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SALRC BULLETIN

Newsletter of the South African Law Reform Commission

10 Years of Democracy

Law reform agencies have a vital role to play in the development of legal systems: they review the past, reform the present and anticipate the future. While this is true of most law reform agencies, it has been particularly true of the South African Law Reform Commission over the past ten years at a time when the justice system is being transformed. For a long time in our history there has been a major discrepancy between the content of the law and the ideal of justice.

The Law Reform Commission is a bridge between the people and the law. To remain relevant and useful to the community it serves, and to provide government with pragmatic advice, law reform must be backed by extensive research and effective public consultation. Consultation is required to ensure that the law reform process is consistent with the principles of participatory democracy where the law is influenced by those it affects. This will ensure that the law evolves in a manner that is in tune with society. Laws that are derived from consultation are also more likely to function effectively and to be accepted by the community. Since 1994 the Commission has made every effort to involve the community in the Commission's activities at grassroots level. A number of measures have been implemented to develop public participation in the Commission's activities.

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 comments. 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

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

In the September 2003 Bulletin it was reported that 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 ALRAESA.

The first general meeting of ALRAESA after its formal establishment was held in Cape Town on 2 March 2004. The general meeting was followed by a workshop on developing trends in law reform. Papers were presented on the following topics:

- Constitutionalism and law reform (Mr J Kollapen, Chairperson: South African Human Rights Commission)
- Anti-terrorism: Balancing human rights and security (Judge C Howie, President of the Supreme Court of Appeal
- Falling through the net: Surviving the information revolution (Ms A Louw, Researcher: SA Law Reform Commission
- Trafficking in persons: An international perspective (Ms L Stuurman, Researcher: SA Law Reform Commission
- International methods for harmonizing domestic law (Prof T Bennett (UCT)
- New trends in the reform of customary law: Reform Commissions and the courts (Prof R T Nhlapo, former Commissioner of SA Law Reform Commission)
- Is the improvement of women's rights best advanced through law reform? (Ms M O'Sullivan, Director: Women's Legal Centre)
- IT technology and research (Ms K Pillay, Information System Management, Department of Justice and Constitutional Development)

The general meeting and workshop were significant events which created the possibility to extend the membership of the Association and 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 conference was highly successful.

Issue Papers

Since publication of the previous Bulletin, one Issue Paper has been published for general information and comment.

Trafficking in Persons (Issue Paper 25)

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.

The closing date for comment on Issue Paper 25 was 31 March 2004.

Discussion Papers

The following Discussion Paper has been published for general information and comment:

Assisted Decision-Making: Adults with Impaired Decision-Making Capacity (Discussion Paper 105)

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.

The closing date for comment on Discussion Paper 105 was 31 March 2004.

The Issue Paper and Discussion Paper are available on request and are free of charge. Correspondence should be addressed to:

The Secretary
SA Law Reform Commission
Private Bag X668
PRETORIA
0001

Telephone: (012) 322-6440
Fax: (012) 320-0936

The Issue Papers are also available on the Internet at
www.law.wits.ac.za/salc/salc.html

On 1 June 2004 the Commission approved the following Discussion Papers which will be published soon:

Consolidated Legislation Pertaining to International Co-operation in Civil Matters (Discussion Paper 106)

There is a dire need to review existing legislation in the area of consolidated legislation intended to promote international co-operation in 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.

In response to this the legislature enacted various pieces of legislation providing for international co-operation in civil matters. This is achieved by way of designation of countries under the different pieces of legislation. To date only a few countries have been designated under the various pieces of legislation for the purpose of co-operation in civil matters.

The introduction of statutory enforcement procedures was intended to overcome the cumbersome common law procedures but these have proved ineffective due to the limited number of designations. For example, in respect of judgments relating to money, Namibia is the only country designated under enabling regulations as a country with reciprocal enforcement procedures.

A similar situation prevails in respect of the enforcement of other types of civil judgments such as maintenance orders. The relevant Act applies only to a limited number of designated countries. This means that maintenance orders emanating from countries which are not designated under the Act cannot be enforced in South Africa. This exclusion applies to most countries. The reciprocal service of legal documents is hindered by the same issue of designation.

The necessary pieces of legislation exist in our statute book but are not achieving their purpose. The first possible reason is that there are too many statutes governing this area, thereby complicating rather than facilitating the process of co-operation. The second possible reason is that the relevant statutes operate on the basis of designation of foreign countries thereby excluding most countries from their application.

The other problem identified is that in certain situations more than one statute governs a particular procedure. This creates confusion and uncertainty in an already complex area of law.

The Discussion Paper focuses mainly on three aspects of international co-operation:

- The recognition and enforcement of foreign judgments.
- The reciprocal service of legal documents.
- Mutual assistance in the obtaining of evidence.

