

## **REPORTS COMPLETED**

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

### **Project 73: Simplification of criminal procedure: Sentence Agreements**

The Criminal Procedure Act, because it gives a wide discretion to the prosecution, directly and indirectly, provides for plea agreements. What it does not provide for, however, is sentence agreements. There are studies which show that plea (and even sentence) negotiation takes place in South Africa and performs an important part in our criminal justice system.

There are two types of sentencing agreements: The one is where the prosecution, in exchange for a plea of guilty, undertakes to submit to the court a proposed sentence or agrees not to oppose the proposal of the defence. This type is known in our law. The agreement has no effect on the court and does not require any particular action from the court. The court can ignore the agreement or implement it. If it ignores the agreement, the plea of guilty stands, so does the sentence. The Commission concludes that there is no reason why this procedure should be dealt with by way of legislation. The second type is the case where the accused agrees with the state to plead guilty provided an agreed sentence is imposed and in the Commission's view it is this type of agreement that should be legalised and regulated.

A procedure which provides for sentence agreements will have important advantages for the criminal justice system. A serious problem in the criminal justice system is the backlog in courts and the inability of the Legal Aid Board to finance the defence of the indigent. A system which formalises plea agreements and which makes the outcome of the case more predictable will make it easier for practitioners to allow their clients who are guilty to plead guilty. Protection of the victim against publicity and against having to be subjected to cross-examination has also become a sensitive issue. Plea agreements may limit such exposure. The practice of plea negotiation in South Africa could therefore make an important contribution to the acceleration of the process. Statutory measures are provided to meet legitimate objections so that the procedure could eventually be used to improve the effectiveness of the system of criminal law, while still maintaining established legal principles.

The Commission recommends that sentence agreements be recognised statutorily and that legislation provide for the following principles and procedure:

- The prosecutor, subject to the directives of the National Director of Public Prosecutions, and an accused may enter into an agreement in respect of a plea of guilty to the offence charged or to an offence of which the accused may be convicted on the charge and an appropriate sentence to be imposed by the court if the accused is convicted of that offence.
- The agreement must be reached before the plea.
- Such an agreement will be binding on both the accused and the prosecution once accepted by the court.
- The agreement must be in writing and must state that, before conclusion of the agreement, the accused has been informed that he or she has the right to be presumed innocent and to put the State to task of proving his or her guilt beyond reasonable doubt; to remain silent and not to testify during the proceedings; and not to be compelled to give self-incriminating evidence.
- The agreement must state fully the terms of the agreement, including the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made.
- The presiding officer must ensure that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts, which rights have to be explained to the accused before the agreement is concluded.
- If an agreement is reached, the sentence agreement is disclosed to the court and once the court is satisfied that the agreed sentence is appropriate the accused is requested to plead.
- The court, before convicting the accused, must question the accused to ascertain whether the accused understood his or her rights, that the agreement was entered into freely and voluntarily and that the plea is in conformity with the facts. In other words, a procedure similar to that provided for in section 112 (1) (b) and (2) of the Criminal Procedure Act comes into operation.

- If the court accepts the agreement, the accused is found guilty in terms of the plea and the agreed sentence is imposed.
- If the court is of the view that it would have imposed a lesser or heavier sentence than the agreed sentence, the court must inform the parties of the lesser or heavier sentence which it considers to be appropriate.
- Where the parties have been informed of the lesser or heavier sentence, the prosecutor or the accused, as the case may be, may abide by the agreement or withdraw from the agreement, and in the latter event the trial must proceed *de novo* before another presiding officer. In such a case the agreement is to be regarded *pro non scripto*; no admissions contained in the statements are admissible against the accused; the prosecutor and the accused may not enter into a similar agreement and the prosecutor may proceed on any charge against the accused.
- The judicial officer may not instigate or take part in any negotiations.
- Once a person is convicted and sentenced in terms of an agreement, he or she should not have a right of appeal against sentence. Review would be the proper remedy in the event of undue influence or the like.

*The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.*

### **Project 85: Aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour**

The Report deals with harmful (i.e. unacceptable) sexual behaviour by persons with HIV or AIDS that could transmit HIV or expose others to HIV, current measures available to address such behaviour, and whether there is a need for statutory intervention. The recommendations cover only *consensual* sexual activity. Transmission of or exposure to HIV can also occur during *non-consensual* sexual acts such as rape. The need for further measures in the latter regard will be dealt with under the Commission's investigation into sexual offences.

The Commission concluded that the creation of a statutory offence is neither necessary nor desirable and recommended that the current legal position be maintained. The Commission is of the view that arguments against legislative intervention override arguments supporting such

step. Moreover, the Commission believes that strong indications from the entire process of research and deliberation (including the distribution of a discussion paper for public comment and a consultative meeting with a wide range of experts, representing diverse interests) weigh against legislative intervention and that recommending new legislation under these circumstances would not be principled.

