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PROGRESS REPORT

It is axiomatic that the extent to which the South African Law Reform Commission can add value will be heavily influenced by the nature of the work it undertakes and its particular experience and suitability to do so. In selecting topics for law reform there is a need for independence from, but good liaison with, government. It is therefore important for the Commission to understand how its work will contribute to the government's overall strategic outcomes and

priorities. There should also be explicit recognition by government of the particular contribution the Commission can make to the overall law reform environment.

For the year under review the research programme of the Commission has been as follows:

Project	Title
25	Statutory law revision
94	Arbitration: Community dispute resolution structures Arbitration: Family mediation
107	Sexual Offences: Adult prostitution
113	The use of electronic equipment in court proceedings
118	Domestic partnerships
121	Consolidated legislation pertaining to international co-operation in civil matters
122	Assisted decision-making: Adults with impaired decision-making capacity
123	Protected disclosures
124	Privacy and data protection
125	Prescription periods
126	Review of the rules of evidence
127	Review of administration orders
128	Review of aspects of the law of divorce
129	Review of aspects of matrimonial property law
130	Stalking
131	Trafficking in persons
133	A specific civil action in respect of consequential damages arising from hoaxes
134	Administration of estates

A number of the above-mentioned projects are in line with the government's priorities as identified in the Government's Programme of Action, 2007. The priorities and programmes arise from the January 2007 Cabinet Lekgotla and the President's State of the Nation Address on 9 February 2007.

Crime prevention and public safety is identified as a main action by the Justice, Crime Prevention and Security Cluster. A sub-action is the implantation of initiatives directed at preventing crimes against women and children. The Commission's investigations into sexual offences: adult prostitution (project 107); stalking (project 130); and trafficking in persons (project 131) are aimed at crime prevention

and the protection of vulnerable groups. Another sub-action is the implementation of restorative justice and alternative dispute resolution, which relates to the Commission's project on community dispute resolution structures (project 94).

The Commission's statutory law revision project (project 25) is aimed at revising the complete statute book with a view to removing or adapting legislative provisions considered to be unconstitutional, redundant or obsolete. The investigation is endorsed by Cabinet – in 2001 Cabinet requested the identification of all discriminatory and unconstitutional legislation enacted prior to 1994, as well as the review of provisions in the legislative framework that would result

in unfair discrimination as defined in section 9 of the Constitution. In terms of a Cabinet decision the Commission is required to submit bi-annual reports on progress with the investigation to Cabinet.

Two of the strategic goals of the Department of Justice and Constitutional Development are "access to justice for all" and "transforming justice, state and society". A number of the Commission's projects are linked to the strategic objectives under these goals:

- ensuring access for vulnerable groups
- facilitating accessible deceased and insolvent estate services
- alternative dispute mechanisms
- develop a legislative framework for the promotion of access to justice for all
- transforming and maintaining the legal system by investigating, preparing and promoting legislation
- ensure the effectiveness and efficiency of the justice system

It is further significant to note that law reform agencies in the world often review similar areas of law. The research programme of the South African Law Reform Commission is no exception and this fact could be seen as an indicator to gauge the relevancy of projects undertaken by the South African Law Reform Commission.

The position regarding work in progress in respect of the Commission's research programme is as follows:

Project 25 - Statutory law revision: The establishment of a permanently simplified, coherent and generally accessible statute book

In 2004, the Commission embarked upon a major investigation aimed at revising the complete statute book with a view to removing or adapting legislative provisions considered to be unconstitutional,

redundant or obsolete. An audit of all national legislation (excluding provincial and secondary legislation) by the Commission revealed that there are close to 3 000 statutes on our statute book, comprising Principal Acts, Amendment Acts, Supplementary or Additional Acts and Private Acts. Many of these Acts are not being applied anymore while others contain provisions that are in conflict with the Constitution. Redundant and obsolete provisions on the statute book are being identified and government departments are being consulted in order to verify these provisions. Numerous meetings were held to develop a methodology for conducting the investigation into the constitutionality and redundancy of existing legislation. The Commission also envisages an instrumental role in assisting Provinces with the alignment of provincial legislation vis-à-vis the Constitution by rendering such support as may be required.

