co-operation between the Republic and other countries, in particular African countries, through the promotion of democracy, good governance, the prevention and resolution of conflict, socio-economic development and integration, humanitarian assistance and human resource development; to repeal three Acts, and to provide for matters incidental thereto.

2.25 The objects of the Fund include: (a) co-operation between the Republic and other countries, in particular African countries; and (b) the promotion of democracy and good governance; (c) the prevention and resolution of conflict; (d) socio-economic development and integration; and (e) humanitarian assistance and human resource development.[33]

2.26 It is stated on the website of the Department of International Relations and Cooperation that the introduction of the African Renaissance and International Co-operation Fund is historic for three reasons:[34]

- For the first time the concept of "African Renaissance", is encapsulated in legislation in South Africa, and, for that matter, by a legislature on the African Continent;
- Secondly, the Act introduces, for the first time, a framework and basis for the South African government to identify and fund, in a proactive way, projects and programmes aimed at the six regulatory framework principles mentioned above, by the granting of loans or rendering of other financial assistance within the African Renaissance framework.
- Thirdly, the Act introduces, also for the first time as far as the South African government is concerned, a mechanism through which donor (third party) funds could be channelled to recipients and/or joint tripartite projects.

2.27 In April and December 2010, the Department of International Relations and Cooperation indicated to the SALRC that the Department is in the process of amending the African Renaissance and International Co-operation Fund Act 51 of 2000. The SALRC requested the

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32 See "Establishment of the African Renaissance and International Co-operation Fund' on the website of the Department of International Relations and Cooperation: http://www.dfa.gov.za/foreign/Multilater al/profiles/arfund.htm accessed on 9 December 2010.

33 Section 4.

34 See http://www.dfa.gov.za/foreign/Multilateral/profiles/arfund.htm accessed on 9 December 2010.

DIRCO to comment on the status of amendments to the principal Act. The DIRCO advises that the DIRCO is in the process of promulgating the South African Development Partnership Agency Bill, which will, once promulgated, repeal the African Renaissance and International Co-operation Fund Act.[35]

2.28 Since the South African Development Partnership Agency Bill will repeal the African Renaissance and International Co-operation Fund Act in future there is no purpose in effecting amendments to the outdated definitions in section 1 of the African Renaissance and International Co-operation Fund Act which refer to "'Department' as meaning Department of Foreign Affairs" and "'Minister' as meaning Minister of Foreign Affairs". Since the South African Development Partnership Agency Bill will repeal the African Renaissance and International Co-operation Fund Act the SALRC does not include the repeal of the latter Act in the Schedule to the Bill.

# E LEGISLATION YET TO BE PROCLAIMED

## 1 Foreign States Immunities Amendment Act 5 of 1988

2.29 This Act amends the Foreign States Immunities Act 87 of 1981. Although the amendment Act was assented to twenty-three years ago on 3 March 1988, it has yet to come into operation by

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[35] See "International Relations to Create South African Development Agency" at http://www.sabinetlaw.co.za/foreign-affairs/articles/international-relations-create-south-african-development-agency where Sabinet reported on 1 June 2011 as follows:
The international relations and cooperation minister, Maite-Nkoana-Mashabane, has revealed that her department is busy finalising a bill that will create the South African Development Agency (SADPA). Speaking during her budget vote speech in Parliament, the minister pointed out that mention was first made of the SADPA in last year's budget vote speech. SADPA intends to push a development partnership programme in order to build "innovative, proactive and sustainable partnerships to advance African development". The minister added that SAPDA would become operational during the last quarter of 2011. The department will also soon be presenting a draft white paper to Parliament that will outline the principles and framework of South Africa's foreign policy. An "extensive consultative process" has already taken place involving interaction with business, academia, labour and civil society. The minister committed her department to continue to work towards the integration of the region. Co-operation between regional economic communities would also be promoted. In his budget vote speech, the deputy minister, Marius Fransman, pointed out that plans to establish a foreign policy council were at an advanced stage.
The council would be known as the South African Council on International Relations. He added that the council would strive to make South Africa's foreign policy as inclusive and participatory as possible. As regards the draft white paper on foreign policy, the deputy-minister drew attention to some of the key issues highlighted in the document. Some of the issues include:
- Successful promotion of African agenda in last 15 years
- New dynamics in geopolitics-emerging economies
- Growing inequalities between and within states
- Complex and global challenges

proclamation. In totality, the amendment Act amends six sections in the Foreign States Immunities Act 87 of 1981.[36]