In concert with this recommendation, the Commission identifies a pivotal need for the development of practical mechanisms by government departments to utilise effectively the existing common law crimes in cases of harmful HIV-related behaviour; and to encourage a culture of responsibility regarding HIV status.

These mechanisms may include:

- Making the public aware of applicable common law crimes coupled with the assurance that our existing law will indeed be used in respect of harmful HIV-related behaviour.
- Introducing practical measures to establish a standard of policing, investigation and prosecution that would ensure successful prosecutions of harmful HIV-related behaviour under the existing law.
- Maintaining and improving public health measures relating to awareness about HIV and its prevention, and public access to HIV testing and counselling. Such activities should be aimed at encouraging a culture of responsibility.

Major reasons for the Commission's conclusion are the following:

- Lack of scientific, empirical or even informal evidence that the behaviour to be targeted by intervention is occurring to such an extent that the creation of a statutory offence is necessary.
- Enactment of a statutory offence will have no or little practical utility and could be largely symbolic, especially in view of the existence of an array of common law crimes that could be utilised against harmful HIV-related behaviour.
- The social costs entailed in creating an offence targeting *negligent* behaviour (in the form of negligent transmission of or exposure to HIV - which is not covered by existing common law), is not justified. Negligence in the HIV/AIDS context would involve an individual who is

not aware that he or she has HIV and in this state of ignorance unknowingly transmits HIV or exposes another to HIV. The Commission is convinced that where the majority of persons in South Africa with HIV are unaware of their HIV status and where there are insufficient resources for the widespread HIV testing that would be required to enable a change of behaviour, it is not just and right that persons who are ignorant of their health status (but ought perhaps ideally to know that they are infected), should be punished. In effect such individuals would be punished for their failure to know their HIV status - which may lie outside their control.

- The extent of intrusion into sexual privacy that will be inherent in any HIV-specific statutory offence is not justified.

*The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.*

#### **Project 94: Arbitration: Domestic arbitration**

Arbitration is increasingly recognized as an important method of resolving commercial and other disputes, which can help to relieve the pressure on the civil justice system. Arbitration needs to be supported by appropriate legislation. The objects of a modern arbitration statute are the fair resolution of disputes by an independent and impartial tribunal without unnecessary delay and expense; party autonomy; balanced powers for the courts; and adequate powers for the arbitral tribunal to conduct the arbitral proceedings effectively. The existing Arbitration Act 42 of 1965 fails to meet these objectives adequately.

The Commission's investigation has revealed that there are three basic options for a new domestic arbitration statute:

- The first is to improve the existing statute while retaining its basic provisions. In view of the dramatic improvements to arbitration legislation in other jurisdictions during recent years, notably England, this option does not appear to be practical.
- The second is to follow the approach adopted by several other countries and to adopt the UNCITRAL Model Law on International Commercial Arbitration of 1985 for both domestic and international arbitration. In July 1998 the Commission published a report which recommended that the UNCITRAL Model Law should be adopted by South Africa for international commercial arbitrations. However, because of the need, in the context of

international arbitration, to keep changes to the content and language of the Model Law to a minimum, this approach also appears to be inappropriate for the needs of a new domestic arbitration statute for South Africa.

- The third approach, and that recommended by the Commission, is to have a new statute combining the best features of the Model Law and the English Arbitration Act of 1996, while retaining certain provisions of the 1965 Act which have worked well in practice. The Commission therefore recommends that the existing Arbitration Act 42 of 1965 should be repealed and replaced with a comprehensive new arbitration statute for domestic arbitration, based on the principles set out below.

It is notorious that the potential advantages claimed for arbitration compared to litigation, as a more expeditious and cost-effective method of resolving disputes, are often not achieved in practice, particularly in complex commercial disputes and in the construction industry. The Commission therefore recommends that a statutory duty should be imposed on the arbitral tribunal to adopt procedures which, while fair, in the particular circumstances of the dispute will avoid unnecessary delay and expense. Increased powers are recommended for the tribunal to enable it to comply with this duty. These powers include the power to rule on its own jurisdiction, the power to depart from the ordinary rules of evidence, the power to decide whether or not there should be an oral hearing, a limited power to order interim measures and security for costs, the power to call witnesses, more effective powers to deal with a party in default and the power to limit recoverable costs. To address the problem posed by multi-party disputes, the Commission recommends that the tribunal should have a limited power to permit a third party to join the arbitral proceedings in certain circumstances. True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner.

The Commission recommends that the powers of the court pertaining to arbitration should be reviewed and generally brought into line with the powers of the court under the Model Law, while retaining certain powers of the court in the 1965 Act not found in the Model Law, but in modified form. Particular attention has been given to the need to prevent applications to court being abused by unscrupulous parties intent on delaying the arbitration process. The Draft Bill annexed to the Report also contains certain provisions designed to facilitate the use of mediation by the parties to an arbitration agreement. In the interests of consumer protection, it is recommended that a consumer, as defined in the Draft Bill, who enters into an arbitration agreement relating to future disputes should be able to cancel that arbitration agreement within

a specified period.