In March 2007 a progress report on the investigation was forwarded to the Department of Justice and Constitutional Development for submission to the Minister with a view to informing Cabinet about the progress made in the investigation.

Professor Cathi Albertyn developed a document for the Commission setting out guidelines for the identification of legislative provisions that are obviously in conflict with section 9 of the Constitution. The guidelines are based on an analysis of Constitutional Court judgements. The tables of Constitutional cases as per Professor Albertyn's report have been updated and made available to the researchers involved with project 25. Future judgements of the Constitutional Court relating to the "equality" clause in the Constitution will be added as and when they become available.

The following table indicates work in progress in respect of the statutory law revision investigation:

<p>Legislation administered by the Department of Agriculture</p>	<p>The 112 statutes administered by the Department of Agriculture are being analysed to determine which are redundant, obsolete or unconstitutional. Once this has been done, a consultation paper with repeal and amendment proposals will be submitted to the Department for further discussion.</p>
<p>Legislation administered by the Department of Transport</p>	<p>The 218 statutes administered by the Department of Transport were scrutinised and a draft repeal Bill and consultation paper were drafted. Discussions were held with the legal adviser of the Department of Transport in November 2006 to consult on the statutes which have been identified for repeal or amendment. The Department indicated that it agreed with the proposals made by the Commission. The consultation paper and draft repeal Bill will be reworked and converted into a discussion paper that will be published for public consultation.</p>

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Legislation administered by National Treasury	The 624 statutes administered by National Treasury are being analysed to determine which are redundant, obsolete or unconstitutional. Once this has been done, a consultation paper containing repeal and amendment proposals will be submitted to the Department for further discussion.
Legislation administered by the Department of Public Works	The 67 statutes administered by the Department of Public Works have been analysed to determine which are redundant, obsolete or unconstitutional. A draft repeal Bill and draft consultation paper have been prepared. Once this has been reviewed the consultation paper containing repeal and amendment proposals will be submitted to the Department for further discussion.
Legislation administered by the Department of Trade and Industry	The approximately 220 statutes administered by the Department of Trade and Industry are being analysed with a view to determining which are redundant, obsolete or unconstitutional. Once this has been done, a consultation paper containing repeal and amendment proposals will be submitted to the Department for further discussion.
Legislation administered by the Department of Justice and Constitutional Development	The 385 statutes administered by the Department of Justice and Constitutional Development will be analysed to determine which are redundant, obsolete or unconstitutional. Once this has been done, a consultation paper containing repeal and amendment proposals will be submitted to the Department for further discussion. A review of the constitutionality of the Criminal Procedure Act 51 of 1977 was finalised and the report submitted to the Department during 2001 as Project 101: The application of the Bill of Rights to the criminal law, the law of criminal procedure and sentencing.
Repeal of the Transkei Penal Code and the Dangerous Weapons Act, No. 71 of 1968	A consultation paper on the repeal of the Transkei Penal Code and the Dangerous Weapons Act 71 of 1968, as far as it is still in force in the territory of the former Transkei, is being drafted following a request from the Judge President of the Transkei High Court.

On 9 September 2006 the Commission approved the inclusion of an investigation into the recognition of Hindu Marriages into the programme. This investigation is conducted as part of project 25. Preliminary research with a view to developing an issue paper has commenced. The researcher is also studying the January 2007 judgement of the High Court in the Durban and Coast Local Division in **Suchitra Singh v Jailall Ramparsad and Others**.

The Commission approved the publication of a discussion paper on the review of the Interpretation Act 33 of 1957 on 9 September 2006. A media statement announcing the availability of discussion paper 112 was released on 6 October 2006. The closing date for comment on discussion paper 112 was initially 31 December 2006. In January 2007 the closing date was extended to 28 February 2007 to afford respondents more time to comment. In February 2007 the closing date was further extended to 30 March 2007 in view of the limited responses received.

The Interpretation Act was drafted during an era of parliamentary sovereignty. It is not in line with the current constitutional dispensation or with the principles and practices of drafting and interpretation adopted by the legislature and the courts since 1994.

