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# SALRC BULLETIN

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## Newsletter of the South African Law Reform Commission

### Amendments to the South African Law Commission Act

In terms of the Judicial Matters Amendment Act, 2002, the South African Law Commission Act 19 of 1973 has been amended to effect a change of name to the South African Law **Reform** Commission.

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".

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).

### Issue Papers

Since publication of the previous Bulletin, two Issue Papers have been published for general information and comment.

#### Protected Disclosures (Issue Paper 20)

The Issue Paper deals with the need for the extension of the ambit of the Protected Disclosures Act No 26 of 2000 (the PDA).

The PDA purports to protect employees from the victimisation of employers. It has three main objects, which are to—

- provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer;
- protect an employee, whether in the public or the private sector, from being subjected to an occupational detriment on account of having made a protected disclosure; and
- provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure.

A disclosure is protected only if it has been made in accordance with the provisions of the PDA. Specific categories to whom protected disclosures may be made are identified in the PDA. Disclosures made outside the requirements of the PDA are not protected. All the disclosures under the PDA are confined to the relationship between employer and employee in the public and private sectors. The PDA does not provide protection to disclosures outside the employer/employee relationship.

Whistle blowers who intend using the provisions of the PDA to conceal their own involvement in criminal activities are not protected. Where a law has been contravened, the PDA does not protect the employee from criminal prosecution or civil liability to third parties. Thus there is no exclusion of civil or criminal liability for making a protected disclosure.

The PDA does not provide for a remedy where an employee has been victimised as a result of a protected disclosure. In terms of the PDA, there are no offences in terms of which an employer would be committing an offence by unlawfully subjecting an employee to victimisation, and an employee would be committing an offence by making a false disclosure or by making a disclosure without knowing or believing it to be true.

In relation to all these concerns regarding the expansion of the ambit of the PDA, the Commission publishes the Issue Paper as the first step in public consultation in this investigation. The Issue Paper is presented in the form of a questionnaire. Its purpose is to provide persons and bodies wishing to comment or make suggestions and proposals for the reform of the PDA with background information.

*The closing date for comment on Issue Paper 20 is 28 February 2003.*

### **Consolidated Legislation Pertaining to International Cooperation in Civil Matters (Issue Paper 21)**

The Issue Paper deals with the need for consolidated legislation which will promote international co-operation in civil matters.

The present position is that, subject to certain statutory exceptions, a foreign judgment is not directly enforceable in South Africa. The common law procedures are expensive, time-consuming and complex. In response to this the legislature enacted various pieces of legislation providing for international co-operation in civil matters. This is achieved by way of designation of countries under the different pieces of legislation.

To date only a few countries have been designated under the various pieces of legislation for the purpose of co-operation in civil matters. The introduction of statutory enforcement procedures was intended to overcome the cumbersome common law procedures but these have proved unsuccessful. For example, in respect of judgments relating to money, Namibia is the only country designated under enabling regulations as a country with reciprocal enforcement procedures.

A similar situation prevails in respect of the enforcement of other types of civil judgments such as maintenance orders. The relevant Act applies only to a limited number of designated countries. This means that maintenance orders emanating from countries which are not designated under the Act cannot be enforced in South Africa. This exclusion applies to most countries. The reciprocal service of legal documents is hindered by the same issue of designation.

The necessary pieces of legislation exist in our statute book but are not achieving their purpose. The first possible reason is that there are too many statutes governing this area, thereby complicating rather than facilitating the process of co-operation. The second possible reason is that the relevant statutes operate on the basis of designation of foreign countries thereby excluding most countries from their application.

The Issue Paper focuses mainly on three aspects of international co-operation:

- The recognition and enforcement of foreign judgments.
- The reciprocal service of legal documents.
- Mutual assistance in the obtaining of evidence.

The Issue Paper sets out the various pieces of legislation and the limited extent of their application thereby highlighting their shortcomings and inadequacies. There is a dire need to review existing legislation in this area especially in the light of South Africa's trade and other relations with foreign countries. It is clear that current statutory enforcement has limited scope thereby

rendering it ineffective. The Issue Paper seeks ways to remedy this problem.

*The closing date for comment on Issue Paper 21 is 28 February 2003.*

**The Issue Papers are available on request and are free of charge. Correspondence should be addressed to:**

**The Secretary  
SA Law Commission  
Private Bag X668  
PRETORIA  
0001**

**Telephone: (012) 322-6440  
Fax: (012) 320-0936**

**The Issue Papers are also available on the Internet at  
[www.law.wits.ac.za/salc/salc.html](http://www.law.wits.ac.za/salc/salc.html)**

### **Discussion Papers**

No discussion papers have been published since publication of the previous Bulletin.

### **Reports**

The following three reports were submitted to the Minister for Justice and Constitutional Development on 21 January 2003:

#### **Report on Sexual Offences**

The report and draft Bill on sexual offences cover both the substantive and procedural law relating to sexual offences and follows on extensive consultations. The report contains the final recommendations of the Commission and includes a proposed Bill on Sexual Offences.

