OVERVIEW

Introduction

The Commission's term of three years expired on 31 December 2001. The following persons have been appointed as members of the Commission for a period of five years with effect from 1 January 2002:

Madam Justice Y Mokgoro as Chairperson
Madam Justice M L Mailula as Vice-Chairperson
Mr J J Gauntlett SC
Mr Justice C T Howie
Professor I P Maithufi as full-time member
Ms Z Seedat
Dr W L Seriti

In terms of section 3(2) of the Act the President may appoint one or more additional members if he deems it necessary for the investigation of any particular matter by the Commission. On 27 October 1999 the President appointed Professor C Hoexter, School of Law, University of the Witwatersrand, as an additional member of the Commission for the investigations into statutory law revision, publication of divorce proceedings, the legal position of voluntary associations (removed from programme) and domestic partnerships.

Since its establishment in 1973 the Commission's annual reports have reviewed calendar years. However, section 55 of the Public Finance Management Act 1 of 1999 now requires that a public entity must submit within five months of the end of a *financial year* to the executive authority responsible for that public entity an annual report on the activities of that public entity during that financial year, as well as the financial statements for that financial year. Administratively the South African Law Commission is part of the organisational structure of the Department of Justice and Constitutional Development and as such it is not a public entity in terms of the Public Finance Management Act. However, since the activities of the Law Commission and, in particular, its financial statements for a financial year, must be reflected in the departmental annual report, it is practicable to align the reporting period of the Law Commission's annual report with that of the Department's annual report. A financial year runs from 1 April to 31 March. *This annual report covers the period from 1 January*

2001 to 31 March 2002 and the 2002 annual report will cover the period from 1 April 2002 to 31 March 2003.

The year under review

Two issue papers were published for general information and comment:

- Project 118: Domestic partnerships (issue paper 17)
- Project 122: Incapable adults (issue paper 18)

Issue papers published by the Commission are listed in **Annexure E**.

Eight discussion papers were published for consultation purposes:

- Project 73: Simplification of criminal procedure: A more inquisitorial approach to criminal procedure - police questioning, defence disclosure, the role of judicial officers and judicial management of trials (discussion paper 96)
- Project 82: Sentencing: A compensation scheme for victims of crime (discussion paper 97)
- Project 114: Publication of divorce proceedings: Section 12 of the Divorce Act 70 of 1979 (discussion paper 98)
- Project 108: Computer-related crime: Preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data software applications and related procedural aspects (discussion paper 99)
- Project 73: Out-of-court settlements in criminal cases (discussion paper 100)
- Project 59: Islamic marriages and related matters (discussion paper 101)
- Project 107: Sexual offences: Process and procedure (discussion paper 102)
- Project 110: Review of the Child Care Act, 1983 (discussion paper 103)

The discussion papers are listed in **Annexure F**.

Five reports were approved by the Commission:

- Project 73: Simplification of criminal procedure: Sentence Agreements
- Project 85: Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour
- Project 94: Arbitration: Domestic arbitration

- Project 101: The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing
- Project 109: Review of the Marriage Act 25 of 1961

A summary of the recommendations contained in these reports appears in **Chapter 4**.

Two research papers were published by the Commission in its research series:

- Project 73: Simplification of criminal procedure: Settlements out of court - a comparative study of European criminal justice systems
- Project 82: Sentencing: An empirical, quantitative study on the progress and finalisation, including by conviction, of criminal matters reported to the police

The following Acts emanating from reports of the Commission were promoted by Parliament in 2001:

- Project 73: Simplification of criminal procedure - Sentence agreements
  Criminal Procedure Second Amendment Act 62 of 2001
- Project 104: Money laundering and related matters
  Financial Centre Intelligence Act 38. of 2001

The following Bills emanating from reports of the Commission are receiving the attention of Parliament:

- Project 42: Time limits for the institution of actions against the state
  Institution of Legal Proceedings Against Organs of State Bill
- Project 105: Security legislation - Monitoring and Interception Prohibition Act 127 of 1992
  Interception and Monitoring Bill

The following completed investigations and recommendations of the Commission are receiving the attention of the Department of Justice and Constitutional Development (unless otherwise indicated):

- Project 47: Unreasonable stipulations in contracts and the rectification of contracts
- Project 52: Investigation into the legal consequences of sexual realignment and related matters
- Project 63: Review of the law of insolvency (insolvency of individuals)
- Project 65: Surrogate motherhood

- Project 73: Simplification of criminal procedure: The right of the Director of Public Prosecutions to appeal on questions of fact
- Project 82: Sentencing - A new sentencing framework
- Project 85: Aspects of the law relating to AIDS: Non-controversial matters related to the health care setting - first interim report (Draft regulations for Hazardous Biological Agents are being finalised for promulgation by the Department of Labour) (The Department of Health is finalising a national policy for HIV testing for promulgation)
- Project 85: Aspects of the law relating to AIDS - Compulsory HIV testing of offenders arrested in sexual offence cases
- Project 86: Euthanasia and the artificial preservation of life (The Commission's report is under consideration by the Department of Health)
- Project 88: Recognition of class actions and public interest actions in South African Law
- Project 90: Customary law: Conflicts of law
- Project 94: Arbitration - International arbitration
- Project 94: Arbitration: Domestic arbitration
- Project 100: Family law and the law of persons: Access to minor children by interested persons
- Project 106: Juvenile justice
- Project 109: Review of the Marriage Act 25 of 1961
- Project 111: Jurisdiction of Magistrates' Courts in constitutional matters
- Project 112: Sharing of pension benefits

One new investigation was included in the Commission's programme in the year under review:

- Project 126: Review of the rules of evidence

A progress report on investigations not yet completed appears in **Chapter 5**.

2

OBJECTS, CONSTITUTION AND FUNCTIONING

Establishment of the Commission

The South African Law Commission was established by the South African Law Commission Act 19 of 1973.

The objects of the Commission

The objects of the Commission are set out as follows in section 4 of the Act: to do research with reference to all branches of the law of the Republic and to study and investigate all such branches in order to make recommendations for the development, improvement, modernisation or reform thereof, including -

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic;
- the consolidation or codification of any branch of the law; and
- steps aimed at making the common law more readily available.

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

Constitution of the Commission

The members of the Commission are appointed by the President.

In terms of section 3(1)(a) of the Act the Commission is constituted as follows:

- A judge of the Constitutional Court, the Supreme Court of Appeal or a High Court, as Chairperson.
- Six persons who appear to the President to be fit for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, or on account of any other qualification relating to the

objects of the Commission.

From 1 January 1999 to 31 December 2001 the Commission was constituted for a period of three years as follows:

Chairperson

- Judge I Mahomed (Chief Justice; deceased 17 June 2000)
- Madam Justice Y Mokgoro (Judge of the Constitutional Court; Chairperson with effect from 3 November 2000)

Vice-Chairperson

- Madam Justice Y Mokgoro (Judge of the Constitutional Court; Vice-Chairperson until 2 November 2000)

Other members

- Mr J J Gauntlett, SC (Member of the Cape Bar)
- Judge C T Howie (Judge of the Supreme Court of Appeal; member with effect from 3 November 2000)
- Madam Justice M L Mailula (Judge of the High Court)
- Professor I P Maithufi (Professor in law, University of Pretoria; full-time member with effect from 26 March 2001)
- Mr P Mojapelo (Practising attorney, Nelspruit)
- Professor R T Nhlapo (Honorary Professor in the Department of Private Law, University of Cape Town; resigned with effect from 1 October 2000)
- Ms Z Seedat (Practising attorney, Durban)

In terms of section 3(c) of the Act not more than three members may be designated as full-time members of the Commission. During the year under review Professor R T Nhlapo served in a full-time capacity until his resignation on 1 October 2000 and Professor Maithufi served as full-time member from 26 March 2001.

In terms of section 3(2) of the Act the President may appoint one or more additional members if he deems it necessary for the investigation of any particular matter by the Commission. The

volume of work generated by the research staff has increased considerably over the last few years. This has substantially increased the workload of Commissioners, especially in relation to project leadership. On 27 October 1999 the President appointed Professor C Hoexter, School of Law, University of the Witwatersrand, as an additional member of the Commission for the investigations into statutory law revision, publication of divorce proceedings, the legal position of voluntary associations (removed from programme) and domestic partnerships.

Annexure A contains a list of members of the Commission and the periods for which they served or for which they were appointed.

Committees

Section 7A of the Act provides for the establishment of committees of the Commission. There are two categories: committees appointed by the Commission and consisting of members of the Commission only (such as the working committee), and committees consisting of members of the Commission and persons who are not members of the Commission. The latter are appointed by the Minister. The object of the second category of committees is to utilise the expertise of persons outside the Commission and to ensure direct community involvement in the activities of the Commission.

Committees of the Commission perform the activities assigned to them by the Commission and are subject to the Commission's directives. Activities performed by committees are deemed to be performed by the Commission and for the purposes of remuneration members of committees are deemed to be members of the Commission.

Working committee

Under the first category of committees the Commission had established a working committee which consisted of members of the Commission co-opted for meetings according to their availability.

The working committee may be considered the executive committee of the Commission. In accordance with the Commission's directives, this committee attends on a continuous basis to routine matters and other matters that require urgent attention. The working committee may exercise all the functions of the Commission excluding the approval of reports. The committee also considers the inclusion of new investigations in the Commission's programme.

Furthermore, the committee plans and manages the activities of the Commission's secretariat.

Project committees

Project committees fall under the second category of committees. The Commission follows the practice of instituting project committees consisting of experts to assist with investigations and to advise the Commission if a specific investigation in the Commission's programme so requires.

The names of the members of the project committees appear in **Annexure B**. The Commission would like to express its appreciation to individuals and organisations for their willingness to serve on project committees of the Commission.

Secretariat of the Commission

The Commission is assisted in its task by a full-time secretariat consisting of officials on the establishment of the Department of Justice and Constitutional Development. The secretariat consists of an administrative component and a professional component. The Chief Director, Mr W Henegan, serves as the Secretary to the Commission.

The research component of the secretariat consists of 17 State Law Advisers from diverse backgrounds. Their task is to do the necessary research under the guidance of project leaders (who are designated by the Commission), to consult with interested parties, to compile issue papers, discussion papers and draft reports and to carry out other assignments of the Commission. These posts are at present filled by the following persons:

Ms D M Clark (Senior State Law Adviser)
Mr M B Cronje (Principal State Law Adviser)
Ms S Govender (Senior State Law Adviser – appointed in the period under review)
Ms C T Hartley (Senior State Law Adviser – appointed in the period under review)
Ms A-M Havenga (Principal State Law Adviser)
Mr G O Hollamby (Principal State Law Adviser)
Ms L J Jankie (Senior State Law Adviser – appointed in the period under review)
Ms C P Kimble (Senior State Law Adviser)
Ms A M Louw (Principal State Law Adviser)
Ms P A Matshelo-Busakwe (Principal State Law Adviser)
Ms G M B Moloi (Senior State Law Adviser)

Mr M F Palumbo (Principal State Law Adviser)
Ms C J Pienaar (Senior State Law Adviser – appointed in the period under review)
Ms L A Stuurman (Senior State Law Adviser)
Mr A W F van Vuuren (Principal State Law Adviser)
Mr P A van Wyk (Principal State Law Adviser – promoted in the period under review)
Ms R van Zyl (Senior State Law Adviser – to be appointed on 1 June 2002)

Mr M F Palumbo serves as Assistant Secretary to the Commission. Currently there is one vacancy for a Senior State Law Adviser. The vacancy will be filled in June 2002.

The librarian is Ms M A Kgasago.

The administrative component of the Secretariat currently consists of the following persons:

Senior Administrative Officer	:	Ms J M H Oosthuizen
Chief Administration Clerk	:	Ms P J Kotze
Senior Administration Clerk	:	Mr J D Kabini
Senior Administration Clerk	:	Ms J M Nkabinde
Senior Administration Clerk	:	Mr A Singh
Administration Clerk	:	Ms J A Jackson
Administration Clerk	:	Mr R Swart
Senior Secretary	:	Ms L V Damons
Senior Operator	:	Mr K M Mahlangu
Senior Messenger	:	Ms Z A Mahlangu

As a result of increases in the workload of the administration, the services of a temporary staff member, Ms A J G Kruger, have been obtained.

Ms E M Mashabela, secretary to the full-time member, died unexpectedly on 23 January 2002. She is greatly missed by the Commissioners and her colleagues at the Law Commission.

The Commission wishes to express its appreciation to the members of the secretariat for their outstanding services to the Commission and the high standard of working documents and reports developed by the research staff.

The Commission also wishes to express its appreciation to the various project leaders (from

within and outside the Commission) for guiding the researchers, for the research done by them and for the documents and reports compiled under their guidance.

Financing of the Commission

Funds for the expenditure connected with the Commission's activities are provided in the Vote of the Department of Justice and Constitutional Development under the Law Reform Subprogramme. The Secretary is consulted on the compilation of the draft Vote.

The Commission's budget for the financial year 1 April 2001 – 31 March 2002 was R9, 989,277.00 which is made up as follows:

- Personnel expenditure R7,090,277.00
- Administrative expenditure R1,177,000.00
- Inventories R581,000.00
- Equipment R430,000.00
- Professional and special services R710,000.00
- Miscellaneous expenditure R1,000.00

The Commission=s resources are supplemented by funding and technical assistance from foreign and local donors for specific projects. During the period under review the Commission has received financial support from the German Technical Co-operation (GTZ); USAID; and Save the Children (Sweden). The Commission wishes to record its sincere appreciation to these agencies.

Parts 3 and 5 of the annual report of the Department of Justice and Constitutional Development contain information on the Commission's programme performance and financial statements.

Programme

The Act provides that the Commission must from time to time draw up programmes listing the

matters which in its opinion require consideration in order of priority. The Commission's programme is subject to the Minister's approval.

The Commission's present programme appears in **Annexure C**. **Annexure D** contains a list of all the investigations included in the Commission's programme since its inception and indicates the final result or current state of investigations.

Any person or body is free to submit proposals for law reform to the Commission. In each case the Commission considers the merits of a proposal. In some instances a preliminary inquiry is instituted in order to determine whether the inclusion of a matter in the Commission's programme is justified. The Commission also includes matters in the programme of its own accord.

Every effort is made to dispose of urgent matters with the least possible delay. However, the Commission has to follow certain procedures which sometimes take up considerable time. The availability of funds and skilled research capacity, the nature and extent of the inquiry and the need for consultation all determine the time spent on each project. Consultation, in particular, is time-consuming, but the Commission regards it as an indispensable part of the law reform process.

Working methods

Research is done to determine authoritatively the existing legal position and to identify shortcomings or deficiencies that need to be rectified. Consultation takes place between the researcher and project committee (where one exists) and interested parties or persons with particular knowledge concerning the matter under investigation. Comparative studies are carried out in order to enable the Commission to benefit from experiences elsewhere in the world. The consultation process is facilitated by the Commission's policy (since 1996) of compiling issue papers as a first step. Issue papers outline the problems encountered with particular areas of the law and invite submissions on possible solutions. They are distributed as widely as possible for general information and comment and are in appropriate cases also supplemented by workshops. Responses to an issue paper and further intensive research form the basis for the preparation of a discussion paper.

Discussion papers contain essential information on the investigation and the Commission=s tentative proposals for reform. In particular, a discussion paper will include a statement of the

existing legal position and its deficiencies, a comparative survey, and a range of possible solutions. In most cases the discussion paper will also include a draft Bill. Members of the public are informed of the availability of discussion papers by notices in the *Government Gazette*, press releases and press conferences. In addition, copies are distributed to organisations and, sometimes, individuals whose views on the subject under discussion the Commission particularly wishes to canvass. The responses to the provisional proposals are carefully studied before final decisions are made. The Commission also hears oral evidence in appropriate cases. Its recommendations are embodied in comprehensive reports which are submitted to the Minister for Justice and Constitutional Development.

In making its recommendations the Commission bears in mind that there is a need to provide access to justice for all, to protect the rights of all parties - especially those of women and children, to make legal processes affordable, to make the law less complicated, and to give effect to the values and principles underlying the Constitution.

Judging from comments received, the Commission's discussion papers and reports are of a high standard. There appears to be an increasing tendency in the faculties of law of various universities to prescribe the Commission's discussion papers and reports as literature for their students at undergraduate as well as postgraduate level.

In view of the many valuable comments and proposals received on the Commission's recommendations as contained in its documents, there is no doubt that its working methods have proved successful. These methods ensure that the Commission's final recommendations are well substantiated and are the product of thorough debate. They also facilitate the enactment of the Commission=s proposed legislation which embodies the recommendations.

In the course of its activities the Commission publishes a variety of documents. The document series of the Commission consists of the following:

Commission papers and committee papers

Commission papers and committee papers are internal documents that are normally not available outside the ranks of the Commission. In these papers suggestions for the inclusion of matters in the Commission's programme, research results for the information of or consideration by the Commission, draft issue papers, discussion papers and reports as well as a variety of other matters are dealt with. The papers are numbered in sequence as they serve before the

Commission.

Issue papers

In order to involve the community actively at an earlier stage, the Commission publishes issue papers for appropriate investigations as the first step in the consultation process. The purpose of an issue paper is to announce an investigation, to clarify the aim and extent of the investigation, and to suggest the options available for solving existing problems.

Discussion papers

Discussion papers, previously referred to as working papers, are documents in which the Commission=s preliminary research results are contained. In most cases discussion papers also contain draft legislation. The main purpose of these documents is to test public opinion on solutions identified by the Commission.

Discussion papers are numbered serially as they are published. The number of the discussion paper bears no relation to the number of the investigation concerned. Discussion papers published since the introduction of the document series are listed in **Annexure F**.

Reports

The Act requires the Commission to prepare a full report on any matter investigated by it and to submit such report together with draft legislation, if any, to the Minister for consideration. All reports of the Commission are official, but not all are published. **Annexure D** lists the investigations reported on by the Commission since its establishment.

In addition to the reports on particular investigations, the Act provides that the Commission must annually submit to the Minister a report on all its activities during the previous year.

Papers in the Commission's research series

This series is used mainly for publications intended to make the common law more readily available and contains translated common law sources and noter-ups. A research paper relating to an empirical study of the sentencing practices in South Africa was published in the year under review. Papers published in this way are listed in **Annexure G**.

