

## 2009: THE YEAR IN REVIEW

### INSIDE THIS ISSUE:

**NEW PRIVACY  
LAW PROPOSED** 2

**HINDU  
MARRIAGES** 2

**SEXUAL  
OFFENCES** 3

**PROJECT 25:  
STATUTORY  
REVISION** 4

**LAW REFORM  
ESSAY  
COMPETITION** 5

**WHO'S WHO:** 6

**REQUESTING  
AN  
INVESTIGATION** 7

### SPECIAL POINTS OF INTEREST:

- **Stalking Report Released**
- **Public Consultation**
- **Visits by Foreign Institutions**
- **Interaction with Government**
- **South Africa's new Public Protector**

### PROMOTING LAW REFORM

Welcome to our first newsletter of 2010. In this issue, we launch our "new-look" newsletter and present a selection of Commission activities of the past year.

It provides an informative read of highlights from 2009, and I think, an optimistic herald for 2010.

#### What we do?

Simply, the Commission's task is law reform. We recommend reforms to develop, improve and modernize the law in South Africa.

In achieving its objectives, the Commission is committed to the core values of equality, integrity, inclusiveness, professionalism, and impartiality.

#### What we did in 2009?

In carrying out its tasks in 2009, the Commission played a leading role in various pio-

neering research investigations including privacy and data protection, adult prostitution, Hindu marriages, stalking, statutory law revision and assisted-decision making.

With the aim of engaging with the public, consultative workshops were held on two major Commission investigations: (i) adult prostitution and (ii) the practice of *ukuthwala*.

In addition, the Commission interacted with Government on issues relating to gender equality and customary law. As a member of the international law reform community, the Commission engaged with various law reform agencies and foreign institutions and hosted delegations from Indonesia, Vietnam, Zambia, Somaliland, and Nigeria.

#### Keeping you informed

As the Commission begins its 37<sup>th</sup> year of work with renewed vigour and sense of enthusiasm, we aim to keep you informed of our projects and activities in reforming the law through a number of communication channels, including our website, engaging and informative newsletters (published twice annually), consultations, workshops, and Commission publications such as issue papers, discussion papers and reports.

We would appreciate your views on this issue and welcome suggestions/comments on our work. Write to us at: [reform@justice.gov.za](mailto:reform@justice.gov.za).

*Nerisha Singh*

Editor: Newsletter  
and Senior Researcher  
SA Law Reform Commission

### FROM THE SECRETARIAT

#### Getting Involved

A comprehensive and open process of consultation is an important part of the Commission's work and we therefore value the views of as many people as possible.

In 2009 a high level of community engagement took place after publication of the [Discussion Paper on Sexual Offences: Adult Prostitution](#). In addition, extensive community

participation heralded the publication of the pioneering research document, [Report on Privacy and Data Protection](#). A unique way of consulting in the Commission's extensive statutory law revision project, is by submitting Consultation Papers setting out preliminary proposals to relevant government departments. In 2009, Consultation Papers were submitted to the Departments of

Co-operative Governance and Traditional Affairs; Energy; and Labour.

In placing high emphasis on community participation in the law reform process, the Commission remains open to any initiatives to improve access to justice and the process of law reform.

*Michael Palumbo*

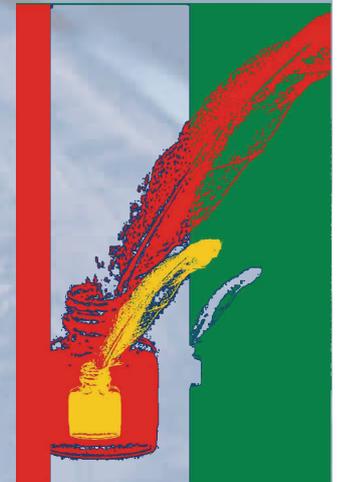
Secretary  
SA Law Reform Commission

## NEW PRIVACY LAW PROPOSED FOR SOUTH AFRICA

The Commission's *Report on Privacy and Data Protection* was published in August 2009. The report contains the Commission's final recommendations for a framework for the protection of personal information in South Africa, as well as a draft proposed Bill, the *Protection of Personal Information Bill*. The recommendations and draft legislation are the result of a thorough consultation process and

many years of research in the area. The Bill has been submitted to the Minister of Justice and Constitutional Development, who has sought and obtained Cabinet approval to table it in Parliament. The Bill (B9/2009) is currently being deliberated by the Justice Portfolio Committee. It can be accessed at <http://pmg.org.za> or obtained from Parliament, the Government Printers or the Commission.

