



WORK IN PROGRESS: IMPORTANT INVESTIGATIONS ON THE PROGRAMME OF THE SOUTH AFRICAN LAW REFORM COMMISSION (SALRC)

PROJECT 25: STATUTORY LAW REVISION

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. The purpose of this investigation is to modernise and simplify the statute book, thereby reducing its size and saving the time of legal professionals and others who make use of it. In turn this helps to avoid unnecessary costs. It also ensures that people are not misled by obsolete laws masquerading as "living" law.

The focus of the investigation at this stage is the constitutionality of legislation and repeal of outdated provisions. The constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution. 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 some pre-1994 provisions are constitutionally non-compliant. A 2004 provisional audit (by the SALRC in consultation with national government departments) of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes. It is envisaged that some of these statutes serve no useful purpose anymore, while others may contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

The methodology adopted for the statutory revision project is to evaluate the statute book per Department – a Department is identified, all its national legislation is considered for constitutionality and redundancy, preliminary findings and proposals are included in a consultation document and consultations with that Department are conducted to verify the findings and proposals on redundancy and constitutionality. This process commenced in September 2006 by the evaluation of national legislation, particularly in respect of redundancy, administered by the Department of Transport. A discussion paper on the legislation administered by the Department of Transport containing provisional proposals for amendment and repeal of statutes was published for general information and comment in June 2008.

In 2007 the evaluation of the legislation administered by the Department of Housing commenced. The SALRC will publish its discussion paper on the legislation administered by the Department of Housing for general information and comment by the end of November 2008.

The national statutes administered by the Departments of Public Works, Arts and Culture, Foreign Affairs, and National Treasury (excluding tax legislation which will be evaluated separately) are being evaluated with a view to determining redundancy, obsolescence or unconstitutionality. The SALRC is presently consulting with the

Departments of Public Works, Arts and Culture and National Treasury (excluding tax legislation) on its preliminary findings on repeal and amendment. The SALRC will consult with the Department of Foreign Affairs on its preliminary findings once the consultation paper on the legislation administered by that Department has been finalised.

With a view to increasing research capacity, the SALRC identified advisory committee members for appointment by the Minister of Justice and Constitutional Development to review the legislation administered by the following thirteen Departments: Agriculture; Communications; Defence; Education; Environmental Affairs and Tourism; Health; Home Affairs; Justice and Constitutional Development; Labour; Land Affairs; Minerals and Energy Affairs; Provincial and Local Government; and Trade and Industry. The SALRC also recommended that advisory committee members be appointed to advise the SALRC on the tax legislation administered by National Treasury. The proposed appointments were considered by the previous Minister of Justice and Constitutional Development and she appointed 112 advisory committee members to 14 advisory committees on 31 July 2008.

During October 2008 the advisory committees have started meeting to decide on the way forward, agree on a division of the statutes to be reviewed, time-frames of the first stage of the review, and the development of consultation papers by the end of February 2008.

PROJECT 100: REVIEW OF FAMILY LAW AND THE LAW OF PERSONS: CUSTODY (CARE) AND ACCESS (CONTACT) TO MINOR CHILDREN

The SALRC was requested to investigate problems surrounding access to children after divorce. After the collation of questionnaires distributed to members of the public on problems experienced with access to children after divorce, it soon became clear that this problem is not limited to divorced parents. The legal position of unmarried fathers also changed after the enactment of section 21 of the Children's Act 38 of 2005, as unmarried fathers of children in some instances now have the same parental rights and responsibilities as the mothers of those children. Some parents of children born as a result of a relationship outside of a legally recognised marriage and who are living separately, are therefore now in a similar position as divorced parents living separately from each other. For this reason it was decided to expand the investigation to review aspects related to the custody of and access to all minor children.

To glean the opinions of professionals in this field, four different questionnaires for professionals were developed. The questionnaires were aimed at legal practitioners, family advocates, family counsellors and psychologists. A questionnaire was also developed which was administered to parents involved in custody and access disputes. Focus group discussions were held with nine offices of the Family Advocate in the nine provinces to obtain their views on the procedures involved in determining custody and access of minor children. Subsequent to the focus groups with the offices of the Family Advocate, a national focus group forum was held

with the senior and principal family advocates and Family Counsellors to reach consensus on controversial issues. Subsequently, two national focus group forums were held in Cape Town and Gauteng involving lawyers, psychologists, family advocates, social workers, parents, academics, government officials, FAMSA, practicing mediators and a judge. The data obtained from all five questionnaires and the various focus group discussions and forums have been collated and a discussion paper will be published shortly.