Issue papers and discussion papers are supplied free of charge to interested institutions and persons who wish to comment on a particular matter. These papers are widely distributed and are also obtainable from the Commission's offices. The annual report, papers in the research series and reports on investigations that are published can be purchased from the Government Printer in Pretoria.

Meetings

The Commission met on 21 April 2001 and on 24 November 2001.

The working committee of the Commission met on 30 March 2001, 17 September 2001, 19 November 2001 and 14 December 2001.

The following project committees of the Commission met on the dates indicated:

Aspects of the law relating to AIDS	27 July 2001
Community dispute resolution structures	12 May 2001 15 September 2001
Domestic partnerships	26 July 2001 8 February 2002
Islamic marriages and related matters	31 January 2001 7 April 2001 23 June 2001 1 September 2001
Review of the Child Care Act	19 – 20 January 2001 16 – 17 March 2001 16 – 17 August 2001 23 – 24 August 2001 21 September 2001 27 – 28 September 2001 29 November 2001 13 – 14 February 2002 7 – 8 March 2002
Sentencing	10 May 2001 16 August 2001

	25 September 2001
Sexual offences	8 – 9 March 2001 6 – 7 September 2001 31 October 2001 10 December 2001 14 January 2002 5 February 2002 16 February 2002
Simplification of criminal procedure	13 August 2001

Proposed amendment to the South African Law Commission Act 19 of 1973

The Commission continues to operate under its founding statute, which was adopted in 1973. In many respects that statute reflects the times in which it was adopted, namely the pre-constitutional era. In some respects, it assumes a small professional body, abstracted from public concerns, and focussing on isolated research. The projects upon which the Commission has been requested by the Minister to embark in the course of the past years testify that the new Commission has adopted a very different focus and approach. As a consequence, it has had to adapt its working methods considerably. For instance, projects involving issues of social concern and the transformation of the legal system require a far wider consultative approach than that adopted in the past. Administratively the Commission has done everything in its power to meet the demands of this paradigm shift, but it has become evident that in certain respects the Commission=s founding statute does not serve this new focus, and indeed in some respects hampers the smooth functioning of the Commission.

A proposed amending statute which reflects the restricted changes the Commission has in mind has been submitted to and is under consideration by the Minister for Justice and Constitutional Development.

3

THE COMMISSION'S PROGRAMME: INVESTIGATIONS INCLUDED AND REMOVED

One new investigation was included in the Commission=s programme in the period under review:

Project 126: Review of the rules of evidence

Mr Justice LTC Harms, the Chairperson of the Commission's project committee dealing with the simplification of criminal procedure, proposed that consideration be given to the review of the rules of evidence as a result of technological developments. The question arose whether the matter should be included in the project committee's terms of reference or whether consideration should be given to the inclusion of a new investigation in the Commission's programme.

The investigation is broader than the project committee's original terms of reference since it also includes the civil law, for example, the rules relating to hearsay and the rules governing computer-generated evidence. Moreover, there are a number of existing investigations on the Commission's programme which, to a lesser or greater extent, include a review of rules of evidence: the investigations into sexual offences, computer-related crime, and the use of electronic equipment in court proceedings. It is sensible to approach the rules of evidence in a holistic manner. It was consequently decided to recommend the inclusion of a new investigation in the Commission's programme.

The Minister approved the inclusion of the investigation in the Commission=s programme in December 2001.

Three investigations were removed from the Commission's programme in the period under review:

Project 8: Steps aimed at making the common law more readily available

One of the objects of the Commission as set out in section 4(e) of the South African Law Commission Act 19 of 1973 is to take steps to make the common law more readily available. To give effect to this object, Project 8 was included in the Commission=s programme.

Works that have been published in this regard are the following:

Author, editor, compiler, etc	**Title or subject**
Mr S I E van Tonder SC (ed)	Index to the Opinions of the Roman-Dutch Lawyers and the Decisions of the Courts of the Netherlands which have been digested in the Algemeen Berede-neerd Register of Nassau La Leck (1741-1795), by Dr A A Roberts, Vols 1(A-B), 2(C-D), 3(E-H), 4(I-L), 5(M), 6(N-R), 7(S-T) and 8(U-W)
Profs F J Bosman, J Th de Smidt, H W van Soest & P van Warmelo	Observations on decided cases concerning antenuptial contracts written by Cornelius Neostadius
Profs R Feenstra, P van Warmelo & D T Zeffertt	Some cases heard in the Hooge Raad reported by Willem Pauw
Mr P J J Viljoen	South African Noter-up to the Institute of Justinian
Prof P van Warmelo and Adv C J Visser	Aantekeninge van Johannes Voet oor die Inleidinge van Hugo de Groot (text and translation)
Prof L J du Plessis	Translation of Vinnius= *Tractatus de Pactis*
Prof W J Hosten (ed and transl), Mrs C van Soelen and Mr P Ellis	Treatise on the quasicontract called *promutuum* and on the *condictio indebiti* by Robert-Joseph Pothier
Prof R Whitaker	*Quaestiones juris privati* by Cornelius van Bijnkershoek
Mr P J J Viljoen	South African Noter-up to the *Corpus Juris Civilis* of Justinian including the Institutes of Gaius
Margaret Hewett (transl)	*Censura Forensis* Part I Book V by Simon van Leeuwen

The Commission resolved initially that this project should enjoy a low priority. However, in the light of the Commission=s research programme which contains a number of high priority investigations, the Commission later decided that the Minister be requested to approve the removal of project 8 from the Commission=s programme.

The Minister approved the removal of the investigation from the Commission's programme in

June 2001.

Project 100: Review of the maintenance system

In the course of this investigation the Commission published an issue paper and an interim report in 1998.

During 1998 the Department of Justice also embarked on a project to amend the Maintenance Act 23 of 1962. This project resulted in the replacement of this Act by the Maintenance Act 108 of 1998. The Commission participated in the process of the development of this Act by commenting on early drafts of the Bill that was introduced in Parliament. The Commission was also closely involved in the Parliamentary passage of the Bill.

Since the promulgation of the new Maintenance Act the Department has been involved in efforts to implement this Act effectively and efficiently. The new Maintenance Act came into operation in November 1999.

The Commission initially decided to keep its investigation in abeyance for a period of six months from the enactment of the Act, pending the efforts of the Department to implement it, and subsequently to assess the functioning of the Act.

Following the enactment of the new Maintenance Act the Department launched a project to re-engineer the maintenance system. One of the primary objectives of this project is the effective implementation of the new Maintenance Act. In the course of this project a task team held a number of workshops in which a researcher of the Commission participated. At the workshops amendments to the new Maintenance Act to improve its functioning in practice were discussed.

The suggested amendments to the new Maintenance Act did not amount to a large-scale overhaul of the Act, requiring extensive research and consultation, but could be effected on an *ad hoc* basis by the appropriate structures within the Department of Justice. At the workshops the conclusion was also reached that the larger issue of the review of the present maintenance system should be seen as a medium to long term objective. In the short term the Department's efforts and resources should be devoted to the implementation of the new Maintenance Act and the solving of problems such as the functioning of maintenance investigators. For the next five

to ten years the new Maintenance Act should therefore be retained. After this period, and on the basis of the performance of the new Maintenance Act, a review could be undertaken to determine whether the system contained in the new Maintenance Act should be discarded and replaced with a different approach to determine the maintenance duty, calculate maintenance amounts and collect maintenance payments.

The Commission agreed with the conclusions reached at the workshops of the task team on the re-engineering of the maintenance system.

The Minister approved the removal of the investigation from the Commission's programme in January 2001.

Project 117: The legal position of voluntary associations

In **Mitchell's Plain Town Centre Merchants Association v McLeod and Another** 1996 (4) SA 159 (A) the Supreme Court of Appeal denied legal personality to a voluntary association with more than twenty members formed for "the purpose of carrying on any business that has for its objects the acquisition of gain by the ... association ... or by the individual members thereof". As a result of this decision, numerous voluntary associations such as the South African Agricultural Union, sport clubs, jockey clubs, etc, are uncertain as to their legal personality.

Due to lack of capacity no meaningful progress could be made with this investigation.

It was decided that the investigation was a company law matter which could be dealt with by the Standing Advisory Committee on Company Law (SAC). The SAC was requested to consider dealing with the matter.

The SAC subsequently included the matter as part of its corporate law reform programme to be dealt with by the Committee and the Department of Trade and Industry in due course. It was not considered to be an urgent matter requiring legislative intervention on an *ad hoc* basis.

The Minister approved the removal of the investigation from the Commission's programme in January 2002.

4

REPORTS COMPLETED

In the period under review the following five reports were completed:

Project 73: Simplification of criminal procedure: Sentence Agreements

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

There are two types of sentencing agreements: The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law. The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, so does the sentence. The Commission concludes that there is no reason why this procedure should be dealt with by way of legislation. The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed and in the Commission's view it is this type of agreement that should be legalised and regulated.

A procedure which provides for sentence agreements will have important advantages for the criminal justice system. A serious problem in the criminal justice system is the backlog in courts and the inability of the Legal Aid Board to finance the defence of the indigent. A system which formalises plea agreements and which makes the outcome of the case more predictable will make it easier for practitioners to allow their clients who are guilty to plead guilty. Protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure. The practice of plea negotiation in South Africa could therefore make an important contribution to the acceleration of the process. Statutory measures are provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established legal principles.

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

- The prosecutor, subject to the directives of the National Director of Public Prosecutions, and an accused may enter into an agreement in respect of a plea of guilty to the offence charged or to an offence of which the accused may be convicted on the charge and an appropriate sentence to be imposed by the court if the accused is convicted of that offence.

- The agreement must be reached before the plea.

- Such an agreement will be binding on both the accused and the prosecution once accepted by the court.

- The agreement must be in writing and must state that, before conclusion of the agreement, the accused has been informed that he or she has the right to be presumed innocent and to put the State to task of proving his or her guilt beyond reasonable doubt; to remain silent and not to testify during the proceedings; and not to be compelled to give self-incriminating evidence.

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

- The presiding officer must ensure that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts, which rights have to be explained to the accused before the agreement is concluded.

- If an agreement is reached, the sentence agreement is disclosed to the court and once the court is satisfied that the agreed sentence is appropriate the accused is requested to plead.

- The court, before convicting the accused, must question the accused to ascertain whether the accused understood his or her rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, a procedure similar to that provided for in section 112 (1) (b) and (2) of the Criminal Procedure Act comes into operation.

- If the court accepts the agreement, the accused is found guilty in terms of the plea and the agreed sentence is imposed.

- If the court is of the view that it would have imposed a lesser or heavier sentence than the agreed sentence, the court must inform the parties of the lesser or heavier sentence which it considers to be appropriate.

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

- The judicial officer may not instigate or take part in any negotiations.

- Once a person is convicted and sentenced in terms of an agreement, he or she should not have a right of appeal against sentence. Review would be the proper remedy in the event of undue influence or the like.

The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.

Project 85: Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour

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

The Commission concluded that the creation of a statutory offence is neither necessary nor desirable and recommended that the current legal position be maintained. The Commission is of the view that arguments against legislative intervention override arguments supporting such

step. Moreover, the Commission believes that strong indications from the entire process of research and deliberation (including the distribution of a discussion paper for public comment and a consultative meeting with a wide range of experts, representing diverse interests) weigh against legislative intervention and that recommending new legislation under these circumstances would not be principled.

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

These mechanisms may include:

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

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

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

Major reasons for the Commission's conclusion are the following:

- Lack of scientific, empirical or even informal evidence that the behaviour to be targeted by intervention is occurring to such an extent that the creation of a statutory offence is necessary.

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

- The social costs entailed in creating an offence targeting *negligent* behaviour (in the form of negligent transmission of or exposure to HIV - which is not covered by existing common law), is not justified. Negligence in the HIV/AIDS context would involve an individual who is

not aware that he or she has HIV and in this state of ignorance unknowingly transmits HIV or exposes another to HIV. The Commission is convinced that where the majority of persons in South Africa with HIV are unaware of their HIV status and where there are insufficient resources for the widespread HIV testing that would be required to enable a change of behaviour, it is not just and right that persons who are ignorant of their health status (but ought perhaps ideally to know that they are infected), should be punished. In effect such individuals would be punished for their failure to know their HIV status - which may lie outside their control.

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

The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.

Project 94: Arbitration: Domestic arbitration

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

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

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

- The second is to follow the approach adopted by several other countries and to adopt the UNCITRAL Model Law on International Commercial Arbitration of 1985 for both domestic and international arbitration. In July 1998 the Commission published a report which recommended that the UNCITRAL Model Law should be adopted by South Africa for international commercial arbitrations. However, because of the need, in the context of

international arbitration, to keep changes to the content and language of the Model Law to a minimum, this approach also appears to be inappropriate for the needs of a new domestic arbitration statute for South Africa.

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

It is notorious that the potential advantages claimed for arbitration compared to litigation, as a more expeditious and cost-effective method of resolving disputes, are often not achieved in practice, particularly in complex commercial disputes and in the construction industry. The Commission therefore recommends that a statutory duty should be imposed on the arbitral tribunal to adopt procedures which, while fair, in the particular circumstances of the dispute will avoid unnecessary delay and expense. Increased powers are recommended for the tribunal to enable it to comply with this duty. These powers include the power to rule on its own jurisdiction, the power to depart from the ordinary rules of evidence, the power to decide whether or not there should be an oral hearing, a limited power to order interim measures and security for costs, the power to call witnesses, more effective powers to deal with a party in default and the power to limit recoverable costs. To address the problem posed by multi-party disputes, the Commission recommends that the tribunal should have a limited power to permit a third party to join the arbitral proceedings in certain circumstances. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

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

a specified period.

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

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

The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.

Project 101: The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing

The report focuses primarily on those sections which are clearly unconstitutional and which need urgent consideration. The premise is that the Commission should not usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Criminal Procedure Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop the case law step by step. The constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation is, however, also dealt with.

The report deals *inter alia* with provisions of the Criminal Procedure Act 51 of 1977 which are in conflict with the following:

- *The presumption of innocence*, for example, section 55 (failure of accused to appear on a summons); section 60 (failure of an accused on bail to appear in court); section 74 (failure of accused on warning to appear in court); sections 78(1A) and (1B) (mental defect and criminal responsibility); section 170 (failure of accused to appear after adjournment); section 174 (discharge of accused after case for the prosecution); section 212 (proof of certain facts by affidavit); section 217 (confessions); section 219A (admissions) section 37(evidence on charge of bigamy); section 240 (evidence on charge of receiving stolen property); section 243 (evidence of receipt of money or property and general deficiency on charge of theft);

section 245 (evidence on charge of which false representation is an element); and section 332 (prosecution of corporation and members of association).

- *The constitutional provisions of equality and access to courts*, for example, section 7 (private prosecution on certification of *nolle prosequi*); section 29 (search to be conducted in orderly manner); section 190 (impeachment or support of credibility of witness); section 191 (payment of expenses of witness); and section 269 (sodomy).

- *The right to a fair trial which includes the right to appeal*, for example, section 302 (sentences subject to review in the ordinary course and transmission of record).

- *The right to a public trial*, for example, section 153 (circumstances in which criminal proceedings shall not take place in open court); and section154 (prohibition of publication of certain information relating to criminal proceedings).

- *The right to adduce and challenge evidence and adequate facilities to prepare defence*, for example, section 166 (cross-examination); section 179 (process for securing attendance of witnesses); section 182 (witnesses from prison); and section 190 (impeachment or support of credibility of witness).

- *The right to freedom and security of person*, for example, section 185 (detention of witness) and section 286 (declaration of certain persons as dangerous criminals) and section 286B (imprisonment for an indefinite period).

- *The right to be brought before a court after arrest*, for example, section 50 (arrest).

- *The right to a fair trial, including the right to be informed in detail of charge*, for example, section 95 (housebreaking with intent to commit an offence).

- *The right to a fair trial (unconstitutionally obtained evidence)*, for example, section 225 (evidence of prints or bodily appearance of accused); and section 252A (authority to make use of traps and undercover operations and admissibility of evidence so obtained).

- *The right to a fair trial*, for example, section 213 (proof of written statement by consent); and sections 105, 119, 126, 213 (the unrepresented accused).

The report was submitted to the Minister for Justice and Constitutional Development on 29 May

2001.

Project 109: Review of the Marriage Act 25 of 1961

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

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

- The Commission is presently dealing with three interrelated family law themes in separate investigations: the review of the Marriage Act (project 109), Islamic Marriages and Related Matters (project 59) and Domestic Partnerships (project 118). It also finalised its report on Customary Marriages in 1998. It has been suggested that these investigations should first be finalised with a view to ultimately regulating all marriages in one Marriage Act. The Commission is, however, of the view that amendments which are identified in this investigation should be implemented and the Marriage Act consolidated in future to address civil, religious and customary marriages in one Marriage Act.

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

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

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

- Ambassadors, High Commissioners and Consuls should, by virtue of their office and as long

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

- The Marriage Act is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion". Provision should be made that any religious organisation or denomination may apply to the Minister of Home Affairs for recognition, and that they may nominate persons for designation by the Minister as marriage officers. Such applications for recognition should contain information setting out whether-

  - the religious body professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;

  - the rites and usages of the marriage ceremony followed by the religious body meet the requirements of South African marriage law; and

  - the religious body is sufficiently established, both in respect of continuity of existence and recognised rites and usages, to warrant the designation of its religious representatives as marriage officers.

- Any nomination by a recognised body of a person for designation by the Minister as a marriage officer must set out particulars as to whether the person nominated is a religious representative ordained or appointed according to the rites and usages of the body concerned; and that nominated person is, as a religious representative, recognised by the religious body to which he or she belongs as authorised to conduct marriages according to its rites and usages.

- A religious body should state in its nomination for the appointment of a person as a marriage officer that adequate notice of the nomination has been given to its members in order to afford them an opportunity to raise objections.

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

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

- If a religious body changes the name whereby it was known, or amalgamates with any other religious body, or changes its objects, or if there is a material change in its circumstances, it must immediately advise the Minister who may revoke its recognition for any of these reasons.

