

2**OBJECTS, CONSTITUTION AND FUNCTIONING****Establishment of the Commission**

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

The objects of the Commission

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

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

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

Constitution of the Commission

The members of the Commission are appointed by the President.

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

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

objects of the Commission.

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

Chairperson

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

Vice-Chairperson

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

Other members

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

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

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

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

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

Committees

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

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

Working committee

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

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

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

Project committees

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

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

Secretariat of the Commission

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

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

Ms D M Clark (Senior State Law Adviser)

Mr M B Cronje (Principal State Law Adviser)

Ms S Govender (Senior State Law Adviser – appointed in the period under review)

Ms C T Hartley (Senior State Law Adviser – appointed in the period under review)

Ms A-M Havenga (Principal State Law Adviser)

Mr G O Hollamby (Principal State Law Adviser)

Ms L J Jankie (Senior State Law Adviser – appointed in the period under review)

Ms C P Kimble (Senior State Law Adviser)

Ms A M Louw (Principal State Law Adviser)

Ms P A Matshelo-Busakwe (Principal State Law Adviser)

Ms G M B Moloi (Senior State Law Adviser)

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

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

The librarian is Ms M A Kgasago.

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

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

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

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

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

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

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

Financing of the Commission

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

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

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

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

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

Programme

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

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

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

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

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

Working methods

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

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

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

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

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

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

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

Commission papers and committee papers

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

Commission.

Issue papers

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

Discussion papers

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

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

Reports

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

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

Papers in the Commission's research series

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

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

Meetings

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

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

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

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

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

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

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

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