A key recommendation by the Commission is that privacy and information protection will be regulated by a general information statute, with or without sector specific statutes, supplemented by codes of conduct. Should the recommendations contained in the Bill be adopted by Parliament, the protection of information privacy in South Africa will be in line with our international obligations in terms of prescribed adequacy requirements.



## CUSTOMARY LAW

The promulgation of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 will constitute a major milestone towards the attainment of gender justice and poverty alleviation in South Africa.

This Act emanates from the Commission's *Report on the Customary Law of Succession*.

The Act introduces funda-

mental changes to the customary law of succession in that it aims to abolish the customary rule of male primogeniture in so far as it applies to the law of succession and to bring it in line with the Constitution.

This principle disqualifies widows from inheriting intestate estates of their spouses, daughters and extra-marital children from

benefiting from the intestate estate of their fathers. Some of the benefits under the Act include: women and children will inherit the intestate estates of their husband and fathers; women in related and supporting marital unions will also inherit. In addition, the Act provides a for a mechanism for resolving disputes which could arise in the devolution of the property.

## VISION

**To be a centre for excellence, producing groundbreaking research pivotal to the improvement and renewal of the legal system of South Africa.**

## HINDU MARRIAGES

South African law does not recognise marriages by Hindu rites. As a result, legal consequences of a marriage do not apply to such marriages. Spouses of a Hindu marriage for example cannot claim any of the legal consequences of divorce, such as maintenance.

The aim of this investigation is to look into the recognition of Hindu marriages in South Africa in order to afford such marriages full legal recognition and the same status as marriages concluded in accordance with civil rites. In September 2009, a four-member Advisory Committee

was appointed to assist the Commission. The committee is now seeking the appointment of an additional member with expertise on Hindu Personal Law. The committee envisages presenting a draft Discussion Paper for consideration by the Commission at the end of March 2010.



## SEXUAL OFFENCES: ADULT PROSTITUTION

The Commission's investigation seeks to explore legal responses to adult prostitution with a view to recommending to government a response that is more effective, upholds human dignity and is aligned with South Africa's constitutional and international human rights obligations. The primary aim of the investigation is to consider the need for law reform on adult prostitution and to identify alternative

policy and legislative responses that might regulate, prevent, deter or reduce prostitution. Under South African legislation voluntary selling of adult prostitution, buying of voluntary adult sex and all prostitution related acts are criminal offences. In May 2009, the Commission published the *Discussion Paper on Sexual Offences: Adult Prostitution* for public comment.

The release of the Discussion Paper will be followed by a Report which will contain the Commission's final recommendations and will be accompanied by legislative proposals on adult prostitution. The Commission followed up the release of the Discussion Paper with a number of workshops and focus group meetings around South Africa. The aim of the discussion paper and the work-

shops was to elicit comments to assist the Commission in preparing the report and draft legislative proposals. The response to the Discussion Paper was welcoming with the research team receiving over 2600 submissions. The research team is currently collating these submissions. Focus group meetings with relevant Government and other stakeholders will be held in the course of this year.

## ASSISTED DECISION-MAKING

The Commission is currently engaging in further research to establish the impact of the Convention on the Rights of Persons with Disabilities (2006) on its draft proposals in order to ensure that they are compatible with the Government's unreversed ratification of the Convention. The Commission's research and consultation supported a conclusion that a change to the

law is necessary to establish an affordable, accessible and flexible alternative for the current curatorship system. In addition to this, the introduction of a mechanism to assist persons who need or wish to plan in advance for future support with decision-making is regarded as essential to alleviate problems currently experienced in this regard.