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

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

  - that at least one of the parties to the intended marriage is a South African citizen;

  - where one party to the intended marriage is not a South African citizen, that that party is not a subject or citizen of the foreign country or sufficient facilities do not exist for conducting the marriage in the foreign country in accordance with the law of that country;

  - where one party to the intended marriage is a subject or citizen of the foreign country, that the authorities of that country will not object to the intended marriage being conducted in that country; or

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

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

- The Act prohibits the joining of parties in marriage without the production of an identity document or the making of the prescribed declaration by the parties. The Act should state that failure to comply strictly with the provision does not affect the validity of the marriage

provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act; that there were no other lawful impediments to the marriage; that such marriage was not dissolved or declared invalid by a competent court; and that neither of the parties to such marriage had after such marriage and during the life of the other, lawfully married another.

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

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

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

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

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

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

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

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

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

The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.

5

PROGRESS REPORT

In this Chapter the position regarding uncompleted investigations on the Commission's programme is discussed. Reports completed are discussed in **Chapter 4**.

Project 25 - Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book

The object of this investigation is the ultimate establishment of a permanently simplified, coherent and generally accessible statute book. It is a task of immense proportions and deals with, *inter alia*, the constitutionality of legislation; the rectification of discriminatory legislation and gender insensitive provisions; the repeal of obsolete and redundant provisions and the systemisation of the statute book by grouping provisions that belong together.

The further funding of the project was approved by the German Government in September 2001. Once the funds are activated the establishment of a secretariat for the project and the outsourcing of research will commence.

The Law Review Project (a section 21 Association) is undertaking the AGood Law Project@ which overlaps with the Law Commission=s investigation into statutory law revision. The Minister has indicated that ways to coordinate the efforts should be undertaken, including the possibility of taking the statutory law revision process forward under the auspices of the Law Commission.

Project 59 - Islamic marriages and related matters

The object of this investigation is to determine the extent to which provision can be made in South African law for the recognition of Islamic law relating to marriage, matrimonial property, succession, guardianship and related aspects of family law and the law of persons. The names of the project committee members appointed for the investigation are contained in **Annexure B**.

A discussion paper on Islamic marriages and related matters (discussion paper 101) was published in December 2001.

The discussion paper contains preliminary recommendations and a proposed draft Bill on the recognition of Islamic marriages.

Historically, and until the landmark 1999 Supreme Court of Appeal decision in *Amod v Multilateral Motor Vehicle Accidents Fund*, a marriage contracted according to Islamic law was regarded by South African courts as null and void and as being contrary to public policy, with the result that the marriage and its consequences were not legally recognised in any form. The decision in *Amod*, however, recognised a monogamous Islamic marriage for the purposes of support only, and did not deal with other crucial issues such as polygamy and the status of respective spouses, maintenance obligations, proprietary consequences of Islamic marriages, termination, etc. The result is that gross inequities and hardships arising from the non-recognition of Islamic marriages still prevail.

The Law Commission published an Issue paper for public comment in July 2000. The purpose of the Issue paper was to identify the issues and problem areas, arising out of the investigation, with a view to maximum consultation with all interested parties and bodies, so as to obtain their inputs in arriving at an appropriate solution to the issues and problems identified in that document. The lively interest shown in the Issue paper was illustrated by the significant number of comments on the proposals in that paper. These comments were duly taken into account by the Commission's project committee during the process of developing a draft Bill.

The proposed draft Bill contained and explained in the discussion paper draws a clear distinction between an Islamic marriage and a civil marriage. It is only Islamic marriages that would fall within the ambit of the Bill. Provision is *inter alia* made for the regulation of proprietary consequences, changes to matrimonial property systems (with due regard to existing and vested rights) and the regulation of polygamous marriages. In terms of the draft Bill all existing Islamic marriages would be recognised as valid marriages, for all purposes, upon commencement of the proposed legislation. This would cover both monogamous and polygamous Islamic marriages which, if applicable, may exist alongside a civil marriage (ie a marriage registered under the Marriage Act).

It is further proposed that, because the judges of secular courts are by and large non-Muslims, a judge be assisted by two assessors who are experts in Islamic law in the adjudication of all disputes relating to Islamic law. The appointment of assessors means that the court presiding

over a dispute involving Islamic law would have the necessary expertise to resolve such disputes effectively.

The Commission's proposed draft Bill in addition addresses the registration of Islamic marriages, the dissolution of such marriages through the pronouncement of a *Talaq* (which, in terms of the proposals, must be confirmed by a court), custody of and access to minor children and maintenance.

The closing date for comment had been 31 January 2002 but was extended to 31 March 2002. *A draft report will be considered by the Commission in the second half of 2002.*

Project 73 - The simplification of criminal procedure

The investigation entails a comprehensive review of the Criminal Procedure Act 51 of 1977. Owing to the extent of the task the Commission adopted an incremental approach to the investigation. Reports that have already been finalised are reflected in **Annexure D**. The objects are to investigate the possibility of shortening and simplifying certain cumbrous procedures that give rise to the unnecessary protraction of trials as well as to investigate the influence of the Bill of Rights on the Criminal Procedure Act.

The names of the project committee members appointed for the investigation are reflected in **Annexure B**.

A discussion paper on **a more inquisitorial approach to criminal procedure: police questioning, defence disclosure, the role of judicial officers and judicial management of trials (discussion paper 96)** was published for general information and comment in April 2001.

The discussion paper addresses the following issues:

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

    - the extent to which a suspect/accused could legitimately be questioned and hence used as a source of evidence at the different stages of the criminal justice process (from pre-trial to the trial phase);

- different options to make police questioning more effective, including by bringing it under control of codes of conduct, or under judicial control, or by legislating police questioning;

- the consequences of and constitutional implications of police questioning having due regard to the right to silence; and

- the different admissibility requirements for admissions and confessions.

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

  - whether or not the defence should be required to disclose relevant evidence, and if so, the extent to which it should be required;

  - a review of the provisions of section 115 of the Criminal Procedure Act and its interaction with the right to silence and the consequences of non-disclosure; and

  - whether the existing provisions with regard to prosecution disclosure are sufficient and, if not, the extent to which amendments would be justified.

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

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

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

that alternative options be considered with the aim to stimulate debate.

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

The Commission's conclusions and recommendations are briefly the following:

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

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

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

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

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

(b) Questioning of suspects

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

(c) Admissibility of confessions and admissions

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

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

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

Option 1 - no legislative intervention is necessary

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

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

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

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

defences:

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

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

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

(e) Defence disclosure in the course of the trial

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

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

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

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

Option 2 - reciprocal defence and prosecution disclosure

An alternative proposal for comment entails reciprocal defence and prosecution disclosure and a continuing duty on each to disclose additional information. The accused may request the prosecution, before evidence has been led, to disclose any prosecution material to him or her and the court may direct the prosecution to disclose such material. The accused may of his or her own accord, or where the prosecution has complied with such a request or direction, is obliged to, give a written defence statement to the court and the prosecutor which sets out in general terms the nature of the defence and an indication of the matters which are disputed and the reasons therefor. Where the defence has complied with such disclosure there is a duty on the prosecution to disclose additional prosecution material which has not previously been disclosed.

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

(g) Case and trial management

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

The Commission also recommends that statutory provision be made for pre-trial conferences. In terms of the proposal the presiding officer may on application of the prosecutor or the accused or defence direct the prosecutor and the accused or defence to appear before him or her to consider the identification of issues not in dispute; the possibility of obtaining admissions of fact with the aim to avoid unnecessary evidence; to ensure that sufficient details are disclosed

where the defence intends to raise a defence of an alibi; and to consider the necessity of calling expert evidence and such other matters as may aid in the disposal of the trial in the most expeditious and cost effective manner. In such event the court must record in open court the agreements entered into and concessions made.

The closing date for comment on discussion paper 96 had been 30 June 2001, but was extended to 31 July 2001. Two regional workshops were conducted on 29 and 30 October 2001 in Cape Town and Pretoria respectively. *A draft report is under consideration by project committee members and will be considered by the Commission in the second half of 2002.*

A discussion paper on **out-of-court settlements in criminal cases (discussion paper 100)** was published for general information and comment in October 2001.

An interim report which recommended the formal recognition of a process of plea negotiations in the Criminal Procedure Act 51 of 1977 was submitted to the Minister for Justice and Constitutional development in 2001. In this report the Commission concluded that the process of plea bargaining should be statutorily recognised and that a separate investigation should be launched into out-of-court settlements of criminal cases.

The aim of the discussion paper is to determine whether there is a need in South Africa to develop procedures that provide for the settling of criminal cases without having to go to court, and if so, the best way in which this can be achieved within the South African context.

Particular attention is given to the international trend to have certain criminal cases dealt with out of court. This trend is based mainly on two considerations: firstly to increase the cost-efficiency of the criminal justice process through simplified and streamlined procedures, and secondly to deal with mass crime outside of the traditional criminal process, so that the courts have more time to deal adequately with increasingly complex cases.

In the discussion paper an out-of-court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion of the matter from the trial process. An out-of-court settlement needs to be distinguished from other pre-trial procedures and agreements. It is distinct from *sentence* and *plea agreements* in that these follow upon a decision by the prosecutor to institute a prosecution. The agreement

may affect the offences for which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. Therefore, such offender will have been put through the entire criminal process and will end up with a criminal record. An out-of-court settlement does not involve the entire criminal process, does not lead to a conviction and does not result in a criminal record.

On 17 September 1987 the Committee of Ministers to member states of the Council of Europe accepted a document which is pertinent to the present discussion and many European countries introduced legislation relating to speedier criminal procedures and which allows for discretionary prosecution of cases. The Committee recommended that member states should introduce the principle of "discretionary prosecution" and make use of several measures to settle criminal cases out of court when dealing with minor and mass offences. The main consideration behind the recommendation was to accelerate and simplify the working of the criminal justice system, while taking due consideration of articles 5 and 6 (the right to speedy trial) of the European Convention on Human Rights, as well as the increase in the number of criminal cases and the fact that delays in dealing with crimes bring criminal law into disrepute and affect the proper administration of justice.

Having considered these developments in Europe and current South African law, the Commission has concluded that formal recognition of a procedure to settle criminal cases out of court will have particular advantages for the criminal justice process in South Africa. Such a process will, among others -

- contribute to saving precious court time and costs, since cases can be finalised without going to court, and without the time-consuming task of settling factual disputes;

- save time which will mean that more cases can be dealt with more rapidly, something that should improve the public's perception of the administration of justice;

- give the accused person certainty regarding the outcome of the case, provided the conditions of the agreement are complied with;

- provide the accused person the opportunity not to end up with a record of previous convictions, a factor which often prompts people to dispute a criminal charge;

- provide ample opportunities for the application of restorative justice initiatives as an outcome of an out-of-court settlement; and

- protect victims from publicity, and from having to be subjected to cross-examination, and yet benefit from compensation or restitution by the accused.

The Commission has therefore concluded that there is a definite need for legislation which will formalise out-of-court settlements in criminal cases in South Africa and recommends that the legislation provide for the following principles:

- The prosecutor may, before substantial evidence has been adduced against the accused and considering all the facts at his disposal, if he or she is satisfied that it is in the public interest to do so and that the court would upon conviction impose a sentence other than imprisonment or imprisonment for a period not exceeding one year, enter into an out-of-court settlement with the accused.

- In terms of the settlement the prosecution may undertake to discontinue the prosecution on condition that the accused complies with the conditions as agreed upon in the settlement.

- In considering whether it will be in the public interest to enter into an out-of-court settlement, the prosecution must have regard to whether the accused poses a significant threat to the community and is likely to benefit from the settlement; the effect of a conviction on the accused; whether, in the case of an accused with two or more previous convictions for the same or similar offences or an accused who has entered into a settlement on two or more occasions for the same or similar offences, there are substantial and compelling circumstances meriting the settlement; and the interests of the victim of the crime.

- An out-of-court- settlement can only be entered into once a charge sheet, setting out the offence or offences for which the accused is being charged, has been served on the accused; if the prosecution is satisfied that there is sufficient evidence to warrant the prosecution of the accused; and through the accused's legal representative, if the accused is legally represented.

- In exercising its discretion the prosecution must, if circumstances permit, obtain the views of the investigating officer and the victim of the offence, and must consider such views, before

entering into a settlement with the accused.

- An out-of-court settlement is, for a period as agreed upon between the parties, but not more than two years, subject to one or more of the following conditions:

    - Compensation.

    - The rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

    - The performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community.

    - Payment of an amount of money of not more than the amount prescribed from time to time by the Minister in the *Gazette*, to the State or a state agency as directed by the prosecution.

    - Submission to instruction or treatment.

    - Submission to supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act 116 of 1991.

    - The compulsory attendance or residence at some specified centre for a specified purpose.

    - Referral to community dispute resolution structures that have been put into place in terms of an Act of Parliament.

- If the conditions to a settlement require the accused to perform community service, to undergo instruction or treatment, or to attend or reside at a specified centre for a specified purpose, the prosecutor must cause a notice to be served on the accused, directing him or her to report on a date and time specified in the notice to undergo that instruction or

treatment or to attend that centre or reside thereat.

- The terms of the out-of-court settlement must be in writing, and must be signed by the prosecutor and the accused; it has to be approved by the Director of Public Prosecutions having jurisdiction and may be amended on good cause shown, with consent from both parties.

- If the accused fails to comply with any of the conditions of the out-of-court settlement and the prosecutor is satisfied that such failure was beyond the accused's control, or for any other good and sufficient reason, the prosecutor may, having due regard to the extent to which the conditions of the prior settlement have been complied with, enter into a further out-of-court settlement.

- If the accused fails to comply with any of the conditions of the out-of-court settlement, the criminal proceedings against the accused on that charge can be resumed from the point when the out-of-court settlement was entered into.

- Once the accused has complied with the conditions of the out-of-court settlement, the charge is considered finalised and no prosecution resulting from the same offence may be instituted.

The closing date for comment on discussion paper 100 had been 31 December 2001 but was extended to 30 April 2002. *A draft report will be considered by the Commission in the second half of 2002.*

Project 82 - Sentencing

The objective is to develop a comprehensive Sentencing Act that would provide a permanent framework for sentencing in South Africa. The project committee appointed for the investigation plans to adopt a holistic approach to all issues related to sentencing, which would include placing victims at the centre of the criminal justice system. The names of the project committee members are reflected in **Annexure B**.

A discussion paper on a compensation scheme for victims of crime in South Africa (discussion paper 97) was published for general information and comment in April 2001.

The discussion paper considers the feasibility of establishing a Victim Compensation Scheme (VCS) in South Africa. An overview of the nature and extent of violent crime in the country is given. This is considered critical to understanding the foundation for such a compensation scheme and for realistically costing the endeavour. The discussion paper also briefly documents the economic, physical and psychological impacts of violent crime on its victims and discusses the services currently available to victims.

Debates in respect of compensation are raised and an analysis of the motivations for and against the establishment of a VCS is provided. Strong arguments from a victim-centred and moral perspective are made for establishing a VCS. Some potential benefits for the criminal justice system as a whole are also described. Arguments against establishing a VCS are subsequently outlined. These mainly focus on whether providing compensation, in a context of limited resources, should be prioritised over and above other aspects of victim support. The conclusion from the debates is that compensation, either partial or full, should be seen as a complementary component of victim support, which is vital to ensuring the efficacy of the whole criminal justice system. This makes prioritisation difficult.

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

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

The findings of an analysis of selected police dockets are reported in order to verify information about certain types of violent crimes and their impact on victims. This information is used to make assumptions when costing a VCS, and for shaping possible policy scenarios. In addition, the docket analysis focuses on the usefulness of police information in adjudicating possible

claims for victim compensation. It reveals, among other findings, that current police recording practices provide inadequate data on which to base an assessment of compensability, such as may be required in a VCS. Of particular concern is the fact that a medical report was not completed in over 80% of the cases studied.

The variables that would determine the overall cost of a compensation scheme in South Africa are dealt with on the basis of certain assumptions, taking into consideration the estimated financial impact of various policy permutations and applied eligibility parameters. The discussion paper also considers the estimated administrative costs that would be incurred in running a compensation scheme. These, and the costs of different models, vary a great deal (i.e. from incredibly costly to potentially viable in the South African context) depending on the policy parameters used.

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

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

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

dismissed out of hand simply because a full-scale scheme is not feasible in the short-term. The feasibility of the scheme itself should be assessed periodically against a number of suggested criteria and a VCS in South Africa should be developed incrementally.

The closing date for comment on discussion paper 97 was 31 July 2001. Six regional workshops were held in November 2001. *A draft report will be considered by the Commission in the second half of 2002.*

Project 90 - Customary law

On 22 October 1999 the Commission decided that the name of the project should be changed from AHarmonisation of the common law and indigenous law@ to "Customary law@, since the name would be a more appropriate description of the work in which the project committee is presently engaged.

The aim of the investigation is to ensure the orderly development of customary law as a component of the plural legal system in a way that is compatible with the Constitution. The project committee appointed to assist the Commission in this investigation (the names of the members are reflected in **Annexure B)** identified the following issues for preferential treatment:

- The recognition of customary marriages
- Conflicts of law
- Law of succession
- Traditional courts

Reports on the recognition of customary marriages and conflicts of law are reflected in **Annexure D**.

A discussion paper (which includes a draft Bill) on succession in customary law was published for general information and comment in August 2000. The closing date for comment on the discussion paper was 22 September 2000. The project leader's resignation with effect from 1 October 2000 delayed the completion of the investigation. On 30 March 2001 Professor Maithufi was appointed as the new project leader and Ms Moloi was appointed as the researcher. Comments received on the discussion paper on succession in customary law were

evaluated and workshops were held countrywide. A *draft report on succession in customary law will be considered by the Commission in the second half of 2002.*

A discussion paper on the judicial powers of traditional leaders was published for general information and comment in May 1999. The closing date for comment on the discussion paper was extended to 31 August 1999. The project leader's resignation with effect from 1 October 2000 delayed the completion of the investigation. Professor Maithufi was appointed as the new project leader and Ms Moloi was appointed as the researcher. The development of a draft report was outsourced to Professor S Rugege (University of the Western Cape) who has completed a draft report and is finalising a draft Bill to be included in the report. *A draft report will be considered by the Commission in the second half of 2002.*

A discussion paper on the administration of estates was published in December 2000. The closing date for comment was extended to 31 March 2001. A draft report was considered by the Commission on 24 November 2001. The Commission decided that an interim report should be submitted to the Minister. *A progress report was submitted to the Minister in January 2002.*

Project 94 - Arbitration

The investigation initially dealt with international and domestic commercial arbitration only, but at the request of the Minister it was broadened to include an investigation into alternative dispute resolution (ADR) at all levels. The project committee was broadened for this purpose. The names of the project committee members are reflected in **Annexure B**.