2.30 Given that twenty-three years have passed since the date of assent of the Foreign States Immunities Amendment Act 5 of 1988 and there does not appear to be an indication as to whether the amendment Act will come into operation by proclamation, the question arises whether this amendment Act has not become redundant and ought to be repealed. The SALRC requested the view of the DIRCO, in particular, to comment on the retention of this Act.

2.31 The DIRCO commented with regard to the implementation of this Act that due to political considerations the Amendment Act was deemed necessary at the time and that the question whether or not to implement the Act will be reconsidered by the Minister soon.

## 2 Application of Resolutions of the Security Council of the United Nations Act 172 of 1993

2.32 The Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 was assented to on 8 December 1993. However, since that date, more than seventeen years ago, the Act has yet to come into operation by proclamation. In the long title, it is stated that the Act is "to provide for the application in the Republic of certain resolutions taken by the Security Council of the United Nations; and to provide for matters connected therewith. Section 1 dealing with "application of resolutions of Security Council of United Nations" enables the State President, by proclamation in the *Gazette*, to declare that any resolutions taken by the Security Council of the United Nations apply in the country, to the extent stated in the proclamation as from the dates specified and implemented in the country in such manner as the State President determines. Section 2 sets out the procedure for tabling of proclamations in parliament. Section 3 sets out offences and penalties for failure to comply with provisions in the proclamation. Section 4 is the State's exemption from liability provision connected with *bona fide* acts performed in accordance with a resolution made applicable in South Africa under section 1.

2.33 Given that more than seventeen years have passed since the date of assent of the Application of Resolutions of the Security Council of the United Nations Act 172 of 1993 and there does not appear to be an indication as to whether the Act will come into operation by proclamation, the question arises whether this Act has not become redundant and ought to be repealed. The SALRC requested the view of the DIRCO, in particular, on the retention of this Act.

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[36] See also the Foreign States Immunities Amendment Act 48 of 1985 which was assented to on 12 April 1985 and commenced on 24 April 1985.

2.34 The DIRCO remarked as follows in commenting to the Consultation Paper:

> Regarding the Application of Resolutions of the Security Council of the United Nations Act, 1993 (Act No 172 of 1993) it is noted that this Act was never put into operation as some of its provisions were regarded as unconstitutional. A subcommittee on sanctions legislation has recently been established as part of an inter-departmental counter-terrorism working group to devise a way forward to ensure that adequate legislation is put in place to address all measures called for in United Nations Security Council (UNSC) resolutions adopted under the Chapter VII of the UN Charter. It is accordingly foreseen that the Application of Resolutions of the Security Council of the United Nations Act, 1993 could be amended to accommodate the implementation of Security Council measures. This will be addressed by the Department in due course.

# F REDUNTANT OR OBSOLETE PROVISIONS PROPOSED FOR AMENDMENT

## 1 Foreign States Immunities Act 87 of 1981

2.35 The basic approach of the Foreign States Immunities Act 87 of 1981 has been to proclaim a rule of immunity "of foreign states from the jurisdiction of the courts of the Republic" and exceptions thereof. The Act was assented to on 6 October 1981 and commenced on 20 November 1981.

2.36 Section 2 of the Act sets out a general principle that "a foreign state shall be immune from the jurisdiction of the courts of the Republic". This is followed by a number of sections setting out exceptions to the general rule of immunity in the following circumstances: waiver of immunity (section 3); commercial transactions (section 4); contracts of employment (section 5); personal injuries and damage to property (section 6); ownership, possession and use of property (section 7); patents, trade-marks, etc (section 8); membership of associations and other bodies (section 9); arbitration (section 10); admiralty proceedings (section 11); and taxes and duties (section 12).

