

THE COMMISSION'S PROGRAMME: INVESTIGATIONS INCLUDED AND REMOVED

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

Project 127: Review of administration orders

The Centre for Advanced Corporate and Insolvency Law (CACIL) of the University of Pretoria released an interim research report in three volumes on the review of administration orders in terms of section 74 of the Magistrates' Courts Act 32 of 1944.

The report was handed to the Department of Justice and Constitutional Development with the recommendation that the Department prepare draft legislation to be published for comment by all the important role-players. This course of action was necessitated by the fact that CACIL had no legislative authority and that certain pertinent issues indicated in the report needed to be resolved before new legislation could be introduced.

The Minister for Justice and Constitutional Development requested the Chairperson of the Law Reform Commission to consider the inclusion of an investigation into the review of administration orders in the Commission's programme and to follow an incremental approach to distinguish between reforms that could be effected in the short and medium terms and reforms that could be effected in the medium to long terms.

On 17 August 2002 the Commission considered the Minister's request and approved that an investigation into the review of administration orders be included in the Commission's programme. The Commission agreed that the matter had become a burning issue with serious problems being experienced in practice. In its report on the related topic of insolvency, the Commission made minor recommendations regarding administration orders but did not investigate administration orders in detail. With developments in the micro-lending industry, administration orders had led to considerable problems and people being abused by so-called loan sharks and others. Section 74 was not adequate to deal with the problems.

The Minister approved the inclusion of the investigation in the Commission's programme in December 2002.

Project 128: Review of aspects of the law of divorce

On 26 November 2002 the Commission considered the inclusion of an investigation into “children affected by the divorce or separation of their parents” in its programme.

The Commission highlighted the plight of children affected by the divorce or separation of their parents in the investigation into the review of the Child Care Act (discussion paper 103). In chapter 14 of this discussion paper the Commission made several preliminary recommendations regarding the protection of such children. However, these preliminary recommendations did not relate to amendments to the Child Care Act 74 of 1993, but related mainly to amendments to the Divorce Act 70 of 1979, the Matrimonial Affairs Act 37 of 1953 and the Mediation in Certain Divorce Matters Act 24 of 1987. Consequently, very little protection was offered to children affected by the divorce or separation of their parents in the proposed Children’s Bill contained in the report on the review of the Child Care Act.

Given the inherent danger associated with piecemeal amendments to different pieces of legislation in the absence of a holistic framework, the Commission considered it judicious to conduct a separate investigation into the protection of children affected by the divorce or separation of their parents. With a view to ensuring that the scope of the investigation was sufficiently broad to investigate other existing problems relating to the law of divorce, the Commission decided that it be recommended that an investigation titled “review of aspects of the law of divorce” be included in the Commission’s programme.

The Minister approved the inclusion of the investigation in the Commission’s programme in January 2003.

Project 129: Review of aspects of matrimonial property law

On 26 November 2002 the Working Committee of the Commission considered the inclusion of an investigation into “joint bank accounts” in its programme.

The Commission on Gender Equality referred a complaint of gender discrimination to the South African Law Commission for investigation. The complainant argued that although the banking industry allowed married couples to have a joint account, both partners did not enjoy equal status. The Banking Council commented that the legal environment in South Africa did not create a framework conducive to the operation of joint bank accounts.

The problems experienced with joint bank accounts related to matrimonial property law. With a view to ensuring that the scope of the investigation was sufficiently broad to investigate other existing problems relating to the Matrimonial Property Act 88 of 1984, the Commission decided that it be recommended that an investigation into the “review of aspects of matrimonial property law” be included in the Commission’s programme.

The Minister approved the inclusion of the investigation in the Commission’s programme in January 2003.

Project 130: Stalking

Stalking refers to any type of harassing and intimidating conduct that causes a person to fear for his or her safety. The methods employed by stalkers to harass a victim can involve a series of actions which are unlawful, such as making obscene telephone calls, using threatening language and committing acts of violence. On the other hand, stalkers frequently exhibit behaviour which is perfectly legal and socially acceptable in isolation. This apparently harmless conduct, such as following someone or sending gifts, can be intimidating if done persistently and against the will of another person. Taken together, and in the context of the relationship between the stalker and the victim, seemingly innocuous behaviour becomes wrongful and dangerous. Typically, stalking commences with conduct that appears more annoying and irritating than dangerous. Then the frequency and magnitude of the conduct escalates, which causes increasing fear, emotional distress and disruption to the victim’s life. Ultimately, stalking may intensify to physical violence and homicide.

In discussion paper 85: sexual offences - the substantive, law it was recommended as follows:

No legal intervention will prevent all forms of stalking, but it is essential that the legal system does provide the greatest protection and remedies possible. It is the opinion of the Commission that including stalking and, or harassment in legislation specifically aimed at criminalising specific sexual conduct will not afford all victims of stalking or harassment the necessary protection which they deserve. In so doing, those instances where the motive of the stalker or harasser is not sexual, it will leave victims vulnerable.

The motive of a person is often impossible to establish until real harm has already been done. There is a clear need for specific legislation criminalising stalking or harassment. Although the Domestic Violence Act will give recourse to those who fall within the definition of a domestic relationship, once the Act is put into operation, obtaining a protection order may not give victims the protection they need. It is proposed that a separate investigation be conducted to ascertain the need to enact comprehensive legislation prohibiting stalking.