## STALKING REPORT RELEASED

After extensive consultation and an analysis of existing criminal and civil law remedies in our law and in comparative law, the Commission released its *Report on Stalking* in November 2008. The report contains recommendations for law reform, including a draft *Protection from Harassment Bill*.

The proposed draft Bill provides a specific civil remedy for stalking aimed at interrupting the stalker's pattern of behaviour before physical harm to the victim occurs. The remedies include the issuing of a protection order coupled with a suspended warrant of arrest. The Bill defines harassment as un-

reasonably engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the victim. The *Protection from Harassment Bill* has been approved by Cabinet and is scheduled for discussion in Parliament during the course of 2010.

## MISSION

The continuous reform of the law of South Africa in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law.



## VALUES

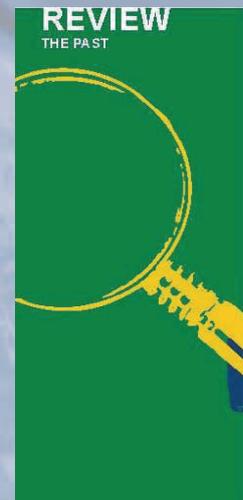
In the execution of its duties the SALRC strives to uphold the values of integrity, inclusiveness, professionalism, impartiality, excellence, responsiveness, efficiency and respect for the dignity of others.

## PROJECT 25: STATUTORY REVISION

In 2004 the Commission included in its law reform programme an investigation into the revision of the statute book from 1910 to date to identify all redundant and obsolete provisions or provisions which infringe the equality provisions of the Constitution. In terms of methodology, the Commission identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary

findings and proposals in a consultation paper and consults with that Department to verify the Commission's preliminary findings and proposals. The Commission then undertakes the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the Commission, it is published for general information and comment. Finally, the Commission develops a report in respect of each Department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

In 2009, the Commission approved a report proposing the repeal of a number of statutes administered by the Department of Transport. A draft report on the legislation administered by the Department of Human Settlements will be finalised shortly. Consultation papers have also been submitted to a number of Departments, including Labour and the Department of Energy. A list of Departments reviewed and [discussion papers published to date is available on the Commission's website.](#)



## COMMISSION NEWS

### VISITS BY FOREIGN INSTITUTIONS

In 2009, the Commission interacted with a number of foreign institutions involved in law reform. These interactions provided an opportunity for a meaningful exchange of ideas and relevant comparative research.

The following visits were hosted in 2009:

**\*Indonesia**

In March 2009, at the request of the United Nations

Development Fund for Women, the Commission hosted an Indonesian delegation to share good practices on efforts to eliminate violence against women. The delegation presented information on their new and emerging laws relating to women and children in view of their Constitution, and in turn were briefed on various Commission projects

**\*Vietnam**

In September 2009, the Commission hosted a delegation from the Law Committee of the National Assembly of Vietnam who were briefed on our working methodology processes.

**\*Nigeria**

In November 2009, the Commission hosted the Secretary of the Nigerian

including Sexual Offences: Adult Prostitution; Stalking; Domestic Violence and Hindu Marriages.

**\*Zambia**

In April 2009, the Commission hosted a delegation from the Zambian Law Development Commission to share expertise on reviewing child-related laws.

**\*Somaliland**

In July 2009, the Commis-

sion hosted a delegation of Commissioners from the Somaliland Law Reform Commission. The visit included briefings on the Commission's role in the parliamentary process; a talk by the Deputy Minister of Justice and Constitutional Development; and a visit to the Centre for Human Rights, University of Pretoria.

Law Reform Commission, Mrs A Cocker and Librarian, Mr TE Ogbabila.

In addition to exchanging information on working methodology and Commission activities, the delegation attended a round table discussion hosted by the Commission on the practice of *ukuthwala*.



## ISMAIL MAHOMED LAW REFORM ESSAY COMPETITION

The Ismail Mahomed Prize for Law Reform is a joint venture between the Commission and Juta & Co. The competition, established in honour of the late Chief Justice and former Chairperson of the SA Law Reform Commission, is an annual initiative of the Commission. The aim of the competition is to encourage critical legal writing by students, while generating new innovative ideas for the reform of the law. The competition in-

volves the submission of essays by law students on any topic relating to the modernisation, improvement, development or reform of any branch of South African law.