In view of the procedural safeguards in the Draft Bill and the protection provided by it for consumers, arbitration agreements should be expressly exempted from the legislation recommended in 1998 by the Commission in its *Report on Unreasonable Stipulations and the Rectification of Contracts*, which will enable the High Court to render unreasonable, unconscionable or oppressive contracts inoperative.

The report follows the South African Law Commission's *Report and draft Bill on International Arbitration* submitted to the Minister of Justice in July 1998.

*The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.*

### **Project 101: The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing**

The report focuses primarily on those sections which are clearly unconstitutional and which need urgent consideration. The premise is that the Commission should not usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the Criminal Procedure Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop the case law step by step. The constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation is, however, also dealt with.

The report deals *inter alia* with provisions of the Criminal Procedure Act 51 of 1977 which are in conflict with the following:

- *The presumption of innocence*, for example, section 55 (failure of accused to appear on a summons); section 60 (failure of an accused on bail to appear in court); section 74 (failure of accused on warning to appear in court); sections 78(1A) and (1B) (mental defect and criminal responsibility); section 170 (failure of accused to appear after adjournment); section 174 (discharge of accused after case for the prosecution); section 212 (proof of certain facts by affidavit); section 217 (confessions); section 219A (admissions) section 37(evidence on charge of bigamy); section 240 (evidence on charge of receiving stolen property); section 243 (evidence of receipt of money or property and general deficiency on charge of theft);

section 245 (evidence on charge of which false representation is an element); and section 332 (prosecution of corporation and members of association).

- *The constitutional provisions of equality and access to courts*, for example, section 7 (private prosecution on certification of *nolle prosequi*); section 29 (search to be conducted in orderly manner); section 190 (impeachment or support of credibility of witness); section 191 (payment of expenses of witness); and section 269 (sodomy).
- *The right to a fair trial which includes the right to appeal*, for example, section 302 (sentences subject to review in the ordinary course and transmission of record).
- *The right to a public trial*, for example, section 153 (circumstances in which criminal proceedings shall not take place in open court); and section 154 (prohibition of publication of certain information relating to criminal proceedings).
- *The right to adduce and challenge evidence and adequate facilities to prepare defence*, for example, section 166 (cross-examination); section 179 (process for securing attendance of witnesses); section 182 (witnesses from prison); and section 190 (impeachment or support of credibility of witness).
- *The right to freedom and security of person*, for example, section 185 (detention of witness) and section 286 (declaration of certain persons as dangerous criminals) and section 286B (imprisonment for an indefinite period).
- *The right to be brought before a court after arrest*, for example, section 50 (arrest).
- *The right to a fair trial, including the right to be informed in detail of charge*, for example, section 95 (housebreaking with intent to commit an offence).
- *The right to a fair trial (unconstitutionally obtained evidence)*, for example, section 225 (evidence of prints or bodily appearance of accused); and section 252A (authority to make use of traps and undercover operations and admissibility of evidence so obtained).
- *The right to a fair trial*, for example, section 213 (proof of written statement by consent); and sections 105, 119, 126, 213 (the unrepresented accused).

*The report was submitted to the Minister for Justice and Constitutional Development on 29 May*

2001.

### **Project 109: Review of the Marriage Act 25 of 1961**

The Report focuses mainly on whether the provisions contained in the Marriage Act are adequate or whether they should be amended and, in that event, the way in which such amendments should be effected.

Some of the issues addressed and recommendations made in the report are the following:

- The Commission is presently dealing with three interrelated family law themes in separate investigations: the review of the Marriage Act (project 109), Islamic Marriages and Related Matters (project 59) and Domestic Partnerships (project 118). It also finalised its report on Customary Marriages in 1998. It has been suggested that these investigations should first be finalised with a view to ultimately regulating all marriages in one Marriage Act. The Commission is, however, of the view that amendments which are identified in this investigation should be implemented and the Marriage Act consolidated in future to address civil, religious and customary marriages in one Marriage Act.
- The Marriage Act should provide for the Minister of Home Affairs to designate countries whose consular or diplomatic officers may conduct marriages in South Africa. The Act should require that neither of the parties contemplating marriage should be a South African citizen, that the marriage should not be void because either of the parties is lawfully married to some other person, that the parties are within a prohibited relationship, or that either of the parties is under marriageable age. The marriage should also be recognised as a valid marriage by the law or custom of the foreign country, and the marriage should be registered in terms of the Act.
- The Act should set out the circumstances under which marriages are void and voidable.
- The Act should reflect the present position regarding the designation of Commissioners and special justices of the peace as marriage officers.
- Ambassadors, High Commissioners and Consuls should, by virtue of their office and as long

as they hold such office, be *ex officio* marriage officers for the area in which they hold office.