The Discussion Paper discusses the various pieces of legislation and the limited extent of their application, thereby highlighting their shortcomings and inadequacies. It is clear that current statutory enforcement has limited scope thereby rendering it ineffective. The Discussion Paper identifies the gaps, overlaps, inadequacies and obstacles which hinder progress in this area.

Possible remedies to these problems are also recommended in the Discussion Paper. The recommendations include accession to the relevant Hague Conventions; the provision of a uniform procedure relating to the obtaining of foreign evidence; making the procedure for service of documents abroad applicable to all foreign states; clarity regarding the common law; clarity regarding the international competence of foreign courts; amendments to the Prescription Act; amendments to the Protection of Businesses Act; the use of only one statute for the enforcement of foreign maintenance orders; and amendment of the Foreign Civil judgments Act.

Protected Disclosures (Discussion Paper 107)

The main focus of the investigation is the possibility of extending the ambit of the Protected Disclosures Act 26 of 2000 (the PDA) beyond the strict employer/employee relationship.

The purpose of the PDA is to provide for procedures and to offer protection to employees who blow the whistle on their employers. It aims to put in place a mechanism through which persons can make disclosures in the public interest that are protected, and therefore to prevent any person from being subjected to victimisation or occupational detriment as a result of the disclosure. The PDA was enacted with a view to creating a culture in which employees may in a responsible manner disclose information of criminal or other irregular conduct in the workplace 'by providing comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures'. Another aim of the statute is to 'promote the eradication of crime and misconduct in organs of state and private bodies'.

The PDA purports to protect employees from the victimisation of employers. It has three main objects, which are to—

(i) provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer;

(ii) protect an employee, whether in the public or the private sector, from being subjected to an occupational detriment on account of having made a protected disclosure; and

(iii) provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure.

Against the above background the Commission on a preliminary basis proposes, among others, the following:

- The ambit of the PDA should be extended beyond the strict employer/employee relationship to include independent contractors, consultants, agents and other such workers. This would considerably extend the legal environment in which disclosures may safely be made. Comment is invited on the further extension of the protection of the Act to all persons, ie the introduction of what is provisionally termed *citizens' whistleblowing*.
- The list of forms of victimisation should be left open-ended to allow additional forms, bearing in mind that any form of victimisation suffered by a whistleblower will inevitably have to be shown to be related to an act of *whistleblowing*. Further, the definition of 'occupational detriment' should be extended to include reprisals such as defamation actions; suits based on the alleged breach of a confidentiality agreement or duty; and the loss of a contract or the failure to acquire a contract.
- The PDA should provide for the exclusion of criminal and civil liability on making a protected disclosure.
- Where the identity of a whistleblower is known, it should as far as possible be kept confidential and protected.
- Section 4 of the PDA should be amended to provide expressly for claims for damages with no ceiling; and courts and tribunals should be directed to take into account the actual loss suffered by a claimant when awarding damages.
- It is proposed that, without reducing the existing flexibility of section 4 of the Act, the PDA should expressly provide for

specific remedies such as interdicts, including mandatory interdicts.
- The PDA should not criminalise the act of knowingly making a false disclosure, and nor should it make it an offence for an employer to subject a person to an occupational detriment.

Reports

The following three reports were approved by the Commission on 6 March 2004:

Sentencing: A Compensation Fund for Victims of Crime

The Commission's final conclusions and recommendations 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 -

(a) develop and provide support services for victims of crime;
(b) 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;
(c) promote awareness of the needs of victims of crime;
(d) develop standards and provide training for providers of services;
(e) provide information on matters affecting victims;
(f) do research and develop policy on and undertake projects relating to matters affecting victims of crime;
(g) administer the Fund for Victims of Crime; and
(h) 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 -

(a) establishing, developing and co-ordinating services for victims of crime;
(b) promoting the implementation of the Victim Charter of Rights;
(c) 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;
(d) promoting access to justice and victim participation in the justice system and developing the law, policies and programmes through research and consultation;
(f) promoting legislative reforms designed to address the needs of victims of crime and articulate their role in the criminal justice system; and
(g) promoting the implementation of the Basic Principles of Justice for Victims of Crime.

Statutory Law Revision: Repeal of the Black Administration Act

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 Africans and was one of the principal mechanisms for regulating the lives of Africans 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.

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.

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 andOctober 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. This 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 of 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 to 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 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 of 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 emphasizes 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 Reports are available on the Internet at http://www.law.wits.ac.za/salc/salc.html

Programme of the Commission

The following projects on the Commission's programme are currently receiving attention:

25	Statutory law revision
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 cooperation 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

Invitation

The public is invited to submit proposals for law reform to the Commission and to give information in respect of any of the projects of the Commission.

The Commission is housed in the Sanlam Centre (12th Floor), c/o Andries and Schoeman Streets, Pretoria.

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Internet

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http://www.law.wits.ac.za/salc/ salc.html

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