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To: Mrs B S Mabandla, MP, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(2) of the South African Law Reform Commission Act 19 of 1973, the Commission's report on all its activities from 1 April 2003 to 31 March 2004.

Yours sincerely

Madam Justice Y Mokgoro
Justice of the Constitutional Court
Chairperson of the South African Law Reform Commission

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OVERVIEW

CHAPTER 1

SOUTH AFRICAN LAW REFORM COMMISSION

THIRTY FIRST ANNUAL REPORT 2004/05

Ten years of democracy

The transformation of our legal system has offered great challenges in the area of law reform. Since 1994 the Commission has submitted 99 reports to the Government and published 54 discussion papers and 25 issue papers for general information and comment.

The following Reports are noteworthy:

- Group and human rights
- Reform of the law of bail
- Natural fathers of children born out of wedlock
- Simplification of criminal procedure (a number of Reports)
- Money laundering
- Aspects of the law relating to AIDS (a number of reports)
- Customary law (marriages; traditional courts; succession)
- International and domestic arbitration
- Maintenance
- Insolvency
- Administrative law
- Sentencing (sentencing framework and compensation fund for victims of crime)
- Juvenile justice
- Security legislation (Terrorism; Monitoring and Interception Prohibition Act)
- Sexual offences
- Review of the Child Care Act
- Islamic marriages
- Review of the Black Administration Act

In his State of the Nation Address on 14 February 2003 President Mbeki referred to the fundamental transformation of our country into one that is non-racial, non-sexist and prosperous. He observed that we were gradually moving away from the entrenched racial, gender and spatial rigidities of the past.

In the year under review the South African Law Reform Commission has contributed to these ideals. Discriminatory legislation and gender-insensitive provisions are consistently scrutinised in all the investigations on the Commission's programme; and have specifically been targeted as part of Project 25 (statutory law revision). The Black Administration Act, 1927, was one of the principal mechanisms for regulating the lives of Blacks under apartheid. The continued presence of the Black Administration Act on South Africa's statute book is an anachronism. In its report on the repeal of the Black Administration Act (see Chapter 4) the Commission envisages an incremental repeal of the Act, but it sets in place a mechanism for such repeal which at the same time would avoid an uncoordinated and piecemeal attempt at getting rid of the Act as a whole.

The Commission's report on customary law of succession contains draft legislation which is aimed at reforming the customary rule of male primogeniture that discriminates against women and children, in accordance with the principles of equality as enshrined in the Constitution (see Chapter 4).

In the year under review the Commission has also endeavoured to create legal certainty with regard to Muslim marriages, to give effect to Muslim values and to afford better protection to women in those marriages in accordance with Islamic and constitutional tenets (see Chapter 4).

With reference to international relations, President Mbeki made the following statements:
. . . let us again affirm that with regard both to changing the lives of South Africans for the better, and building relations of human solidarity with the peoples of the world, the tide has turned . . . Our task is to take this tide at the flood, further to progress towards the achievement of the goals for which so many of our people sacrificed. This is the perspective that will inform our work as we strive to meet our obligations to our people, and the peoples of Africa and the world . . . we must, once more, set ourselves the necessary realistic tasks for the year . . . These tasks encompass such areas as . . . expanding our system of relations with the rest of the world.

The South African Law Reform Commission recognises the importance of strengthening ties with other law reform agencies in Africa and in the rest of the world. The Commission is one of the founding members of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA) which was established in the year under review to –

- exchange and share ideas on best practices in law reform;
- exchange and share ideas on the development of law, within the countries of the member agencies in accordance with the principles of human rights, good governance and rule of law; and
- collectively contribute to the attainment of the objectives of member agencies.

The first general meeting of ALRAESA after its formal establishment was held in Cape Town from 2 – 4 March 2004 in conjunction with a workshop on law reform. From the perspective of developing trends in law reform as well as strengthening ties with other law reform agencies in Africa, the ALRAESA general meeting and workshop were rewarding experiences (see also Chapter 6).

OVERVIEW

The year under review

This annual report covers the period from ***1 April 2003 to 31 March 2004.***

Four issue papers were published for general information and comment:

- Project 130: Stalking (issue paper 22)
- Project 125: Prescription periods (issue paper 23)
- Project 124: Privacy and data protection (issue paper 24)
- Project 131: Trafficking in persons (issue paper 25)

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

Two discussion papers were published for general information and comment:

- Project 118: Domestic partnerships (discussion paper 104)
- Project 122: Assisted decision-making: Adults with impaired decision-making capacity (discussion paper 105)

Discussion papers published by the Commission are listed in ***Annexure F.***

Six reports were approved by the Commission:

- Project 25: Statute law: Repeal of the Black Administration Act, 1927
- Project 59: Islamic marriages and related matters
- Project 82: Sentencing: A compensation fund for victims of crime
- Project 90: Customary law: Customary law of succession
- Project 96: The Apportionment of Damages Act 34 of 1956
- Project 113: The use of electronic equipment in court proceedings (postponement of criminal cases via audiovisual link)

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

The following Acts emanating from reports of the Commission were promoted by Parliament in the year under review:

- Project 52: Sexual realignment (The Alteration of Sex Description and Sex Status Act 49 of 2003)

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

- Project 85: Aspects of the law relating to AIDS: Compulsory HIV testing of offenders arrested in sexual offence cases (Compulsory HIV Testing of Sexual Offenders Bill)
- Project 105: Review of security legislation: (Protection of Constitutional Democracy against Terrorist and Related Activities Bill)
- Project 106: Juvenile justice (Child Justice Bill)
- Project 107: Sexual offences (Criminal Law (Sexual Offences) Amendment Bill
- Project 110: Review of the Child Care Act, 1983 (Children's Bill)

The following Bills emanating from reports of the Commission have been identified for submission to Cabinet and Parliament during the 2004 Session of Parliament with a view to finalising them as soon as circumstances permit:

- Project 25: Statutory law revision: Repeal of the Black Administration Act, 1927 (Customary Law Matters Amendment Bill)
- Project 63: Review of the law of insolvency (Insolvency and Business Recovery Bill)
- Project 73: Simplification of criminal procedure: Right to silence; discovery of police dockets; a more inquisitorial approach to criminal procedure; out of court settlements in criminal cases (Criminal Procedure Amendment Bill)
- Project 73: Simplification of criminal procedure: The right of the Director of Public Prosecutions to appeal on questions of fact (Criminal Procedure Second Amendment Bill)
- Project 90: Customary law: Succession (Customary Law of Succession Amendment Bill)
- Project 94: Arbitration: International arbitration (International Arbitration Bill)
- Project 113: The use of electronic equipment in court proceedings – Postponement of criminal cases by way of audiovisual link where accused persons are in custody (Criminal Procedure Third Amendment Bill)

The following Bills emanating from reports of the Commission have been identified for submission to Parliament when they are ready for introduction with a view to finalising them when circumstances permit:

- Project 47: Unreasonable stipulations in contracts and the rectification of contracts (Control of Unreasonable or Oppressive Stipulations in Contracts Bill)
- Project 59: Islamic marriages and related matters (Islamic Marriages Bill)
- Project 88: The recognition of class actions in South African law (Public Interest and Class Actions Bill)
- Project 90: Customary law: Traditional courts and the judicial function of traditional leaders (Traditional Courts Bill)
- Project 90: Customary law: Conflicts of law (Application of Customary Law Bill)
- Project 94: Arbitration (Domestic Arbitration Bill)
- Project 96: The Apportionment of Damages Act, 1956 (Apportionment of Damages Amendment Bill)
- Project 101: The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence, and sentencing (Criminal Procedure Fourth Amendment Bill)
- Project 112: Sharing of pension benefits (Sharing of Pension Benefits Bill/Divorce Amendment Bill)

- Project 114: Publication of divorce proceedings (Publication of Divorce Proceedings Bill)

The following reports emanating from the Law Reform Commission are receiving the attention of government departments other than the Department of Justice and Constitutional Development:

- Project 86: Euthanasia and the artificial preservation of life (Department of Health)
- Project 109: Review of the Marriage Act 25 of 1961 (Department of Home Affairs)

A report on a new sentencing framework (Project 82: Sentencing) was submitted to the Minister in December 2000. The Sentencing Framework Bill has been referred back to the Law Reform Commission to address concerns regarding an Appendix setting out amended and repealed legislation. Both the Commission's reports on juvenile justice and sentencing contain recommendations for the repeal of provisions of the Criminal Procedure Act dealing with sentencing. The Child Justice Bill is receiving the attention of Parliament, therefore the Annexure reflecting the repeal of the provisions of the Criminal Procedure Act as recommended in the sentencing report will only be finalised after finalisation of the Child Justice Bill.

The recommendations contained in the reports on surrogate motherhood (Project 65) and access to minor children by interested persons (Project 100) will be incorporated in the Children's Bill (Project 110: Review of the Child Care Act, 1983).

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

- Project 132: Abolition of the oath

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

OBJECTS, CONSTITUTION AND FUNCTIONING

CHAPTER

2

SOUTH AFRICAN

LAW REFORM COMMISSION

THIRTY FIRST ANNUAL REPORT 2004/05

Establishment of the Commission

The South African Law Reform Commission was established by the South African Law Reform 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.
- Not more than eight 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.

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
Adv J J Gauntlett SC
Prof C Hoexter
Mr Justice C T Howie
Professor I P Maithufi as full-time member
Ms Z Seedat
Mr Justice W L Seriti

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 has established a working committee which consists 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 19 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 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)
Ms C T Hartley (Senior State Law Adviser)

Ms A-M Havenga (Principal State Law Adviser)
Ms C P Kimble (Senior State Law Adviser)
Ms L J Jankie (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)
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)
Ms R van Zyl (Senior State Law Adviser)

Mr M F Palumbo serves as Assistant Secretary to the Commission.

