

SALC BULLETIN

Newsletter of the South African Law Commission

The Chairperson's elevation

Both the Commission and its secretariat are proud of the Chairperson, Mr Justice Ismail Mahomed, who has been appointed as South Africa's new Chief Justice with effect from 1 January 1997. He succeeds Chief Justice Michael Corbett who has retired. At the time of his appointment Judge Mahomed was also the Chief Justice of Namibia and the President of the Lesotho Court of Appeal. During his illustrious career he was admitted to the English Bar, became Honorary Professor of Law at the University of the Witwatersrand, was appointed Vice-President of the Constitutional Court and, apart from other awards, received honorary doctorates in law from the University of Delhi and the University of Pennsylvania.

At a cocktail party held in Judge Mahomed's honour during the Commission's last meeting in November 1996, he asserted that it is not possible to exaggerate the

importance of the work of the Law Commission: it reviews the past, reforms the present and anticipates the future. He called upon the Commission to continue to play an active role in the dissemination of information. In his view the tools available to the Commission are formidable: accessibility, which is a vital part of disseminating information; the undertaking of meticulous scientific research with a view to establishing a global village as opposed to the heresy of national sovereignty, and an uncompromising commitment to integrity which is a singular quality. Judge Mahomed indicated that he has observed all these qualities among the members of the Commission and its research staff, and that he holds little doubt that the stature of the Commission will grow and with it an informed electorate.

Review of 1996

During the course of 1996 the Commission met on 23 and 24 February, 20 April, 15 June, 31 August and 29 and 30 November. Its next meeting is due to take place in April of this year.

The following investigations were completed and reports submitted to the Minister of Justice:

- Money laundering and related matters (project 104);
- Speculative and contingency fees (project 93);
- Access to minor children by

interested persons (project 100);

- Interim report on legal aspects relating to AIDS (project 85).

The following Acts emanating from draft Bills recommended by the Commission were adopted by Parliament during 1996:

- The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 which is expected to commence during the first quarter of 1997. The Act will facilitate South Africa's accession to the Hague Convention.
- The Divorce Amendment Act 95 of 1996 which commenced on 22 November 1996. The Act empowers courts, in civil divorce proceedings, to take religious requirements for the dissolution of marriages into account.
- The Criminal Procedure Amendment Act 86 of 1996 which is expected to commence on 14 February 1997. The Act contemplates the simplification of criminal procedure.
- The Criminal Procedure Second Amendment Act 85 of 1996 which commenced

on 29 November 1996. The Act deals with the applica-

- The International Co-operation in Criminal Matters Act 75 of 1996 which is expected to commence shortly. The Act regulates procedures for co-operation with foreign countries in criminal matters.
- The Proceeds of Crime Act 76 of 1996 which is expected to commence on 21 February 1996. The Act regulates procedures to restrict and confiscate the proceeds of crime and criminalises money laundering.
- The Extradition Amendment Act 77 of 1996 which is expected to commence on 17 January 1996. The Act streamlines the extradition process and enhances reciprocity in extradition relations with foreign states.

Four issue papers and eight discussion papers were also published during 1996. See this newsletter and previous editions for details.

Appointment of project committee members

The following appointments have been made to project committees:

Juvenile Justice

Ms Anne Skelton: Lawyers for Human Rights (Pietermaritzburg): Chairperson and project leader.
Ms Pat Moodley: University of Durban-Westville.
Ms Zubeda Seedat: Member of the Commission.
Ms Julia Sloth-Nielsen: University of the Western Cape.
Mr Tseliso Thipanyane: South African Human Rights Commission.
Ms Magdalene Tserere: Lawyers for

tion of the trapping system.

Human Rights (Umtata). The simplification of Criminal Procedure

Miss Justice Leonora van den Heever: Chairperson and project leader.
Prof Andreas Dhlohlho: Dean, Faculty of Law, University of Zululand.
Advocate Mike Hellens SC: Johannesburg Bar.
Mr Piet Kotze: Retired Regional Court President.
Prof Bongani Majola: Legal Resources Centre, Johannesburg.
Mr Jakes Molo: Attorney, Welkom.
Mr Justice Pierre Olivier: Member of the Commission.
Ms Asha Ramgobin: Legal Aid Centre, University of Natal.

