

## MEDIA STATEMENT BY THE SOUTH AFRICAN LAW COMMISSION CONCERNING ITS INVESTIGATION INTO THE 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 (PROJECT 73) REPORT

The South African Law Commission has completed a report on a more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials.

The Commission's recommendations include the following:

- Police questioning of the suspect/accused, its legitimacy, effectiveness and the right to silence and its consequences

The report considers 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.

The Commission recommends that legislation be introduced in terms of which a suspect is placed under a duty to disclose particular matters to the police at the risk that a court might in due course draw an adverse inference from his or her failure to do so, in the following circumstances:

- (a) Where a suspect is questioned by the police in the course of their investigations and fails to disclose a matter that is subsequently relied upon in his or her defence.

Although the proposals raise a concern that to encourage the questioning of suspects by the police carries with it the danger that suspects would be overreached, it must be borne in mind that the present proposal does not introduce an innovation in that respect. There is nothing to prevent the police from questioning suspects, and from thereby securing admissions or confessions, which might be admissible in evidence against the accused if the grounds for such admissibility are established. The proposal does no more than to place the suspect under the risk that if he or she fails to disclose something to the police which is later relied upon in support of the defence, a court might disbelieve the accused. Moreover, a court is not obliged to draw an adverse inference against a suspect, even where it is justified, and it will be open to a court to exclude evidence of what occurred during questioning if it is not satisfied that the accused was fairly treated.

The proposal is also moderated by limiting its application to questioning which has taken place substantially in accordance with a Code of Conduct promulgated in terms of the Police Act.

(b) Where, upon arrest, a suspect is asked to account for objects, substances or marks found on or in the suspect's possession.

(c) Where, upon arrest, the suspect is asked to account for his or her presence at the place where he or she was found.

The Commission concludes that there appears to be no substantial objection to a court drawing an adverse inference if the person fails to provide an explanation of his or her possession of objects, substances or marks at the time of arrest, or the failure of the suspect to explain at the time of arrest his or her presence at the scene of a crime, nor does the Commission believe that to permit a court to do so will open the way to police misconduct.

#### · Admissibility of admissions and confessions

Our law draws a distinction between admissions (whether by words or by conduct) and confessions in determining the "threshold" requirements for admissibility. The significance of the distinction is that the requirements for admissibility are more onerous for confessions than for admissions. For an admission to be admitted into evidence it must be established that it was made "voluntarily", and that term has been restrictively interpreted. An admission is not voluntary if it has been induced by a promise or threat proceeding from a person in authority. A confession may be admitted into evidence only if it was made "freely and voluntarily" by the accused in his "sound and sober senses and without undue influence". If the confession was made to a peace officer other than a magistrate or justice, the confession must be reduced to writing and confirmed in the presence of a magistrate or justice.

The report considers a proposal that there should be common requirements for the admissibility of confessions and admissions and concludes that the proposal is largely uncontroversial. What is contentious is whether incriminatory statements made to police officers should be dealt with on a different basis. Bearing in mind that incriminating statements will be admissible only if it is established by the prosecution that the statement was made freely and voluntarily, while the person was in his or her sound and sober senses, and without having been unduly influenced thereto, the Commission is of the view that no purpose is served by an additional requirement that such statements made to the police should be reduced to writing. The Commission recommends that the Criminal Procedure Act be amended to provide for common requirements for the admissibility of all statements or conduct of the accused which might be self-incriminatory, without distinguishing between police officers and others.

#### · Defence disclosure before and during the trial

The proposals for reform fall into three distinct groups:

(a) Disclosure by the defence of specific defences

The Commission concludes that there is merit in the proposal with regard to the disclosure of specific defences and the intention to call expert evidence and recommends an amendment to the Criminal Procedure Act to this effect. The sanction that is sought to be imposed for failure to make such disclosure is that the accused will not be permitted to raise the particular defence, or call the expert witness, as the case may be, without the leave of the court. The proposal provides specifically, however, that the court may not refuse such leave if the accused was not informed of his or her obligations.

The Commission's recommendations are confined to specific defences, in respect of which the accused in any event has a duty either to introduce or disclose the defence. It is already well established in our law that an alibi might be regarded with scepticism if it is not disclosed in advance. A defence raising justification for otherwise unlawful conduct, or suggesting that the accused was not criminally capable at the time the offence was committed, must also be raised by the defence before the prosecution is required to exclude it. Moreover, there can be little doubt that where such an issue is raised by the defence at a late stage of the trial, the prosecution will be permitted a postponement, or be permitted to reopen its case if necessary, in order to deal with the issue. Similar considerations apply in relation to the calling of expert evidence. Accordingly the proposals are not radical and merely seek to ensure that these matters are raised timely so as to avoid delays in the trial.

#### (b) Codifying prosecution disclosure

The Commission recommends that legislation be introduced in terms of which the prosecution is obliged to provide the defence with documents which tend to exculpate the accused; statements of witnesses, whether or not the state intends to call them; and any material which is reasonably required to enable the accused to prepare his or her defence. In addition the circumstances under which the prosecution may withhold information are outlined, for example, where it is not required in order to enable the accused to exercise his or her right to a fair trial; where disclosure of the information could lead to the disclosure of the identity of an informer or state secrets; and where there is reason to believe that disclosure of the information would prejudice the course of justice.

#### (c) Providing for reciprocal disclosure by the defence and the prosecution

The Commission does not support the proposal for reciprocal disclosure by the defence and the prosecution and is of the view that the proposal for reciprocal disclosure would be workable only if a distinction were to be made between those accused who are represented and those who are not. Such a distinction is not desirable, and to make such a distinction would in any event pave the way for the legislation to be circumvented.

#### · A greater role in the criminal justice process by judicial officers

The Commission recommends that the Criminal Procedure Act be amended to provide that, at the commencement of the trial, the judicial officer be placed in possession of the material which by that

stage already is in the hands of both parties, and which will enable him or her to evaluate how to conduct the trial. One of the functions of the judicial officer is to control the conduct of the trial and this proposal does not purport to introduce any innovation in that respect: it merely aims at equipping the judicial officer to perform that task more effectively.

- Possible ways of enhancing judicial management of trials and case management.

The report considers whether provision should be made for pre-trial conferences and, if so, the extent to which legislation are necessary. The purpose of such a conference is to attempt to limit the issues in the trial and generally to facilitate the efficient disposal of the matter.

There are at least some cases in which a pre-trial conference could be of material assistance in the conduct of the trial. Bearing in mind that the holding of such a conference will not be compulsory, but in the discretion of the judicial officer, the Commission is of the view that it is desirable to provide a formal structure for that to take place. The Commission therefore 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 direct the prosecutor and the accused to appear before him or her to consider matters which may aid in the disposal of the trial, for example, the identification of issues not in dispute; the possibility of obtaining admissions of fact with the aim to avoid unnecessary evidence; and the disclosure of sufficient details where the defence intends to raise a special defence such as an alibi.

The Commission also 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; of the consequences of remaining silent; that he or she is not obliged to make any confession or admission; and to ask him or her whether he or she wishes to make a statement indicating the basis for defence. It also obliges the presiding officer to question an accused where the accused fails to disclose the basis of the defence.

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

**ISSUED BY THE SECRETARY: SA LAW COMMISSION**

**DATE: 29 AUGUST 2002**

**CONTACT FOR ENQUIRIES IN RESPECT OF MEDIA STATEMENT:**

**MR W VAN VUUREN (012) 322-6440**

**E-MAIL: [wvuuren@salawcom.org.za](mailto:wvuuren@salawcom.org.za)**

**Return to SA Law Commission Home Page**