The following are the main issues dealt with in the discussion paper on the review of the Interpretation Act 33 of 1957 and the proposed Interpretation of Legislation Bill:

- The meaning of the word legislation [original and assigned legislation; primary legislation (parliamentary and provincial legislation and municipal by-laws) and legislation issued by the executive (subordinate or secondary legislation); new legislation and old order legislation].
- The definitions to be included in the definition clause in the proposed Interpretation of Legislation Bill.

- The purpose of the Interpretation of Legislation Bill.
- The application of the Bill.
- Some principles of interpretation including the supremacy of the Constitution.
- Legislation to be interpreted in the light of changing circumstances.
- Inconsistencies between provisions in the same legislation.
- Elements of legislation to be considered during interpretation (intrinsic information) such as preambles, long titles, marginal notes, headings to chapters or sections, paragraphing and punctuation, footnotes, endnotes, diagrams and examples, and schedules.
- Extrinsic information as aids to interpretation such as preceding discussions and speeches in Parliament and explanatory material.
- Commencement of legislation.
- Exercise of powers before commencement of legislation.
- Publication of legislation.
- Parliamentary scrutiny of subordinate legislation.
- The expiration or demise of legislation including express repeal of legislation; effect of repeal; and implied repeal.
- Proposals for the implementation of measures for sun-setting of subordinate legislation whereby all subordinate legislation will have a limited life, for example five years or ten years, after which the legislation has to be scrutinised and re-enacted otherwise it ceases to be of force.
- The extent to which legislation binds the State.
- The application of the *functus officio* doctrine and revocation of administrative decisions generally and proposals for reform of section 10(1) of the Interpretation Act.
- Notification in the Gazette of official acts performed in terms of legislation.
- Directory and peremptory words in legislation.
- Amendment and repeal of subordinate legislation.
- The exercise of powers and performance of duties.
- The power to appoint persons.
- The power to differentiate when issuing subordinate legislation.
- Delegation of power.
- Transfer of legislation, powers and functions.
- A list of general definitions for words and expressions often used in legislation.
- Definitions in old order legislation.
- Derivatives and other grammatical forms of defined words and expressions.
- Gender provisions.
- Reckoning of time and measurement of distance.

- Standard provisions in legislation such as prescribed forms; methods of serving, delivering, sending or submitting documents; consultation procedures; and decisions of bodies consisting of members, quorums of bodies and distant participants.

Project 94 – Arbitration

The investigation initially dealt with international and domestic commercial arbitration only. A report on international arbitration was submitted to the Minister in July 1998 and a report on domestic arbitration was submitted to the Minister in June 2001.

Alternative dispute resolution (ADR) covers all forms of dispute resolution other than litigation or adjudication through the courts. It therefore includes a broad range of mechanisms and processes designed to assist parties in resolving disputes creatively and effectively. These mechanisms and processes are not intended to supplant court adjudication, but rather to supplement it. The most common types of ADR include negotiation, conciliation, mediation and arbitration.

An issue paper dealing with all aspects of ADR was published for general information and comment during 1997.

The finalisation of an amended draft report on community dispute resolution structures is receiving attention. Although a project committee meeting to discuss the draft Bill and re-assess the membership of the project committee is still pending as most of the active members are not available, the researcher, the project leader, Professor Schärf and Professor Cartwright have considered the draft Bill and a draft report is being finalised. In their consideration of the draft Bill, Professors Schärf and Cartwright had encountered a few problems which they brought to the attention of the project leader and the researcher. These are being attended to.

Although the project committee decided that a discussion paper on family mediation would be completed subject to the finalisation of the investigation into community dispute resolution structures, preliminary research is being carried out whenever time allows as the researcher has been appointed to serve on the task team on Judicial Functions of Traditional Leaders: Policy Formulation.

Project 107 - Sexual offences: Adult prostitution

An issue paper on adult prostitution was published for general information and comment in August 2002.

While it is often said that prostitution is one of the oldest professions, the legal response to it differs from society to society and over the course of time. Internationally, the topic of prostitution remains an emotive one and opinions on the legal treatment of prostitution are generally strongly polarised. This is no different in South Africa.