The joint winners of the 2008 competition were announced at a ceremony held at the Constitutional Court in July 2009. They were Ms S Harvey, a final year student (University of Cape Town) for her essay "Closing a Loop-hole in the Labour Relations

Act: The Constitutionality of s198"; and Mr C McConnachie, a third year LLB student (Rhodes University) for his essay "With such changes as may be required by the context: Section 13 of the Civil Union Act. Absurdity and Gender Discrimination in the Legal Consequences of Marriage".

Both winners received vouchers worth R10,000 each from Incredible Connection, sponsored by Juta&Co.



Mr Chris McConnachie (joint winner); Ms Han-marié Marshall-van Zyl (Student Books Publisher: Juta Law); Suzanna Harvey (joint winner); Judge Y Mokgoro (Chairperson: SA Law Reform Commission); Mr F Mdumbe (SALRC), Mr W Staples (Marketing Manager: Juta Law), Judge W Seriti (Vice-Chairperson: SA Law Reform Commission)

## PUBLIC CONSULTATION WORKSHOPS IN 2009

\*Sexual Offences: Adult Prostitution  
The Discussion Paper on Sexual Offences: Adult Prostitution was published for comment by the Commission in May 2009. The Commission hosted a series of workshops in 2009 with the purpose of engaging the public in discussing the proposals contained in the Discussion Paper and to focus on law reform initiatives in this regard. The following

workshops were held in 2009:—Pretoria, 19<sup>th</sup> May; —Johannesburg, 26<sup>th</sup> May; —Cape Town, 28<sup>th</sup> May; —Durban, 2<sup>nd</sup> June; —Mokopane, 11<sup>th</sup> June; —Kimberley, 25<sup>th</sup> June; —Port Elizabeth, 30<sup>th</sup> June; —Nelspruit, 9<sup>th</sup> July

\*The practice of ukuthwala  
As part of a preliminary investigation to determine whether the practice of *ukuthwala* should be included in the Commission's

law reform programme and in an effort to gather information, the Commission hosted a roundtable at its offices in Pretoria in November 2009. The practice of *ukuthwala* involves "abduction" of a prospective bride by her suitor or his friends to his homestead. The discussions explored various issues including the magnitude and nature of the practice; the current legal protections available to women and young girls and the need for law reform.

**"The Commission relies extensively on the cooperation of institutions and persons who have an interest in its investigations for the efficient performance of Commission functions"**

## INTERACTION WITH GOVERNMENT

The Commission has interacted with government on various matters including:  
\*Gender Equality:  
Ms Carien Pienaar, a Senior State Law Adviser at the Commission, is a member of the *Gender Equality Task Team* set up by the Department for Women, Children and Persons with Disabilities

for the purposes of making recommendations on gender equality legislation. Ms Pienaar completed research for the task team by exploring various issues on gender equality and development, and is currently advising the task team on an ad-hoc basis.

\*Customary law:

Ms Maureen Moloi, a Principal State Law Adviser at the Commission and researcher on customary law, was appointed to the inter-departmental *Task Team on Judicial Functions of Traditional Leaders: Policy Formulation*. The task team was established in 2006 to advise on the implications of

conferring civil and criminal jurisdiction on traditional leaders, formulate policy proposals and draft legislation relating to this matter. The task team has submitted a policy framework to Cabinet and the Traditional Courts Bill [B 15–2008] is currently before Parliamentary committees.

## WHO'S WHO: MS DELLENE CLARK

Prior to her appointment at the Commission Ms Clark was employed in the South African Police Legal Services. Ms Clark, a Principal State Law Adviser, is an admitted advocate of the High Court of South Africa and her educational qualifications include: BLC, LLB and LLM from the University of Pretoria and a B.Comm (Hon) from the University of Cape Town.

### Major research projects:

\*Protected Disclosures—

Project 123: In 2007, Ms Clark completed the report and draft amendments to the Protected Disclosures Act 2000.