2.37 Although no definitions of "Minister" and "Department" are contained in the definitions of the Act, references to these designations in the Act as "Minister of Foreign Affairs and Information" and "Department of Foreign Affairs and Information" respectively, are no longer relevant. The SALRC proposes that references to these designations should be updated and amended in the Act to provide that "Minister" means the Minister of International Relations and Cooperation and that "Department" means the Department of International Relations and Cooperation. In addition the Constitution, 1996, now provides for the President as head of the State. It is proposed that references to the term "State President" in the Act should be substituted for the term "President".

2.38 It has been noted above that the Foreign States Immunities Amendment Act 5 of 1988 amends the Foreign States Immunities Act 87 of 1981. However, the Amendment Act has not yet come into operation by promulgation. Some of the amendments to the principal Act include the addition of subsection 2(4) which provides that immunity of foreign state from the jurisdiction of the South African courts do not apply in cases where all the parties are sovereign states. Section 9(1)(a) of the principal Act has been amended by the deletion of the word "foreign" in the phrase "has members that are not foreign states". Similarly, section 10(2)(b) of the principal Act was amended by the deletion of the word "foreign" in the phrase "the parties to the arbitration agreement are foreign states". Other amendments to the principal Act included sections 13(1); 13(5); and 17 that contain references to the former Department of Foreign Affairs and Information. Section 14(1) also provides for an amendment in the principal Act.

2.39 In view of the substantial amendments to the Foreign States Immunities Act 87 of 1981 by the Foreign States Immunities Amendment Act 5 of 1988, the question arises as to why in the twenty-three years that have passed since the date of assent of the Amendment Act the amendment Act has yet to come into operation by proclamation. Given the time-span of more than two-decades, is it the case that this amendment Act has become redundant and ought to be repealed? The SALRC requested the views of the Department of International Relations and Cooperation in this regard and in particular, to comment on the retention of the Amendment Act.

2.40 Apart from the proposal in 2.37, no obsolete or redundant provisions or provisions that infringe constitutional equality provisions have been identified in this Act. The SALRC considers that the Foreign States Immunities Act 87 of 1981 continues to serve a purpose to ensure legal certainty on matters related to the extent of immunity of foreign states from the jurisdiction of the South African courts and proposes that that the Act be retained on the statute book.

2.41 Commenting to the Consultation Paper the DIRCO comments that they have considered the proposed amendments to this Act and they concur with them. See also par 2.34 above the comment by the DIRCO that the question whether or not to implement the Amendment Act will be reconsidered by the Minister soon.

## 2 Diplomatic Immunities and Privileges Act 37 of 2001

2.42 The Diplomatic Immunities and Privileges Act 37 of 2001 was assented to on 22 November 2001 and came into operation by promulgation on 28 February 2002. The Act repealed the Diplomatic Immunities and Privileges Act 74 of 1989 and sought to address the shortcomings of the 1989 Act. The Diplomatic Immunities and Privileges Act 37 of 2001 contains provisions either

impacting directly on South Africa's municipal law or dealing with matters not covered by the conventions on diplomatic relations and consular relations.[37] In terms of its long title, the Act is intended:

> To make provision regarding the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives, of the United Nations, and its specialised agencies, and other international organisations and of certain other persons; to make provision regarding immunities and privileges pertaining to international conferences and meetings; to enact into law certain conventions; and to provide for matter connected therewith.

2.43 In terms of section 2(1): "Subject to the provisions of this Act, the Conventions have the force of law in the Republic". In section 1 "the Conventions" means the Convention on the Privileges and Immunities of the United Nations, 1946, the Conventions on the Privileges and Immunities of the Specialised Agencies, 1947, the Vienna Convention on Diplomatic Relations, 1961 and the Vienna Convention on Consular Relations, 1963.

