

CHAPTER 1

OVERVIEW

Introduction

"Law must be stable, and yet it cannot stand still."

- Roscoe Pound (American Jurist, 1870 – 1964)

Indeed, the law is a dynamic concept - not only does it change along with society, but it often directs society on its path of change.

Across the world, law reform agencies are tasked with investigating the reform of laws in a way that adequately meets the demands and challenges posed by changing societies. This task is complicated by the conflict of values between, among others, different sectors of society, religious and cultural beliefs and the inclusive goal of justice for all.

This is true for any country in the world, but even more so for post-Apartheid South Africa, where many of the laws on the statute book are incompatible with the democratic, non-discriminatory and equality-based values espoused by the Constitution.

However, neither these values nor the fundamental human rights enshrined in the Bill of Rights can stand in isolation. The rights of citizens and the obligations flowing from these rights inevitably require the creation of new laws or the reform of existing ones, all of which must ultimately pass constitutional scrutiny.

During the period under review the South African Law Reform Commission (the Commission) continued its efforts to facilitate law reform that contributes to the realisation of a society based on democratic values, social justice and fundamental rights for all.

End of term of the Commission

31 December 2006 marked the end of the term of the Commission which was appointed for a period of five years with effect from 1 January 2002. The Commission consisted of the following members:

- Justice Y Mokgoro as Chairperson
- Judge M L Mailula as Vice-Chairperson
- Adv J J Gauntlett SC
- Prof C E Hoexter (resigned with effect from 1 January 2005)
- Judge C T Howie
- Prof I P Maithufi as full-time member
- Ms Z Seedat
- Judge W L Seriti

The transformation of our legal system presented the Commission with great challenges in the area of law reform, having regard to the relationship between reform and the wider social and political context in which it takes place, and focusing on various rights in the Bill of Rights in the absence of a fully developed constitutional

jurisprudence. The research programme of the Commission during its tenure demonstrated that a very wide ambit of topics received the attention of the Commission.

Criminal justice reform was driven largely by progressive critiques of criminal justice practices and the rise of victim concerns. In this regard projects related to simplification of criminal procedure; the use of electronic equipment in court proceedings; a compensation fund for victims of crime; sexual offences; terrorism; stalking; and trafficking in persons.

A number of projects related to what could be termed "social law reform", indicated by criteria such as that the problem is described in social terms rather than by reference to an area of legal doctrine; the project requires moral or social value judgments to be made on politically controversial issues; the project explicitly addresses social justice issues; or the project proposes an entirely new approach to a social problem, rather than simply proposing minor changes to legal rules. Social law reform projects investigated by the Commission related to adult prostitution; protected disclosures; privacy and data protection; review of the Child Care Act, 1983; Islamic marriages; customary law; domestic partnerships; assisted decision-making; adults with impaired decision-making capacity; and publication of divorce proceedings.

As part of the Commission's extensive statutory law revision project, the Interpretation Act 33 of 1957 was reviewed.

The publications (excluding annual reports) which were completed by the Commission during its tenure of five years are reflected in **Annexure A**.

Appointment of a new Commission

Under section 3 of the South African Law Reform Commission Act 19 of 1973, the President appointed a new Commission, in which considerable academic and practical experience are combined, for a period of five years with effect from 1 January 2007:

- Justice Yvonne Mokgoro (Chairperson)
- Judge Willie Seriti (Vice-Chairperson)
- Judge Dennis Davis
- Advocate Mahlape Sello
- Advocate Dumisa Ntsebeza SC
- Mr Tembeka Ngcukaitobi
- Professor Pamela Schwikkard
- Ms Thuli Madonsela (Full-time member)
- Professor Cathi Albertyn

The new Commissioners are welcomed heartily and assured of the support of the Secretariat to face the challenges of law reform in South Africa.

