

FOR IMMEDIATE RELEASE

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION ON ITS INVESTIGATION INTO CUSTOMARY LAW OF SUCCESSION (PROJECT 90)

The South African Law Reform Commission (the Commission) hereby releases its report on Customary Law of Succession for general information.

The Black Administration Act of 1927 did not codify or define African customary law. It simply singled out Africans as a separate segment of society, subject to a different, discriminatory set of rules and laws, under the apartheid system. It provided that all Africans were subject to African customary law. Therefore, the African customary law rule of male primogeniture applied.

The purpose of the report is to reform the customary rule of male primogeniture. The Constitutional Court has, in **Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another** 2005 (1) SA 580 (CC), ruled that the customary rule of male primogeniture law is unconstitutional. The report contains draft legislation which is intended to modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard.

The Commission published a discussion paper which was widely distributed and which elicited comments from a variety of interested parties, including prominent non-governmental and community based organisations concerned with women's issues and customary law regarding the envisaged legislation. A series of workshops were also held which were attended, among others, by traditional leaders in all the provinces. A follow-up consultative meeting of expert role-players was also held during which the Bill was discussed.

The Commission also had the benefit of considering numerous precedents set by other African countries. This report gives an overview of the discussions and debates that took place in the different *fora* during this process. It explains the dilemma faced by the Commission in choosing the options eventually adopted in the report and draft Bill.

In its report the Commission recommends the repeal of section 23 of the Black Administration Act of 1927. The Commission also considered statutes that govern the application of the customary law of succession, namely, the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law, Proc R151 of 1987. Sections 79 to 82 make provision for testate and intestate inheritance of property and that succession and inheritance have to be in accordance with the rule of male primogeniture if the deceased family head had contracted a customary marriage.

There is also a recommendation that property rights relating to certain customary marriages be protected, that is, the retention of the protection afforded to a widow whose customary marriage was dissolved by her husband having entered into a civil marriage with another woman (section 22(7) of the Black Administration Act of 1927). The discarded widows and children of these marriages should inherit on par with the civil marriage widows, provided that such customary marriages were contracted before 2 December 1988 (before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act of 1988).

The Commission discussed various customary law arrangements that fall outside the customary marriage, including all related and supporting marital unions (*ukungena, ukuzalela, ukuvusa* and ancillary unions entered into by women) that are found in all African communities in order to clarify the status of women in these unions. The Commission recommends that the women and children in such unions should share in the estate of the deceased who or on whose behalf the union was entered into.

Generally, Africans do not adopt children in accordance with the prescripts of the Children's Act 38 of 2005. The Intestate Succession Act, 1987 places adopted children of a deceased in the same position as other children for purposes of intestate succession. The Commission recommends that children adopted in terms of customary law should also inherit from their adoptive parents.

Provision is made for property accruing to a woman or her house under customary law by virtue of her customary marriage to devolve in terms of a will. (If she dies without a will, her property will devolve in terms of the Intestate Succession Act, 1987.) Any reference in a will of such a woman to a "child" and any reference in section 1 of the Intestate Succession Act to a "descendant" in relation to such a woman who dies without a will, will be interpreted to include any child born out of any ancillary union entered into in terms of customary law for the purpose of raising or increasing children for such woman or her house.

In Western societies law emphasises the interests, rights and liberties of individuals. On the contrary, African customary law is general, traditional and aimed at preserving group interests. In the circumstances it is foreseen that the rigid application of rules of succession will not always meet the needs of the persons concerned. The Commission has recommended a procedure for resolving disputes and uncertainties pertaining to the devolution of family property, among others. Disputes or uncertainties in connection with the devolution of family property will be determined by the Master of the High Court having jurisdiction.

In the Commission's view the adoption of its proposed draft Bill by Parliament will go a long way in creating legal certainty with regard to the intestate succession of women and children.

The report will be made available on the Internet at the following site:
<http://www.doj.gov.za/salrc/index.htm>

ISSUED BY THE SECRETARY: SA LAW REFORM COMMISSION, PRETORIA

DATE: 7 March 2008

CONTACT FOR ENQUIRIES IN RESPECT OF MEDIA STATEMENT:

MS MAUREEN MOLOI (012) 392 9540 (T)

086 686 3928 (F)

gmoloi@justice.gov.za

FOR IMMEDIATE RELEASE