Alternative dispute resolution (ADR) covers all forms of dispute resolution other than litigation or adjudication through the courts. It therefore includes a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. These mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. The most common types of ADR include negotiation, conciliation, mediation and arbitration.

An issue paper dealing with all aspects of ADR was published for general information and comment during 1997.

A discussion paper on community dispute resolution structures was published for general information and comment in September 1999. Comments received on the discussion paper had

been collated and a draft report was considered by the project committee on 28 October 2000. On 12 May 2001 the project committee had considered an amended draft report and a subcommittee had been established to make additional recommendations which the project committee considered on 15 September 2001. The committee decided that legislation was not appropriate for community dispute resolution structures. *A further amended draft report which includes recommendations by the subcommittee will be considered by the project committee in April 2002.*

Project 95 - The admissibility of computer-generated evidence

The business world relies with confidence on computers for the keeping and processing of information. However, when it comes to the presentation of evidence in civil and criminal proceedings, the law is reluctant to admit computer-produced information as evidence in trials. The Computer Evidence Act 57 of 1983 sets strict requirements with which computer print-outs must comply in order to be admitted as evidence.

On 23 January 1998 the Working Committee decided that computer crimes (project 108) should be completed first and that the same project committee should then proceed with project 95.

The investigation has been suspended pending the outcome of the Electronic Communications and Transactions Bill (Minister of Communications).

Project 96 - The Apportionment of Damages Act, 1956

The investigation entails the review of the Act in question with special reference to the meaning of Afault@ and the concept of Acontributory negligence@ as used in the Act.

A discussion paper was published in October 1996 for general information and comment. The finalisation of a report had been deferred in the light of the researcher=s involvement in more urgent investigations.

Ms Hartley, a new researcher who assumed duty on 1 February 2002, has been allocated to the project. A discussion document is being finalised after which a meeting of experts will be convened. *A draft report will be considered by the Commission in the second half of 2002.*

Project 105 - Security legislation

The previous Commission considered a request received from the Minister of Safety and Security addressed to the Minister of Justice and referred to the Commission. The Minister of Safety and Security proposed that a review and rationalisation of South Africa=s security legislation should be undertaken by the Commission so as to ensure that the legislation is in accordance with international norms, the Constitution and the current requirements of the country.

The names of the members of the project committee appointed for the investigation appear in **Annexure B**.

A report on the Interception and Monitoring Prohibition Act was submitted to the Minister in November 1999. The Interception and Monitoring Bill is being considered by the Portfolio Committee on Justice and Constitutional Development.

Other areas of the law relating to security were provisionally identified by the project committee:

- The review of the crimes of terrorism and sabotage.
- The protection of classified information in the possession of the State.
- Regulation of private intelligence companies.
- Economic espionage as a threat to national security.
- Protection of the property and personnel of foreign governments and international organisations, including protection from intimidation, obstruction, coercion and acts of violence committed against foreign dignitaries, foreign officials and their family members.
- Hostage-taking in order to compel any government to do or abstain from doing any act.

A discussion paper on terrorism was published for general information and comment in August 2000. The closing date for comment was extended to 27 October 2000. The finalisation of a draft report was delayed in view of international developments that had to be included in the report after the September 11 terror attacks in the USA. *A draft report will be considered by the Commission in the second half of 2002.*

Project 107 - Sexual offences

The drafting of legislation to combat the sexual exploitation and abuse of children was another

priority identified in the National Plan of Action for Children. The Minister of Justice (as he then was) accordingly requested the Commission to include an investigation into sexual offences by and against children in its law reform programme. It became clear during the course of the investigation that any proposed changes to the law relating to sexual offences would have far-reaching effects on the position not only of children, but also of adults. Consequently, and as a result of various other requests, the Commission decided to expand the scope of the investigation to include sexual offences against adults.

The names of the project committee members appointed for this investigation appear in **Annexure B**.

A second discussion paper of a four part series, namely a discussion paper on sexual offences: process and procedure (discussion paper 102), was published for general information and comment in December 2001 as part of an incremental approach. The first discussion paper dealt with the substantive law relating to sexual offences, while the third and fourth papers will address the controversial issues of adult prostitution and pornography.

The discussion paper contains a draft Bill which embodies some progressive recommendations on the reform of the law relating to sexual offences. Although the discussion paper concentrates on aspects of the procedural law in relation to sexual offences the Bill which accompanies the discussion paper includes substantive law provisions, all of which have been revised following the integration of submissions received on the discussion paper on the substantive law. An explanatory memorandum clearly sets out the reasons for the revision of the substantive law provisions.

The release of the discussion paper on process and procedure relating to sexual offences will be followed by a joint report on both the substantive and procedural law relating to sexual offences. The joint report on sexual offences will contain the final recommendations of the Commission and will be accompanied by a Bill on Sexual Offences. The report and the Bill will, once approved by the Commission, be handed to the Minister for Justice and Constitutional Development for his consideration.

The discussion paper on the procedural law relating to sexual offences includes a discussion of the various agencies or service providers responsible for dealing with the victims and offenders of sexual offences and the procedures for disclosure, reporting and investigation of sexual

offences, the court hearing, rules of evidence and sentencing of the sexual offender.

The aim of the discussion paper is to test the preliminary recommendations contained in the discussion paper and to elicit comments which will be used to assist the Commission in preparing a report.

The revised substantive law provisions now include the following:

- A revised statutory definition of the offence of rape. The revision of this offence includes the following:

    - Penetration of a person by objects or human bodily parts should be limited to the anus and genital organs - in a manner which simulates sexual intercourse. In order to avoid any speculation as to whether penetration extends to animal bodily parts, it is made clear that objects include any part of the body of an animal.

    - The definition of indecent act now provides for the indemnification of health professionals who employ these acts for proper medical purposes.

    - The list of factors indicating the presence of coercive circumstances, originally proposed, has now been categorised in three categories, these being coercive circumstances; circumstances in which an act of sexual penetration is committed under false pretences, and finally, circumstances in which a person is incapable in law to understand the nature of an act of sexual penetration.

- The non-disclosure by a person that he or she is infected with a sexually transmissible disease prior to sexual relations with another (consenting) person would amount to sexual relations by false pretences and would therefore constitute rape.

- Child prostitution now constitutes what was previously referred to as Commercial Sexual Exploitation of Children due to the fact that the divergent role-players targeted in the original provisions are all in some way involved in child prostitution. These would include pimps, clients, brothel-keepers and people trafficking in children for purposes of sexual offences.

- Provision has been made for the prohibition of the organisation or promotion of child sex

tours. This provision criminalises the actions of both persons and bodies that facilitate such tours within or to South Africa in any way, whether by making travel arrangements for potential perpetrators or advertising such tours.

- Everybody is in need of increased protection as far as sexual offences are concerned - both locally and internationally. Therefore the original provision allowing for extra-territorial jurisdiction in respect of all offences under the Act and not only those committed in relation to children, is retained.

- Some of the areas of the process and procedural law relating to sexual offences that have received attention are as follows:

    - Agencies or service providers who are involved with or play a key role in the prosecution of a sexual offence, including those tasked with providing services to victims of sexual offences, are identified and critically analysed in respect of existing practices. This analysis is followed, where applicable, by recommendations for change.

    - It is the responsibility of the state to provide the financial means to cover the cost of prescribed medication for victims of rape, as well as costs for treatment and counselling as a result of the rape.

    - Criminal sexual activity compounded by deliberate or reckless exposure to HIV/AIDS should be subject to criminal sanction. It provisionally endorses the view that a separate offence should be created which specifically criminalises harmful HIV-related behaviour in the context of committing a sexual offence, coupled to the proviso that HIV should not be singled out to the exclusion of any other life-threatening sexually transmissible disease or condition.

- Due to numerous problems in practice which have been brought to the Commission's attention, it has considered the system of criminal procedure that should govern the conduct of trials in relation to sexual offences. In doing so the Commission has critically assessed the rules of evidence and procedure which govern and/or are applied in sexual offence trials. In this regard the discussion paper gives attention, amongst others, to the following:

- The creation of a category of vulnerable witnesses which will include all complainants in sexual offence cases and which will afford them new protective measures, in addition to protective measures already provided for in the Criminal Procedure Act, 1977 (such as *in camera* hearings, the appointment of intermediaries and the use of closed circuit television). The new protective measures would include the appointment of a support person to assist the witness during the trial as well as at pre-trial procedures.

- The abolition of the cautionary rule in relation to complainants in sexual offence cases, single witnesses and children, which currently requires or allows that such evidence should or can be treated with caution.

- Some of the issues which have received attention in relation to sentencing and the post-trial phase of the criminal procedure process in relation to sexual offences are:

  - Drug and alcohol rehabilitation orders where it appears that a person convicted of a sexual offence may benefit from treatment for the misuse of alcohol and drugs.

  - Sex offender orders which will prohibit a person convicted of a sexual offence from acting in a way that may cause harm to others, from frequenting specified locations and from contacting specified persons.

  - The possibility of increasing the penalties for persons contravening the prohibition against publication of information or revealing the identities of complainants and witnesses in sexual offence cases.

  - The possibility of providing compensation to the victims of sexual offences who suffered physical, psychological or other injury, loss of income or support.

  - The placement of dangerous sexual offenders under long term supervision upon their release from imprisonment or release on parole.

The closing date for comment on discussion paper 102 had been 28 February 2002 but was extended to 31 March 2002. *A draft report will be considered by the Commission in the second half of 2002.*

A draft discussion paper on adult prostitution will be considered by the Working Committee in the second half of 2002.

The preparation of a draft discussion paper on adult pornography will receive attention when the report on sexual offences has been finalised.

Project 108 - Computer-related crime

The purpose of this investigation is to develop legislation to combat the use of computers to commit crimes. The names of the project committee members appointed for the investigation are reflected in **Annexure B**.

Six objectives have been set which the Commission aims to investigate:

- The criminalisation of unauthorised access to computers as well as the unauthorised modification of computer data and software applications.

- The possibility of providing for the procedural aspects associated with the investigation and prosecution of the above-mentioned offences.

- The use of computers to commit offences such as theft and fraud.

- Offences committed by means of the Internet.

- Matters relating to encryption in order to protect information.

- The continuing education of the investigating and prosecuting authorities as well as the judiciary to understand and correctly apply the legislation which may be forthcoming from this investigation.

Because of the wide scope of the investigation an incremental approach is adopted. The first issue paper on options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects was published for general information and comment in August 1998.

Work in this project was suspended for a substantial period as a result of the researcher=s involvement in other urgent investigations and activities.

A discussion paper on computer-related crime: preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects (discussion paper 99) was published for general information and comment in May 2001.

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

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

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

- Unauthorised access to applications or data in computer system.

- Unauthorised modification of applications or data in computer system.

- Development and trafficking in devices or applications primarily used to obtain unauthorised access.

- Trafficking in computer passwords.

- Interference with use of computer system.

It is also proposed that a Computer Misuse Act make provision for procedural matters such as

search and seizure, admissibility of evidence and jurisdiction.

The closing date for comment on discussion paper 99 was extended to 31 July 2001.

The investigation has been suspended pending the outcome of the Electronic Communications and Transactions Bill (Minister of Communications).

Project 110 - Review of the Child Care Act, 1983

In scope, the investigation goes beyond the review of the present Child Care Act, 1983, and includes a comprehensive review and redraft of all child care legislation. The names of the members of the project committee appointed for the investigation are reflected in **Annexure B**.

An issue paper was published in May 1998 for general information and comment.

To enable the project committee to prepare a discussion paper with draft legislation, the members of the project committee and contract researchers prepared consultation papers on selected issues as background documents to stimulate debate within specific focus groups.

A discussion paper on the review of the Child Care Act (discussion paper 103) was published for general information and comment in December 2001.

The discussion paper contains the Commission's preliminary recommendations and findings following a comprehensive review of more than 24 statutes, including the Child Care Act, 1983, international law, the common law and religious and customary law affecting children. The discussion paper follows on the Issue paper released in 1998 and is informed by an extensive consultation process involving the Portfolio Committee on Social Development, government departments, civil society and a child participation process.

Given the broad scope of the investigation, the discussion paper covers a wide range of issues:

- The difficult issue of when childhood begins and when it ends. It further addresses the question of the best interests of the child, children's rights and responsibilities, and the principles underpinning the new children's statute.

- Aspects such as legitimacy of children, artificial insemination and surrogate motherhood.

- The diversity of family forms in South Africa, the shift from parental power to parental responsibility, the acquisition of parental responsibility by persons other than biological parents and the termination of parental responsibility.

- The discussion paper recognises prevention and early intervention services as vitally important components of a future children's statute.

- Formal measures for the protection of children from abuse and neglect are the central focus of the discussion paper. The discussion paper considers legal provisions and interventions which are designed to deal with situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect. Exploitation and abandonment, being forms of abuse and neglect respectively, are included within the ambit of these protective measures. The discussion paper further addresses issues such as the protection of the health rights of children, the protection of children as consumers, children in need of special protection, and the protection of children affected by the divorce or separation of their parents.

- It examines the issues of legislative support for early childhood development services and temporary care of children by persons other than their parents or ordinary caregivers.

- It deals with the following forms of substitute care: foster care, adoption, and residential care. More specifically, it addresses aspects such as professional foster care, cluster foster care, parental rights and responsibilities for foster parents, the foster care grant, who may be adopted, who may adopt, subsidised adoptions, the rights of children to care and protection in residential care facilities, minimum standards and quality assurance in residential care, and funding of residential care.

- It considers the issues of religious laws and customary laws affecting children. It further addresses international issues affecting children. These include, inter alia, inter-country adoptions, trafficking of children across borders, child abductions and refugee children.

- It proposes a new court structure with extensive powers, and addresses the issues of grants and social security for children, and a monitoring system to ensure the effective

implementation of the new children's statute.

The discussion paper specifically addresses the care of sexually exploited children. In this regard, the recommendations made in respect of child prostitution, child pornography and child trafficking focus on the child as a victim who may be in need of care. These are closely linked to the discussion paper on Sexual Offences, which focusses on the criminal law aspects which has also been released for public comment. Both these discussion papers aim to address holistically and in an integrative manner child sexual abuse, albeit from different perspectives.

Among the more contentious preliminary recommendations made in the discussion paper on the Review of the Child Care Act are the recommendations that the age of majority be lowered to 18; that more than one (even more than two) persons be allowed to acquire and manage parental rights and responsibilities, or components thereof, in respect of the same child at the same time; that mothers and married fathers be accorded such parental rights and responsibilities automatically, while some unmarried fathers and other persons will have to apply to court to acquire such rights and responsibilities; that local government be empowered and compelled to provide primary prevention and early intervention services for children and their families; that the common law defence of the right of reasonable parental chastisement to a charge of assault be repealed in order to protect children from serious breaches of physical integrity, which in effect will make some forms of parental chastisement a criminal offence; that all children over the age of 12 years may consent to HIV testing, with proper pre- and post-test counselling; that confidential access to contraceptives should be provided to all sexually-active persons, regardless of age; and that safety at places of entertainment should be regulated.

The discussion paper does not contain a draft Bill. The preliminary recommendations in the discussion paper, however, contain clear legislative proposals for inclusion in such a comprehensive children’s Bill.

The closing date for comment on discussion paper 103 had been 28 February 2002 but was extended to 31 March 2002.

The preparation of the comprehensive draft children’s Bill will be completed in the second half of 2002, after which a draft report will be considered by the Commission.

Project 113 - The use of electronic equipment in court proceedings

The objective of the investigation is to determine whether or not the use of electronic equipment in court proceedings is a viable option to save costs or prevent delays in civil and criminal trials.

In view of several investigations with a higher priority, it has not yet been possible to commence with research. *A researcher has been allocated to the project who will commence with the investigation once his other projects are finalised.*

Project 114 - Publication of divorce proceedings: Section 12 of the Divorce Act 70 of 1979

Section 12 of the Divorce Act 70 of 1979 deals with the limitation of publication of particulars of a divorce action. The objective of the investigation is to determine whether or in what respects disclosure of divorce proceedings should be permitted or prohibited.

A discussion paper on the publication of divorce proceedings (discussion paper 98) was published for general information and comment in May 2001.

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

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

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

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

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

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

Option one

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

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

Option two

The second option would make provision for the amendment of section 12 of the Divorce Act so that there would be no general prohibition on publication of proceedings, but in terms of which a court would have the discretion to make an order preventing any person from publishing any particulars of a divorce action or any information or evidence which comes to light in the course of such an action. Such order would not apply for the purposes of the administration of justice, to a bona fide law report or to information published for the advancement of or use in a particular profession or science.

Option three

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

Option four

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

The closing date for comment on discussion paper 98 was extended to 31 July 2001.

A draft report will be considered by the Commission in the second half of 2002.

Project 116 - The carrying of firearms and other dangerous weapons in public or at gatherings

The investigation is aimed at clarifying the uncertainty surrounding the carrying of firearms in public or at gatherings. The problem is compounded by different legislative enactments.

Professor R W Palmer of the University of Natal was appointed as a consultant to assist with the research. The completion of an issue paper was delayed pending the finalisation of the new Firearms Control Act 60 of 2000 which greatly limits the issues to be researched.

In the second half of 2002 the Working Committee will consider the removal of the investigation from the Commission's programme.

Project 118 - Domestic partnerships

The purpose of the investigation is *inter alia* to determine whether legal recognition should be

given to same-sex and opposite sex partnerships and if so, what criteria should be used in determining the permanence of the relationship. The investigation is aimed at harmonising family law with the provisions of the Bill of Rights and specifically, with the constitutional values of equality and dignity. Consideration will also be given to the question as to whether the criteria should be status or contract based.

The following options will be considered in the investigation:

- The legalisation of same-sex marriages.

- The introduction of a scheme of registered partnerships.

- The granting of recognition to partnership contracts and the enforceability of such contracts against third parties.

- The formal extension of rights and obligations of partnership to adults living in an interdependent relationship but which is not a conjugal relationship.

An issue paper on domestic partnerships (issue paper17) was published for general information and comment in September 2001.