2.44 The Department of International Relations and Cooperation summarises the implications of the Act as follows:[38]

- Incorporating the provisions of the Conventions on Diplomatic Relations and on Consular Relations in full in South African legislation;
- Incorporating the provisions of the Convention on Privileges and Immunities of United Nations and of the Conventions on the Privileges and Immunities of the Specialised Agencies in South African legislation;
- The Act thus gives effect to the provisions of section 231(4) of the Constitution of the Republic of South Africa, Act No. 108 of 1996 that stipulates that any international agreement becomes law in the Republic when it is enacted into law by national legislation.
- The Act synchronises the ad hoc practices currently applied to individual organizations in order to introduced equality in the treatment of the various international organizations in South Africa and thus addressing one of the major shortcomings of the [1989] Act.

2.45 Some of the main provisions of the Act include the conferring of immunities and privileges on persons other than diplomats and consuls set out in sections 4 to 6.[39] In terms of section 7, the conferment of immunities and privileges conferred to any person or organisation in terms of the Act must be published by notice in the *Gazette*. Section 8 allows for the waiver of immunities and

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37 See 'Introduction to the New Diplomatic Immunities and Privileges Act 37 of 2001' http://www.dfa.gov.za/docs/2002/act37_0307.htm accessed on 9 December 2010.

38 See 'Introduction to the New Diplomatic Immunities and Privileges Act 37 of 2001' http://www.dfa.gov.za/docs/2002/act37_0307.htm accessed on 9 December 2010.

39 Such as heads of state, special envoys, United Nations, specialised agencies and immunities and privileges pertaining to international conferences or meetings convened in South Africa.

privileges.[40] The waiver is recognised if made by the "head, or any person who performs the functions of the head, of- (a) a mission; (b) a consular post; (c) an office of the United Nations; (d) an office of a specialised agency; or (e) an organisation".[41] The Minister is obliged to keep a register of the names of all persons who enjoy immunity for the civil and criminal jurisdiction of South African courts or immunities and privileges in accordance with the Conventions.[42] Section 10 empowers the Minister to withdraw immunities, privileges and exemptions. Section 15 gives effect to offences and penalties and states that a person who "wilfully or without the exercise of reasonable care" obtains or executes any legal process against a person who enjoys immunity is guilty of an offence. Schedules 1-4 of the Act reflects the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 146 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialised Agencies respectively.

2.46 In the definitions section of the Diplomatic Immunities and Privileges Act 37 of 2001,[43] it is provided that "'Director-General' means the Director-General: Foreign Affairs" and "'Minister' means Minister of Foreign Affairs". In view of the name change of the Department, the references to the ministry as "Foreign Affairs" are not longer relevant. The SALRC proposes that the Act be updated and amended to provide that "Director-General" means the Director-General of International Relations and Cooperation and that "Minister" means the Minister of International Relations and Cooperation.

2.47 Apart from the proposal in par 2.46 above, no obsolete or redundant provisions or provisions that infringe constitutional equality provisions have been identified in this Act. The SALRC considers that the Diplomatic Immunities and Privileges Act 37 of 2001 continues to serve a purpose to ensure legal certainty and proposes that that the Act be retained on the statute book.

2.48 Commenting to the Consultation Paper the DIRCO comments that they have considered the proposed amendments to this Act and they concur with them.

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40 In terms of section 8(1): "A sending State, the United Nations, any specialised agency or organisation may waive any immunity or privilege which a person enjoys under this Act".

41 Section 8(2).

42 Section 9.

43 Section 1.

# G LEGISLATION REVIEWED AND PROPOSED TO BE RETAINED WITHOUT AMENDMENT

## 1 Foreign State Immunities Amendment Act 48 of 1985

2.49 The Foreign State Immunities Amendment Act 48 of 1985 amends the Foreign States Immunities Act, 1981, "so as to make it clear that the property of foreign states shall not be subject to attachment in order to found jurisdiction".[44] The amendment Act was assented to on 12 April 1985 and commenced on 24 April 1985.