Three posts of Principal State Law Adviser are vacant.

The librarian is Ms M A Kgasago.

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

Senior Administrative Officer:	Ms J M H Oosthuizen
Senior Administrative Officer:	Ms P J Kotze
Senior Secretary:	Ms R Bronkhorst
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 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 AJG Kruger, have been obtained. One post of Secretary, two posts of Administration Clerk and one post of Food Service Aid are vacant.

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 Sub-programme 3. The Secretary is consulted on the compilation of the draft Vote.

The Commission's budget for the financial year 1 April 2003 – 31 March 2004 was R15, 017,000 which is made up as follows:

Personnel expenditure	R 10,141,000
Administrative expenditure	R 1,487,000
Inventories	R 1,326,000
Equipment	R 1,153,000
Professional and special services	R 910,000

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 technical and financial support from the German Technical Cooperation (GTZ). The Commission wishes to record its sincere appreciation to the GTZ.

The annual report of the Department of Justice and Constitutional Development contains 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 in order of priority the matters which in its opinion require consideration. 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 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 noters-up. 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.***

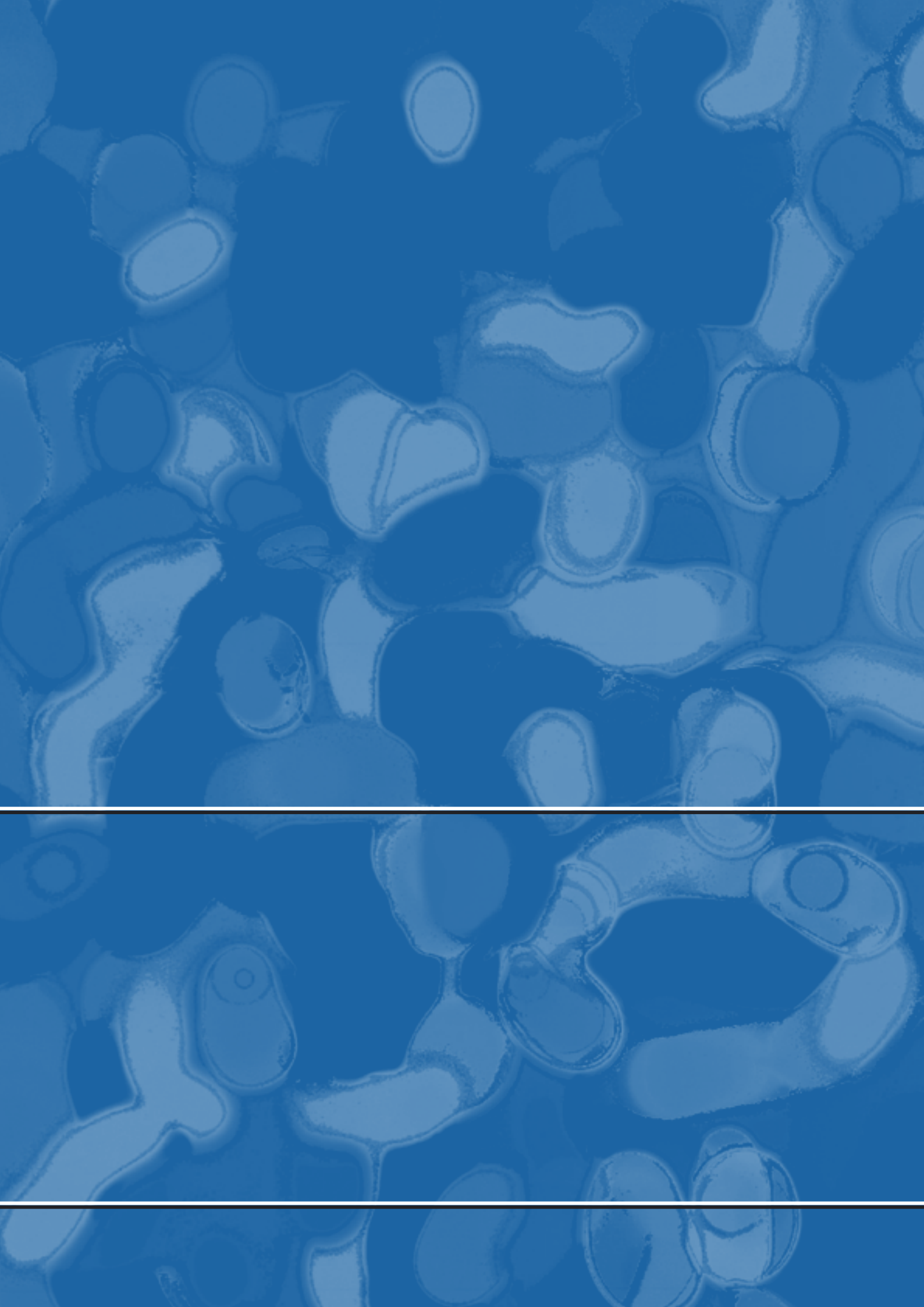
Issue papers and discussion papers are supplied free of charge to interested institutions and persons who wish to comment on a particular matter. These papers are widely distributed and are also obtainable from the Commission's offices. The annual report, papers in the research series and reports on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

Meetings

The Commission met on 28 June 2003, 18 October 2003 and 6 March 2004. The working committee of the Commission met on 31 July 2003, 21 August 2003 and 19 December 2003.

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

Administration orders	16 September 03; 8 November 03; 10 December 03; 17 March 04
Assisted decision-making: Adults with impaired decision-making capacity	24 July 03; 1 December 03
Customary law	23 July 03; 21 November 03; 15 December 03; 26 January 04; 13 February 04
Domestic partnerships	6 June 03
Islamic marriages and related matters	12 April 03
Privacy and data protection	29 July 03
Review of the law of evidence	30 October 03
Sentencing	5 February 04



THE COMMISSION'S PROGRAMME: INVESTIGATIONS INCLUDED AND REMOVED

CHAPTER 3

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

Project 132: Abolition of the oath

It is evident, from a review of recent case law as well as developments elsewhere in the world, that the possibility of reforming the administration of oaths and affirmations in our courts should be investigated. It appears that a very few persons taking the oath understand the religious implications or matters of conscience arising in either taking an oath or affirmation although they may well appreciate the dangers of being convicted or perjury if they should lie in the witness box.

There are a few options to consider, for example:

- The retention of the oath in the Criminal Procedure Act, the Civil Proceedings Evidence Act or any other legislation governing the taking of an oath or making of an affirmation in affidavits which would be flexible so that it can easily be adapted to religions which are not part of the Judeo-Christian tradition
- The reversal of the current order so that the affirmation is the "standard" option and an oath the subordinate option.
- The removal of the religious oath and replacement with a non-religious affirmation or promise to tell the truth.

The Minister approved the inclusion of the investigation in the Commission's programme in August 2003.

REPORTS COMPLETED

CHAPTER 4

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

Project 25:
Statutory law revision: Review of the Black Administration Act 38 of 1927

The report contains recommendations and a proposed draft Bill on the repeal of the Black Administration Act 38 of 1927.

Since the establishment of the new democratic order in South Africa, the enactment of the Constitutions of 1993 and 1996, as well as the development of completely new branches of the law, Government has now set high on its agenda the repeal of those statutes on the statute book that are either redundant, obsolete or in conflict with constitutional imperatives. One such statute is the Black Administration Act 38 of 1927. The Black Administration Act formed part of a myriad apartheid laws that created a labyrinthine system of governance of Blacks and was one of the principal mechanisms for regulating the lives of Blacks under apartheid. The continued presence of the Black Administration Act on South Africa's statute book, however, is not in line with the present democratic order.

The German Technical Co-operation, in consultation with the Commission, appointed a firm of consultants to do the required research and to make recommendations with regard to the repeal of the Black Administration Act. During the research period all relevant state departments, academics, the organised legal profession as well as identified interested persons, bodies and institutions were consulted.

Currently there is no single government department responsible for the administration of the Black Administration Act. Apart from the Department of Justice and Constitutional Development, the Departments of Land Affairs and Provincial and Local Government also administer some of the provisions of the Act. Both these Departments have spearheaded reforms that are relevant to certain provisions of the Act. The Commission holds the view that the Department of Justice and Constitutional Development should promote the repeal of the Black Administration Act since it acts as the custodian of the Constitution and because there can be no doubt that the Act is mainly unconstitutional.

The Commission's research has shown that there are certain provisions of the Black Administration Act that have fallen into disuse and that may be repealed immediately. Another batch of provisions have already been targeted for reform by the government departments referred to (including proposals for reform by the Commission itself in the areas of traditional courts and the customary law of succession). A single provision, dealing with liability for the obligations of traditional leaders, cannot be done away with and has been retained in an adjusted form in the draft Bill proposed by the Commission. The draft Bill also effects an amendment to the Administration of Estates Act 66 of 1965 in order to treat all orphans and minors equally, irrespective of race.

In addition to the involvement of various government departments in the administration of the Black Administration Act, certain provisions of the Act have been assigned to various provincial legislatures under the Interim Constitution of 1993. This implies that the assigned provisions will have to be repealed by the provincial legislatures themselves.

The Bill proposed by the Commission therefore envisages an incremental repeal of the Black Administration Act, but it sets in place a mechanism for such repeal which at the same time would avoid an uncoordinated and piecemeal attempt at getting rid of the Black Administration Act as a whole.

In the Commission's view the adoption of its proposed draft Bill by Parliament will set in motion the long needed process of doing away with what can only be described as an offending piece of legislation that has somehow survived on the South African statute book since 1927.

The report was submitted to the Minister for Justice and Constitutional Development in March 2004.