Marriage is currently the only legally recognised form of intimate partnership. Domestic partnerships, on the other hand, are virtually unrecognised and partners are excluded from the rights and obligations which attach automatically to marriage.

The number of people living in non-marriage relationships has, however, increased worldwide and also in South Africa. In research on marriage conducted by Statistics South Africa, approximately 40 percent of African and Coloured women indicated that they had been in marriages of one kind or another (religious, customary or civil). This suggests that large numbers of South Africans live with their intimate partners without marrying.

Social customs have changed radically, outdating early notions of marriage as the only form of acceptable relationship. Domestic partnerships have come to be perceived in many cases as functionally similar to marriage. More and more legal problems associated with domestic partners and their families are coming to the attention of the courts and of lawyers generally.

South Africa is, however, far behind many countries in its development of appropriate laws. Tanzanian law, for example, protects the rights of couples in opposite-sex partnerships, Denmark recognises same-sex partnerships, while the Netherlands and Germany recognise same-sex marriage.

In the recent past the courts have carried much of the responsibility for crafting family law and policy with regard to domestic partners by creatively applying non-family laws, including the law of unjust enrichment, estoppel and contract, to domestic partners who have been excluded from family law regimes. The Constitutional Court has furthermore upheld a constitutional challenge under sec 9 (equality) on the ground of sexual orientation. With the extension of statutorily defined benefits (sometimes including domestic partnerships into the definition of "spouse" for various purposes), there has also been increasing recognition of these relationships outside marriage. The law of marriage itself has undergone major changes, for example with the recognition of the "no-fault" divorce, the recognition of customary marriages and changes in matrimonial property rules. These developments have led to a patchwork of laws that do not express coherent family policy.

The Commission is consequently considering proposals for possible law reform with regard to the following issues:

- Whether domestic partnerships should be legally recognised and regulated.

- Whether marital rights and obligations should be further extended to domestic partnerships.

- Whether a scheme of registered partnerships should be introduced.

- Which marital rights, obligations and benefits should require registration or marriage and which should depend only on the existence of a domestic relationship.

- Whether legislation should provide for same-sex marriage.

- Whether marital rights and obligations should be further extended to people living in interdependent relationships having no sexual element.

The closing date for comment on issue paper 17 had been 30 November 2001 and was

extended to 31 December 2001.

A draft discussion paper on domestic partnerships will be considered by the Working Committee in the second half of 2002.

Project 119 - Uniform national legislation on the fencing of national roads

The Fencing Act 31 of 1963 is obsolete and various Provincial Ordinances lack uniformity as regards the fencing of national roads. Problems arise where fences are removed or damaged and where farm animals stray onto roads and cause accidents.

Ms N Bawa, a member of the Cape Bar, was appointed as a consultant to assist with the research. An issue paper was published for general information and comment in June 2000.

Comments received on the issue paper were forwarded to Ms Bawa in November 2000 with a view to preparing a draft discussion paper.

In the second half of 2002 the Working Committee will decide on the way forward concerning the investigation.

Project 121 - Consolidated legislation pertaining to international co-operation in civil matters

In November 1999 a Justice Departmental workshop was held on international cooperation between South Africa and foreign states in civil matters. There have been no significant developments in the field of international civil matters and there is a need to revisit our legislation with a view to developing consolidated legislation. The workshop concluded that the Law Commission should be mandated, in consultation with business, to do a thorough research of existing legislation with a view to preparing consolidated legislation on international cooperation in civil matters.

The Minister approved the inclusion of the investigation in the Commission's programme on 12 June 2000.

The project has not received attention due to a lack of research capacity.

Ms Govender, who assumed duty on 1 March 2002, has been allocated to the project. *Research with a view to preparing an issue paper has commenced pending the appointment of a project leader.*

Project 122 - Incapable adults

The Commission, as far back as 1988, undertook an investigation with a view to improving the plight of mentally incapacitated persons who cannot afford the costs involved in securing a High Court appointed curator. Its recommendations led to the adoption of the Mentally Ill Persons' Legal Interests Amendment Act 109 of 1990, which amended the Mental Health Act 18 of 1973. This amendment enabled an interested person to apply to the Master of the High Court (which entails insignificant costs) for the appointment of a curator to a person who is *not declared* to be mentally ill, but whom the applicant *believes* to be suffering from mental illness to such an extent that the person is incapable of managing his or her own affairs.

The investigation into incapable adults means a revival of its previous investigation, but on a wider basis. Additional measures to protect the interests of those whose legal capacity has for some reason been diminished are researched.

An issue paper on incapable adults (issue paper 18) was published in December 2001.
The issue paper deals with the need for measures to protect the interests of adults whose capacity to act in the legal sense and to litigate has for some reason been diminished.

Diminished capacity can be the result of mental illness, inability to communicate because of a physical or other disability, head injury, stroke, learning disability, a specific disease (including diseases such as Alzheimer's and Parkinson's diseases) or may be related to ageing in general.

The legal principles governing mental incapacity are the same, irrespective of how the incapacity was caused. Any mental incapacity that affects a person's intellect and judgment will in terms of South African private law affect his or her capacity to act in the legal sense (eg to enter into a contract) and to litigate (i e to appear in court as a party to a suit). These capacities depend on whether the person in question is "insane" or not at the relevant time.

A person is insane if he or she is incapable of managing his or her affairs. An insane person's capacity to act is determined by common-law principles as extended by the courts and is currently not all regulated by legislation. Current statutory measures (the Mental Health Act 18

of 1973) applicable to mentally ill persons must be distinguished from the common-law principles and apply to the reception, detention and treatment of mentally ill persons. Measures contained in the Act concerning the care and administration of the property of a mentally ill person likewise only relate to “patients” (i e persons detained, supervised, controlled and treated in terms of the Act).

At present the legal solution to the problem of persons who cannot manage their own affairs takes the form of curatorships: A curator can be appointed by the court to an individual’s person (a *curator personae*) to see to his or her personal welfare (including making decisions eg on where the person should stay, and whether he or she should be admitted to an institution or undergo medical treatment). A *curator bonis* can be appointed to protect the proprietary interests of a mentally incapacitated person. In addition to these, an individual can allow another to act on his or her behalf, for certain purposes or generally, through a power of attorney. However, for a power of attorney to be valid, the person granting the power must have contractual capacity. A change of status (which could be caused by insanity) will thus terminate the agency.

The existing system of curatorships has been criticised on the ground that it suffers from a number of serious and frustrating difficulties. The problem of a power of attorney ceasing on incapacity has also caused concern. As early as 1988 the Commission undertook an investigation with a view to improving the plight of mentally incapacitated persons. Recommendations by the Commission for the provision of enduring powers of attorney (i e for providing that a power of attorney remain in force despite the fact that the principal has become mentally incapacitated) were, however, not promoted by the government at the time.

The number of persons suffering from diminished capacity are increasing worldwide and also in South Africa. The aged population (i e the elderly over pensionable age) in South Africa currently consists of about 7% of the total population.

Many of these persons will gradually lose their ability to administer their assets and to care for themselves. The number of persons with dementia (a broad term referring to a condition in which a person’s cognitive functions decline) are also increasing and although little is known about the specific prevalence of dementia in South Africa, it is expected that it would increase because of the ageing of the population in accordance with world-wide trends. Moreover, in 1996 7% of the South African population was classified as disabled. These included persons suffering from disabilities relating to sight and hearing as well as mental disabilities.

In several comparable legal systems enduring powers of attorney have been introduced in the 1980's. More recently comprehensive legislative schemes to deal with the problems faced by incapable adults, their families and caregivers have been introduced through law reform. The latter include reform in England, Australia, Canada and most notably and recently in Scotland. In some of these countries completely new systems comprising substitute "decision-makers" have replaced old and intrusive systems, which required appointment of public officials where it was unnecessary.

The closing date for comment on issue paper 18 had been 28 February 2002 but was extended to 31 March 2002.

The appointment of a project committee will be considered by the Working Committee in the second half of 2002, after which a draft discussion paper will be developed.

Project 123 - Protected disclosures

The Portfolio Committee on Justice and Constitutional Development submitted its report on the Protected Disclosures Bill to Parliament on 16 May 2000. The Bill aimed to protect employees in both the public and private sectors from suffering any occupational detriment on account of having disclosed information regarding unlawful or irregular conduct by their employers.

The Committee was of the view that the following matters referred to in its report should be investigated fully before a review of the provisions of the Bill could take place:

- The possibility of extending the ambit of the Bill beyond the purview of the employer/employee relationship.

- The possibility that a worker can also make a protected disclosure relating to the conduct of a person other than his or her employer.

- The exclusion of criminal or civil liability for making a protected disclosure.

- The creation of a new course of action for an employee who had been victimised by an employer in contravention of the Bill. (Such course of action could be aimed at the person who acted in contravention of the Bill, or at both the employer and such person, and could also introduce the concept "punitive damages" into our law.)

- The desirability of creating offences in the Bill in terms of which -

    - an employer would be committing an offence by unlawfully subjecting an employee to an occupational detriment; and

    - an employee would be committing an offence by making a false disclosure not knowing or believing it to be true.

The Portfolio Committee on Justice and Constitutional Development was of the view that the Law Commission would be best suited to undertake research into these matters and accordingly requested the Minister for Justice and Constitutional Development to consider referring these matters to the Commission for investigation.

The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000.

The project has not received attention due to a lack of research capacity.

Ms Jankie, who assumed duty at the Commission on 1 January 2002, has been allocated to the project. *The preparation of a draft issue paper is receiving attention pending the appointment of a project leader.*

Project 124 - Privacy and data protection

The Ad Hoc Joint Committee on the Open Democracy Bill submitted its report on the Promotion of Access to Information Bill to Parliament on 24 January 2000.

The Committee noted that the Bill only dealt with the aspect of access to private information of an individual, be it access by that individual or another person, and did not regulate other aspects of the right to privacy, such as the correction of and control over personal information.

Foreign jurisdictions with freedom of information regimes enacted separate legislation which, as an important component of democracy legislation, regulates aspects such as the correction of and control over personal information. Privacy legislation generally provides for more detailed mechanisms and provisions dealing with personal information in the hands of another person by

empowering that individual, amongst others, to demand the correction of incorrect information.

The Committee requested the Minister for Justice and Constitutional Development to introduce privacy and data protection legislation in Parliament as soon as possible. Since the preparation of this type of legislation will require extensive research, the Minister requested the Law Commission to consider the possible inclusion of such an investigation in its programme.

The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000.

The project has not received attention due to a lack of research capacity.

A project committee has been established and the first meeting of the project committee will take place in the second half of 2002.

Project 125 - Prescription periods

The Limitation of Legal Proceedings against Government Institutions Bill was passed by the National Assembly in September 2000. The Portfolio Committee on Justice and Constitutional Development recommended in its report on the Bill that, as no comprehensive review of all the provisions providing for different prescription periods - whether of a contractual or delictual nature - has been done, the Minister should be approached to request the Law Commission to include an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods in the Commission's programme.

The Minister approved the inclusion of the investigation in the Commission's programme on 8 December 2000. Research was held in abeyance until the finalisation of the report on the administration of estates.

Research with a view to finalising a draft issue paper in the second half of 2002 has commenced.

Project 126 - Review of the rules of evidence

The background to this investigation is provided in Chapter 3.

Prof P J Schwikkard (University of Cape Town) has been contracted to conduct a preliminary investigation to determine the extent of the investigation. *The preliminary investigation will be concluded in the second half of 2002.*

6

PUBLIC RELATIONS

For the efficient performance of its functions, the Commission depends on the co-operation of institutions and persons that have an interest in its investigations. In order to ensure the best possible involvement of interested parties, therefore, it is the Commission's policy to inform the public as far as possible of new investigations undertaken and of discussion papers published for general information and comment. Issue papers and discussion papers of the Commission are released by way of press statements so as to ensure good coverage. However, the Commission also submits issue papers and discussion papers of its own accord to institutions that have an interest in the investigation concerned. The reaction to these documents is an indispensable link in the process of law reform and it plays an important role in the eventual recommendations made by the Commission in its reports.

The Commission publishes a quarterly Bulletin, the aim of which is to inform people about the work of the Commission. The Bulletin contains information on the activities of the Commission, an update on current projects and items on new and completed investigations.

A brochure introducing the Commission is made available to the public at workshops and on other occasions.

Interaction with law reform bodies in other countries

The good relations maintained by the Commission with law reform bodies in other countries makes the exchange of working papers, reports and other information possible. In this way valuable information is exchanged that facilitates and expedites comparative law research. It is significant how various legal systems are often faced with similar problems. The exchange of documents enables the Commission to evaluate ways of thinking elsewhere in the world.

In the period under review the Commission received the following visitors:

- New South Wales Law Reform Commission

Professor R Graycar, a full-time Commissioner at the New South Wales Law Reform Commission, visited the South African Law Commission on 30 January 2001 to interact with

researchers working in the area of family law.

- Law Development Commission of Zimbabwe

Ms Justice E Gwaunza, Deputy Chairperson of the Law Development Commission of Zimbabwe, undertook a familiarisation visit to the South African Law Commission from 25 – 28 June 2001 in order to acquaint herself with the latter's structure and working methods. Ms Justice Gwaunza reported that her visit to the South African Law Commission had been highly successful and that the useful lessons she had learnt might be adopted and adapted to the situation in Zimbabwe.

- Law Reform Commission of Rwanda

Five Commissioners from the Rwandan Law Reform Commission undertook a study visit to the South African Law Commission from 10 – 14 December 2001. The delegation included the Chairperson and Vice-President of the Law Reform Commission. Meetings were also arranged with the Ministry for Justice and Constitutional Development; the Magistrates' Commission; Court Services; the National Director for Public Prosecutions; and with the President of the Transvaal Provincial Division of the High Court.

- National Youth Leadership Forum of the United States of America

A delegation of the National Youth Leadership Forum was briefed on issues of law reform as well as the South African Law Commission's working methods and projects on 7 January 2002.

- Law Reform Commission of Hong Kong

The Secretary of the Law Reform Commission of Hong Kong paid a courtesy visit to the South African Law Commission on 6 February 2002.

Electronic and printed media and liaison

The Commission maintains good relations with the electronic and the printed media. Information that, in the Commission's opinion, is newsworthy is supplied to the media and enquiries are replied to fully and promptly. The Commission wishes to express its gratitude for the interest displayed by the media in investigations conducted by the Commission.

On 8 May 2001, 6 June 2001 and 17 January 2002 the Commission hosted media conferences at which occasions discussion papers and reports were released for publication.

The Secretary and Assistant Secretary deal with enquiries on the work of the Commission virtually on a daily basis. These include enquiries from the media, the professions, the universities, NGOs and members of the public.

Apart from dealing with routine enquiries on a regular basis, researchers and project committee members also participated in the following programmes and discussions:

PROJECT	**ELECTRONIC/PRINTED MEDIA**	**LIAISON (Interviews, consultations, discussions, meetings, etc)**
85: Aspects of the law relating to AIDS	Interviews with Cape Talk and Radio 702	
86: Euthanasia and the artificial preservation of life	Television panel discussion (Christian Network) Interview on "Monitor"	
90: Customary law	Interviews with Hearsay Newsletter (Department of Justice), Cape Argus, Sowetan, The Mirror, Radio Ligwalagwala, Radio Teemaneng, Thobela FM, Radio Mafisa, Radio Bop, Winterveld Community Radio Article in the Provincial Parliamentary Programme (PPP) Bulletin Article in Reform (Australian Law Reform Commission journal) Article in Hearsay Newsletter (Department of Justice) Article in Profile (KwaZulu-Natal)	Discussion with Phil Mahlangu, National Parliament Interview with Ingrid Martens (producer/journalist) I'm Original Productions (Pty) Ltd - News, Current Affairs & Documentaries Discussion with Catarina T de Albuquerque of UNICEF Mozambique
90: Administration of estates	Interviews with SABC TV News, SA FM, SABC One O' Clock Live, Ligwalagwala FM, Ukhozi, RSG Monitor	
94: Community dispute resolution structures		Meeting with the Councillors of the Ekurhuleni Metropolitan Council Meeting with Hisham Mohammed, Department of Justice Regional Head in the Western Cape
105: Security legislation: Terrorism	Interviews with Sunday Times, Kaya FM, Cape Talk, Deutsche Welle, Radio Sonder Grense, Agence France Presse	
107: Sexual offences	Interviews with numerous radio stations and newspapers	
110: Review of the Child Care Act	Interviews with numerous radio stations and newspapers	
114: Publication of divorce proceedings	Interviews with numerous radio stations and newspapers	

PROJECT	ELECTRONIC/PRINTED MEDIA	LIAISON (Interviews, consultations, discussions, meetings, etc)
118: Domestic partnerships	Interviews with numerous radio stations and newspapers	Discussion with Professor S C J J Kortmann visiting from the University of Nijmegen, The Netherlands
122: Incapable adults		Meeting with representatives of the Directorate: Mental Health and Substance Abuse and the Directorate: Chronic Diseases, Disabilities and Geriatrics, Department of Health Meeting with Ms Nthuli Mahlangu, Assistant Director: Older Persons, Department of Social Development

In line with the Commission's policy to broaden its consultation base the following workshops and briefings were held:

Workshops and briefings initiated by the Commission

PROJECT	VENUE/LOCATION	TARGET AUDIENCE	DATE
73: 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)	Cape Town Pretoria	Legal fraternity	29 October 01 30 October 01
82: Sentencing (Compensation fund for victims of crime)	Pretoria Durban East London Pietersburg Kimberley Cape Town	Legal fraternity, relevant NGOs, State Departments	19 November 01 20 November 01 21 November 01 22 November 01 23 November 01 26 November 01

PROJECT	VENUE/LOCATION	TARGET AUDIENCE	DATE
90: Customary law (Succession)	Cape Town Nelspruit Kimberley Bloemfontein East London Durban Pietersburg Mmabatho, North West Province Law Commission	Provincial workshops involving all role players in customary law	2 October 01 25 October 01 31 October 01 1 November 01 7 November 01 20 November 01 6 December 01 13 March 2002 18 March 02
90: Customary law (Succession) (Jointly hosted by the Centre for Applied Legal Studies and the Law Commission)	Wits University	Experts	30 Aug 01
107: Sexual offences	Gordon's Bay Pretoria Vredendal George UWC Centre for Child and Youth Research, Cape Town	Experts National inter-sectoral workshop Workshop Workshop Workshop	16 – 17 Feb 02 25 February 02 7 March 02 13 March 02 19 March 02
110: Review of the Child Care Act	Gordon's Bay	Portfolio Committee on Social Development	5 – 7 Oct 01

Participation of researchers and project committee members in activities not initiated by the Commission

In some instances researchers of the Commission and project committee members are invited by government departments, non-governmental organisations and other institutions to attend seminars or conferences and to participate in workshops relating to investigations on the Commission's programme. This inter-sectoral approach facilitates co-operation between the Commission and other role players, serves to publicise the Commission's activities and ensures that duplication of initiatives is avoided.

