

SALC BULLETIN

Newsletter of the South African Law Commission

Farewell of Minister A M Omar and Deputy Minister M E Tshabalala- Msimang

The Commission would like to thank Dr Omar and Dr Tshabalala-Msimang for their keen involvement in and support of the activities of the Commission. A number of important investigations received attention during their term of office and their efforts to promote the Commission's reports and proposals for draft legislation in Parliament are highly appreciated.

The Commission's best wishes accompany Dr Omar in his new portfolio as Minister of Transport. Dr Tshabalala-Msimang is congratulated on her appointment as Minister of Health.

Welcoming of Minister PM Maduna and Deputy Minister CE Gillwald

The Commission welcomes Dr Maduna and Ms Gillwald and assures them of its support. The Commission acknowledges the fact that it has a vital role to play in the development and transformation of our legal system. To this end the Commission endeavours to provide a quality service in a spirit of cooperation.

Reports

According to the present position in

The following reports were submitted to the Minister of Justice:

Project 63: Review of the Law of Insolvency: Interim Report on the Enactment in South Africa of UNCITRAL's Model Law on Cross-border Insolvency

On 15 December 1997 the General Assembly of the United Nations adopted a resolution, co-sponsored by South Africa, recommending that States review their legislation on cross-border insolvency and in that review give favourable consideration to the Model Law on Cross-Border Insolvency developed by the United Nations Commission on International Trade Law (UNCITRAL), bearing in mind the need for internationally harmonised legislation governing instances of cross-border insolvency. The Model Law was developed by the United Nations Commission on International Trade Law in close cooperation with the International Association of Insolvency Practitioners (INSOL) over a number of years and benefited from INSOL's expert advice during all stages of the preparatory work. Active consultative assistance during the formation of the Law was also received from Committee J of the Section on Business Law of the International Bar Association.

The Objects of the Model Law are to promote—

(a) cooperation between the courts and other competent authorities of the Republic and foreign States involved in cases of cross-border insolvency;

(b) greater legal certainty for trade and investment;

our law it is unlawful to terminate a

(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) protection and maximization of the value of the debtor's assets; and

(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

There is strong support for the enactment of the Model Law in South Africa. As few changes as possible have been made to the Model Law in order to strive for a satisfactory degree of harmonisation and certainty, but the Model Law has been adjusted in a draft Bill to suit South African law. In terms of the Bill the Insolvency Act is amended to indicate that foreign representatives and creditors have access to the court as provided in Chapter 2 of the Model Law and that applications for the liquidation of the estate of a debtor are limited as provided in Chapter 5 of the Model Law.

Project 86: Euthanasia and the Artificial Preservation of Life

The report contains various recommendations regarding end-of-life decisions and the treatment of terminally ill patients. In certain instances legislation has been proposed to give effect to these principles in view of current uncertainty in the minds of the general public and medical personnel about the legal position in this regard.

person's life in order to end his or her

unbearable suffering even if it is clear that death is inevitable and that the person is about to die. The intentional termination of such a person's life remains punishable even if the suffering person expresses the wish to die or even begs to be killed. Withholding or withdrawing of life-sustaining medical treatment from a patient who is terminally ill may however be permissible under specific circumstances and subject to certain conditions.

The advances made in medical science and especially the application of medical technology have resulted in patients living longer. For some patients this signifies a welcome prolongation of meaningful life, but for others the result is a poor quality of life which inevitably raises the question whether treatment is a benefit or a burden. Furthermore, increased importance is being attached to patient autonomy worldwide. The need has therefore arisen to consider the protection of a mentally competent patient's right to refuse medical treatment or to receive assistance, should he or she so require, in ending his or her unbearable suffering by the administering or supplying of a lethal substance to the patient. The position of the incompetent patient, as well as the patient who is clinically dead, has to be clarified as well.

Since matters concerning the treatment of terminally ill people are at present being dealt with on a fairly **ad hoc** basis, there is some degree of uncertainty in the minds of the general public and medical personnel about the legal position in this regard. Doctors and families want to act in the best interest of the patient, but are unsure about the scope and content of their obligation to provide care. Furthermore, doctors are afraid of being exposed to civil claims, criminal prosecution and professional censure should they withhold life support systems or prescribe drugs which may inadvertently or otherwise shorten the patient's life, even if they are merely complying with the wishes of the patient. Under this option the practice of active euthanasia could be regulated through legislation in terms of which a

patient.

To clarify the uncertain position the Commission recommends the enactment of legislation to give effect to the following principles:

(a) A medical practitioner may, under specified circumstances, cease or authorise the cessation of all further medical treatment of a patient whose life functions are being maintained artificially while the person has no spontaneous respiratory and circulatory functions or where his or her brainstem does not register any impulse.

(b) A competent person may refuse any life-sustaining medical treatment with regard to any specific illness from which he or she may be suffering, even though such refusal may cause the death or hasten the death of such a person.

(c) A medical practitioner or, under specified circumstances, a nurse may relieve the suffering of a terminally ill patient by prescribing sufficient drugs to control the pain of the patient adequately even though the secondary effect of this conduct may be the shortening of the patient's life.