Project 59:
Islamic marriages and related matters

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 polygyny and the status of respective spouses, maintenance obligations, proprietary consequences of Islamic marriages, termination, etc. More recently, in its decision in Daniels v Campbell NO and Others of June 2003, the Cape of Good Hope Provincial Division of the High Court found that parts of the Intestate Succession Act and the Maintenance of Surviving Spouses Act are unconstitutional in that those Acts, in their definitions of "spouse" and "survivor" respectively, do not specifically provide for a husband or wife married in accordance with Muslim rites. However, legislation giving full recognition to such marriages is absent, with the result that gross inequities and hardships arising from the non-recognition of Islamic marriages still prevail.

The Bill contained and explained in the report 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, with provision being made for Muslims who are married by way of a civil marriage, to exercise an option to have the provisions of the Bill apply to them. Provision is also made for the regulation of proprietary consequences, changes to matrimonial property systems (with due regard to existing and vested rights) and the

regulation of polygynous 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. Parties in an existing marriage are, however, given the option of opting out of the provisions of the Bill, should they so desire. With regard to future marriages concluded after the proposed legislation has come into operation, parties would be allowed to elect at the time of the conclusion of the marriage whether the provisions of the Bill should apply to them. The draft Bill covers both monogamous and polygynous Islamic marriages which, if applicable, may exist alongside a civil marriage (ie a marriage registered under the Marriage Act).

It is further recommended that, because the judges of secular courts are by and large non-Muslims, a judge be appointed from the ranks of existing Muslim judges or from Muslim legal practitioners to preside in legal disputes on an ad hoc basis, and that, on appeal, the views of two accredited Muslim institutions may be solicited for purposes of commenting on questions of law. The courts may also be assisted by 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.

In the Commission's view the adoption of its proposed draft Bill by Parliament will go a long way in creating legal certainty with regard to Muslim marriages, will give effect to Muslim values and will afford better protection to women in those marriages in accordance with Islamic and constitutional tenets.

The report was submitted to the Minister for Justice and Constitutional Development in July 2003.

Project 82:
Sentencing: A compensation fund for victims of crime in South Africa

In the beginning of 1997 the then Minister for Justice and Constitutional Development requested the Commission to undertake an investigation into the plight of victims of crime in the criminal justice system. The Commission had already completed its investigation into sentencing which, inter alia, recommended a new sentencing policy framework which included recommendations on victim and community participation in sentencing; victim impact statements and victim-offender mediation.

With regard to the second part of the investigation the Commission published an issue paper titled "Restorative justice: A compensation fund for victims of crime" in the course of 1997. The issue paper considered the need for the establishment of a compensation fund for victims of crime as well as the broader issues of victim empowerment and a restorative justice approach to crime. Subsequently a discussion paper on "A compensation fund for victims of crime" was published in 2001. The discussion paper considered the feasibility of establishing a victim compensation scheme in South Africa against the Commission's broader mandate to revisit the plight of victims of crime within the criminal justice system in general.

The Commission's final conclusions and recommendations in the report include the following:

- In contemplating a victim compensation scheme in South Africa, careful consideration should be given to why victims of crime should be given priority over other people in need. Financial pay-outs for suffering and financial losses resulting from, for example, a rape or violent robbery make moral sense, but these become difficult to justify in a context of limited resources where poverty alleviation, combating Aids and providing employment all demand increased resourcing. In order to consider adequately whether South Africa should set up a compensation scheme, a number of key questions need to be answered. These include the financial viability of a compensation scheme and the question as to how a compensation scheme could be integrated with current victim empowerment initiatives. A compensation fund can be an extremely expensive and complex undertaking. The Commission has given careful consideration to the parameters of a compensation scheme and its possible cost implications. Attention has been given to the administration of the scheme; the administrative infrastructure needed; prerequisites for an efficient scheme; dangers inherent in establishing a compensation scheme; and possibilities to reduce the risks.

- The Commission has come to the conclusion that it would be a mistake to presume that compensation, even if the motivations are substantiated significantly, could meet all the needs of victims. In the Commission's view, two particular problems justify the conclusion that the establishment of a compensation fund is, at this stage, not a viable option: the affordability of the fund in the current financial climate and the absence of prerequisites necessary for the effective and efficient administration of the fund. The Commission has therefore concluded that a compensation scheme should rather be seen as an additional component of a comprehensive victim empowerment programme.

- The current Victim Empowerment Programme (VEP) is one of the key components of the National Crime Prevention Strategy (NCPS). The NCPS advocates a victim-centred approach to

combating and preventing crime and violence. Within this broadly restorative justice strategy it is argued that victim empowerment and support can make an important contribution to crime prevention. The programme emphasises crime as a social issue rather than a security issue. The ultimate purpose of the programme, as captured in the mission statement, is to provide a caring and supportive service to victims of crime that is available; accessible; thorough and professional; rendered in an empowering, respectful and supportive manner; co-ordinated and integrated effectively; efficient in providing all the necessary information on available services to victims; and efficient in providing information on the progress of relevant criminal investigations as well as information on procedures and processes to victims, thus contributing to a sense of empowerment and an environment conducive to peaceful communities.

- The Commission is of the view that the conclusion is inevitable that the efforts of the VEP team still lack the ability to deal effectively with all the issues relating to victims of crime. It is clear that their current programme focuses on support services, particular categories of victims are targeted, and the programme does not comprehensively deal with all the needs of victims. Without an effective legislative basis, support services will continue to be unco-ordinated, fragmented and reactive in nature. The Commission is of the view that in South Africa the treatment of victims and services provided to them should be placed on a firm footing. The Commission has therefore concluded that legislation should be adopted to provide a comprehensive "package deal" when dealing with the needs of victims of crime.

- The legislation should, as a minimum, provide for the creation of a permanent structure - an Office for Victims of Crime within government structures - to take care of the needs of victims on a permanent basis. There are two alternatives for the location of the Office for Victims of Crime. Without recommending the exact location the Commission proposes that the Office should either be located within the structures of the National Director of Public Prosecutions (this option is not supported by the National Director of Public Prosecutions) or within the structures of the Department of Justice and Constitutional Development in the Business Unit: Court Services (this option is supported by the Department).

- The functions of the Office for Victims of Crime should, inter alia, be to -
  - develop and provide support services for victims of crime;
  - oversee the implementation of the Victim Charter and report on its implementation, which includes receiving complaints from victims of crime about alleged breaches of the Victim Charter and resolving them;
  - promote awareness of the needs of victims of crime;
  - develop standards and provide training for providers of services;
  - provide information on matters affecting victims;
  - do research and develop policy on and undertake projects relating to matters affecting victims of crime;
  - administer the Fund for Victims of Crime; and
  - ensure the implementation of decisions and recommendations of the Victim Council and relevant legislation passed by Parliament.

- The creation of a permanent body or institution (Victim Council) to advise government on policy issues and legislative amendments to meet the needs of victims of crime is recommended.

- Legislative principles to guide the treatment of victims of crime should be introduced.

- The Commission has concluded that a Fund for Victims of Crime should be established with, inter alia, the objectives of -
  - establishing, developing and co-ordinating services for victims of crime;
  - promoting the implementation of the Victim Charter of Rights;
  - enhancing knowledge; promoting developments; and informing the public and criminal justice practitioners about the impact of victimization, the needs of victims of crime and approaches to respond to those needs, and about the criminal justice system and the victim's role in the system;
  - promoting access to justice and victim participation in the justice system and developing the law, policies and programmes through research and consultation;
  - promoting legislative reforms designed to address the needs of victims of crime and articulate their role in the criminal justice system; and
  - promoting the implementation of the Basic Principles of Justice for Victims of Crime.

The report was submitted to the Minister for Justice and Constitutional Development in March 2004.

Project 90:
Customary law: Succession

The report contains draft legislation which is aimed at reforming the customary rule of male primogeniture that discriminates against women and children, in accordance with the principles of equality as enshrined in the Constitution.

The customary law of succession is based on the principle of male primogeniture, which currently enjoys legislative recognition, and excludes women, daughters and sons (who are not the eldest) from inheriting in terms of the rules of intestate succession. The general rule is that only males who are related to the deceased through the male line, qualify as intestate heirs.

The Commission published a discussion paper entitled "customary law of succession" for general information and comment in August 2000. The discussion paper was the second attempt by the Commission to address the issue of bringing African customary law rules of succession in line with the right to equality in the Bill of Rights. The first attempt which culminated in the Customary Law of Succession Bill, 1998, met a hostile reaction from traditional leaders and was withdrawn in the same year. A process of discussion with interested parties or stakeholders ensued, and the discussion paper was prepared. The production of the discussion paper was accelerated by a series of decisions in Mthembu v Letsela (1997 (2) SA 936 (T), 1998 (2) SA 675 and 2000 (3) 867 (SCA)) indicating that, from the point of view of the courts, changes to the customary law of succession by legislation was inevitable.

Country-wide workshops were held during the period 1 October 2001 and 13 March 2003 in all the provinces. In addition to the provincial workshops, the Commission benefited greatly from the meetings that were conducted between November 2002 and October 2003. Household surveys (field trips) were conducted in a number of townships.

The Commission had also had the benefit of considering reforms in this field by other African countries. The report attempts to communicate a sense of the discussions and debates that took place in the different fora during this process and to express the dilemma faced by the Commission in choosing whatever options have eventually been adopted in the draft Bill.
The main purpose of the report and proposed draft legislation is to remove elements of discrimination found in the application of the customary legal tradition of male primogeniture. This is achieved by extending the application of the Intestate Succession Act, 1987, to all intestate estates of Africans who were previously excluded from its application, that is, spouses of customary marriages and their children as well as supporting and ancillary unions. In African communities there are a number of related and supporting marital unions.

A recommendation is also made that children adopted in terms of customary law should inherit on the same basis as those children adopted in terms of statute.