Researchers and project committee members participated in the following activities **not initiated** by the Commission:

PROJECT	WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
63: Review of the law of insolvency		Paper delivered at the 5th Annual In-house Legal Conference 2001: 28 March 2001 Paper delivered at Insolvency Law Symposium 2001: 31 May and 1 June 2001 Paper delivered at International Association of Insolvency Regulators: London 15 July 2001
65: Surrogate motherhood		Paper delivered at Miller du Toit Conference on Changing Legal Definitions of the Family: Cape Town, 25 -27 March 2002
85: Aspects of the law relating to AIDS	Meetings of the Legislation Review Technical Task Team working under the Department of Public Administration's Impact and Action Project: June - October 2001	Briefing of Suid-Afrikaanse Vroue Federasie: Pretoria, 11 February 2002
86: Euthanasia and the artificial preservation of life		Paper delivered at workshop on "Euthanasia and Assisted Suicide in Perspective": University of the Witwatersrand, 12 September 2001
90: Customary law	National conference on "Enhancing the Participation of Women in the Law Making Process": 25 - 27 July 2001 Gender Summit 2001: 5-7 August 2001. Workshop arranged by the Provincial Parliamentary Programme: Umzinto, 11 November 2001 Congress of Law Teachers of Southern Africa conference: Rhodes University, 23-25 January 2002 Workshop at Tonga Constituency Office: Mpumalanga, 2 – 3 February 2002	Paper delivered at customary law of succession expert meeting jointly hosted by the Centre for Applied Legal Studies and the South African Law Commission: 30 August 2001 Briefing of attendants at the Department of Provincial and Local Government: 14 March 2001 Briefing of the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women: 29 August 2001
94: Community dispute resolution structures	Community court indaba: Mamelodi ,2 February 2002 Workshop on "Guardians or Gangsters, Vigilantism during South Africa's period of Transition: Graduate School, University of the Witwatersrand, 25 June 2001	

PROJECT	WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
105: Security legislation (Terrorism)		Paper presented at conference on "Urban Terror in the New Millennium: Implications for SA: University of Pretoria, 4 April 2001 Paper presented at conference on "International Terror: Implications for South And Southern Africa: The Proposed South African Anti-Terror Legislation: The Way Forward": Institute for Security Studies, University of Pretoria,15 November 2001
107: Sexual offences	South African Conference on Commercial Sex Work / Health Issues: Muldersdrift, 19-20 February 2001 Workshop for SA National Council for Child and Family Welfare: Parktown, 7 February 2002 Workshop for Commission of Gender Equality: Braamfontein, 11 February 2002 Workshop arranged by Provincial Network of Violence Against Women: Umtata, 15 March 2002	Briefing of prosecutors: Cape Town, 8 February 2002 Briefing at Child Abuse Seminar at CSIR: Pretoria, 11 February 2002 Briefing of prosecutors: Bloemfontein, 22 February 2002 Briefing of participants attending the Sexual rights Third Mini Conference: Cape Town, 1 March 2002 Briefing of prosecutors: Durban, 8 March 2002 Report given at the Child Abuse Parliamentary Hearings: Cape Town, 11 March 2002

PROJECT	WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
110: Review of the Child Care Act	Department of Social Development Flagship programme: Pretoria, 20 March 2001 SAYSTOP (South African Young Offenders Project) workshop: Cape Town, 23 April 2001 Meeting with CHILDS: Pretoria, 4 May 2001 Consultative meetings with officials from the Department of Social Development: Pretoria, 26 June 2001, 13 July 2001 Workshop on HIV/AIDS, National Children's Forum: Cape Town, 24 August 2001 Workshop on Early Childhood Development (ECD): School of Education, Wits University, 5 September 2001 Second World Congress against Commercial Sexual Exploitation of Children: Yokohama, Japan, 17-20 December 2001 Child protection workshop, SA National Council for Child and Family Welfare: Parktown, 7 February 2002 Workshop on "Hearing Children's Voices": ACESS, Cape Town, 19 February 2002 Consultative meeting on combating trafficking in human beings, especially women and children: Pretoria, 28 February 2002 ECPAT International Conference on Commercial Sexual Exploitation of Children: Johannesburg, 3-6 March 2002 Miller du Toit Conference on Changing Legal Definitions of the Family: Cape Town, 25 -27 March 2002	Paper presented at Reunite International Conference: Justice College, Pretoria, 25-26 January 2001 Paper presented at First Pan African Conference on Human Trafficking: Nigeria, 19-23 February 2001 Researcher presented paper at Social Assistance workshop: Cape Town, 7-8 March 2002 Paper presented at workshop on children affected by HIV/AIDS: Boystown, Johannesburg, 25 July 2001 Paper presented at child legislation workshop: Kopanong, 9-12 October 2001 Researcher presented paper at conference on children in need of special protection: Baragwanath Hospital, 20 February 2002 Paper presented at conference on corporal punishment: SAHRC, Kopanong, 20-23 February 2002 Paper presented at workshop for Commissioners of Child Welfare: Centurion Lake, 6 March 2002 Briefing of the DG: Social Development: Pretoria, 9 April 2001 Briefing of the Portfolio Committee on Social Development: Parliament, 16 May 2001 Briefing of the Chairperson of the Portfolio Committee on Social Development: Parliament, 30 August 2001 Briefing of the DG: Social Development, Cape Town: 26 September 2001 Briefing of the Portfolio Committee on Social Development: Parliament, 11 March 2002 Briefing of the Unaccompanied Minors Network: Pretoria, 29 January 2002, 28 March 2002 Briefing of the SA Nasionale Vrouefederasie: Pretoria, 11 February 2002

PROJECT	WORKSHOPS, CONFERENCES, CONSULTATIVE MEETINGS, ETC	BRIEFINGS, LECTURES, DISCOURSES, ETC
122: Incapable adults	17th International Conference of Alzheimer's Disease International: Christchurch, New Zealand, 25-27 October 2001	Briefing of Parkinson's Association of SA: Johannesburg, 8 February 2002 Briefing of Alzheimer's and Related Dementias Association: Johannesburg, 2 August 2001 Briefing of Tshwane Bipolar Association: Pretoria, 20 February 2002 Briefing of Brain Injury Group: Pretoria, 5 March 2002 Presentation at Miller du Toit Conference on Changing Legal Definitions of the Family: Cape Town 26 March 2002
124: Privacy and data protection	Interdepartmental workshop on Electronic Communications and Transactions Bill: Department of Communications, 14 May 2001 23rd International Conference of Data Protection Commissioners: Sorbonne University, Paris, 23 – 26 September 2001	
		Paper presented on "Options for Reform, Victims and their Treatment in South African Law and Facets of Restorative Justice" at consultative workshop on a draft South African Victim Charter: Pretoria, September 2001

Internet

An Internet site has been administered for the Commission free of charge by the Wits Law School since March 1997 (http://www.law.wits.ac.za/salc/salc.html). Any person with access to the Internet can subscribe to a free notification service. Subscribers are informed of the publication of new documents on the site.

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ACKNOWLEDGEMENTS

During the period under review a substantial number of persons and institutions responded to specific or general invitations by the Commission to comment on particular issues or to assist it with its activities in some respect. It is impossible, within the scope of this report, to mention all contributors. However, the Commission expresses its sincere thanks to all concerned - without their goodwill and assistance the Commission would not be able to perform its duty satisfactorily.

The Commission would like to express its sincere appreciation for the generous assistance given by the following foreign donors and contributors:

- *The German Government through the German Technical Co-operation (GTZ)*
  Simplification of criminal procedure
  Sentencing
  Assistance with training of personnel and organisational development measures

- *USAID*
  Community courts

- *Save the Children (Sweden))*
  Review of the Child Care Act
  Sexual offences

The Commission wishes to extend a special word of gratitude to Mr Rainer Pfaff, who completed his term as resident expert of the German Technical Co-operation (GTZ) for his contributions to and involvement in a variety of the Commission's investigations. A warm welcome and the assurance of fruitful cooperation is extended to his successor, Ms Claudia Lange.

The Commission would also like to thank the Government Printer and staff who are responsible for the printing of the Commission's reports for their professional supporting service.

In conclusion, the Commission wishes to thank the Minister and Deputy Minister for Justice and Constitutional Development for their personal interest in and support for the

Commission's work. The Department of Justice and Constitutional Development as a whole is thanked for its co-operation and goodwill.

ANNEXURE A

MEMBERS OF THE COMMISSION IN ORDER OF APPOINTMENT

(Present members are marked with an asterisk, see **Chapter 3**)

Title/Name	Term of office
Chairpersons	
Judge D H Botha, Judge of Appeal	1973-09-28 to 1975-12-28
Chief Justice P J Rabie DMS	1976-02-27 to 1982-05-31
Judge G Viljoen, OMSG, Judge of Appeal	1982-09-30 to 1988-11-30
Judge H J O van Heerden, Judge of Appeal	1988-12-01 to 1995-12-31
Chief Justice I Mahomed	1996-01-01 to 2000-06-17
Madam Justice Y Mokgoro*, Judge of the Constitutional Court	2000-11-03 to date
Vice-Chairpersons	
Judge President N James DMS	1973-09-28 to 1977-07-13
Judge G Viljoen, OMSG, Judge of Appeal	1977-09-22 to 1982-09-27
Judge H J O van Heerden, Judge of Appeal	1982-09-30 to 1988-11-30
Judge P J J Olivier, Judge of Appeal	1988-12-01 to 1998-12-31
Madam Justice Y Mokgoro, Judge of the Constitutional Court	1999-01-01 to 2000-11-02
Madam Justice M L Mailula*, Judge of the High Court	2002-01-01 to date
Full-time members	
Mr G G Smit	1982-01-01 to 1995-12-31
Judge P J J Olivier	1986-02-01 to 1995-03-31
Prof R T Nhlapo	1996-01-01 to 2000-09-30
Prof I P Maithufi*	2001-03-26 to date
Members	
Mr D J du P Geldenhuys	1973-09-28 to 1975-10-31
Mr C P Joubert SC	1973-09-28 to 1974-08-20
Mr J E Knoll OMSS	1973-09-28 to 1995-12-31
Mr D D van Niekerk SC	1973-09-28 to 1979-01-31
Prof A D J van Rensburg	1973-09-28 to 1982-08-30
Mr H J O van Heerden SC	1974-09-30 to 1976-08-11
Mr J C Ferreira SC	1975-09-22 to 1979-10-31
Mr M Bliss QC	1976-10-07 to 1977-02-24
Mr F H Grosskopf SC	1977-07-01 to 1980-11-21

Title/Name	Term of office
Mr G G Smit	1979-02-01 to 1982-01-01
Mr P A J Kotzé	1979-11-01 to 1988-10-30
Mr P M Nienaber SC	1981-06-14 to 1982-07-27
Mr P J J Olivier SC	1982-09-30 to 1988-12-01
Prof J T Delport	1982-09-30 to 1987-05-27
Prof D J Joubert	1987-12-21 to 1995-12-31
Dr W G M van Zyl	1988-11-01 to 1991-10-31
Mr R P McLaren SC	1989-07-24 to 1990-10-31
Prof C R M Dlamini SC	1991-05-08 to 1995-12-31
Mr J A Venter	1992-03-12 to 1995-12-31
Judge Y Mokgoro	1996-01-01 to 1998-12-31
Mr J J Gauntlett SC*	1996-01-01 to date
Mr P Mojapelo	1996-01-01 to 2001-12-31
Ms Z Seedat*	1996-01-01 to date
Judge M L Mailula	1999-01-01 to 2001-12-31
Prof C Hoexter* (additional member)	1999-10-27 to date
Judge C T Howie*	2000-11-03 to date
Dr W L Seriti*	2002-01-01 to date

ANNEXURE B

PROJECT COMMITTEES OF THE COMMISSION AND THEIR MEMBERS

(Chairpersons of committees are marked with an asterisk.)

Committee	Members	
Aspects of the law relating to AIDS	Judge E Cameron*	
	Mr Z Achmat	Former Head, AIDS Law Project, Centre for Applied Legal Studies at the University of the Witwatersrand
	Dr P J Haasbroek	Group economist, Barlows Ltd
	Ms M Makhalemele	Community representative
	Dr M J Matjila	Department of Community Health, MEDUNSA
	Ms L Seftel	Chief Director, Labour Relations, Department of Labour
	Dr N Simelela	Director, HIV AIDS/STDs, Department of Health
	Ms A Strode	National Co-ordinator, Lawyers for Human Rights: AIDS and Human Rights Programme
	Prof C van Wyk	Faculty of law, University of South Africa
Arbitration	*Domestic arbitration:*	
	Judge J Steyn*	
	Prof D A Ailola	Faculty of Law, University of South Africa
	Prof D W Butler	Faculty of Law, University of Stellenbosch
	Prof R H Christie	Faculty of Law, University of Cape Town
	Mr J J Gauntlett SC	Member, Law Commission

Committee	Members	
	Judge J M Hlophe	
	Ms S Pather	Commissioner, CCMA
	Mr C M Sardiwalla	Attorney, Ladysmith
	Mr N Singh SC	Natal Bar
	Alternative dispute resolution:	
	Prof R H Christie*	Faculty of Law, University of Cape Town
	Prof D W Butler	Faculty of Law, University of Stellenbosch
	Mr Cartwright	Community Peace Programme
	Mr R Choudree	Society of Advocates, KwaZulu Natal
	Mr J J Gauntlett SC	Member, Law Commission
	Ms B Hechter	Office of the Family Advocate
	Mr A Jooste	Chief Magistrate, Cape Town
	Ms N Mkefa	Cape Town Metropolitan Council
	Mr P Pretorius	Johannesburg Bar
	Prof W Schärf	Institute of Criminology, UCT
Computer-related crimes	Prof D P van der Merwe*	Faculty of Law, University of South Africa
	Capt B Grobler	SAPS, Computer Crime Investigations
	Capt J B Grobler	SAPS, Commercial Crime Unit
	Mr L W Mahlati	Office of the Director for Public Prosecutions, Kimberley
	Mr I M Melamed	Computer Systems Consultant

Committee	Members	
	Prof R T Nhlapo	Full-time member, Law Commission
	Judge C O'Regan	
	Prof S H von Solms	Department of Computer Science, Rand Afrikaans University
	Judge R H Zulman	
Customary law	Prof I P Maithufi*	Full-time member, Law Commission
	Ms L G Baqwa	Attorney
	Prof T W Bennett	Faculty of Law, University of Cape Town
	Prof C R M Dlamini SC	Rector of the University of Zululand
	Prof C Himonga	University of Cape Town
	Ms M Mashao	Commission on Gender Equality
	Mr P Mawila	University of Venda
	Ms L Mbatha	Centre for Applied Legal Studies, WITS
	Judge Y Mokgoro	Chairperson, Law Commission
	Prof R B Mqeke	Dean of law, Rhodes University
	Prof S Rugege	University of the Western Cape
Domestic partnerships	Judge C T Howie*	
	Ms B Goldblatt	Centre for Applied Legal Studies, WITS
	Prof C Hoexter	Member, Law Commission
	Prof R Louw	Dean of Law, University of Natal (Durban)

Committee	Members	
	Ms L Malepe	SA project manager, Canada/SA Justice Linkage Project
	Prof T Mosikatsana	Faculty of Law, WITS
Islamic marriages and related matters	Judge MS Navsa*	
	Sheikh M F Gamieldien	Islamic law consultant
	Moulana A A Jeena	United Ulama Council
	Ms F Mahomed	Member of Parliament
	Prof N Moosa	Faculty of Law, University of the Western Cape
	Mr M S Omar	Attorney, United Ulama Council
	Dr R A M Salojee	Member of Gauteng Legislature
	Ms Z Seedat	Member, Law Commission
	Ms D Singh	Office of the Family Advocate, Durban
	Ms A Thornton	Department of Health and Welfare, Western Cape
Review of the Child Care Act	Prof N Zaal*	Faculty of Law, University of Durban-Westville
	Dr J Loffell	Johannesburg Child Welfare Society
	Dr C Matthias	Department of Social Work, University of Durban-Westville
	Ms B Mbambo	Social Worker (Private Consultant)
	Mr M Mtshali	Magistrate, Pietermaritzburg
	Ms Z Seedat	Member, Law Commission
	Ms A Skelton	Child Justice Project
	Prof J Sloth-Nielsen	Community Law Centre, University of the Western Cape

Committee	Members	
	Mr A Theron	Department of Welfare
	Ms E Swanepoel	Department of Welfare
Security legislation	Judge C T Howie*	
	Mr G J Marcus SC	Johannesburg Bar
	Judge Y Mokgoro	Chairperson, Law Commission
	Mr D Tabata	Attorney
	Mr D Nkadimeng	Attorney
Sentencing	Mr J Kollapen*	Human Rights Commission
	Ms L Camerer	Institute for Security Studies
	Mr K Govender	State Attorney
	Mr V Peterson	Department of Welfare, Mpumalanga
	Ms M E M Ramagoshi	National Network on Violence Against Women
	Mr P M Shabangu	Magistrate, Durban
	Prof D van Zyl Smit	Faculty of Law, University of Cape Town
Sexual offences	Ms Z Seedat* (Chairperson)	Member, Law Commission
	Ms J van Niekerk (Project leader)	Childline, Durban
	Ms L Malepe	SA project manager, Canada/SA Justice Linkage Project
	Ms C McClain	Commissioner, Human Rights Commission
	Prof J Milton	Faculty of Law, University of Natal (Pietermaritzburg)

Committee	Members	
	Ms B Pithey	Senior Public prosecutor, Cape Town
	Prof R L September	Institute of Child Family Development, University of the Western Cape
Simplification of criminal procedure	Judge L T C Harms*	
	Judge A E B Dhlodlo	
	Mr P A J Kotze	Johannesburg Bar
	Prof B Majola	Director, Legal Resources Centre
-	Prof N C Steytler	Faculty of Law, University of the Western Cape
Privacy and data protection	Judge C T Howie* (Chairperson)	
	Prof J Neethling (Project leader)	Dean of Law, UNISA
	Prof I Currie	University of the Witwatersrand
	Ms C da Silva	SA Insurance Association
	Ms C Duval	Direct Marketing Association: Consumer Affairs Committee
	Prof B Grant	University of Natal
	Ms A Grobler	Banking Council of SA
	Mr M Heyink	Chairperson, E-commerce committee, Law Society of SA
	Ms S Jagwanth	University of Cape Town
	Ms A Tilly	Open Democracy Advice Centre

ANNEXURE C

PRESENT PROGRAMME OF THE COMMISSION

Project number	Title
25	Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book
59	Islamic marriages and related matters
73	Simplification of criminal procedure
82	Sentencing
90	Customary law
94	Arbitration
95	The admissibility of computer-generated evidence
96	The Apportionment of Damages Act, 1956
105	Security legislation
107	Sexual offences
108	Computer-related crimes
110	Review of the Child Care Act, 1983
113	The use of electronic equipment in court proceedings
114	Publication of divorce proceedings
116	The carrying of firearms and other dangerous weapons in public or at gatherings
118	Domestic partnerships
119	Uniform national legislation on the fencing of national roads
121	Consolidated legislation pertaining to international co-operation in civil matters
122	Incapable adults
123	Protected disclosures
124	Privacy and data protection
125	Prescription periods
126	Review of the rules of evidence

ANNEXURE D

INVESTIGATIONS INCLUDED IN THE COMMISSION'S PROGRAMME SINCE ITS ESTABLISHMENT: RESULT

(Current investigations marked with an asterisk,
see Chapters 3 and 5.)