(d) A medical practitioner may, under specified circumstances, give effect to an advance directive or enduring power of attorney of a patient regarding the refusal or cessation of medical treatment or the administering of palliative care, provided that these instructions were issued by the patient while mentally competent.

(e) A medical practitioner may, under specified circumstances, cease or authorise the cessation of all further medical treatment with regard to terminally ill patients who are unable to make or communicate decisions concerning their medical treatment, provided that his or her conduct is in accordance with the wishes of the family of the patient or authorised by a court order.

As regards active voluntary multi-disciplinary panel or committee is instituted to consider requests for euthanasia according to set criteria.

euthanasia, the Commission does not make a specific recommendation. The Commission is aware of the array of competing interests and the diversity of social, moral and ethical values involved in the issue of active voluntary euthanasia. It has thus not formulated final recommendations in this regard, but submits the following options for further public debate and discussion. These options were identified through comments received in consultations and from responses to two discussion papers which were distributed for public information:

(a) *Option 1:* Confirmation of the present legal position

Under this option it is recommended that there should be no change to the current legal position in South Africa prohibiting active voluntary euthanasia and physician-assisted suicide. The arguments in favour of legalising euthanasia are not sufficient reason to weaken society's prohibition of intentional killing since it is considered to be the cornerstone of the law and of all social relationships. Whilst acknowledging that there may be individual cases in which euthanasia may seem to be appropriate, these cannot establish the foundation of a general pro-euthanasia policy. It would furthermore be impossible to establish sufficient safeguards to prevent abuse.

(b) *Option 2:* Decision-making by the medical practitioner

Under this option the practice of active euthanasia could be regulated through legislation in terms of which a medical practitioner may give effect to the request of a terminally ill, but mentally competent patient to make an end to the patient's unbearable suffering by administering or providing a lethal agent to the patient. The medical practitioner will have to adhere to strict safeguards in order to prevent abuse.

(c) *Option 3:* Decision-making by a panel or committee

Project 111: Constitutional Jurisdiction of Magistrates' Courts

The Report comes after the publication of Discussion Paper 75 last year in which the Commission proposed certain amendments to sections 170 and 172 of the Constitution Act 108 of 1996, section 110 of the Magistrates' Courts Act 32 of 1944, and the Magistrates' Courts Rules.

The two main aims of the amendments were to confer constitutional jurisdiction on magistrate's courts and to ensure symmetry between their constitutional jurisdiction and their *ultra vires* jurisdiction. A number of responses to the Commission's proposals were received. Generally speaking most respondents supported the aims of the amendments. However, opposing views were expressed on two aspects of the Commission's proposals, namely -

(a) that magistrates be precluded from ruling on the validity of Acts of Parliament, legislation passed by the provincial legislatures after 27 April 1994 and any conduct of the President; and

(b) that confirmation by a Full Bench of a High Court be required before any order of constitutional invalidity made by a magistrate has any force.

In the Commission's view the jurisdictional and procedural scheme established by the Constitution points to magistrates' courts being precluded from ruling on the constitutionality of Acts of Parliament and conduct of the President. The Commission also considers it appropriate that magistrates be precluded from ruling on the constitutional validity of legislation passed after 27 April 1997 by the provincial legislatures, which are representative legislatures with significant constitutional status and a range of exclusive legislative powers. For these reasons, the Commission

(j) Any share of retirement fund benefits to which a non-member spouse is entitled is made available on a locked-in basis - in other words, by way of deferred pension and not as a cash benefit.

remains convinced that magistrates should be precluded from ruling on the validity of Acts of Parliament, legislation passed by the provincial legislatures after 27 April 1994 and any conduct of the President.

The Commission accepts the argument that in view of the inapplicability of *stare decisis* in the lower courts the compulsory referral to a Full Bench of a High Court of all rulings of constitutional invalidity by magistrates will result in unnecessary inconvenience, costs and delays. It accordingly proposes that the suggested compulsory referral mechanism be replaced with a requirement that magistrates' courts making orders of constitutional invalidity forthwith notify the relevant organs of state of such order. The organs of state would then be in a position to seek a declarator from the High Court in appropriate cases - e.g. where there is no appeal and where the organs of state have a sufficient interest in the matter and the other requirement for declaratory relief are met. It is considered desirable that the High Courts develop a set of rules and requirements for the granting of declaratory relief in such circumstances.

To give effect to the proposals set out above, the Report contains draft amendments to section 170 of the Constitution; section 110 of the Magistrates' Courts Act 32 of 1944; and the Magistrates' Courts Rules.

Project 112: Sharing of Pension Benefits

The provisions for the sharing of retirement fund benefits on divorce as provided for by the Divorce Act 70 of 1979, via the Divorce Amendment Act 7 of 1989, proved to be unsatisfactory in several respects.

The main recommendations contained (k) Benefits to which a non-member spouse is entitled must be paid to him or her direct from the retirement fund by which the benefits are held on behalf of the non-member spouse.

(l) If the non-member spouse dies

in the Report on the Sharing of Pension Benefits are the following:

(a) The sharing of retirement fund benefits between spouses on divorce must be governed by substantive legislation separate from the Divorce Act, 1979.