Provision is made for the disposition of property allotted or accruing to a wife in a customary marriage. When a customary marriage is entered into a "house" is created. The family head may distribute his property among houses as a matter of convenience and for the support of each house. The draft Bill is intended to protect the interests of the wife and children of such a house on the death of the family head.

There is also a recommendation that the protection afforded by the amended section 22(7) of the Black Administration Act, 1927, to a widow whose customary marriage was dissolved by the civil marriage of her husband with another woman, be retained. The discarded widows of such marriages should inherit on par with the civil marriage widows.

It is recommended that a distinction be made between property that a traditional leader holds in his personal capacity and property that he holds as head of the community. The Commission recommends that succession to property acquired or held by a traditional leader in his official capacity should be excluded from the precepts of the Intestate Succession Act.

Provision is made for the resolution of disputes or uncertainty in consequence of the non-specialised nature of customary law. In Western societies law emphasises the interests, rights and liberties of individuals. On the contrary, African customary law is general, more concrete and visible and aimed at preserving group interests. In the circumstances it is foreseen that the rigid application of rules of succession will not always meet the needs of the persons concerned. Therefore a simple and inexpensive manner of resolving uncertainties and disputes is proposed.

The report was submitted to the Minister for Justice and Constitutional Development in March 2004.

Project 96:
The Apportionment of Damages Act, 1956

The report contains recommendations and a proposed draft Bill on the Apportionment of Damages Act 34 of 1956 ("the Act").

The major application of the Act has been in the field of delictual claims and mostly in the area of motor vehicle accidents. Where the plaintiff or claimant claims that he or she has suffered loss and the court finds that the claimant was also negligent and that his or her negligence contributed to the loss, the Act requires the court to reduce the damages to which the claimant is entitled as the court thinks just and equitable having regard to the degree to which the claimant was at fault in relation to the loss. The Act also regulates the position where two or more persons (joint wrongdoers) have caused the same loss to another person (the injured person or plaintiff).

The Act has been severely criticised over the years. Since the Act was passed there have been major developments in the law. There is an urgent need for the Act to be changed to keep abreast with these developments.

Under the Act fault is the sole criterion of apportionment. The courts have interpreted fault to mean negligence and to exclude intentional wrongdoing. The Commission advocates a broader basis for apportionment and recommends that fault should be one of a wide range of relevant factors which the courts are to consider in attributing responsibility for loss. The draft Apportionment of Loss Bill ("the Bill") contained in the report requires the courts to attribute the responsibility for the loss suffered in proportions that

are just and equitable and gives the courts a wide discretion with regard to the method of determining appropriate proportions.

As a result of fault being the sole criterion of apportionment under the Act, the courts have interpreted the Act as being applicable to delictual claims only. With the broader basis for apportionment advocated in the draft Bill, it is possible to extend apportionment to other areas of the law. The Commission supports the application of the draft Bill to all cases covered by the definition of "wrong" which has been widely defined in the Bill to include a breach of a statutory or other legal duty and a breach of a duty of care arising from a contract. The Bill therefore applies to contractual claims where there is liability for breach of a duty of care owed in contract, to breaches of statutory duty and to cases of strict liability in delict and can also be applied to breaches of fiduciary duty including breaches of trust.

Each joint wrongdoer is fully liable to the injured person for the full amount of his or her damages. The injured person may sue any one of the joint wrongdoers for the full amount of his damages. A joint wrongdoer who has paid the injured person's damages in full may thereafter recover a contribution from the other joint wrongdoer of the amount for which the latter is responsible. The Commission considered whether this system of joint and several liability should be changed to one where each wrongdoer was responsible for his or her share of the damages and decided that the rule should not be changed at this stage. The purpose of the rule is to ensure full compensation to the injured person even though it might be to the detriment of the wrongdoer.

The present procedure for proceeding against joint wrongdoers is inadequate and in urgent need of reform. The Bill proposes a more efficient and streamlined procedure. While rejecting the abolition of the principle of joint and several liability, the Commission recognises the hardship that the rule may cause. The Commission has therefore proposed measures to liberalise the law of contribution in order to improve the position of the joint wrongdoer. Hardship may be caused to a joint wrongdoer who cannot recover a contribution from the other joint wrongdoer because the latter is insolvent or cannot be found. The Commission recommends that provision should be made for the joint wrongdoer to apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable.

The report was submitted to the Minister for Justice and Constitutional Development in June 2003.

Project 113:
The use of electronic equipment in court proceedings

The report contains recommendations and a proposed draft Bill on the use of audiovisual equipment for the postponement of criminal cases against accused persons who are in custody awaiting trial.

The Commission considered a proposal by role-players in the criminal justice system that legislation should be introduced to provide for the postponement of criminal cases via an audiovisual link where the accused person is in custody awaiting trial. This would mean that accused persons would not have to appear physically in courts for the purpose of a mere postponement of the case. The proposal allows for the use of modern technology and the establishment of "video-conference courts" to remand criminal cases against such persons. In terms of the proposal, audiovisual equipment has to be installed at a court point and a remote point (the prison). The initial proposal was limited to postponements and then only after the first appearance of the accused in a court.

In the course of the investigation the Commission, in particular, considered the constitutionality of the proposal. After careful consideration and consultation with relevant role players the Commission concluded that the proposed procedure would not be unconstitutional. The Commission was, however, sympathetic to the view that since the procedure would introduce an innovation, it ought to be implemented incrementally. The Commission also decided to extend the initial proposal to cover bail applications as well as applications for leave to appeal and the hearing of an appeal in respect of persons in custody.

The Commission recommends that -

- legislation be introduced to provide for the use of audiovisual equipment for the purpose of postponing criminal cases against accused persons who are in custody;
- the procedure provides additionally for bail applications, both before conviction and after conviction pending an appeal;
- it should be in the discretion of the presiding officer to order the accused's physical presence in court;
- the procedure also be available for applications for leave to appeal and appeal proceedings in respect of accused persons in custody;
- the legislation be uncomplicated;
- technical matters be provided for in regulations (especially because of continuous changes in technology);
- a prison or place of detention be defined as a prison in terms of the provisions of the Correctional Services Act 111 of 1998, but excluding police cells;
- juveniles (persons younger than 18) be excluded from the process; and
- the point of departure be to allow the procedure unless, in the discretion of the presiding officer, the accused must in the interests of justice be brought before a court.

The report was submitted to the Minister for Justice and Constitutional Development in July 2003.

PROGRESS REPORT

CHAPTER

5

SOUTH AFRICAN

LAW REFORM COMMISSION

THIRTY FIRST ANNUAL REPORT 2004/05

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, among other things, 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.

Technical assistance (including funding) has been made available by the German Technical Co-operation (GTZ) since January 2003. The review of the Interpretation Act 33 of 1957 and the Black Administration Act 38 of 1927 (see Chapter 4) have been identified as priorities.

Work on a draft discussion paper on the review of the Interpretation Act 33 of 1957 has commenced. It is envisaged that a draft discussion paper on the review of the Interpretation Act will be finalised in the third quarter of 2004. The GTZ has commissioned Professor C Botha, Head of the Department of Public Law at the University of Pretoria, to assist in the investigation.

The appointment of a project committee is receiving attention.

Project 90 - *Customary law*

A discussion paper on the administration of estates was published in December 2000. The Commission decided that an interim report should be submitted to the Minister. A progress report was submitted to the Minister in January 2002. The Administration of Estates Amendment Act 47 of 2002 was passed.

A draft discussion paper on the administration of estates will be finalised in the first quarter of 2005.

Project 94 - *Arbitration*

The investigation initially dealt with international and domestic commercial arbitration only. A report on international arbitration was submitted to the Minister in July 1998 and a report on domestic arbitration was submitted to the Minister in June 2001.

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 draft report on community dispute resolution structures was considered by the Commission in March 2004 and referred back to the project committee to provide a framework that will recognise community dispute resolution structures. A second draft report will be finalised in the last quarter of 2004.

A draft discussion paper on family mediation will be finalised in the third quarter of 2004.

Project 107 - *Sexual offences: Adult prostitution*

An issue paper on adult prostitution was published for general information and comment in August 2002.

While it is often said that prostitution is one of the oldest professions, the legal response to it differs from society to society and over the course of time. Internationally, the topic of prostitution remains an emotive one and opinions on the legal treatment of prostitution are generally strongly polarised. This is no different in South Africa.

The finalisation of a draft discussion paper has been delayed in the light of the researcher's resignation. ***A new researcher has been assigned to the project and a draft discussion paper on adult prostitution will be finalised in the last quarter of 2004.***

Project 113 - *The use of electronic equipment in court proceedings*

The project will receive further attention after the completion of Project 126: Review of the law of evidence. See Chapter 4.

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 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 which is not a conjugal relationship.

An issue paper on domestic partnerships was published for general information and comment in September 2001. A discussion paper was published for general information and comment in August 2003. The closing date for comment had been 1 December 2003 and was extended to March 2004.

The discussion paper deals with the question of the legal recognition and regulation of domestic partnerships – that is, established relationships between people of the same or opposite sex. The discussion paper does not come out in favour of any particular option and the idea is to canvass a number of options.

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 these relationships has, however, increased worldwide and also in South Africa. 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.

In the recent past the courts have carried much of the responsibility for crafting family law and policy with regard to domestic partnerships by creatively applying non-family laws, including the law of unjust enrichment, estoppel and contract, to domestic partners who were excluded from family law regimes.

The Constitutional Court has, furthermore, on more than one occasion, upheld constitutional challenges under the equality clause on the ground of sexual orientation. The Constitutional Court has made it clear that same-sex relationships must receive some form of recognition, but has not been prescriptive as to how it should be done. With the extension of statutorily defined benefits (sometimes including domestic partnerships into the definition of "spouse" for various purposes) there has been an increasing recognition of these relationships outside marriage. These developments have led to a patchwork of laws that do not express coherent family policy.