Project number	Title	Year of report	Reference number of published report	Result
1	The codification of certain crimes against the State	1974	RP 17/1976	Recommended legislation not implemented
2	Investigation into a proposed new process for the administration of certain estates	1974	Not published	No new legislation recommended
3	The submission of questions of law in civil cases to the Appellate Division of the Supreme Court	1974	Not published	Section 36 of Act 94 of 1974 enacted
4	Investigation into the element of fault in *injuria*	1978	Not published	No legislation recommended, see also project 44
5	The safeguarding of money held in trust by an agent on behalf of a client	1974	Not published	No legislation recommended
6	Review of the law of evidence: • The admissibility in civil proceedings of evidence generated by computers • Final report	 1982 1986	 RP 95/1982 ISBN 0 621 11348 4	 Act 57 of 1983 passed Act 45 of 1988 passed
7	Revision of pre-Union statutes: • Repeal of certain pre-Union statutes • Repeal of certain pre-Union statutes Retention of certain pre-Union statutes	 1975 1976 1977	 Not published Not published Not published	 Act 36 of 1976 passed Act 43 of 1977 passed Act 24 of 1979 passed
8*	Steps aimed at making the common law more readily avail-able	-	-	Several works published, see previous annual reports, Chapter 3 and Annexure G
9	Review of the law of trusts	1986	June 1987	Act 57 of 1988 passed
10	Draft convention for a uniform law of agency of an international character in respect of the sale of goods	1974	Not published	No legislation recommended
11	Investigation into the common law rule that interest may not accrue beyond the principal debt	1974	RP 18/1975	Recommendations not implemented, but see section 68A of the Insurance Act 27 of 1943 in respect of policy loans
12	Review of the law of divorce • Report	 1977	 RP 57/1978	 Act 70 of 1979 passed, see also project 40

Project number	Title	Year of report	Reference number of published report	Result
	• Section 7(3) of Act 70 of 1979	1991	ISBN 0 621 14140 2	Act 44 of 1992 passed, see also projects 100 and 114
13	Investigation into the right of recourse of spouses in respect of contributions towards necessaries for the joint house-hold	1974	RP 79/1975	Act 13 of 1976 passed, see also project 15
14	The prescribing of a rate of interest in respect of debts where no rate of interest applies in law	1974	Not published	Act 55 of 1975 passed
15	The matrimonial property law with special reference to the Matrimonial Affairs Act, 1953, the status of the married woman, and the law of succession in so far as it affects the spouses	1982	RP 26/1982	Act 88 of 1984 passed, see also projects 41 and 51
16	Investigation into the application of set-off in insolvency	1975	Not published	No legislation recommended, see project 63
17	Examination of the convention on the form of an international will	1975	Not published	No legislation recommended, see project 22
18	Investigation into the enforce-ability of foreign arbitration awards in the Republic	1975	Not published	Act 40 of 1977 passed
19	Investigation into the shifting of the onus of proof in bribery charges	1975	Not published	No legislation recommended, see project 75
20	Investigation into the substitution of petition proceedings in superior courts	1975	Not published	Act 35 of 1976 passed
21	Limitation of the institution of legal actions against the State	1977	Not published	No legislation recommended, see also project 42
22	Review of the law of succession: • Intestate succession • Legitimate portion or right to maintenance	 1985 1987	 ISBN 0 621 09611 3 Not published	 Act 81 of 1987 passed Act 27 of 1990 passed
	• Formalities of a will, alteration and revocation of wills, disqualification from inheriting, substitution and the succession rights of adopted children	1991	ISBN 0 621 14189 5	Act 43 of 1992 passed
23	Risk as a ground for liability in delict	1985	ISBN 0 621 10202 4	No legislation recommended
24	Investigation into the courts' powers of review of administrative acts • Report • Supplementary report	 1992 1994	 ISBN 0 621 15356 7 Not published	 See project 115 See project 115

Project number	Title	Year of report	Reference number of published report	Result
25*	Statute law: The establishment of a permanently simplified, coherent and generally accessible book:			See Chapter 5
	• Repeal of Laws Act	1980	Not published	Act 94 of 1981 passed
	• Investigation into certain aspects of the Prescription Act 68 of 1969	1983	Not published	Act 11 of 1984 passed
	• Investigation into further aspects of the Prescription Act 68 of 1969	1984	Not published	No legislation recommended
26	Criminal law consolidation: Theft and house-breaking	1977	Not published	Recommendations regarding legislation not implemented
27	Abolition of civil imprisonment	1976	Not published	Act 2 of 1977 passed, see also project 54
28	Investigation into leases in respect of movables	1976	Not published	No legislation recommended
29	Investigation into the application of *mens rea* in statutory offences	1982	GP-S 300	No legislation recommended
30	Investigation into an unlimited right of appeal for convicted persons in criminal proceedings	1976	RP 73/1977	No legislation recommended
31	Investigation into the law relating to presumption of death	1977	Not published	Act 23 of 1979 passed
32	Review of the law of admiralty	1982	RP 12/1983	Act 105 of 1983 passed
33	Review of the law of prize	1987	-	Recommendations not implemented
34	Examination of the legal consequences of artificial insemination and the duty of support in respect of certain adulterine children	1978	Not published	No legislation recommended, see also project 38
35	Negligent use of fire-arms	1978	Not published	No legislation recommended
36	Investigation into delictual liability in cases of misrepresentation	1983	Not published	No legislation recommended
37	Review of preferent claims in insolvency	1984	ISBN 0 621 090840 X	Recommendations not implemented, see project 63
38	Investigation into the legal position of illegitimate children	1985	ISBN 0 621 10205 9	Act 82 of 1987 passed
39	Investigation into the legal consequences of suspensive conditions in contracts of sale	1985	ISBN 0 621 11350 6	No legislation recommended
40	Evaluation of the effect of the Divorce Act 70 of 1979	1983	Not published	No legislation recommended
41	The division of pension benefits on divorce:			
	• Report	1986	ISBN 0 621 11357 3	Act 7 of 1989 passed

Project number	Title	Year of report	Reference number of published report	Result
	• Supplementary report	1994	RP 158/1995 ISBN 0 621 16869 6	Referred back to the Commission, see project 112
42	Investigation into time limits for the institution of actions against the State: • Report • Supplementary report	 1985 1998	 Not published ISBN 0 621 28862 4	 Recommendations not implemented Institution of Legal Proceedings Against Organs of State Bill currently under consideration by Parliament

Project number	Title	Year of report	Reference number of published report	Result
43	Investigation into the advancement of the age of majority	1985	ISBN 0 621 10246 6	No legislation recommended
44	A comprehensive and comparative inquiry into the protection of all rights of personality	-	-	Struck off
45	Women and sexual offences in South Africa	1985	ISBN 0 621 09609 1	Acts 103 of 1987, 39 of 1989 and 113 of 1993 passed
46	The giving of security by means of movable property: • Report • Supplementary report	 1991 1993	 ISBN 0 621 14544 0 Not published	 Act 57 of 1993 passed Act 57 of 1993 passed
47	Unreasonable stipulations in contracts and the rectification of contracts	1998	RP 133/1998 ISBN 0 621 28678 8	Report being considered by the Department of Justice and Constitutional Development
48	Examination of the limits of criminal defamation	1983	Not published	No legislation recommended
49	Offences committed under the influence of liquor or drugs	1985	ISBN 0 621 10207 5	Act 1 of 1988 passed
50	Investigation into the payments system in South African law	1994	RP 105/1995 ISBN 0 621 16776 2	Recommendations not implemented
51	Marriages and customary unions of black persons: • Problems relating to the acquisition of leasehold • Final report	 1985 1986	 Not published -	 Section 1 of Act 90 of 1985 enacted Act 3 of 1988 passed
52	Investigation into the legal consequences of sexual realignment and related matters	1995	RP 32/1996 ISBN 0 621 17334 7	Report being considered by the Department of Home Affairs
53	Investigation into the amendment of section 26 of the Insolvency Act 24 of 1936	1983	Not published	Act 84 of 1984 passed, see also project 63
54	Committal to prison in respect of debt	1985	ISBN 0 621 11346 8	See project 74
55	Removal of certain restrictions in respect of land	1984	Not published	No legislation recommended

Project number	Title	Year of report	Reference number of published report	Result
56	Submission of a question of law to the Appellate Division of the Supreme Court relating to the calculation of finance charges under the Limitation and Disclosure of Finance Charges Act 73 of 1968	1976	Not published	*Ex parte Minister of Justice* 1978 2 SA 572 (A)
57	Anton Piller type of orders	1987	Not published	Recommendations not implemented
58	Group and human rights • Interim report • Final report	1991 1994	Report: ISBN 0 621 14128 3 Summary: ISBN 0 621 14127 5 RP 66/1995 ISBN 0 621 16727 4	Act 200 of 1993 passed Made available to the Constitutional Assembly
59*	Islamic marriages and related matters	-	-	See Chapter 5
60	Domicile	1991	ISBN 0 621 14255 7	Act 3 of 1992 passed
61	Enduring powers of attorney and the appointment of curators for mentally incapacitated persons	1988	ISBN 0 621 12107 X	Act 108 of 1990 passed
62	The protection of a purchaser of shares • Report • Supplementary report on section 138 of the Companies Act 61 of 1973	1993 1994	ISBN 0 621 16287 6 RP 152/1995 ISBN 0 621 16847 5	Recommendations not implemented Act 35 of 1998 passed
63	Review of the law of insolvency: • Interim report: Section 34 of the Insolvency Act, 1936 (Act 24 of 1936) • Interim report: Insolvency interdicts • Interim report: Appeals against sequestration orders	1990 1992 1993	(Unpublished/ Informal) ISBN 0 621 14964 0 ISBN 0 621 15421 0	Section 1 of the Insolvency Amendment Act 6 of 1991 enacted, see also Chapter 5 Act 122 of 1993 passed, see also Chapter 5 Section 1 of Act 129 of 1993 enacted, see also Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
	• Interim report: The protection of the financial markets in the event of insolvency	1994	RP 63/1995 ISBN 0 621 16721 5	Act 32 of 1995 passed
	• Interim report: The enactment in South Africa of UNCITRAL's Model Law on Cross-Border Insolvency	1999	Not printed	Act 42 of 2000 passed
	• Report: The review of the law of insolvency	2000	RP 89/2000 ISBN 0 621 30069 1	Report being considered by the Department of Justice and Constitutional Development
64	The legal protection of information	-	-	Struck off
65	Surrogate motherhood	1992	ISBN 0 621 15353 2	Legislation being prepared by the Department of Justice and Constitutional Development
66	Reform of the South African law of bail:			
	• Report	1992	Not published	Referred back for consideration, *inter alia*, in the light of the provisions of the Constitution Act 200 of 1993
	• Report	1994	RP 82/1995 ISBN 0 621 16746 0	Act 75 of 1995 passed
67	The Usury Act and related matters	-	-	Struck off
68	Access to police dockets	1992	ISBN 0 621 15349 4	Not implemented in view of the interpretation of the subsequent provision in section 23 of the Constitution Act 200 of 1993
69	The acquisition and loss of ownership of game	1991	ISBN 0 621 14138 0	Act 105 of 1991 passed
70	Limitation of civil liability of professional persons	-	-	Struck off
71	The protection of child witnesses	1991	ISBN 0 621 14139 9	Act 135 of 1991 passed
72	The alienation of personal servitudes	-	-	Struck off
73*	The simplification of criminal procedure:			
	• First interim report: Appeal procedures	1994	-	Recommendations not implemented
	• Second interim report: The simplification of the criminal procedure	1995	RP 70/1996 ISBN 0 621 17405 X	Act 86 of 1996 passed

Project number	Title	Year of report	Reference number of published report	Result
	• Third interim report: The right of the Director of Public Prosecutions to appeal on questions of fact • Fourth interim report: Sentence agreements	2000 2001	RP 58/2001 ISBN 0 621 30678 9 RP 120/2001 ISBN 0 621 31452 8	Under consideration by the Department of Justice and Constitutional Development Act 62 of 2001 passed
74	Debt collecting: • Interim report on imprisonment for debt • Final report	1994 1995	RP 199/1995 ISBN 0 621 16956 0 RP 198/1995 ISBN 0 621 16960 9	Act 81 of 1997 passed Acts 81 of 1997 and 114 of 1998 passed
75	Bribery	1991	ISBN 0 662 15184 43	Act 94 of 1992 passed
76	Jewish divorces	1994	RP 56/1995 ISBN 0 621 16707 X	Act 95 of 1996 passed
77	Constitutional models	1991	Report ISBN 0 621 14239 5 Summary: ISBN 0 621 14197 6	No legislation recommended
78	Interest on damages	1994	ISBN 0 621 16231 0	Act 7 of 1997 passed
79	Natural fathers of children born out of wedlock	1994	RP 55/1995 ISBN 0 621 16706 1	Act 86 of 1997 passed
80	Accession to the Hague Convention on the Civil Aspects of International Child Abduction	1992	Not published	Act 72 of 1996 passed
81	Submission of a question of law to the Appellate Division of the Supreme Court concerning certificates under instruments of debt as conclusive proof of liability	1991	Not published	*Ex parte Minister of Justice in re: Nedbank v Abstein Distributors and Donelly v Barclays National Bank* 1995 3 SA 1 (A)
82*	Sentencing: Report on a new sentencing framework	2000	Currently being printed	Under consideration by the Department of Justice and Constitutional Development
83	Review of the Moratorium Act, 1963	-	-	Struck off

Project number	Title	Year of report	Reference number of published report	Result
84	Application of the trapping system	1994	RP 174/1995 ISBN 0 621 16896 3	Act 85 of 1996 passed
85	Aspects of the law relating to AIDS			
	• First interim report: Health-related aspects	1997	RP 106/1997 ISBN 0 621 27345 7	For status of implementation of recommendations by Departments of Health and Labour see Chapter 1 of fourth interim report
	• Second interim report: Pre-employment HIV testing	1998	RP 120/1998 ISBN 0 621 28049 6	Recommendations incorporated in the Employment Equity Act 55 of 1998
	• Third interim report: HIV/AIDS and discrimination in schools	1998	RP 121/1998 ISBN 0 621 28048 8	Department of Education promulgated Commission's draft National Policy on HIV/AIDS for Learners in Public Schools on 10 August 1999
	• Fourth interim report: Compulsory HIV testing of persons arrested in sexual offence cases	2000	RP 40/2001 ISBN 0 621 30618 5	Under consideration by the Department of Justice and Constitutional Development
	• Fifth interim report: The need for a statutory offence aimed at harmful HIV-related behaviour	2001	RP 78/2001 ISBN 0 621 30750 5	Under consideration by the Department of Justice and Constitutional Development
86	Euthanasia and the artificial preservation of life	1998	RP 186/1999 ISBN 0 621 29831 X	Report submitted to Minister for Justice and Constitutional Development on 25 May 1999, referred to Department of Health
87	Jurisdictional lacuna in the Supreme Court Act, 1959	1994	RP 64/1995 ISBN 0 621 16723 1	Act 122 of 1998 passed
88	The recognition of a class action in South African law	1998	RP 181/1999 ISBN 0 621 29818 2	Under consideration by the Department of Justice and Constitutional Development
89	Declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person	1995	RP 100/1996 ISBN 0 621 17494 7	Act 68 of 1998 passed

Project number	Title	Year of report	Reference number of published report	Result
90*	Customary law: • Customary marriages • Conflicts of law	 1998 1999	 RP 170/1998 ISBN 0 621 28755 5 RP 81/2000 ISBN 0 621 30061 6	 Act 120 of 1998 passed Report being considered by the Department of Justice and Constitutional Development
91	The review of the offences created by sections 36 and 37 of the General Law Amendment Act 62 of 1955, and section 1 of Act 50 of 1956 and related matters	-	-	Struck off
92	The re-evaluation of the offence created by section 1 of Act 1 of 1988	-	-	Struck off
93	Speculative and contingency fees	1996	RP 37/1997 ISBN 0 621 17648 6	Act 66 of 1997 passed
94*	Arbitration: • International arbitration • Domestic arbitration • Community dispute resolution structures	 1998 2001 -	 RP 30/1999 ISBN 0 621 28861 6 RP 119/2001 ISBN 0 621 31453 6 -	 The International Arbitration Bill to be introduced in Parliament Report being considered by the Department of Justice and Constitutional Development See Chapter 5
95*	The admissibility of computer-generated evidence	-	-	See Chapter 5
96*	Apportionment of Damages Act, 1956	-	-	See Chapter 5
97	Unjustified enrichment	-	-	Struck off
98	International co-operation in criminal prosecutions	1995	RP 47/1996 ISBN 0 621 17357 6	Acts 75 of 1996, 76 of 1996 and 77 of 1996 passed
99	The application of the rule *huur gaat voor koop* with reference to the question whether a lessee has a choice to continue the lease with a new lessor after the sale of the leased property	-	-	Struck off