\*Sexual Offences—Project 107: Ms Clark was assigned to the sexual offences project in 1999 and research she completed formed part of the following Commission publications: Discussion paper on Sexual Offences: The Substantive Law (1999); Discussion paper on Sexual Offences: Process

and Procedure (2001); Report on Sexual Offences (2002); and Discussion paper on Sexual Offences: Adult Prostitution (2009).

\*Stalking—Project 130: Ms Clark was assigned to lead the research into stalking in 2003. The Commission published an issue paper in 2003, a discussion paper in 2004 and the Report on Stalking with a draft Bill in 2006. The draft Bill has been tabled in Parliament for debate in 2010.



Ms Dellene Clark

## WHO'S WHO: MR TSHEPANG MONARE

Mr Monare was appointed as Senior State Law Adviser to the Commission in May 2008. Mr Monare is an admitted advocate of the High Court of South Africa. Prior to joining the Commission, Mr Monare was employed as a lecturer at the University of North- West, Potchefstroom. Mr Monare's legal career began at the Centre for Applied Legal Studies at the University of Witwatersrand

as a legal intern at the AIDS Law Project (1998). His work experience also includes stints as a prosecutor at Soweto Magistrates Court (1999) and at the Military Court, Bloemfontein (2001).

### Major research projects:

\*Harmonization of Prescription Periods—Project 125: Mr Monare is currently leading research in the Commission's investigation into the harmonization of existing laws providing for different

prescription periods.

### \*Statutory Law Revision—Project 25:

Mr Monare was assigned to the statutory law revision project in 2008 where he is currently reviewing legislation administered by the Department of Trade and Industry.

### \*Access to Justice—Pre-investigation:

Mr Monare is currently conducting a preliminary investigation on Access to Justice.



Mr Tshepang Monare

## SOUTH AFRICA'S NEW PUBLIC PROTECTOR

In October 2009, the Commission's Full-Time Commissioner, Ms Thuli Madonsela was appointed as South Africa's third Public Protector. Ms Madonsela is the country's first female head of a government watchdog and was appointed by President Jacob Zuma after being unanimously recommended

by a multi-party committee of MPs.

Ms Madonsela was appointed to the Commission in 2007 and during her tenure, she managed the Commission's research programme and also served as the project leader for specific Commission projects including Statutory Law Re-

vision (project 25); Review of the Interpretation Act 1957 (project 25) as well as being co-project leader for Sexual Offences: Adult Prostitution (project 107). The Commission and staff, who will miss her dearly, congratulate Ms Madonsela on her appointment and wishes her every success.