This discussion paper therefore includes proposals for possible law reform to recognise and regulate various forms of domestic partnerships. The proposals are aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. Possible amendments to the Marriage Act of 1961 and the promulgation of legislation to deal specifically with registered and unregistered partnerships are proposed.

The legislative proposals can be summarised as follows:

Marriage and civil unions

The Commission considers as unconstitutional the fact that there is currently no formal legal recognition of same-sex relationships. Recognition could be effected in a number of ways. The following alternatives have been identified:

a)Same-sex marriage (same-sex relationships)

Option1:
The first option is to make marriage as it is currently known available to both same- and opposite-sex couples by inserting a definition of marriage to that effect in the Marriage Act.

Option 2:
The second option entails the separation of the civil and religious elements of marriage. The Marriage Act of 1961 will therefore only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law. In practice it will mean that both same- and opposite-sex couples will have to solemnise their marriages before a civil marriage officer. After the civil ceremony couples who value the religious aspects of marriage will then be free to have their marriage blessed by a religious official in a religious ceremony. Religious institutions will have to decide whether their religious blessing is available to same-sex couples or not.

b)Civil unions (same- and opposite sex relationships)

Option 3:
According to this option same-sex couples will be afforded a legal status parallel to that of marriage under a separate institution called a civil union. A civil union will have the same legal consequences as marriage, but will be established through a civil registration procedure and, depending on the circumstances, terminated by mutual agreement or court procedure.

Option 4:
In terms of option 4 the institution of civil union will also be made available to opposite sex couples who object to the moral and religious connotations of traditional marriage.

Registered partnerships (same- and opposite-sex relationships)

Option 5:

A Registered Partnerships Act is proposed for partners of the same or opposite sex who do not wish to get married but still desire some legal protection. Upon registering their relationship as a partnership with a civil registration officer, parties will be afforded some of the basic rights associated with civil marriage. Depending on the circumstances, termination of a registered partnership will take place either by mutual agreement or court procedure.

The default property regime for registered partnerships will be the accrual system, but parties could agree to use another system. In addition, registered partners will have a mutual duty to support each other during the existence of the relationship; the right to claim damages in the event of the death of a partner; and the right to intestate succession. Where a child is born into a registered partnership between persons of the opposite sex, the male partner will be deemed to be the biological father of that child. There will only be a limited right to maintenance between former registered partners after termination of the registered partnership.

Unregistered partnerships (same-and opposite-sex relationships)

An Unregistered Partnerships Act is proposed in terms of which same- or opposite-sex couples in unregistered partnerships will be afforded a civil status as if they have formally committed to the relationships, without their having taken any steps to effect such recognition. The Commission distinguishes between de facto and ex post facto relationships in this regard.

Option 6: De facto unregistered partnerships

Option 6 creates rights and obligations for a couple in a conjugal relationship during the existence of the unregistered partnership. Relationships will be assessed in terms of a definition and a list of factors (both set out in the Unregistered Partnership legislation) such as the duration of the relationship and the degree of mutual commitment to a shared life. When the status of the relationship is disputed during its existence, a court may be approached to declare the status of the relationship.

Compared to marriage and registered partnerships the rights and obligations afforded to unregistered partnerships will be limited. The focus will be on regulating the ownership of property accumulated by the partners during and after termination of the relationship. The disposal of such property by one partner will be restricted and there will be a joint liability for household expenses during the relationship. Provision will be made for the equitable division of accumulated property after termination of the relationship and the right to inherit a child's share from a partner who dies intestate. A former partner will be able to claim maintenance from the other partner only under prescribed circumstances.

In order to protect the autonomy of partners in unregistered partnerships, there will be a provision to exclude the legislation by mutual agreement. Where the application of the Act has been so excluded, the parties will still have recourse to the ordinary remedies of the law to the extent that they may be applicable.

Option 7: Ex post facto unregistered partnerships

This option allows former partners in an unregistered partnership who cannot agree about the division of property and maintenance after the partnership has ended, to apply to court for an equitable property division and maintenance order. Such an order may be made only after the court has determined that the relationship indeed qualifies as an unregistered partnership as defined. No rights and obligations are created automatically for the couple during the existence of the relationship. The legislation only becomes relevant to the partners on the breakup of the relationship or the death of one of the partners should they be unable to manage their situation privately.

When making a property division or maintenance order, the focus of the court will be to ensure an equitable settlement of the proprietary disputes between the former partners. The court will be allowed to consider the terms of a domestic partnership agreement between the former partners when deciding the case.

This version of the unregistered partnership proposal will apply to intimate partnerships (conjugal relationships) as well as care partnerships (non-conjugal relationships). Care partners are persons who are in financially or emotionally interdependent relationships that are of a non-conjugal nature.

Conclusion

Owing to the diverse nature of the options mentioned before and the wide variety of relationships under discussion, it would be impossible to select only a single generally valid statutory measure to regulate all relationships. The aim would be to combine the proposals in such a way as to afford the desired protection to parties in domestic partnerships without imposing on their autonomy or over-regulating the position.

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

There is a need to review existing legislation in the field of international civil matters especially in the light of South Africa's trade and other relations with foreign countries. The present position is that, subject to certain statutory exceptions, a foreign judgment is not directly enforceable in South Africa. Common law procedures are available to litigants but these are expensive, time-consuming and complex.

An issue paper on consolidated legislation pertaining to international co-operation in civil matters was published for general information and comment in January 2003. The issue paper is expanded on in the previous annual report.

A draft discussion paper on consolidated legislation pertaining to international co-operation in civil matters will be considered by the Commission in June 2004.

Project 122 – *Assisted decision-making: Adults with impaired decision-making capacity*

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 present investigation 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 was published in December 2001.

A discussion paper was published for general information and comment in January 2004. Making decisions is an important part of human life. Although we take it for granted that adults can make decisions about their personal welfare, financial affairs and medical treatment, some adults cannot make such decisions for themselves because of diminished capacity as a result of mental illness, intellectual disability, physical disability or an incapacity related to ageing in general. A legitimate expectation of the law is that it should establish a structure within which appropriate autonomy and self-determination is recognised and protected. Such a structure should provide appropriate substitute decision-making devices and the necessary protection from abuse, neglect and exploitation.

At present the law deals with decision-making incapacity by way of curatorships. The curatorship system has been criticised on the ground that it suffers from a number of serious and frustrating difficulties. An individual can also allow another to act on his or her behalf through a power of attorney. A power of attorney however terminates on the incapacity of the person who granted the power. The latter is a major cause for concern: Frequently care givers are under the impression that the power granted by a person in their care will be effective until that person dies, even in cases where the person had severely diminished mental capacity and is therefore incompetent in the eyes of the law.

Against the above background the Commission on a preliminary basis proposes that a change to the law is necessary to provide for the following:

- An alternative to the curatorship system (without abolishing it). The alternative proposed consists of a multi-level system including a default arrangement, short term measures and longer term measures. The proposed alternative provides for assisted decision-making with regard to financial affairs as well as personal welfare.
- Introduction of the concepts of the enduring power of attorney and the conditional power of attorney into our law. (An enduring power endures the subsequent incapacity of the person who granted it while a conditional power comes into operation only on incapacity.) The Commission suggests that it should be possible to grant enduring and conditional powers of attorney in respect of financial affairs as well as personal welfare. Measures are built into the proposed legislation to ensure sufficient protection against possible abuse of the authority granted by an enduring power of attorney.

The detail of the Commission's proposals is reflected in the proposed draft legislation included in the discussion paper. Nine workshops to discuss the draft legislation contained in the discussion paper with the public were held.

A report on assisted decision-making: adults with impaired decision-making will be finalised in the last quarter of 2004.

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 certain matters referred to in its report should be investigated fully before a review of the provisions of the Bill could take place and it 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.

An issue paper dealing with the need for the extension of the ambit of the Protected Disclosures Act 26 of 2000 was published in the form of a questionnaire in January 2003. The issue paper is expanded on in the previous annual report.

A draft discussion paper on protected disclosures will be considered by the Commission in June 2004.

Project 124 -
Privacy and data protection

An issue paper was published for general information and comment in August 2003.

Privacy is a valuable aspect of personality. While potential invasions of privacy can come from many sources, a chief concern in recent years has been information privacy. Information privacy has been defined as the claim of individuals, groups or institutions to determine for themselves how, when and to what extent information about them is collected, stored or communicated to others.

Information about people and their activities can range from medical records, purchasing habits and property ownership to borrowing habits at the video store, cell phone conversations and surfing practices on the Internet - all mostly recorded in digital form. It is clear that personal information has acquired a market value.

In South Africa the right to privacy is protected in terms of both our common law and in section 14 of the Constitution. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.

The constitutional right to privacy is, like its common law counterpart, not an absolute right but may be limited in terms of law of general application and has to be balanced with other rights entrenched in the Constitution.

In protecting a person=s personal information consideration should therefore also be given to competing interests such as the administering of national social programmes, maintaining law and order, and protecting the rights, freedoms and interests of others, including the commercial interests of industry sectors such as banking, insurance, direct marketing, health care, pharmaceuticals and travel services. The task of balancing these opposing interests is a delicate one.

Concern about data protection has increased worldwide since the 1960s as a result of the expansion in the use of electronic commerce and the technological environment. The growth of centralised government and the rise of massive credit and insurance industries that manage vast computerised databases have turned the modest records of an insular society into a bazaar of data available to nearly anyone at a price. The question could no longer be whether information could be obtained, but rather whether it should be obtained and, where it has been obtained, how it should be used.