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The finalisation of a draft discussion paper on adult prostitution has been receiving attention subject to the finalisation of the investigations into protected disclosures (project 123), stalking (project 130) and trafficking in persons (project 131). A draft discussion paper will be finalised during the second quarter of 2007.

Project 113 - The use of electronic equipment in court proceedings

The project will receive further attention after the completion of Project 126: Review of the law of evidence and is also subject to the researcher's involvement in the implementation of the Service Charter for Victim's of Crime and the review of the criminal justice system.

Project 122 – Assisted decision-making: Adults with impaired decision-making capacity

The Commission, as far back as 1988, undertook an investigation with a view to improving the plight of mentally incapacitated persons who cannot afford the costs involved in securing a High Court appointed curator. Its recommendations led to the adoption of the Mentally Ill Persons' Legal Interests Amendment Act 109 of 1990, which amended the Mental Health Act 18 of 1973. This amendment enabled an interested person to apply to the Master of the High Court (which entails insignificant costs) for the appointment of a curator to a person who is not declared to be mentally ill, but whom the applicant believes to be suffering from mental illness to such an extent that the person is incapable of managing his or her own affairs.

The present investigation means a revival of its previous investigation, but on a wider basis. Additional measures to protect the interests of those whose legal capacity has for some reason been diminished, are researched.

An issue paper on incapable adults was published in December 2001. A discussion paper was published for general information and comment in January 2004 and is discussed in the 03/04 annual report. The project leader approved final amendments to a proposed draft Bill containing about 150 clauses in July 2006. The draft Bill was submitted to the project committee in September 2006. A draft report will be submitted to the project leader during the third quarter of 2007.

Project 123 - Protected disclosures

The purpose of the Protected Disclosures Act 26 of 2000 (the PDA) is to provide for procedures and to offer protection to employees who blow the whistle on their employers.

An issue paper dealing with the need for the extension of the ambit of the PDA was published in the form of a questionnaire in January 2003. A discussion paper was published for general information

and comment in June 2004 and is discussed in the 04/05 annual report. A draft report was submitted to the Department of Justice and Constitutional Development in October 2005. The completion of the report is subject to departmental discussions. The draft report has been submitted to the project leader.

Project 124 - Privacy and data protection

Privacy is a valuable aspect of personality. While potential invasions of privacy can come from many sources, a chief concern in recent years has been information privacy. Information privacy has been defined as the claim of individuals, groups or institutions to determine for themselves how, when and to what extent information about them is collected, stored or communicated to others. Information about people and their activities can range from medical records, purchasing habits and property ownership to borrowing habits at the video store, cell phone conversations and surfing practices on the Internet - all mostly recorded in digital form. It is clear that personal information has acquired a market value.

An issue paper was published for general information and comment in August 2003 and is discussed in the 03/04 annual report. A discussion paper was published for general information and comment in October 2005 which is discussed in the 05/06 annual report.

A series of workshops hosted by the Commission were held in February and March 2006. The closing date for comments on the discussion paper was extended to 31 May 2006. The researcher presented the draft Bill at a series of workshops hosted countrywide during July 2006 by the E-law Committee of the Law Society of South Africa. Written submissions received on the discussion paper have been collated. The draft Bill has been amended in accordance with the comments received and submitted to the project committee for comment in March 2007. A draft report is being finalised.

Project 125 - Prescription periods

No comprehensive review of all the provisions providing for different prescription periods - whether of a contractual or delictual nature - has been undertaken. When reporting on the Bill which subsequently became the Legal Proceedings Against Certain Organs of State Act 40 of 2002, the Portfolio Committee on Justice and Constitutional Development recommended that the Minister for Justice and Constitutional Development be approached to request the Commission to include in its programme an investigation into the harmonisation of the provisions of existing laws providing for different prescription periods. An investigation into the review of prescription periods was subsequently included in the Commission's programme. An issue paper was published for general information and comment in August 2003 and is discussed in the 03/04 annual report. The researcher involved in the preparation of a

draft discussion paper was transferred to another department. The project is not currently receiving attention and it will be assigned to a new researcher when the three vacant posts of Senior State Law Adviser are filled.