The Minister approved the inclusion of the investigation in the Commission=s programme in January 2003.

Project 131: Trafficking in persons

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, was signed by South Africa on 14 December 2000. For the purposes of this Protocol “trafficking in persons” means 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 (section 3(a)).

According to the official explanatory notes to the UN Trafficking Protocol, the UN definition of trafficking in persons in section 3(a) describes in some detail the nature of the crime. However, this international definition is not appropriate for use in domestic criminal codes. It has too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult. Also, some of the language is ambiguous, which could lead to legal challenges by defendants. It is therefore important to incorporate the essence of the definition into national legislation using simple and clear language.

Chapter 21 of the Law Reform Commission’s proposed Children’s Bill relates to the trafficking of children. However, the occurrence of trafficking of people in South Africa appears to be serious enough to warrant an investigation into separate trafficking legislation to provide holistically for the prosecution of all forms of trafficking. The illicit trade in persons is a profitable, criminally organised global industry. Traffickers use deception, force or coercion to move people into situations in which they are vulnerable and easily held in conditions of sexual exploitation, forced labour and slavery. Trafficked persons are often treated as criminals, rather than as victims of crime, while traffickers escape prosecution. Those who try to escape or seek help risk retaliation from traffickers. Although victims of traffickers can be of either gender, an overwhelming majority of victims are female.

The Minister approved the inclusion of the investigation in the Commission=s programme in January 2003.

Four investigations were removed from the Commission's programme in the period under review:

Project 95: The admissibility of computer-generated evidence

Project 108: Computer-related crime

In 1998 the Commission decided that the investigation into computer-related crime (project 108) should be completed first and that the same project committee should then proceed with the investigation into the admissibility of computer-generated evidence (project 95). No work was done in respect of project 95.

Because of the wide scope of the investigation into computer-related crime an incremental approach was adopted. The first issue paper on options for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects was published for general information and comment in August 1998.

A discussion paper on computer-related crime: preliminary proposals for reform in respect of unauthorised access to computers, unauthorised modification of computer data and software applications and related procedural aspects was published for general information and comment in May 2001. The closing date for comment on the discussion paper had been extended to 31 July 2001, after which the investigation was suspended pending the outcome of the Electronic Communications and Transactions Bill (Minister of Communications).

The aim of the Electronic Communications and Transactions Act 25 of 2002 is, inter alia, to prevent abuse of information systems. Part XII of the Act relates to cyber crime and deals with unauthorized access to, interception of or interference with data; computer-related extortion, fraud and forgery; attempt and aiding and abetting; penalties; procedure; criminal jurisdiction; and saving of the common law.

Chapter 1 of Part III of the Act relates to the legal requirements of data messages and deals, inter alia, with the legal recognition of data and data messages; and with the admissibility and evidential weight of data messages.

The Commission decided that projects 95 and 108 should be removed from the Commission's programme in the light of the passing of the Electronic Communications and Transactions Act 25 of 2002.

The Minister approved the removal of the investigations from the Commission's programme in October 2002.

Project 116: The carrying of firearms and other dangerous weapons in public or at gatherings

The South African Agricultural Union requested the Commission to investigate certain issues pertaining to the carrying of firearms at gatherings and in public places in terms of the Dangerous Weapons Act 71 of 1968.

On 30 March 1998 the Commission approved that an investigation into "the carrying of firearms and other dangerous weapons in public or at gatherings" be included in its programme. The Minister endorsed the inclusion on 21 April 1998.

Prof R W Palmer of the University of Natal (Durban) was appointed as a consultant to assist with the research. The finalisation of a draft issue paper had been delayed until the enactment of the Firearms Control Act 60 of 2000. Prof Palmer was of the opinion that the investigation should be discontinued in the light of the Firearms Control Act 60 of 2000 whose objective had been the establishment of a comprehensive and effective system of firearms control.

The Commission agreed that the investigation should be removed from the Commission's programme in the light of the passing of the Firearms Control Act 60 of 2000.

The Minister approved the removal of the investigation from the Commission's programme in August 2002.

Project 119: Uniform national legislation on the fencing of national roads

Agri SA (the South African Agricultural Union at the time) requested the Commission in August 1997 to investigate the possibility of enacting national uniform legislation on the fencing of public roads. The request originated from a SAAU conference during which the problems encountered by farmers whose farms are adjacent to public roads were discussed. A consultant, Advocate Nazreen Bawa, was appointed to look into the matter and to draft an issue paper on to the possibility of national legislation for the fencing of national roads. The issue paper was published in June 2000. Only 5 institutions responded to the issue paper. No response was

received from Agri SA, the initiator of the investigation.

From the outset concern was expressed about the scope of the investigation. It appeared that the fencing of national roads was not the real problem, but the real concern was the fencing of public roads in general. However, it was uncertain whether an investigation into the fencing of all public roads would address the problem, as the legislative competence for roads and fencing mostly resided with the provinces. Even an investigation of that nature would not cover all concerns, as fencing of railway lines, for example, also warranted investigation, as did fencing in general.

In the light of the Commission's priorities it was proposed that the project be removed from the Commission's programme.

The Minister approved the removal of the investigation from the Commission's programme in December 2002.