There are now well over thirty countries that have enacted data protection statutes at national or federal level and the number of such countries is steadily growing. The investigation into the possible development of data privacy legislation for South Africa is therefore in line with international trends.

Early on, it was, however, recognised that information privacy could not simply be regarded as a domestic policy problem. The increasing ease with which personal data could be transmitted outside the borders of the country of origin produced an interesting history of international harmonisation efforts, and a concomitant effort to regulate trans-border data flows.

Two crucial international instruments evolved in 1981, namely the so-called CoE (Council of Europe) Convention and the OECD (Organization for Economic Cooperation and Development) 1981 (OECD) Guidelines. These two agreements have had a profound effect on the enactment of national laws around the world, even outside the OECD member countries. They incorporate technologically neutral principles relating to the collection, retention and use of personal information.

Although the expression of data protection in various declarations and laws varies, all require that personal information must be –

- obtained fairly and lawfully;
- used only for the specified purpose for which it was originally obtained;
- adequate, relevant and not excessive to the purpose;
- accurate and up to date;
- accessible to the subject;
- kept secure; and
- destroyed after its purpose is completed.

These principles are known as the APrinciples of Data Protection@ and form the basis of both legislative regulation and self-regulating control.

In 1995, the European Union furthermore enacted the Data Protection Directive which is important since articles 25 and 26 of the Directive stipulate that personal data from Europe should only flow outside the boundaries of the Union to countries that can guarantee an Aadequate level of protection@ (the so-called safe-harbour principles).

Privacy is therefore an important trade issue, as data privacy concerns can create a barrier to international trade. Considering the international trends and expectations, information privacy or data legislation will ensure South Africa=s future participation in the information market, if the country is regarded as providing Aadequate@ data protection by international standards.

The effectiveness of data protection provisions in protecting an individual=s personality rights will, however, depend largely on how they are applied and interpreted in practice. Four models aimed at the protection of personal information can be identified. Depending on their application, these models can be complementary or contradictory. In most countries several are used simultaneously.

First of all, there is a general law that governs the collection, use and dissemination of personal information by both the public and private sectors. An oversight body then ensures compliance. This is the preferred model for most countries adopting data protecting laws and was adopted by the European Union to ensure compliance with its data protection regime.

Secondly, some countries have avoided enacting general data protection rules in favour of specific sectoral laws governing, for example, video rental records and financial privacy. In such cases, enforcement is achieved through a range of mechanisms. A major drawback with this approach is that it requires that new legislation be introduced with each new technology - protection therefore frequently lags behind. There is also the problem of a lack of an oversight agency.

Thirdly, data protection can also be achieved - at least in theory - through various forms of self-regulation, in which companies and industry bodies establish codes of practice and engage in self-policing. This is currently the policy promoted by the governments of the United States and Singapore.

Finally, with the recent development of commercially available technology-based systems, data protection has also moved into the hands of individual users. It is possible to employ a range of programs and systems that provide varying degrees of privacy and security of communications.

Governments may find that proposed measures to protect privacy meet the staunch opposition of business interests which see such safeguards as an expense and an unjustified constraint on their right to conduct their business affairs as they wish. On the other hand, business interests may be enhanced by a statutory data protection regime. Many countries, especially in Asia, have developed or are currently developing data protection laws in an effort to promote electronic commerce. These countries recognise that consumers are uneasy with the increased availability of their personal data, particularly with new means of identification and forms of transactions, and therefore that their personal information is being utilised worldwide. Data privacy laws are therefore being introduced, not from a human rights perspective, but rather as part of a package of laws intended to facilitate electronic commerce by setting up uniform rules.

It should be noted that the promulgation of data protection legislation in South Africa will necessarily result in amendments to other South African legislation, most notably the Promotion of Access to Information Act 2 of 2000 and the Electronic Communications and Transactions Act 25 of 2002. Both these Acts contain interim provisions regarding data protection in South Africa.

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

- Whether privacy and data protection should be regulated by legislation.
- How the general principles of data protection could be developed and incorporated in the legislation.
- Whether a statutory regulatory agency should be established.

If it is a viable option to promote a flexible approach in terms of which industries will develop their own codes of practice (in accordance with the principles set out in the legislation) which could be overseen by the regulatory agency.

A draft discussion paper will be finalised in the last quarter of 2004.

Project 125 - *Prescription periods*

An issue paper was published for general information and comment in August 2003.

No comprehensive review of all the provisions providing for different prescription periods - whether of a contractual or delictual nature - has been undertaken. When reporting on the Bill which subsequently became the Legal Proceedings Against Certain Organs of State Act 40 of 2002, the Portfolio Committee on Justice and Constitutional Development recommended that the Minister for Justice and Constitutional Development be approached to request the Commission to include in its programme an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods. An investigation into the review of prescription periods was subsequently included in the Commission's programme.

A few of the questions raised in the issue paper are the following:

- Should different prescription periods be retained or should different periods of prescription be avoided as far as possible?
- Are all or some of the different prescription periods in section 11 of the Prescription Act justified?
- Are all or some of the different prescription periods in other legislation justified?
- Should there be special protection for public authorities regarding prescription?
- If it is decided that there should be one uniform prescription period for all or most cases, how long should this period be?
- Should it be allowable to contract out of the legislative prescription regime or to modify it by agreement?
- The scope of this review is limited to prescription periods. Is there a need to review other aspects of prescription or prescription in general?

A draft discussion paper will be finalised in the last quarter of 2004.

Project 126 - *Review of the rules of evidence*

It was decided to follow an incremental approach in this investigation. "The principle of relevance" and "hearsay evidence" are aspects that have been identified for immediate research. The review of the law of evidence is a specialised field and experts will be contracted to do the research.

A draft discussion paper will be finalised in the last quarter of 2004.

Project 127 – *Review of administration orders*

The project committee has held a number of meetings to deliberate on the research report on the review of administration orders submitted to the Department of Justice and Constitutional Development by the Centre for Advanced Corporate and Insolvency Law of the University of Pretoria.

A draft discussion paper on administration orders will be finalised in the last quarter of 2004.

Project 128 – *Review of aspects of the law of divorce*

A questionnaire was distributed publicly. ***A draft discussion paper on review of aspects of the law of divorce will be finalised in the last quarter of 2004.***

Project 129 – *Review of aspects of matrimonial property law*

Research will commence when the discussion paper on review of aspects of the law of divorce (project 128) has been finalised.

Project 130 – *Stalking*

An issue paper was published for general information and comment in August 2003.

The issue paper broadly defines stalking as any type of harassing and intimidating conduct that causes a person to fear for his or her safety. It identifies different categories of stalkers for example delusional erotomanics, "former intimate" stalkers, sociopathic stalkers, disgruntled clients, cyberstalkers and debt collectors. The issue paper exposits the existing legal response to acts associated with stalking and explores possible reform of civil and criminal remedies.

The three options for reform are as follows:

- Expand or enact similar legislation to the Domestic Violence Act, 1998;
- Amend and adapt section 384 of the Criminal Procedure Act, 1955 which regulates a binding over of persons to keep the peace; or
- Enact independent legislation criminalising stalking.

A draft discussion paper on stalking will be finalised in the third quarter of 2004.

Project 131 – *Trafficking in persons*

An issue paper was published for general information and comment in January 2004.

The issue paper highlights various international instruments which recognise trafficking in persons as a world-wide problem. It further focuses on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime which is the first international instrument that deals comprehensively with the issue of trafficking in persons. The protocol defines trafficking in persons as follows:

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

The issue paper gives an overview of the extent of the problem of trafficking in persons, particularly within the South African context. It further identifies weaknesses within the South African legal system which hinder the country from dealing effectively with the problem of trafficking in persons. Questions posed in the issue paper relate specifically to how the current system can be improved for purposes of reforming the law regarding trafficking in persons.

A draft discussion paper on trafficking in persons will be finalised in the last quarter of 2004.

Project 132 – *Abolition of the oath*

The background to this investigation is provided in Chapter 3.

Research will commence when capacity becomes available.

PUBLIC RELATIONS

CHAPTER

6

SOUTH AFRICAN

LAW REFORM COMMISSION

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Ismail Mahomed prize for law reform

The Law Reform Commission offers a prize for the best essay on law reform by a student in the final year of LLB studies at a South African University. The aim of the competition is to provide an incentive for good legal writing while generating new ideas for the reform of the law.

The Ismail Mahomed Prize for Law Reform was established in honour of the late Chief Justice and Chairperson of the Law Reform Commission. The 2002 prize was awarded at a ceremony hosted by the Commission on 17 October 2003. The Commission is grateful to Juta Law for sponsoring a first prize consisting of a personal computer valued at over R6 000 and a prize for the runner-up consisting of a one-year subscription to Juta's Statutes of South Africa on CD-ROM with quarterly updates.

The winner for 2002 was Ms Kerry Williams of the University of Cape Town for her excellent essay on legalising same-sex marriage in South Africa. The runner-up was Ms Penelope Lane, of the University of Natal, for her essay on the conflict between the Trade Marks Act and the right to freedom of speech.

It is sincerely hoped that Juta Law will be amenable to sponsoring future Ismail Mahomed Prizes in the interest of law reform in our country.

Public consultation

For the efficient performance of its functions, the Commission depends on the co-operation of institutions and persons who 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 issue papers and 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 investigations 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 regular 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 and institutions in other countries

The good relations maintained by the Commission with law reform bodies and institutions in other countries make the exchange of consultation 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 and information enables the Commission to evaluate thinking elsewhere in the world.

Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA)

Towards the end of 2001 a conference was convened in Tanzania on best practices in law reform following a visit of the Law Reform Commission of Tanzania to its South African counterpart. The conference resolved that an Association of Law Reform Agencies for Eastern and Southern Africa be established and a steering committee to take the process forward was elected. In January 2003 a meeting of the steering committee took place in Tanzania where a draft Constitution for the Association was finalised.