Project 126 - Review of the rules of evidence

Professor Schwikkard was requested to prepare a draft discussion paper on the principle of relevance and the hearsay rule. The project committee considered a revised discussion paper on 10 August 2004, after which the committee requested Professor Schwikkard to do further research with the assistance of Justice Nugent. Justice Harms (project leader) and Justice Nugent (project committee member) resigned during February 2005.

The Commission directed on 9 September 2006 that the project should proceed and that new project committee members should be appointed to replace Justice Harms and Nugent. The appointment of new project committee members was pursued, but abandoned because of limited response and in view of the allocation of the researcher to Project 25: Statutory law revision, the Commission's highest priority at present.

Project 127 – Review of administration orders

The previous Minister requested the Commission to investigate administration orders and to follow an incremental approach to distinguish between reforms that could be effected in the short and medium term and reforms that could be effected in the medium to long terms.

The Commission decided on 30 September 2005 that a proposal should be made to the Department of Trade and Industry that the National Credit Bill, 2005 should provide for certain amendments which would pave the way for the abolishment of administration orders in terms of section 74 of the Magistrates' Courts Act 32 of 1944. However, the Bill was passed by Parliament without any of the envisaged provisions. The Department of Justice and Constitutional Development has indicated that it will consider the repeal of section 74 amendments along the lines suggested. The Commission will be requested to approve the removal of this investigation from the Commission's programme.

Project 128 – Review of aspects of the law of divorce

The researcher's involvement in the Children's Bill process has contributed to the delay in finalising a draft discussion paper. A newly appointed researcher has also been allocated to the project. Questionnaires received from members of the public on problems experienced with access to children after divorce and divorce procedures are being collated. Questionnaires for the family advocates and for legal practitioners and social workers dealing with divorce are being developed. Preliminary research with a view to developing a draft discussion paper has commenced.

Project 129 – Review of aspects of matrimonial property law

Preliminary research with a view to developing an issue paper is conducted when time allows while the researcher is still involved in Project 122.

Project 131 – Trafficking in persons

An issue paper was published for general information and comment in January 2004 and is discussed in the 03/04 annual report.

The Commission approved a discussion paper on trafficking in persons for publication in March 2006. The discussion paper is expounded in the 05/06 annual report. The closing date for comments on the discussion paper had been 30 June 2006, but was extended to 31 July 2006. As part of the consultative process, meetings were held to provide interested parties with an opportunity to discuss the Commission's preliminary recommendations as set out in the discussion paper and draft Bill. Consultative meetings were held in Pretoria on 6 June 2006, in Nelspruit on 13 June 2006, in Cape Town on 20 June 2006, in the Eastern Cape on 22 June 2006, in Durban on 27 June 2006, and in Bloemfontein on 29 June 2006.

Comments on the discussion paper have been collated. Comment by the Department of Justice and Constitutional Development is awaited.

Project 133 – A specific civil action in respect of consequential damages arising from hoaxes

The Report of the Portfolio Committee on Safety and Security on the Anti-Terrorism Bill, dated 13 November 2003, recommended as follows:

"...that the South African Law Reform Commission be requested to investigate the possibility of a specific civil action in respect of consequential damages arising from hoaxes (including the possibility of punitive damages) separate from the expenses incurred by the security services, to deal with such hoaxes. The civil action is intended to be separate from the reimbursement order, which may be made by a Court after a conviction in respect of the offence relating to hoaxes (Clause 18(2) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Bill). A provision to this effect in our law is, for example, in respect of riot damage, which occurs as a result of gatherings and demonstrations (see section 11 of the Regulation of Gatherings Act, 1993 (Act No. 205 of 1993))."

The project was assigned to the researcher in June 2005. A draft discussion paper is being finalised.

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Project 134 – Administration of estates

A discussion paper dealing with measures to improve the administration process and reduce the work of the supervising authority and executors was approved for publication by the Commission in September 2005 and is discussed in the 05/06 annual report. Comments are being evaluated. The researcher is exploring interim solutions in consultation with the Office of the Chief Master of the High Court.