Sentencing

Miss Justice Leonora van den Heever: Chairperson and project leader.
Mr Krish Govender: National Association of Democratic Lawyers.
Advocate Mike Hellens SC: Johannesburg Bar.
Mr Jody Kollapen: Lawyers for Human Rights, Pretoria.
Mr Motsamai Makume: Attorney, Germiston.
Ms Pat Moodley: University of Durban-Westville.
Mr Justice Pierre Olivier: Member of the Commission.
Prof Dirk van Zyl Smit: University of Cape Town.

Sexual offences by and against children

Ms Zubeda Seedat: Chairperson and member of the Commission.
Ms Charlotte McClain: University of the Western Cape.
Ms Edmara Mthombeni: Department of Correctional Services, Durban-Westville.
Mr Beema Pillay: Attorney, Durban.
Ms Evanthe Schurink: Human Sciences Research Council.
Ms Rosaline September: University of the Western Cape.
Ms Joan van Niekerk: Childline,

Durban: Project leader.

Discussion papers

Arbitration

Acting on a proposal by the Association of Arbitrators of South Africa, the South African Law Commission is currently investigating all facets of the law regarding international and domestic arbitration.

It is argued that the present South African law does not adequately provide for international commercial arbitration. The Arbitration Act 42 of 1965 contains no provisions which expressly deal with international arbitration, while the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 is limited to the enforcement of foreign awards. It is further felt that the court's statutory powers and powers of assistance and supervision during the arbitral process may be excessive. The Commission believes that an effective legislative framework for the resolution of international trade disputes should be created.

A discussion paper on International Commercial Arbitration (Discussion Paper 69) was published for general information and comment in December 1996. In this paper a holistic approach to international arbitration legislation is adopted. It includes South Africa's response to the Model Law which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) and which provides a framework within which international arbitration can be conducted. It also covers possible changes to the legislation on the New York Convention (currently set out in Act 40 of 1977), and the proposed accession by South Africa to the Washington Convention on the

Settlement of Investment Disputes between States and Nationals of Other States. The paper includes should reach the Commission by 31 March 1997. The discussion paper is obtainable free of charge from the Commission on request.

Reports

Speculative and contingency fees

The need for an investigation into contingency fees emanated from an indication by the former Chief Justice that a system of speculative fees, approved by the Association of Law Societies, is not acceptable in terms of the common law. The Commission was subsequently requested to investigate the desirability of a system of contingency fees and published a working paper for general information and comment during March 1996. A report was approved by the Commission on 30 November 1996 and submitted to the Minister of Justice early in December.

The Commission's main recommendation is that contingency fee agreements should be legalized in South African law and that common law prohibitions on such fees should be removed. A contingency fee agreement is an agreement between a legal practitioner, such as an attorney, and his or her client to the effect that the legal practitioner will charge no fees if the client's court case is conducted unsuccessfully. The system therefore implies that a litigant may, in certain instances, instruct a legal practitioner on a "no success, no pay" basis. Up to the present such a system has not been recognised in South African law due to common law restraints. It has, however, been introduced in certain legal systems abroad, mainly because of its enormous potential to promote access to justice.

The Commission concluded that a system of contingency fees in terms of which a prospective litigant is only liable to remunerate his or her legal representative in the event of

draft legislation with commentary.

Written comments or suggestions successful litigation, can contribute significantly to promote access to the courts and that such a system is desirable.

Should the client win the case, the fee payable to the legal practitioner - in terms of a contingency fee agreement - may be recovered from the proceeds of the litigation (in those cases where the claim concerned is one sounding in money) and is usually higher than the practitioner's normal fee. This is so because the legal practitioner bears the risk of not being compensated in a number of cases. In view of these risks the Commission recommends that legal practitioners, in the event of successful litigation, should be entitled to receive, in addition to their normal fees for the case in question, an uplift to a maximum of 100 per cent of their normal fees. In practice this would mean that legal practitioners will be entitled to charge double their normal fees if they conduct their clients' cases successfully.

The Commission's other recommendations involve the form and content of contingency fee agreements as well as safeguards aimed at eliminating abuse of such agreements and at protecting the interests of the public.

Legal aspects relating to AIDS

The Commission approved an interim report on aspects of the law relating to AIDS at its meeting on 29 November 1996.