Subsequently a meeting was held in Namibia in August 2003 where representatives of law reform agencies in Eastern and Southern Africa convened to finalise the establishment of the Association, to consider the draft Constitution, to finalise the terms of reference of the Executive Committee of the Association, and to deliberate on the future functioning of the Association.

The first general meeting of the Association after its formal establishment was hosted by the South African Law Reform Commission in Cape Town from 2 – 4 March 2004 in conjunction with a workshop on law reform. The event was significant since it created an occasion to extend the membership of the Association and it also afforded the opportunity to participate in the discussions and decisions affecting the development of the Association. From the perspective of developing trends in law reform as well as strengthening ties with other law reform agencies in Africa, the ALRAESA workshop was of great consequence. The following countries were represented at the general meeting and workshop: Botswana; Kenya; Lesotho; Malawi; Namibia; Rwanda; South Africa; Swaziland; Tanzania; Uganda; Zambia; and Zimbabwe.

Interaction with foreign delegations

In the period under review the Commission interacted with the following foreign delegations:

United Kingdom trainers

A delegation consisting of judges, barristers, solicitors, prosecutors and police officers who are all involved in training lawyers in the UK to deal with sexual offences, was briefed on working methods and relevant projects of the South African Law Reform Commission on 26 August 2003.

Chemonics International
A senior manager of Chemonics International (a global consulting firm promoting economic growth and higher living standards in developing countries), was briefed on relevant projects of the South African Law Reform Commission on 10 September 2003.

President of the Law Commission of New Zealand
On 22 September 2003 the President of the Law Commission of New Zealand, Mr Justice Bruce Robertson, visited the South African Law Reform Commission to compare experiences on law reform issues.

Portfolio Committee on Justice of the German Parliament (Bundestag)
On 6 October 2003 the German Parliamentary delegation consisting of nine members was briefed on the role of the South African Law Reform Commission in the judicial system.

Study visit by selected members of the Legal Sector Steering Committee of the Government of the United Republic of Tanzania
The above-mentioned delegation was interested in, among other things, harmonising the legal framework and access to justice for the poor and disadvantaged. On 9 October 2003 the delegation was briefed on the working methods of the Commission as well as on relevant research projects.

Judges and prosecutors from Austria
A delegation of 50 Austrian judges and prosecutors visited South Africa to learn about the judicial system in South Africa. On 27 October 2003 the Commission assisted with the answering of questions during a briefing session.

Lesotho Law Reform Commission
Two researchers at the Lesotho Law Reform Commission undertook a study visit to the South African Law Reform Commission from 21 – 29 January 2004. They were briefed on the working methods of the Commission and interacted with researchers on various research projects.

Minister of Justice (Uganda)
On 16 March 2004 the Ugandan Minister of Justice and the High Commissioner of the Uganda High Commission were briefed on relevant projects of the South African Law Reform Commission.

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 22 July 2003, 28 August 2003 and 23 January 2004 the Commission hosted media conferences at which occasions issue papers, 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 participate in various programmes and discussions relating to their research projects. These take the form of, among other things, interviews with radio stations, television appearances, articles in law journals, and liaison with individuals and institutions.

In line with the Commission's policy to broaden its consultation base, extensive workshops and briefings in respect of relevant investigations are held. An effort is made to host the workshops and present briefings in as many different locations (urban and rural) as possible and the target audiences are, among others, the legal fraternity, relevant NGOs, state departments, Portfolio Committees, relevant experts, and the community in general.

Researchers and project committee members often participate in activities not initiated by the South African Law Reform Commission nationally and abroad. They 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. In addition, they are frequently requested to present papers or lectures on the research projects that they are involved in. This approach facilitates cooperation between the Commission and other role players, serves to publicise the Commission's activities and ensures that duplication of initiatives is avoided.

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.

ACKNOWLEDGEMENTS

CHAPTER 7

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 German Government through the German Technical Cooperation (GTZ)

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 of 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

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*, University of Pretoria, seconded to the Commission	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

ANNEXURE A

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
Justice Y Mokgoro*	1996-01-01 to 1998-12-31
Mr J J Gauntlett SC*, practising advocate	1996-01-01 to date
Mr P Mojapelo	1996-01-01 to 2001-12-31
Ms Z Seedat*, practising attorney	1996-01-01 to date
Judge M L Mailula	1999-01-01 to 2001-12-31
Prof C E Hoexter*, University of the Witwatersrand	1999-10-27 to date
Judge C T Howie*	2000-11-03 to date
Judge W L Seriti*	2002-01-01 to date

ANNEXURE B

PROJECT COMMITTEES OF THE COMMISSION AND THEIR MEMBERS

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ANNEXURE B

PROJECT COMMITTEES OF THE COMMISSION AND THEIR MEMBERS

Administration orders	Judge W Seriti (Project leader)	Member, Law Reform Commission
	Prof A Boraine	University of Pretoria
	Ms A Lotheringen	Department of Trade and Industry
	Mr P Maluleke	Banking Council
	Mr R Mandelstam	Magistrate: Johannesburg
	Ms M Boyce	Black Sash
	Mr P Setou	Micro Finance Regulatory Council
	Ms H van der Merwe	Attorney nominated by the National Association of Administrators and the Law Society of the Northern Provinces
	Mr M Weiner	Attorney nominated by the National Association of Administrators

Arbitration: Alternative dispute resolution	Prof R Christie (Project leader)	University of Cape Town
	Prof D Butler	University of Stellenbosch
	Prof J Cartwright	Community Peace Programme
	Mr R Choudree	Society of Advocates, KwaZulu Natal
	Mr J Gauntlett SC	Member, Law Reform Commission
	Mr A Jooste	Chief Magistrate, Cape Town
	Prof I P Maithufi	Full-time member, Law Reform Commission
	Ms N Mkefa	Cape Town Metropolitan Council
	Mr P Pretorius	Johannesburg Bar
	Prof W Schärf	Institute of Criminology, UCT

Assisted decision-making: Adults with impaired decision-making capacity	Judge B du Plessis (Project leader)	
	Prof J Bekker	Retired Dean of the Faculty of Law, Vista University
	Ms D Mahlangu	Department of Social Development
	Ms Z Seedat	Member, Law Reform Commission
	Dr S Selemani	Psychiatrist attached to Sterkfontein Mental Hospital and the University of the Witwatersrand

	Mr L Vitus	Retired Executive Manager of the SA Federation for Mental Health
	Ms M Meyer	Office of the Master of the High Court

Customary law	Prof I Maithufi (Project leader)	Full-time member, Law Reform Commission
	Prof J Bekker	Retired Dean of the Faculty of Law, Vista University
	Prof T Bennett	Faculty of Law, University of Cape Town
	Prof C Dlamini	Department of Education, KwaZulu Natal
	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
	Prof R Mqeke	Rhodes University
	Prof S Rugege	University of the Western Cape

Domestic partnerships	Judge C Howie(Project leader)	Member, Law Reform Commission
	Ms B Goldblatt	Centre for Applied Legal Studies, WITS
	Prof C Hoexter	Member, Law Reform Commission
	Prof R Louw	University of Natal (Durban)
	Prof T Mosikatsana	University of the Witwatersrand

Islamic marriages and related matters	Judge M Navsa (Project leader)	
	Sheikh M Gamieldien	Islamic law consultant
	Moulana A Jeena	United Ulama Council
	Ms F Mahomed	Member of Parliament
	Prof N Moosa	University of the Western Cape
	Mr M Omar	Attorney, United Ulama Council
	Dr R Salojee	Member of Gauteng Legislature
	Ms Z Seedat	Member, Law Reform Commission

Sentencing	Mr J Kollapen (Project leader)	Human Rights Commission
	Ms L Camerer	Institute for Security Studies
	Mr K Govender	State Attorney
	Judge L Mailula	Member, Law Reform Commission
	Mr V Peterson	Department of Welfare, Mpumalanga
	Ms M Ramagoshi	National Network on Violence Against Women
	Mr P Shabangu	Magistrate, Durban
	Prof D van Zyl Smit	University of Cape Town

Privacy and data protection	Judge C Howie (Chairperson)	Member, Law Reform Commission
	Prof J Neethling (Project leader)	University of South Africa
	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

The use of electronic equipment in court proceedings AND Review of the law of evidence	Judge L Harms (Project leader)	
	Prof L Fernandez	University of the Western Cape
	Adv T Masuku	Cape Bar
	Judge R Nugent	
	Prof P Schwikkard	University of Cape Town
	Dr W Seriti	Member, Law Reform Commission

ANNEXURE C

PRESENT PROGRAMME OF THE COMMISSION

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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
90	Customary law
94	Arbitration
107	Sexual offences: Adult prostitution
113	The use of electronic equipment in court proceedings
118	Domestic partnerships
121	Consolidated legislation pertaining to international co-operation in civil matters
122	Assisted decision-making: Adults with impaired decision-making capacity
123	Protected disclosures
124	Privacy and data protection
125	Prescription periods
126	Review of the rules of evidence
127	Review of administration orders
128	Review of aspects of the law of divorce
129	Review of aspects of matrimonial property law
130	Stalking
131	Trafficking in persons
132	Abolition of the oath

ANNEXURE D

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

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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 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

ANNEXURE D

Project number	Title	Year of report	Reference number of published report	Result
12	Review of the law of divorce			
	• Report	1977	RP 57/1978	Act 70 of 1979 passed, see also project 40
	• 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	1985	ISBN 0 621 09611 3	Act 81 of 1987 passed
	• Legitimate portion or right to maintenance	1987	Not published	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