2.50 This provision of the Foreign State Immunities Amendment Act 48 of 1985 is duplicated in the Foreign States Immunities Amendment Act 5 of 1988. However, the latter Act has yet to come into operation by proclamation. The Amendment Act 48 of 1985 is not obsolete or redundant. The SALRC considers that the amendment Act continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

## 2 Recognition of the Independence of Namibia Act 34 of 1990

2.51 The Recognition of the Independence of Namibia Act 34 of 1990 was assented to on 20 March 1990 and came into operation by promulgation on 21 March 1990. The Act recognises the sovereignty and independence of Namibia and the cessation of South Africa's authority in the country. Namibia struggle for independence culminates with the Recognition of the Independence of Namibia Act 34 of 1990 and the country officially became independent on 21 March 1990.

2.52 The SALRC notes in passing that the enacting formula of the Act contains the following wording: BE IT THEREFORE ENACTED by the State President and the Parliament of the Republic of South Africa", whereas the Constitution, 1996, provides for the President as head of the State. As Francis Bennion explains the enacting formula of an Act forms part of the unamendable components of an Act.[45] There is therefore no need to effect any amendment to the enacting formula of the Act.

2.53 No obsolete or redundant provisions or provisions that infringe constitutional equality provisions which require amendments have been identified in this Act. The SALRC considers that the Recognition of the Independence of Namibia Act 34 of 1990 continues to serve a purpose to

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44 Long title of the amendment Act.

45 FAR Bennion Statutory Interpretation Butterworths: London 2002 at 634.

ensure legal certainty on the sovereignty and independence of Namibia and proposes that that the Act be retained on the statute book.

## 3 Transfer of Walvis Bay to Namibia Act 203 of 1993

2.54 In 1990 South-West Africa gained independence as Namibia from South Africa,[46] however, Walvis Bay remained under South African sovereignty.[47] At midnight on 28 February 1994 sovereignty over Walvis Bay was formally transferred to Namibia, as were the Penguin Islands.

2.55 The Transfer of Walvis Bay to Namibia Act 203 of 1993 was assented to 14 January 1994 and came into operation by promulgation on 23 February 1994. The Act provides for the transfer "to Namibia of the territory of and sovereignty over Walvis Bay and the Penguin Islands". Section 5 of the Act, dealing with issues of citizenship, provides that all persons who were South African citizens and resident in Walvis Bay "shall continue to be a South African citizen" after the date of transfer and entitled to reside in Walvis Bay.

2.56 The SALRC notes in passing that the enacting formula of the Act contains the following wording: BE IT THEREFORE ENACTED by the State President and the Parliament of the Republic of South Africa", whereas the Constitution, 1996, provides for the President as head of the State. As Francis Bennion explains the enacting formula of an Act forms part of the unamendable components of an Act.[48] There is therefore no need to effect any amendment to the enacting formula of the Act.

2.57 No obsolete or redundant provisions or provisions that infringe constitutional equality provisions which require amendments have been identified in this Act. The SALRC considers that the Transfer of Walvis Bay to Namibia Act 203 of 1993 continues to serve a purpose to ensure legal certainty on the transfer to Namibia of the territory of and sovereignty over Walvis Bay and the Penguin Islands and proposes that that the Act be retained on the statute book.

## 4 Diplomatic Immunities and Privileges Amendment Act 35 of 2008

2.58 The Diplomatic Immunities and Privileges Amendment Act 35 of 2008 amended the Diplomatic Immunities and Privileges Act 37 of 2001 "so as to amend the definition of 'member of

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46 Recognition of the Independence of Namibia Act 34 of 1990.

47 Aspects of the legal statues of Walvis Bay before transfer to Namibia are examined in *S v Redondo* 1993 (2) SA 528 (NmS).

48 FAR Bennion Statutory Interpretation Butterworths: London 2002 at 634.

family'; to provide that the Minister must take the list of all the names on the register of persons entitled to immunities or privileges publicly available; and to provide that a certificate by the Director-General stating a fact relating to any question as to whether or not a person enjoys immunity or privilege in terms of the said Act is *prima facie* evidence of that fact".[49]

2.59 The Act effected amendments necessary to ensure clarity and legal certainty concerning the definition of "member of family" and the functions and responsibilities of the Minister and Director-General. The SALRC considers that the Diplomatic Immunities and Privileges Amendment Act 35 of 2008 continues to serve a purpose to ensure legal certainty. The SALRC therefore proposes that the Diplomatic Immunities and Privileges Amendment Act 35 of 2008 should be retained on the statute book.