Project number	Title	Year of report	Reference number of published report	Result
100	Family law and the law of persons:			
	• Access to minor children by interested persons	1996	RP 107/1996 ISBN 0 621 17515 3	Access to Minor Children Bill to be introduced in Parliament
	• Domestic violence	-	See Annexure G	Act 116 of 1998 passed
	• Maintenance: Interim report	1998	RP 137/1998 ISBN 0 621 28685 0	Act 99 of 1998 passed, see Chapter 3
101	The application of the Bill of Rights to the criminal law, the law of criminal procedure and sentencing	2001	RP 118/2001 ISBN 0 621 31451 X	Report being considered by the Department of Justice and Constitutional Development
102	The civil jurisdiction of courts	-	-	Struck off
103	Capping of claims against the Multilateral Motor Vehicle Accidents Fund	-	-	Struck off
104	Money laundering and related matters	1996	RP 31/1997 ISBN 0 621 17621 4	Act 38 of 2001 passed
105*	Review of security legislation			
	• Monitoring and Interception Prohibition Act 127 of 1992	1999	RP 203/1999 ISBN 0 621 29897 2	Interception and Monitoring Bill being considered by Justice and Constitutional Development Portfolio Committee
	• Terrorism	-	-	See Chapter 5
106	Juvenile Justice	2000	RP 159/2000 ISBN 0 621 30228 7	Report being considered by the Department of Justice and Constitutional Development
107*	Sexual offences	-	-	See Chapter 5
108*	Computer-related crimes	-	-	See Chapter 5
109	Review of the Marriage Act	2001	RP 117/2001 ISBN 0 621 31454 4	Report under consideration by the Department of Home Affairs
110*	Review of the Child Care Act	-	-	See Chapter 5
111	Jurisdiction of magistrates' courts in constitutional matters	1999	RP 80/2000 ISBN 0 621 30062 4	Report being considered by the Department of Justice and Constitutional Development
112	Sharing of pension benefits	1999	RP 82/2000 ISBN 0 621 30060 8	Report being considered by the Department of Justice and Constitutional Development
113*	Use of electronic equipment in court proceedings	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
114*	Publication of divorce proceedings	-	-	See Chapter 5
115	Review of administrative law	1999	ISBN 0 621 29881 6	Promotion of Administrative Justice Act 3 of 2000 passed
116*	The carrying of firearms and other dangerous weapons	-	-	See Chapter 5
117	The legal position of voluntary associations	-	-	See Chapter 5
118*	Domestic partnerships	-	-	See Chapter 5
119*	Uniform national legislation on the fencing of national roads	-	-	See Chapter 5
120	Section 63(3) of the Insurance Act 27 of 1943	-	-	Struck off
121*	Consolidated legislation pertaining to international co-operation in civil matters	-	-	See Chapter 5
122*	Incapable adults	-	-	See Chapter 5
123*	Protected disclosures	-	-	See Chapter 5
124*	Privacy and data protection	-	-	See Chapter 5
125*	Prescription periods	-	-	See Chapter 5
126*	Review of the rules of evidence	-	-	See Chapters 3 and 5

ANNEXURE E

ISSUE PAPERS PUBLISHED BY THE COMMISSION

(In order to involve the community actively at an earlier stage, the Commission decided to publish issue papers in appropriate investigations as the first step in the consultation process. The purpose of an issue paper is to announce an investigation, to elucidate the aim and extent of the investigation, to point to possible options available for solving existing problems and to initiate and stimulate debate on identified issues.)

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
1	104	Money laundering and related matters	0 631 17404 1 May 1996
2	100	Family violence	0 621 17495 5 July 1996
3	90	Harmonisation of the common law and the indigenous law: Customary marriages	0 621 17531 5 September 1996
4	90	Harmonisation of the common law and the indigenous law: The application of customary law: Conflict of personal laws	0 621 17532 3 September 1996
5	100	Family law and the law of persons: Review of the maintenance system	0 621 17652 6 January 1997
6	73	Simplification of the criminal procedure: Access to the criminal justice system	0 621 17705 9 April 1997
7	82	Sentencing: Restorative justice (compensation for victims of crime and victim empowerment)	0 621 17718 0 April 1997
8	94	Arbitration: Alternative dispute resolution	0 621 27319 8 May 1997
9	106	Juvenile Justice	0 621 27335 X June 1997
10	107	Sexual offences against children	0 621 27352 X June 1997
11	82	Sentencing: Mandatory minimum sentences	0 621 27353 8 July 1997

Serial number of issue paper	Project number	Title of investigation	ISBN/ Publication date
12	90	Harmonisation of the common law and the indigenous law: Succession in customary law	0 621 8 008 9 April 1998
13	110	The review of the Child Care Act	0 621 28026 April 1998
14	108	Computer related crime: Options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects	0 621 28710 5 August 1998
15	59	Islamic marriages and related matters	0 621 30089 6 May 2000
16	119	Uniform national legislation on the fencing of national roads	0 621 30188 4 July 2000
17	118	Domestic partnerships	0 621 31574 5 September 2001
18	122	Incapable adults	0 621 31797 7 November 2001

ANNEXURE F

DISCUSSION PAPERS PUBLISHED BY THE COMMISSION

(Since March 1983 a serial number has been assigned to all discussion papers - previously referred to as working papers - and only these are listed below. Discussion papers are numbered consecutively.)

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
1	37	Preference on insolvency	18 March 1983
2	22	Law of succession: Intestate succession	17 February 1984
3	9	Law of trusts	24 February 1984
4	41	Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband	October 1984
5	49	Offences committed under the influence of liquor or drugs	10 August 1984
6	43	Investigation into the advancement of the age of majority	15 February 1985
7	38	Investigation into the legal position of illegitimate children	22 February 1985
8	33	Review of the law of prize	12 April 1985
9	25	Statute law: Investigation into the law relating to theft and house-breaking	Not published
10	51	Marriages and customary unions of Black persons	13 September 1985
11	6	Review of the law of evidence	25 April 1986
12	57	Anton Piller type of orders	Not published
13	22	Review of the law of succession: The introduction of a legitimate portion or the granting of a right to maintenance to a surviving spouse	8 August 1986
14	22	Review of the law of succession: Formalities of a will	17 October 1986
15	24	Investigation into the courts' powers of review of administrative acts	2 January 1987
16	62	The protection of a purchaser of securities	27 April 1987
17	22	Review of the law of succession: Amendment and repeal of wills	23 September 1987

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
18	61	Enduring powers of attorney and the appointment of curators for mentally incapacitated persons	0 7970 1381 4 18 March 1988
19	22	Review of the law of succession: Disqualification from inheriting, substitution and the succession rights of adopted children	0 7970 1401 2 26 February 1988
20	60	Domicile	0 7970 1435 7 26 August 1988
21	62	The protection of a purchaser of securities	0 7970 1460 8 31 March 1988
22	50	Proposals for the reform of the Bills of Exchange Act	0 621 1198 9 X 19 December 1988
23	46	The giving of security by means of movable property	0 7970 1558 2 7 October 1988
24	52	Investigation into the legal consequences of sexual realignment and related matters	0 7970 1589 2 17 June 1994
25	58	Group and human rights	GPS 003 9160 10 March 1989
26	12	Amendment of section 7(3) of the Divorce Act, 1979	0 7970 1667 8 1 March 1989
27	69	The acquisition and loss of ownership of game	0 7970 1727 5 29 May 1989
28	71	The protection of child witnesses	0 7970 1826 3 12 June 1989
29	63	Insolvency: Requirements for and alternatives to sequestration	0 7970 1854 9 7 August 1989
30	63	Insolvency: Qualifications, appointment and discharge of trustees	0 7970 1954 5 10 November 1989
31	66	Reform of the South African law of bail	0 7970 2078 0 December 1990
32	75	Bribery	0 7970 2126 4 March 1990
33	63	Insolvency: Effect of insolvency on assets, civil proceedings and contracts	0 7970 2185 X November 1990
34	24	Investigation into the courts' powers of review of administrative acts	0 7970 2292 9 December 1991

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
35	63	Insolvency: Insolvency interdicts	0 7970 2296 1 May 1991
36	62	The protection of a purchaser of securities	0 7970 23003 September 1991
37	68	Access to police dockets	0 7970 2316 X July 1991
38	65	Surrogate motherhood	0 7970 2381 X September 1991
39	63	Insolvency: Rehabilitation	0 7970 2490 5 April 1992
40	78	Interest on damages	0 7970 2607 X May 1992
41	63	Insolvency: Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent	0 7970 2638 X July 1992
42	73	Simplification of the criminal procedure: Working paper on appeal procedure	0 7970 2641 X July 1992
43	41	Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband: Matters relating to the Divorce Amendment Act 7 of 1989	0 621 15039 8 December 1992
44	79	A father's rights in respect of his illegitimate child	0 621 15329 X February 1993
45	76	Jewish divorces	0 621 15331 1 January 1993
46	67	The Usury Act and related matters	0 621 15021 5 April 1993
47	87	Jurisdictional lacuna in the Supreme Court Act 59 of 1959	0 621 15429 6 April 1993
48	62	The protection of a purchaser of shares	0 621 15848 8 October 1993
49	73	Simplification of criminal procedure	0 621 15923 9 November 1993
50	74	Debt collecting	0 621 15933 6 November 1993
51	70	Limitation of professional liability	0 621 15955 7 December 1993

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
52	84	Application of the trapping system	0 621 15959 X December 1993
53	86	Euthanasia and the artificial preservation of life	0 621 15994 8 February 1994
54	47	Unreasonable stipulations in contracts and the rectification of contracts	0 621 16038 5 May 1994
55	89	Declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person	0 621 16358 9 December 1994
56	98	International co-operation in criminal prosecutions	0 621 16820 3 May 1995
57	88	The recognition of a class action in South African law	0 621 16928 5 September 1995
58	85	Aspects of the law relating to AIDS	0 621 16964 1 September 1995
59	94	Arbitration	0 621 16971 4 September 1995
60	95	Investigation into the Computer Evidence Act 57 of 1983	0 621 17259 6 October 1995
61	63	Review of the law of insolvency: Statutory provisions that benefit creditors	0 621 17297 9 November 1995
62	100	The granting of visitation rights to grandparents of minor children	0 621 17344 4 March 1996
63	93	Speculative and contingency fees	0 621 17353 3 March 1996
64	104	Money laundering and related matters	0 621 17453 X June 1996
65	47	Unreasonable stipulations in contracts and the rectification of contracts	0 621 17503 X August 1996
66	63	Review of the law of insolvency: Draft Bill and explanatory memorandum	0 621 17509 9 August 1996
	63	Review of the law of insolvency: Draft Bill and explanatory memorandum: Executive summary	0 621 17510 2 August 1996

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
67	96	Apportionment of Damages Act, 1956	0 621 17543 9 October 1996
68	85	Aspects of the law relating to AIDS	0 621 17550 1 October 1996
69	94	International commercial arbitration	0 621 176028 December 1996
70	100	Family law and the law of persons: Domestic violence	0 621 17650 8 February 1997
71	86	Euthanasia and the artificial preservation of life	0 621 17724 5 April 1997
72	85	Aspects of the law relating to AIDS: Pre-employment HIV testing	0 621 27350 3 June 1997
73	85	Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools	0 621 27697 9 August 1997
74	90	Harmonisation of the common law and indigenous law: Customary marriages	0 621 27723 1 September 1997
75	111	Constitutional jurisdiction of magistrates's courts	0 621 27997 8 March 1998
76	90	Harmonisation of the common law and the indigenous law: Conflicts of law	0 621 28007 0 April 1998
77	112	Sharing of pension benefits	0 621 280208 April 1998
78	105	Review of security legislation: The Interception and Monitoring Prohibition Act 127 of 1992	0 621 28847 0 November 1998
79	106	Juvenile justice	0 621 28851 9 November 1998
80	85	Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour	0 621 28854 3 December 1998
81	115	Administrative law	0 621 28895 0 January 1999
82	90	Customary law: Traditional courts and the judicial function of traditional leaders	0 621 29273 7 May 1999
83	94	Arbitration: Domestic arbitration	0 261 29371 7 September 1999

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
84	85	Aspects of the law relating to AIDS: Compulsory HIV testing of persons arrested in sexual offence cases	0 621 29372 5 September 1999
85	107	Sexual offences: The substantive law	0 621 29374 1 September 1999
86	63	Review of the law of insolvency	0 621 29377 6 September 1999
87	94	Arbitration: Community dispute resolution structures	0 621 29381 4 September 1999
88	109	The review of the Marriage Act 25 of 1961	0 621 29428 4 September 1999
89	73	Simplification of criminal procedure: The right of the Attorney-General to appeal on questions of fact	0 621 29935 9 January 2000
90	101	The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing	0 621 29936 7 January 2000
91	82	Sentencing: A new sentencing framework	0 621 30070 5 April 2000
92	105	Review of security legislation: Terrorism: Section 54 of the Internal Security Act 74 of 1982	0 621 30184 1 July 2000
93	90	Customary law: Succession	0 621 30205 8 August 2000
94	73	Simplification of criminal procedure: Sentence agreements	0 621 30337 2X December 2000
95	90	Customary law: Administration of estates	0 621 30338 0 December 2000
96	73	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	0 621 30683 5 April 2001
97	82	Sentencing: A compensation scheme for victims of crime	0 621 30687 8 April 2001
98	114	Publication of divorce proceedings: Section 12 of the Divorce Act 70 of 1979	0 621 30715 7 May 2001

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
99	108	Computer-related crime: Preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects	0 621 30718 1 May 2001
100	73	Simplification of criminal procedure: Out-of-court settlements in criminal cases	0 621 31591 5 October 2001
101	59	Islamic marriages and related matters	0 621 31794 2 December 2001
102	107	Sexual offences: Process and procedure	0 621 31809 4 December 2001
103	110	Review of the Child Care Act	0 621 31810 8 December 2001

ANNEXURE G

PAPERS PUBLISHED BY THE COMMISSION IN ITS RESEARCH SERIES

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
1	Mr J P J Coetzer SC	A critical legal comparative study of law reform in South Africa (translation)	ISBN 0 621 09442 0
2	Prof Ellison Kahn	The life and works of Hugo Grotius (1583-1645)	GP-S 3 00344
3	Mrs M A Olwage (ed)	Women and sexual offences in South Africa: Proceedings of a seminar held by the Institute for Criminology at the University of South Africa in conjunction with the South African Law Com-mission, Pretoria, 18 October 1984 (translation)	ISBN 0 621 09779 9
4	Mr S I E van Tonder SC (ed)	Index to the Opinions of the Roman-Dutch Lawyers and the Decisions of the Courts of the Netherlands which have been digested in the Algemeen Berede-neerd Register of Nassau La Leck (1741-1795), by Dr A A Roberts, Vols 1(A-B), 2(C-D), 3(E-H), 4(I-L), 5(M), 6(N-R), 7(S-T) and 8(U-W)	Vol 1: ISBN 0 621 09382 3 Vol 2: ISBN 0 621 09646 6 Vol 3: ISBN 0 621 09778 0 Vol 4: ISBN 0 621 10254 7 Vol 5: ISBN 0 621 10295 4 Vol 6: ISBN 0 621 10686 0 Vol 7: ISBN 0 621 10710 7 Vol 8: ISBN 0 621 10709 3
5	Profs F J Bosman, J Th de Smidt, H W van Soest & P van Warmelo	Observations on decided cases concerning antenuptial contracts written by Cornelius Neostadius	ISBN 0 621 09855 8

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
6	Profs R Feenstra, P van Warmelo & D T Zeffertt	Some cases heard in the Hooge Raad reported by Willem Pauw	ISBN 0 621 09715 2
7	Mr P J J Viljoen	South African Noter-up to the Institute of Justinian	ISBN 0 621 09743 8
8	Prof P van Warmelo and Adv C J Visser	Aantekeninge van Johannes Voet oor die Inleidinge van Hugo de Groot (text and translation)	Vol 1: ISBN 0 621 10641 0 Vol 2: ISBN 0 621 10642 9
9	Prof L J du Plessis	Translation of Vinnius' *Tractatus de Pactis*	ISBN 0 621 10277 6
10	Prof W J Hosten (ed and transl), Mrs C van Soelen and Mr P Ellis	Treatise on the quasicontract called *promutuum* and on the *condictio indebiti* by Robert-Joseph Pothier	ISBN 0 621 10722 0
11	Prof R Whitaker	*Quaestiones juris privati* by Cornelius van Bijnkershoek	Vol 1: ISBN 0 621 10657 7 Vol 2: ISBN 0 621 10675 5
12	Profs J T Delport and C R M Dlamini	Two lectures on law reform	ISBN 0 621 10670 4
13	Mr H C Smuts (ed)	Report on the Fourth International Congress with the theme *Law and Computers*, which was held in Rome from 16 to 21 May 1988	ISBN 0 621 12639 X
14	Mr P J J Viljoen	South African Noter-up to the *Corpus Juris Civilis* of Justinian including the Institutes of Gaius	ISBN 0 621 13088 5
15	Margaret Hewett (transl)	*Censura Forensis* Part I Book V by Simon van Leeuwen	ISBN 0 7970 2231 7
16	Law Commission	Domestic Violence	Not printed, but accessible on SA Law Commission Website

Serial Number	Author, editor, compiler, etc	Title or subject	Reference number
17	Law Commission/GTZ	Empirical study of the sentencing practices in South Africa	ISBN 0 621 30091 8
18	Law Commission/GTZ	Sentencing: An empirical, quantitative study on the progress and finalisation, including by conviction, of criminal matters reported to the police	ISBN 0 621 31582 6
19	Law Commission/GTZ	Simplification of criminal procedure: Settlements out of court - a comparative study of European criminal justice systems	ISBN 0 621 29881 6