**"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"**

## SUBMIT YOUR LAW REFORM PROPOSALS

### REQUESTING AN INVESTIGATION



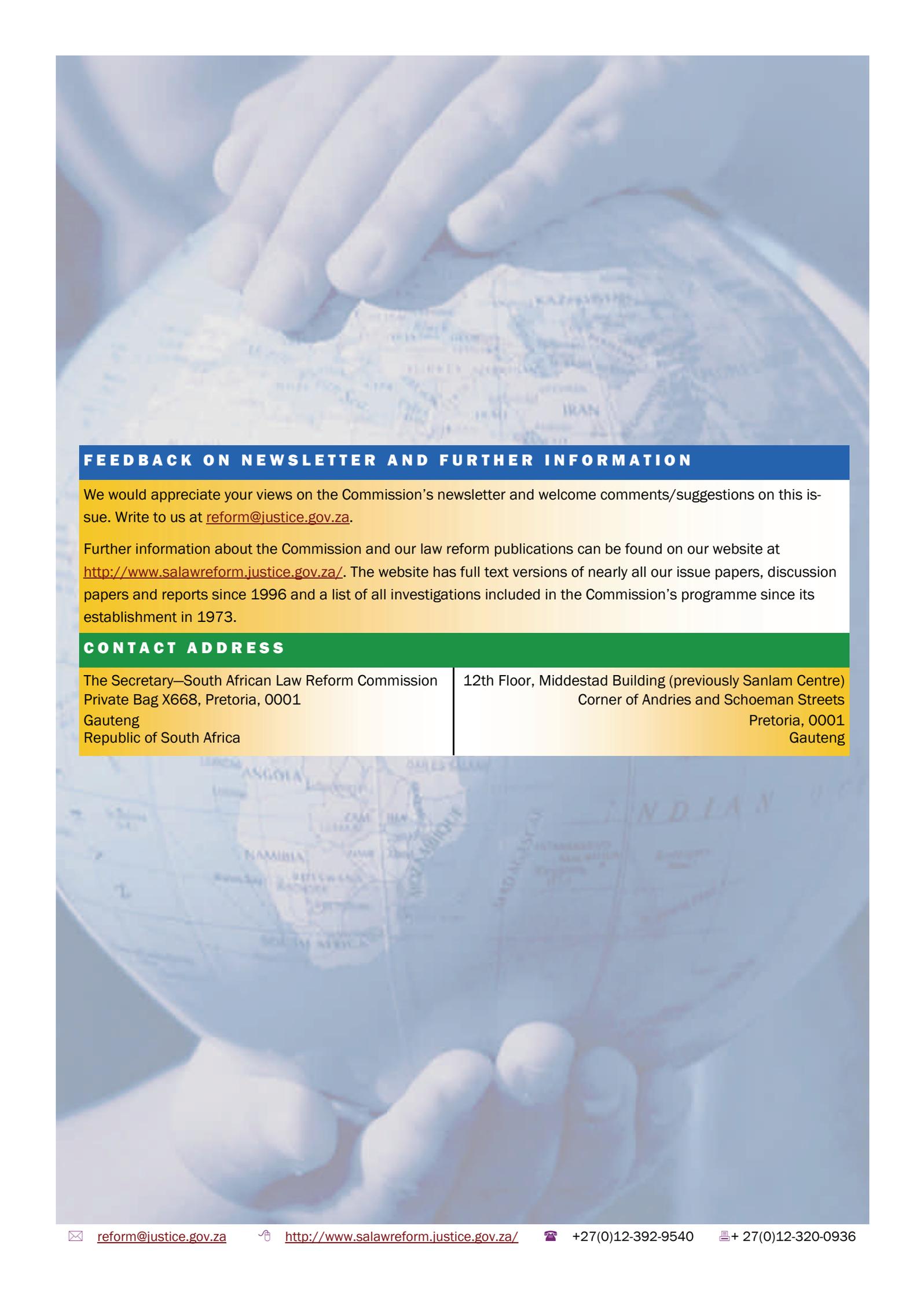
Any person or body is free to submit proposals for law reform to the Commission. In each case the Commission considers the merits of a proposal. In some instances a preliminary inquiry is instituted to determine whether the inclusion of a matter in the Commission's programme is justified. The Commission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

### SELECTION CRITERIA FOR INCLUSION OF AN INVESTIGATION IN THE COMMISSION'S PROGRAMME

The selection criteria provides for a two-phased process to determine the inclusion of an investigation in the Commission's programme. The first set of criteria is used to determine whether a proposal should be rejected even before a pre-investigation is done. It creates a sifting mechanism to reduce the number of pre-investigations. If the proposal does not meet the initial criteria set for inclusion, it is rejected and a recommendation on this basis is made to the Commission for consideration. However, where the initial criteria are met, a pre-investigation is indicated and the second set of criteria is then used to evaluate the proposal and to determine the ultimate inclusion or rejection of the proposal. Whereas all the initial criteria need to be met when deciding whether to go ahead with a pre-investigation, a proposal need not meet all the secondary criteria to be included in the programme. All the criteria in the second phase are considered and such weight is attached to a specific matter as the Commission deems appropriate in the circumstances of each case.

For details on the selection criteria, see <http://salawreform.justice.gov.za/request.html>



## FEEDBACK ON NEWSLETTER AND FURTHER INFORMATION

We would appreciate your views on the Commission's newsletter and welcome comments/suggestions on this issue. Write to us at [reform@justice.gov.za](mailto:reform@justice.gov.za).

Further information about the Commission and our law reform publications can be found on our website at <http://www.salawreform.justice.gov.za/>. The website has full text versions of nearly all our issue papers, discussion papers and reports since 1996 and a list of all investigations included in the Commission's programme since its establishment in 1973.

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