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[49] Long title of the amendment Act.

# Annexure A

# INTERNATIONAL RELATIONS AND COOPERATION LAWS REPEAL AND RELATED MATTERS BILL

**GENERAL EXPLANATORY NOTE:**

**[ ]** Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

**BILL**

**To amend and repeal certain laws of the Republic pertaining to international relations and cooperation; and to provide for matters incidental thereto.**

**BE IT ENACTED** by Parliament of the Republic of South Africa, as follows:

**Amendment of 1 of Act 87 of 1981**

1. The Foreign State Immunities Act 87 of 1981, is hereby amended-

(a) by the insertion in section 1 after the definition of "consular post" of the following definition:

"'Department' means the Department of International Relations and Cooperation".

(b) by the insertion in section 1 before the definition of "Republic" of the following definition:

"'Minister' means the Minister of International Relations and Cooperation";

(c) by the substitution for the expression "Department of Foreign Affairs and Information" of the expression Minister of International Relations and Cooperation, wherever it occurs in sections 13 and 17;

(d) by the substitution for the expression "Minister of Foreign Affairs and Information" of the expression Department of International Relations and Cooperation, wherever it occurs in section 17.

**Amendment of 1 of Act 37 of 2001**

2. Section 1 of the Diplomatic Immunities and Privileges Act, 2001, is hereby amended –

(a) By the substitution in section 1 for the definition of "Director-General" of the following definition:

"'Director-General' means the Director-General: **[Foreign Affairs]** International Relations and Cooperation";

(b) By the substitution in section 1 for the definition of "Minister" of the following definition:

"'Minister' means the Minister of **[Foreign Affairs]** International Relations and Cooperation".

**Repeal of laws**

3. The laws specified in the Schedule are hereby repealed.

**Short title and commencement**

4. This Act is called the International Relations and Cooperation Laws Repeal and Related Matters Bill, 201… and comes into operation on a date determined by the President by proclamation in the Gazette.

**SCHEDULE**

**(Repeal of laws: section 6)**

| Item No. | No. and year of law | Title and subject |
|---|---|---|
| 1. | 32 of 1921 | Treaties of Peace Act |
| 2. | 20 of 1948 | Treaties of Peace Act |
| 3. | 38 of 1961 | Diplomatic Mission in United Kingdom Service Act |
| 4. | 41 of 1961 | Commonwealth Relations (Temporary Provision Act) |
| 5. | 69 of 1962 | Commonwealth Relations Act |

**Annexure B**

**STATUTES ADMINISTERED BY THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION**

| No. | Name of Act, number and year |
|---|---|
| 1. | Treaties of Peace Act No 32 of 1921 |
| 2. | Treaties of Peace Act No 20 of 1948 |
| 3. | Diplomatic Mission in United Kingdom Service Act No 38 of 1961 |
| 4. | Commonwealth Relations Act (Temporary Provision) 4 Act No 1 of 1961 |
| 5. | Commonwealth Relations Act No 69 of 1962 |
| 6. | Foreign States Immunities Act No 87 of 1981 |
| 7. | Foreign State Immunities Amendment Act No 48 of 1985 |
| 8. | Foreign State Immunities Amendment Act No 5 of 1988 |
| 9. | Recognition of the Independence of Namibia Act No 34 of 1990 |
| 10. | Application of Resolutions of the Security Council of the United Nations Act No 172 of 1993 |
| 11. | Transfer of Walvis Bay to Namibia Act No 203 of 1993 |
| 12. | African Renaissance and International Co-operation Fund Act No 51 of 2000 |
| 13. | Diplomatic Immunities and Privileges Act No 37 of 2001 |
| 14. | Diplomatic Immunities and Privileges Amendment Act No 34 of 1990 |