- The Marriage Act is restrictive in that marriage officers can be designated only for the purpose of conducting marriages according to "Christian, Jewish or Mohammedan rites or the rites of any Indian religion". Provision should be made that any religious organisation or denomination may apply to the Minister of Home Affairs for recognition, and that they may nominate persons for designation by the Minister as marriage officers. Such applications for recognition should contain information setting out whether-
  - the religious body professes a belief in a religious doctrine, dogma or creed and is organised for religious worship;
  - the rites and usages of the marriage ceremony followed by the religious body meet the requirements of South African marriage law; and
  - the religious body is sufficiently established, both in respect of continuity of existence and recognised rites and usages, to warrant the designation of its religious representatives as marriage officers.
- Any nomination by a recognised body of a person for designation by the Minister as a marriage officer must set out particulars as to whether the person nominated is a religious representative ordained or appointed according to the rites and usages of the body concerned; and that nominated person is, as a religious representative, recognised by the religious body to which he or she belongs as authorised to conduct marriages according to its rites and usages.
- A religious body should state in its nomination for the appointment of a person as a marriage officer that adequate notice of the nomination has been given to its members in order to afford them an opportunity to raise objections.
- The Marriage Act provides for the "solemnisation" of marriages. "Conduct a marriage" or "join parties in marriage" are recommended as substitutes.
- The Marriage Act should not make provision for the designation of marriage officers other than those presently provided for.

- If a religious body changes the name whereby it was known, or amalgamates with any other religious body, or changes its objects, or if there is a material change in its circumstances, it must immediately advise the Minister who may revoke its recognition for any of these reasons.
- The grounds for revoking the appointment of a person as a marriage officer should be set out in more detail in the Act.
- The Act should provide that any person who is authorised to conduct any marriage in any country outside the Republic of South Africa, may conduct a marriage between parties of whom at least one is a South African citizen and domiciled in the Republic, and such marriage is for all purposes deemed to have been conducted in the Republic. It should be provided that a marriage shall not be conducted in a foreign country unless the marriage officer is satisfied -
  - that at least one of the parties to the intended marriage is a South African citizen;
  - where one party to the intended marriage is not a South African citizen, that that party is not a subject or citizen of the foreign country or sufficient facilities do not exist for conducting the marriage in the foreign country in accordance with the law of that country;
  - where one party to the intended marriage is a subject or citizen of the foreign country, that the authorities of that country will not object to the intended marriage being conducted in that country; or
  - that a marriage in the foreign country between the parties in accordance with the law of that country would not be recognised in South Africa.
- The provision that a marriage may be conducted by a marriage officer only should remain.
- The Act prohibits the joining of parties in marriage without the production of an identity document or the making of the prescribed declaration by the parties. The Act should state that failure to comply strictly with the provision does not affect the validity of the marriage

provided that such marriage was in every other respect conducted in accordance with the provisions of the Marriage Act; that there were no other lawful impediments to the marriage; that such marriage was not dissolved or declared invalid by a competent court; and that neither of the parties to such marriage had after such marriage and during the life of the other, lawfully married another.

- The party raising objections to a marriage should provide a copy of his or her objection in writing to the parties contemplating marriage at least 24 hours prior to the contemplated marriage being conducted.
- The Act prohibits a marriage officer from conducting the marriage of a minor if the required consent is not furnished to him or her in writing. The Act should set out fully what is meant by “legally required consent”.
- The minimum age for marriage should be 18 years of age for males and females.
- The Act should provide that the permission of the Minister of Home Affairs should be sought when parties related by affinity wish to marry provided both parties have reached the age of 18 years. The Act should also clearly set out which marriages between parties closely related are void.
- The Act presently prescribes the following places for the conducting of marriage ceremonies: churches, other buildings used for religious services, public places and private dwelling-houses with open doors. There should be no limitations with regard to places where marriages may be conducted.
- Provision must be made that a marriage officer who is a minister of religion or a person holding a responsible position in a religious body may follow the marriage formula usually observed by that body, provided that the marriage formula includes the words presently prescribed in the Act (subject to minor proposed amendments).
- The Act should provide that a minister of religion or a person holding a responsible position in a religious denomination or organisation may receive such fees or payments as the religious body may from time to time determine for conducting marriages.

- South African courts have jurisdiction to try persons who contravene the provisions of the Marriage Act in any country outside the Republic of South Africa. This position should remain.
- The Transkei Marriage Act of 1978, the Bophuthatswana Marriage Act of 1980 and the Ciskei Marriage Act of 1988 should be repealed.

*The report was submitted to the Minister for Justice and Constitutional Development on 29 May 2001.*