Project number	Title	Year of report	Reference number of published report	Result
24	Investigation into the courts' powers of review of administrative acts			
	• Report	1992	ISBN 0 621 15356 7	See project 115
	• Supplementary report	1994	Not published	See project 115
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
	• Repeal of the Black Administration Act, 1927	2004	Being printed	See Chapter 4 Bill identified for submission to Parliament during the 2004 Session
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

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Project number	Title	Year of report	Reference number of published report	Result
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 con-sequences 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 • Supplementary report	 1986 1994	 ISBN 0 621 11357 3 RP 158/1995 ISBN 0 621 16869 6	 Act 7 of 1989 passed 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 Certain Organs of State Act 40 of 2002 passed

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	Control of Unreasonable or Oppressive Stipulations in Contracts Bill to be introduced when circumstances permit
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	Act 49 of 2003 passed
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
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

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Project number	Title	Year of report	Reference number of published report	Result
58	Group and human rights		Report: ISBN 0 621 14128 3	
	• Interim report	1991	Summary: ISBN 0 621 14127 5	Act 200 of 1993 passed
	• Final report	1994	RP 66/1995 ISBN 0 621 16727 4	Made available to the Constitutional Assembly
59	Islamic marriages and related matters	2003	RP 210/2003 ISBN 0 621 34989 5	See Chapter 4 Islamic Marriages Bill to be introduced when circumstances permit
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	1993	ISBN 0 621 16287 6	Recommendations not implemented
	• Supplementary report on section 138 of the Companies Act 61 of 1973	1994	RP 152/1995 ISBN 0 621 16847 5	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)	1990	(Unpublished/ Informal)	Section 1 of the Insolvency Amendment Act 6 of 1991 enacted
	• Interim report: Insolvency interdicts	1992	ISBN 0 621 14964 0	Act 122 of 1993 passed
	• Interim report: Appeals against sequestration orders	1993	ISBN 0 621 15421 0	Section 1 of Act 129 of 1993 enacted
	• 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	Insolvency and Business Recovery Bill identified for submission to Parliament during the 2004 Session
64	The legal protection of information	-	-	Struck off

Project number	Title	Year of report	Reference number of published report	Result
65	Surrogate motherhood	1992	ISBN 0 621 15353 2	Recommendations to be incorporated in the Children's Bill (Project 110)
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 criminal procedure	1995	RP 70/1996 ISBN 0 621 17405 X	Act 86 of 1996 passed
	• Third interim report: The right of the Director of Public Prosecutions to appeal on questions of fact	2000	RP 58/2001 ISBN 0 621 30678 9	Criminal Procedure Second Amendment Bill identified for submission to Parliament during the 2004 Session
	• Fourth interim report: Sentence agreements	2001	RP 120/2001 ISBN 0 621 31452 8	Act 62 of 2001 passed
	• Fifth interim report A more inquisitorial approach to criminal procedure	2002	RP 219/2002 ISBN 0 621 33510 X	Criminal Procedure Amendment Bill identified for submission to Parliament during the 2004 Session
	• Final report Out of court settlements in criminal cases	2002	RP 218/2002 ISBN 0 621 33511 8	Criminal Procedure Amendment Bill identified for submission to Parliament during the 2004 Session

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Project number	Title	Year of report	Reference number of published report	Result
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 Distri-butors and Donelly v Barclays National Bank 1995 3 SA 1 (A)
82	Sentencing: • A new sentencing framework • A compensation scheme for victims of crime in South Africa	 2000 2004	 RP 57/2001 ISBN 0 621 30679 7 Being printed	 Referred back to the Law Reform Commission (see Chapter 1) See Chapter 4
83	Review of the Moratorium Act, 1963	-	-	Struck off
84	Application of the trapping system	1994	RP 174/1995 ISBN 0 621 16896 3	Act 85 of 1996 passed

Project number	Title	Year of report	Reference number of published report	Result
85	Aspects of the law relating to AIDS			
	• First interim report: Health related aspects	1997	RP 106/1997 ISBN 0 621 27345 7	Regulations on Hazardous Biological Agents were promulgated on 27 December 2001 National policy on HIV testing expected to be promulgated in terms of the National Health Bill
	• 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	Compulsory HIV Testing of Sexual Offenders receiving the attention of Parliament
	• Fifth interim report: The need for a statutory offence aimed at harmful HIV-related behaviour	2001	RP 78/2001 ISBN 0 621 30750 5	No legislation recommended
86	Euthanasia and the artificial preservation of life	1998	RP 186/1999 ISBN 0 621 29831 X	Report under consideration by the 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	Public Interest and Class Actions Bill to be introduced when circumstances permit
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

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Project number	Title	Year of report	Reference number of published report	Result
90*	Customary law:			
	• Customary marriages	1998	RP 170/1998 ISBN 0 621 28755 5	Act 120 of 1998 passed
	• Conflicts of law	1999	RP 81/2000 ISBN 0 621 30061 6	Application of Customary Law Bill to be introduced when circumstances permit
	• Traditional courts and the judicial function of traditional leaders	2003	RP 209/2003 ISBN 0 621 34988 7	Traditional Courts Bill to be introduced when circumstances permit
	• Customary law of succession	2003	Being printed	See Chapter 4 Customary Law of Succession Amendment Bill identified for submission to Parliament during the 2004 Session
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	1998	RP 30/1999 ISBN 0 621 28861 6	International Arbitration Bill identified for submission to Parliament during the 2004 Session
	• Domestic arbitration	2001	RP 119/2001 ISBN 0 621 31453 6	Domestic Arbitration Bill to be introduced when circumstances permit
	• Community dispute resolution structures	-	-	See Chapter 5
95	The admissibility of computer-generated evidence	-	-	Struck off
96	Apportionment of Damages Act, 1956	2003	RP 208/2003 ISBN 0 621 34987 9	See Chapter 4 Apportionment of Damages Amendment Bill to be introduced when circumstances permit
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

Project number	Title	Year of report	Reference number of published report	Result
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
100	Family law and the law of persons:			
	• Access to minor children by interested persons	1996	RP 107/1996 ISBN 0 621 175153	Recommendations to be incorporated in the Children's Bill (Project 110)
	• 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
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	Criminal Procedure Fourth Amendment Bill to be introduced when circumstances permit
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	Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 passed
	• Terrorism	2002	RP 216/2002 ISBN 0 621 33513 5	Protection of Constitutional Democracy against Terrorist and Related Activities Bill receiving the attention of Parliament
106	Juvenile Justice	2000	RP 159/2000 ISBN 0 621 30228 7	Child Justice Bill receiving the attention of Parliament
107*	• Sexual offences	2002	RP 16/2003 ISBN 0 621 33583 5	Criminal Law (Sexual Offences) Amendment Bill receiving the attention of Parliament
	• Adult prostitution	-	-	See Chapter 5
108	Computer-related crimes	-	-	Struck off

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Project number	Title	Year of report	Reference number of published report	Result
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	2002	RP 17/2003 ISBN 0 621 33584 3	Children's Bill receiving the attention of Parliament
111	Jurisdiction of magistrates' courts in constitutional matters	1999	RP 80/2000 ISBN 0 621 30062 4	Recommendations not implemented
112	Sharing of pension benefits	1999	RP 82/2000 ISBN 0 621 30060 8	Sharing of Pension Benefits Bill to be introduced when circumstances permit
113*	Use of electronic equipment in court proceedings • Postponement of criminal cases via audiovisual link	 2003	 RP 211/2003 ISBN 0 621 34990 9	See Chapter 5 See Chapter 4 Criminal Procedure Third Amendment Bill identified for submission to Parliament during the 2004 Session
114	Publication of divorce proceedings	2002	RP 217/2002 ISBN 0 621 33572 6	Publication of Divorce Proceedings Bill to be introduced when circumstances permit
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	-	-	Struck off
117	The legal position of voluntary associations	-	-	Struck off
118*	Domestic partnerships	-	-	See Chapter 5
119	Uniform national legislation on the fencing of national roads	-	-	Struck off
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*	Assisted decision-making: Adults with impaired decision-making capacity	-	-	See Chapter 5
123*	Protected disclosures	-	-	See Chapter 5
124*	Privacy and data protection	-	-	See Chapter 5
125*	Prescription periods	-	-	See Chapter 5

Project number	Title	Year of report	Reference number of published report	Result
126*	Review of the rules of evidence	-	-	See Chapter 5
127*	Review of administration orders	-	-	See Chapter 5
128*	Review of aspects of the law of divorce	-	-	See Chapter 5
129*	Review of aspects of matrimonial property law	-	-	See Chapter 5
130*	Stalking	-	-	See Chapter 5
131*	Trafficking in persons	-	-	See Chapter 5
132*	Abolition of the oath	-	-	See Chapter 3

ANNEXURE E

ISSUE PAPERS PUBLISHED BY THE COMMISSION

SOUTH AFRICAN

LAW REFORM COMMISSION

THIRTY FIRST ANNUAL REPORT 2004/05

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 discussion 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
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

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Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
19	107	Sexual offences: Adult prostitution	0 621 33159 7 July 2002
20	123	Protected disclosures	0 621 33555 X November 2002
21	121	Consolidated legislation pertaining to international cooperation in civil matters	0 621 33553 3 November 2002
22	130	Stalking	0 621 34410 9 August 2003
23	125	Prescription periods	0 621 34444 3 August 2003
24	124	Privacy and data protection	0 621 34530 X August 2003
25	131	Trafficking in persons	0 621 350168 January 2004

ANNEXURE F

DISCUSSION PAPERS PUBLISHED BY THE COMMISSION

SOUTH AFRICAN

LAW REFORM COMMISSION

THIRTY FIRST ANNUAL REPORT 2004/05

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
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

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Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
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
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

Serial number of discussion paper	Project number	Title of investigation	ISBN/ Publication date
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 illegiti-mate 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
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
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