

South African Law Reform Commission

Thirtieth Annual Report

2002/2003

To: Dr P M Maduna MP, Minister for Justice and Constitutional Development

I have the honour to submit to you in terms of section 7(2) of the South African Law Reform Commission Act 19 of 1973, the Commission's report on all its activities from 1 April 2002 to 31 March 2003

Yours sincerely

Madam Justice Y Mokgoro

Judge of the Constitutional Court

Chairperson of the South African Law Reform Commission

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OVERVIEW

Introduction

Seldom in the history of a nation do negotiated political and constitutional changes as dramatic as those in our country occur. Seldom in the history of a nation are the concomitant reforms to the legal system as penetrating and daunting as in our country.

There are major discrepancies between the content of the law and the ideal of justice that must be addressed. This necessitates a paradigm shift from the normal approach aimed at maintaining and modernising the legal system to an approach aimed at the transformation of the legal system.

Law is a dynamic and fragile human accomplishment. It mirrors, and partly moulds, the moral character of a society. Through its legal system a society is able to view and judge itself. Over time, the legal system expresses a society's values and convictions, as well as its prejudices and pathologies. In giving form to a debate about many of life's important questions, the law is a transparent symbol of how we imagine who we are and how we conceive our relationship with others.

Many South Africans question the way the law works. They feel uncomfortable in a legal system that, at times, appears overly adversarial, inaccessible, arbitrary and unfair. They do not see their concerns about justice reflected in the processes of and the results produced by the legal system. The impetus for change comes, for example, from victims, the poor, the disadvantaged, the disempowered, the elderly and the young people, many of whom feel that the assumptions currently underlying the law are outmoded or inappropriate.

South Africans want their law to embody justice, and their legal system to support this ideal. They expect legal institutions to be accessible and accountable. They want the law to respect and promote the values of the Constitution. At the same time they desire law that is responsive to the emerging needs of the South African society. The different socio-economic circumstances of South Africans, a shift in the patterns of rural and urban life, and the country's multicultural social fabric highlight the need for new understandings of law and for approaches emphasising restorative rather than retributive justice.

The pace and depth of social change in South Africa challenge the adequacy of contemporary law and legal institutions. The existing law emanating from our past is still outdated in many of its assumptions, its policies and its prescriptions. Government requires strategic and timely advice on law reform to assist it in recognising these deficiencies and finding appropriate remedies.

The procedures and practices of the Commission are open and inclusive. This requires canvassing a wide range of people affected by and concerned with the law and justice, and giving a voice to those not ordinarily heard. The Commission is committed to making its work responsive and accessible to South Africans. The Commission also understands the law as part of the broader social and economic environment. It will search for the underlying causes and inadequacies from a multidisciplinary perspective.

Promoting a creative relationship between law and justice is a collective challenge. To accomplish this, the Commission has built relationships with organisations from the public and private sectors and with Government departments. It works closely with academics and structures in the communities (rural and urban), as well as with centres of research which will accelerate change through partnership with the people.

Amendments to the South African Law Commission Act 19 of 1973

The Judicial Matters Amendment Act 55 of 2002, which commenced on 17 January 2003, amended the South African Law Commission Act 19 of 1973 as follows:

- **Change of name**

The Commission is now known as the South African Law **Reform** Commission.

- **Number of Commissioners**

The number of persons who appear to the President to be fit for appointment as Commissioners has been increased from “six persons” to “not more than eight persons”.

- **Period of review covered by the Annual Report**

The period of review covered by the Commission's Annual Report has been changed from a calendar year to a financial year (1 April – 31 March), so as to bring it in line with the requirements of the Public Finance Management Act 1 of 1999.

The year under review

This annual report covers the period from 1 April 2002 to 31 March 2003.

Three issue papers were published for general information and comment:

- Project 107: Sexual offences: Adult prostitution (issue paper 19)
- Project 123: Protected disclosures (issue paper 20)
- Project 121: Consolidated legislation pertaining to international co-operation in civil matters (issue paper 21)

Issue papers published by the Commission are listed in **Annexure E**.

No discussion papers were published for general information and comment in the year under review. Discussion papers published by the Commission are listed in **Annexure F**.

Seven reports were approved by the Commission:

- Project 73: Simplification of criminal procedure: A more inquisitorial approach to criminal procedure: police questioning, defence disclosure, the role of judicial officers and judicial management of trials
- Project 73: Simplification of criminal procedure: Out of court settlements in criminal cases
- Project 90: Customary law: Traditional courts and the judicial function of traditional leaders
- Project 105: Security legislation: Terrorism
- Project 107: Sexual offences
- Project 110: Review of the Child Care Act, 1983
- Project 114: Publication of Divorce Proceedings: Section 12 of The Divorce Act 70 of 1979

A summary of the recommendations contained in these reports appears in **Chapter 4**.