Completed reports receiving the attention of Departments

The following reports were submitted to the Minister for Justice and Constitutional Development during previous reporting years:

- Project 47: Unreasonable stipulations in contracts and the rectification of contracts
(submitted to Minister in May 1998)
- Project 59: Islamic marriages
(submitted to Minister in July 2003)
- Project 63: Review of the law of insolvency
(submitted to Minister in February 2000)
- Project 73: Simplification of criminal procedure: Appeal by the Director of Public Prosecutions on questions of fact
(submitted to Minister in December 2000)
- Project 73: Simplification of criminal procedure: Out of court settlements (submitted to Minister in August 2002)
- Project 73: Simplification of criminal procedure: A more inquisitorial approach to criminal procedure – police questioning, defense disclosure, the role of judicial officers and judicial management of trials
(submitted to Minister in August 2002)
- Project 82: Sentencing: A new sentencing framework
(submitted to Minister in December 2000)
- Project 82: Sentencing: A compensation fund for victims of crime in South Africa (submitted to Minister in August 2004)
- Project 88: The recognition of class actions in South African Law (submitted to Minister in September 1998)
- Project 90: Customary law: Traditional Courts
(submitted to Minister in January 2003)
- Project 90: Customary law: Conflicts of law
(submitted to Minister in September 1999)
- Project 90: Customary law of succession
(submitted to Minister in August 2004)
- Project 94: Arbitration: Domestic arbitration
(submitted to Minister in June 2001)
- Project 94: Arbitration: International arbitration
(submitted to Minister in July 1998)
- Project 96: The Apportionment of Damages Act, 1956
(submitted to Minister in July 2003)
- Project 101: The application of the Bill of Rights to criminal procedure, criminal law, the law of evidence and sentencing
(submitted to Minister in June 2001)
- Project 112: Sharing of pension benefits
(submitted to Minister in June 1999)
- Project 113: The use of electronic equipment in court proceedings (submitted to Minister in July 2003)
- Project 114: Publication of divorce proceedings
(submitted to Minister in August 2002)

The following reports emanating from the Commission were referred to government departments other than the Department of Justice and Constitutional Development during previous reporting years:

- 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)

The year under review

This annual report covers the period from 1 April 2006 to 31 March 2007.

No issue papers were published for general information and comment in the year under review.

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

One discussion paper was published for general information and comment:

- Project 25: Statutory law revision: Review of the Interpretation Act 33 of 1957 (discussion paper 112)

Discussion papers published by the Commission are listed in **Annexure C**.

Two reports were approved by the Commission in the year under review:

- Project 121: Consolidated legislation pertaining to international co-operation in civil matters (the report is still under Ministerial consideration)
- Project 130: Stalking (the report is still under Ministerial consideration)

A progress report on investigations not yet completed appears in Chapter 3.

The following Acts emanating from the Commission's reports on domestic partnerships and the review of the Child Care Act were promoted by Parliament in the year under review:

- Civil Union Act 17 of 2006
- Children's Act 38 of 2005 (assented to 8 June 2006)

The recommendations contained in the reports on surrogate motherhood (Project 65) and access to minor children by interested persons (Project 100) are incorporated in Chapter 20 and section 23

CHAPTER 1

OVERVIEW

respectively of the Children's Act 38 of 2005 (Project 110: Review of the Child Care Act, 1983).

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

- Project 106: Juvenile justice: Child Justice Bill
- Project 107: Sexual offences: Criminal Law (Sexual Offences) Amendment Bill

The recommendations contained in the report on compulsory HIV testing of persons arrested in sexual offence cases (Project 85) were initially reflected in the Compulsory HIV Testing of Alleged Sexual Offenders Bill. The Commission's recommendations regarding victims' need for information of their alleged offenders' HIV status have eventually been included in Chapter 5 of the Criminal Law (Sexual Offences) Amendment Bill.

In the Commission's report on the need for a statutory offence aimed at harmful HIV-related behaviour (Project 85) the Commission concluded that a statutory offence was not necessary or desirable and that the current legal position should be maintained. During the course of the Portfolio Committee deliberations on the Criminal Law (Sexual Offences) Amendment Bill, 2003 and prior to the 2004 elections, the Committee suggested including in the Bill the criminalisation of the intentional non-disclosure of a person's HIV-positive status when engaging in intimate contact with another person. When the Bill was submitted to the newly constituted Cabinet for approval after the 2004 elections, Cabinet however expressed reservations about the inclusion of the suggested offence, and the final version of the Bill which was approved by the Portfolio Committee on 10 November 2006 did not include such an offence. The Committee however requested the Department of Justice and Constitutional Development to do further research in this regard, including comparative research, with a view to addressing Cabinet's reservations.

- Project 110: Review of the Child Care Act, 1983: Children's Act 38 of 2005; Children's Amendment Bill