(b) Provision should be made for the division of retirement benefits as such and not merely for the exchange of compensatory assets in place of such benefits.

(c) The exchange of compensatory assets in place of a share of retirement fund benefits should nevertheless remain as an option available to the spouses.

(d) Spouses may exclude pension sharing in terms of their antenuptial contract.

(e) A spouse may waive any right to retirement fund benefits.

(f) Spouses may agree in writing to share retirement fund benefits in different proportions than those prescribed.

(g) Subject to the principles contained in the proposed legislation, a retirement fund may make use of approximate calculations where exact data is not obtainable.

(h) The costs that are recoverable from spouses in respect of the division of benefits may be prescribed by regulation.

(i) The non-member spouse has a right to a share of the retirement fund benefits which accumulated in respect of the member during the marriage. The extent of the right is prescribed in the formulae set out in the proposed legislation in respect of the various types of retirement schemes.

before the date on which the benefits become payable to the member, the withdrawal value of the benefits on the date of the death of the non-member spouse is payable to his or her estate.

(m) The sharing of retirement fund benefits is at this stage limited to spouses whose marriages are recognized as such in terms of existing law.

(n) The proposed legislation should make it clear that retirement fund benefits are not divided as part of the matrimonial property of spouses.

(o) The proposed legislation should be applicable in respect of marriages dissolved after the commencement of the new provisions.

(p) The new provisions should not apply in respect of spouses who have in terms of their antenuptial contract chosen complete separation of their property, but such spouses should be allowed to make the said provisions applicable to them by way of written contract.

Workshops on traditional courts and the judicial function of traditional leaders

On 13 May 1999 the Law Commission unveiled Discussion Paper 82 on Traditional Courts and the Judicial Powers of Traditional Leaders at a briefing in the National Council of Traditional Leaders in Pretoria. The purpose of the briefing was to explain the Commission's proposals to the Council, and to seek the Council's assistance in mobilising the provincial Houses of Traditional Leaders to arrange meetings in their areas to enable the Commission to discuss the proposals with traditional leaders.

The consultative workshops took place between 9 June and 13 July 1999 at 15 venues across all the 96

100 The Apportionment of Damages Act, 1956
Family law and the law of persons:
* Maintenance

101 The application of the Bill of

provinces with Houses of Traditional Leaders. To answer a concern expressed in the past, that the Commission consults only in urban areas, an effort was made to hold the meetings wherever traditional leaders could be assembled. The schedule of workshops was as follows:

(a) Northern Province

9 June Thohoyandou
10 June Giyani
11 June Lebowakgomo

(b) Mpumalanga Province

22 June KwaMhlanga
23 June Eerstehoek
24 June Nkomazi
25 June Nsikazi

(c) Free State Province

28 June Thaba Nchu
29 June Qwaqwa

(d) North West Province

1 July Mmabatho
2 July Taung

(e) Eastern Cape Province

5 July Umtata
6 July Kingwilliams Town

(f) KwaZulu-Natal Province

12 July Ulundi
13 July Durban

Summaries of the Commission's proposals were prepared in all official languages and the consultations were conducted by the Chairperson of the project committee on the Harmonisation of Indigenous Law and Common Law, Professor Thandabantu Nhlapo, and Ms Sindiswa Dube, the researcher on the project. Both pronounced themselves well satisfied

105 Security legislation

106 Juvenile Justice

with the progress of the consultations, especially the massive attendances at all the venues and the meticulous preparations by the respective Houses and their administrative departments. The Commission also extends its gratitude to the Regional Offices of the Department of Justice in the provinces in question, who ensured the attendance of Justice personnel, especially magistrates, at each meeting.

Further meetings with other role-players are planned, some of which will be coordinated by the Commission on Gender Equality.

Programme of the Commission

The following projects on the Commission's programme are currently receiving attention:

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| 25 | Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book |
| 59 | Islamic marriages and related matters |
| 63 | Review of the law of insolvency |
| 73 | The simplification of criminal procedure |
| 82 | Sentencing |
| 85 | Aspects of the law relating to AIDS |
| 90 | Harmonisation of the common law and indigenous law |
| 94 | Arbitration |
| 107 | Sexual offences |
| 108 | Computer related crimes |
| 109 | Review of the Marriage Act |
| 110 | Review of the Child Care Act |

- 113 The use of electronic equipment in court proceedings
- 114 Publication of divorce proceedings
- 115 Review of administrative law
- 116 The carrying of firearms and other dangerous weapons in public or at gatherings
- 117 The legal position of voluntary associations
- 118 Domestic partnerships
- 119 Uniform national legislation on the fencing of national roads

Invitation

Interested parties are invited to submit proposals for law reform and information in respect of projects to the Commission.

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The Commission's office hours are from 07:15 to 15:45 on Mondays to Fridays.

Internet

Most of the Commission's documents are also available on the Internet. The site address is:

<http://www.law.wits.ac.za/salc/salc.html>

Subscribe to listserv on the site address to be notified by email whenever there are new SA Law Commission publications. (Note that this is not a discussion group.)

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