The following Acts emanating from reports of the Commission were promoted by Parliament in the year under review:

- Project 42: Time limits for the institution of actions against the state (Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002)
- Project 105: Security legislation: Interception and Monitoring Prohibition Act, 1992 (Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002)

The following Bills emanating from reports of the Commission are receiving the attention of Parliament:

- Project 85: Aspects of the law relating to AIDS: Compulsory HIV testing of offenders arrested in sexual offence cases (Compulsory HIV Testing of Sexual Offenders Bill, 2003)
- Project 105: Review of security legislation: (Anti-Terrorism Bill, 2003)
- Project 106: Juvenile justice (Child Justice Bill, 2002)

The following Bills emanating from reports of the Commission have been identified for submission to Cabinet and Parliament during the 2003 Session of Parliament with a view to finalising them as soon as circumstances permit:

- Project 73: Simplification of criminal procedure: The right of the Director of Public Prosecutions to appeal on questions of fact (Criminal Procedure Amendment Bill)
- Project 63: Review of the law of insolvency (Insolvency and Business Recovery Bill)
- Project 94: Arbitration: International arbitration (International Arbitration Bill)
- Project 107: Sexual offences (Sexual Offences Bill)

The following Bills emanating from reports of the Commission have been identified for submission to Parliament when they are ready for introduction with a view to finalising them when circumstances permit:

- Project 47: Unreasonable stipulations in contracts and the rectification of contracts (Control of Unreasonable or Oppressive Stipulations in Contracts Bill)

- Project 73: Simplification of criminal procedure: A more inquisitorial approach to criminal procedure: police questioning, defence disclosure, the role of judicial officers and judicial management of trials (Criminal Procedure Second Amendment Bill)
- Project 73: Simplification of criminal procedure: Out of court settlements in criminal cases (Out of courts settlements in Criminal Matters Bill)
- Project 88: Recognition of class actions and public interest actions in South African Law (Public Interest and Class Actions Bill)
- Project 90: Customary law: Conflicts of law (Application of Customary Law Bill)
- Project 90: Customary law: Traditional courts and the judicial function of traditional leaders (Traditional Courts Bill)
- Project 101: The application of the Bill of Rights to the criminal law, the law of criminal procedure and sentencing (Bill to be named)
- Project 94: Arbitration: Domestic arbitration (Domestic Arbitration Bill)
- Project 112: Sharing of pension benefits (Sharing of Pension Benefits Bill)
- Project 114: Publication of divorce proceedings: Section 12 of the Divorce Act 70 of 1979 (Publication of Divorce Proceedings Bill)

The following reports emanating from the Law Reform Commission are receiving the attention of government departments other than the Department of Justice and Constitutional Development:

- Project 52: Investigation into the legal consequences of sexual realignment and related matters (Department of Home Affairs)
- Project 86: Euthanasia and the artificial preservation of life (Department of Health)
- Project 109: Review of the Marriage Act 25 of 1961 (Department of Home Affairs)
- Project 110: Review of the Child Care Act, 1983 (Minister of Social Development)

A report on a new sentencing framework (Project 82: Sentencing) was submitted to the Minister in December 2000. The Sentencing Framework Bill has been referred back to the Law Reform Commission to address concerns regarding an Appendix setting out amended and repealed legislation. Both the Commission's reports on juvenile justice and sentencing contain recommendations for the repeal of provisions of the Criminal Procedure Act dealing with sentencing. The Child Justice Bill, 2002 is already receiving the attention of Parliament, therefore the Annexure reflecting the repeal of the provisions of the Criminal Procedure Act as recommended in the sentencing report will only be finalised after finalisation of the Child Justice Bill.

The recommendations contained in the reports on surrogate motherhood (Project 65) and

access to minor children by interested persons (Project 100) will be incorporated in the Children's Bill (Project 110: Review of the Child Care Act, 1983).

Five new investigations were included in the Commission's programme in the year under review:

- Project 127: Review of administration orders
- Project 128: Review of aspects of the law of divorce
- Project 129: Review of aspects of matrimonial property law
- Project 130: Stalking
- Project 131: Trafficking in persons

A progress report on investigations not yet completed appears in **Chapter 5**.