The report contains recommendations on certain aspects concerning HIV/AIDS which warrant urgent intervention, and which from a scientific, medical and legal viewpoint appear to be relatively uncontroversial. The recommendations include:

- A prohibition on the use of non-disposable syringes, needles, and other hazardous material;

- the implementation, in relevant occupational legislation, of universal work place infection control measures (universal precautions);
- the statutory implementation of a national compulsory standard for condoms conforming to international standards;
- the amendment, finalisation and promulgation of the draft Regulations relating to Communicable Diseases and the Notification of Notifiable Medical Conditions, 1993 (which deschedule AIDS as a communicable disease in respect of which certain coercive measures apply);
- the promulgation of a national policy on testing for HIV/AIDS.

It should be noted that the interim report deals only with the matters indicated above. The Commission has been investigating aspects of law reform relating to HIV/AIDS since 1993. Extensive research has been done during this period. Evidence was heard from interest groups and a discussion document (Working Paper 58) was published for general information and comment during 1995. The comments on the working paper reflected differences of opinion among various interest groups. A project committee, representative of the divergent interests, was appointed during 1996 to assist in resolving the differences and in developing a draft report. The project committee employs a consultative approach in an attempt to resolve the differences. It is also following the approach of dealing

with issues incrementally in an attempt to finalise them more swiftly. The interim report is a

Money laundering under the magnifying glass

Commissioner Jeremy Gauntlett SC recently addressed the Association of Banking Lawyers of Southern Africa on the topic of money laundering at the Rand Afrikaans University. He is a member of the Commission's project committee that drafted the proposed Bill on money laundering. Money laundering is an attempt by organised crime syndicates and those involved in the international drug trade to sever or to purify money obtained from crime from any association with the original crime itself, especially by making use of electronic banking services and open financial markets.

At present South Africa experiences international pressure to address money laundering, especially in view of the tendency of countries such as South Africa to attract money obtained from crime. The question is often posed whether legislation is really necessary. The South African Police Service is currently investigating 55 cases of

product of this approach. Subsequent interim reports will deal with other matters identified for money laundering. The SAPS admits that an accurate estimate of the extent of money laundering in South Africa is not possible - simply because there is no system that can be used to trace money laundering. The extent of money laundering is conservatively estimated to be in the region of R151 million. Of the 55 cases only one is receiving the attention of an attorney-general.

Los Angeles and Miami have found that the moment when control over money laundering was intensified, the movement of money in one of the cities decreased by 500 million dollars. In the USA the extent of money laundering was estimated in 1987 to be 300 billion dollars - an amount that has surely doubled since then.

The argument is also advanced that money has no "smell", and that a developing country such as South Africa should not be fastidious as to whose money it receives. Once a country's financial system has, however, been infiltrated, cleaning up at a later stage proves to be very difficult. Such money also does not assist development. Money from crime always locates the closest country with the weakest control. The money therefore suffers from inherent instability and any capital may subsequently leave a country just as quickly as it entered.

Apart from the Drugs and Drug Trafficking Act of 1992 there is no way in which the community can recover the proceeds of crime. With sufficient support from government the contemplated legislation ought to alleviate the severity of the situation.

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reform.

Members of the Commission

The Chairperson is Judge Ismail Mahomed, former Vice-President of the Constitutional Court. The Vice-Chairperson is Judge Pierre Olivier, a Judge of the Appeal Court. The full time member is Professor Thandabantu Nhlapo. The other members are Judge Yvonne Mokgoro, a judge of the Constitutional Court, Advocate Jeremy Gauntlett SC from the Cape Bar, Ms Zubeda Seedat, an attorney practising in Durban, and Mr Phineas Mojapelo, an attorney practising in Nelspruit.

Invitation

Interested parties are invited to submit proposals for law reform and information in respect of projects to the Commission.

The Commission's offices are situated at 228 Visagie Street, Pretoria.

The postal address is Private Bag X668, Pretoria 0001.

Tel: (012) 322-6440
Fax: (012) 320-0936
E-mail: salawcom@cis.co.za

Some of the Commission's documents are also available on the Internet. The site address is:

<http://www.uct.ac.za/law/salc/salc.htm>

The Commission's office hours are from 07:15 to 15:45 on Mondays to Fridays.

THE COMMISSION AND ITS STAFF MEMBERS WISH ALL BULLETIN READERS A PROSPEROUS AND ENRICHING NEW YEAR !