PROJECT 107: SEXUAL OFFENCES: ADULT PROSTITUTION

The investigation into the legal position relating to adult prostitution constitutes the third leg of the SALRC's Project 107: Sexual Offences. The scope of this leg of the investigation is to review the existing law relating to adult prostitution to present the Department of Justice and Constitutional Development with the implications of retaining the current position, further criminalisation, legalisation and regulation or decriminalisation.

Due to the contentious nature of the topic and in order not to hamper the progress of less contentious reforms proposed in the substantive and procedural arena of sexual offences, the project committee on sexual offences decided to de-link this aspect of the investigation from the larger project. The Report and a draft Bill on Sexual Offences addressing substantive and procedural issues relating to sexual offences (representing a combination of the first and second leg of the investigation) was published in 2002. The Bill addressed child prostitution with a child being defined as a person under the age of 18, but did not address adult prostitution.

To date an issue paper (Issue Paper 19) has been published and a discussion paper is being developed. Once the SALRC has approved the discussion paper for publication it will be broadly workshopped to obtain the views of citizens in this regard. The input from the public will inform the drafting of a final report on adult prostitution.

PROJECT 122: ASSISTED DECISION-MAKING

This investigation was undertaken as a result of attention being drawn to the declining decision-making ability of persons with Alzheimer's disease, in particular, and the outdated and inappropriate ways in which the South African law deals with this situation. The SALRC's investigation, however, has a broader focus and attempts to deal with the shared problems faced by persons with diminished decision-making capacity regardless of the cause (as a result of for example mental illness, intellectual disability, brain injury, stroke, dementia or incapacity related to ageing in general). The primary objective of the investigation is to make provision for a truly comprehensive system of assisted decision-making that is affordable and accessible to all South Africans with decision-making impairment, which system will also protect such persons from abuse, neglect and exploitation. The publication of discussion documents and extensive public and expert consultation preceded the report with final recommendations and draft legislation which is currently being prepared.

PROJECT 124: PRIVACY AND DATA PROTECTION

The Commission will consider its final report on privacy and data protection and the draft Protection of Personal Information Bill for approval on 12 December 2008.

Opportunities for collecting personal information have increased in recent years due to the expansion of high-speed communications technology. Key users of personal information include telephone companies, retailers, credit bureaux, the health and medical profession, banks and financial institutions, the insurance industry, the direct marketing industry and public bodies such as government departments and agencies, local authorities and the police.

An individual's personal information needs protection since important decisions regarding the person are often taken on the strength of information collected about the individual. However, unbeknown to such a person, the information used may be inaccurate, incomplete or irrelevant.

South Africa currently lacks an information security culture which results in high instances of identity theft and compromised_data banks. [and leads to the proliferation of spam.] Information may also be accessed and distributed without authorisation and used for purposes that are incompatible with the purpose for which it was collected. The increasing proliferation of spam also needs urgent attention.

On a global, economic level South Africa has to comply with international trade imperatives. Without adequate privacy legislation the free flow of information across international borders has become very problematic, if not impossible. Global companies, banks and the newly developing call centre industry, which has huge potential for job creation, are some examples of industries that are negatively affected.

The proposed Protection of Personal Information Bill gives effect to eight internationally accepted information protection principles that provide for the regulation of the flow of personal information. This regulatory framework will ensure a system of good business practice which will provide a safe environment for the processing of personal information both in the public and in the private sector.

PROJECT 125: PRESCRIPTION PERIODS

The purpose of prescription periods is to bring about legal certainty. Failure to enforce a claim for a number of years might create the impression that it never existed or that it had already been paid. To promote legal certainty the law provides that a debtor may after the expiry of prescribed period simply refuse to acknowledge the existence of a debt.

The Prescription Act of 1969 provides that, except where a statute provides otherwise, the prescription period for all actions is three years, and there is no provision for condonation where there is late filing of the claim irrespective of the valid reasons that may be provided by the creditor. The result is that there are about 18

statutes providing for different prescription periods. When a creditor wants to institute an action s/he would have to ascertain which statute governs the prescription period. This raises the question whether the different prescription periods may lead to confusion and thus prejudice the enforceability of claims.

The purpose of the investigation is the harmonisation of all prescription periods and to replace them by a single uniform standard of prescription. A discussion paper is being prepared which will be published for general information and comment.