The report specifically addresses the growing and complex problems relating to rape and sexual abuse in South Africa. The intention is to encourage victims of sexual violence to use the criminal justice system, to improve the experiences of those victims who choose to enter the system, and to

increase the conviction rate whilst at the same time giving due regard to the rights accorded to alleged perpetrators of sexual offences. These recommendations are divided into legislative and non-legislative recommendations.

In the course of this investigation the Commission has established that despite mounting public and official concern about sexual offences and rape, South Africa has no clear strategy for dealing inclusively with child and adult victims of sexual offences, either on a primary, preventative level or on a secondary, protective level. It has found, for example, that standards of service vary greatly. In order to ameliorate these and related basic service dilemmas the Commission has made detailed non-legislative recommendations for the attention of critical role players within the criminal justice system and auxiliary services relating to their spheres of responsibility. Aspects addressed are, among others, resourcing, inter-sectoral co-operation, training, awareness raising, and capacity building.

The legislative recommendations are embodied in the draft Bill and include the following:

- A codification of the common law offence of rape. This offence addresses the unlawful and intentional penetration of a person by the genital organs of one person into the anus or genital organs of another person.
- The creation of the related offences of sexual violation and oral genital sexual violation. These offences respectively provide for the unlawful and intentional use of an object to penetrate a person's anus or genital organs; and the penetration of a person's mouth by a person or animal's genital organs.
- Rather than to rely on the absence of consent to the sexual act, the Commission recommends that penetrative sexual acts (rape, sexual violation and oral genital sexual violation) will be deemed to be unlawful if coercive or fraudulent circumstances are present or if

- circumstances exist in which a person is incapable in law to appreciate the nature of the act.
- The Commission is of the opinion that intentional non-disclosure by a person that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person prior to sexual relations with another (consenting) person amounts to sexual relations by false pretences and would therefore constitute rape.
  - Confirmation that a marital or other relationship is not a defence to the offence of rape, sexual violation or oral genital sexual violation.
  - The creation of the offence of promoting a sexual offence with a child where a person manufactures or distributes an article that promotes a sexual offence with a child or where a person sells, supplies or displays to a child an article which is intended to perform a sexual act.
  - The decriminalisation of offences relating to children and mentally impaired persons who are prostitutes and in certain circumstances children benefiting from child prostitution, for example siblings in a child-headed household. A child is defined as a person younger than 18 years of age.
  - The explicit criminalisation and severe penalisation of all role-players involved in child prostitution and the prostitution of mentally impaired persons. This offence targets pimps, clients, brothel-keepers and all other role-players involved in the commercial sexual exploitation of children.
  - The organisation or promotion of child sex tours is specifically prohibited. This provision criminalises the actions of both persons and bodies that facilitate such tours within or to South Africa in any way, whether by making travel arrangements for potential perpetrators or advertising such tours.
- A provision is included which allows for extra-territorial jurisdiction in respect of all offences under the Act and not only those committed in relation to children. This means that the provisions contained in the Sexual Offences Bill will be made applicable to South Africans travelling abroad.
  - The state is to provide appropriate medical care, treatment and counselling to persons who have sustained physical, psychological or other injuries as the result of an alleged sexual offence.
  - The Commission has critically assessed the rules of evidence and procedure which govern and/or are applied in sexual offence trials. In this regard the report recommends the following:
    - The creation of a category of vulnerable witnesses which will include all complainants and child witnesses in sexual offence cases and which will afford them new protective measures, in addition to protective measures already provided for in the Criminal Procedure Act, 1977 (such as in camera hearings, the appointment of intermediaries and the use of closed-circuit television). The new protective measures would include the appointment of a support person to assist the witness during the trial as well as at pre-trial procedures.
    - The abolition of the cautionary rule in relation to complainants in sexual offence cases and children, which currently requires or allows that such evidence should or can be treated with caution.
  - In relation to sentencing and the post-trial phase of the criminal procedure process in relation to sexual offences the following recommendations are made:
    - A court may upon conviction of a sexual offender subject him or her to a drug and alcohol rehabilitation

- order where it appears that the offender may benefit from treatment for the misuse of alcohol and drugs.
- A court may declare a sex offender a dangerous sexual offender and place him or her under long term supervision. Sex offender orders may prohibit a person convicted of a sexual offence from acting in a way that may cause harm to others, from frequenting specified locations and from contacting specified persons.
  - The increase of the penalties for persons contravening the prohibition against publication of information or revealing the identities of complainants and witnesses in sexual offence cases.

### **Report on the Review of the Child Care Act**

From the outset the Commission interpreted its mandate as going beyond the confines of the present Child Care Act, 1983, to include all statutory, common, customary and religious law affecting children. Given this broad scope, the report and draft Bill cover a wide range of issues:

- The general principles underpinning the draft Bill, including the best interests of the child standard are defined; children's rights and responsibilities are enumerated; and it is recommended that the age of majority be advanced to 18 years.
- The diversity of family forms in South Africa; the shift from parental power to parental responsibility; the acquisition and loss of parental responsibility by persons other than biological parents; co-exercise of parental responsibilities and rights; and the termination of parental responsibility are dealt with.
- Aspects such as legitimacy of children; and the status of children born of artificial insemination and surrogate motherhood are considered.
- The draft Bill grants a new status and a wider jurisdiction to the existing children's courts in an effort

to improve the experiences of children going through the formal system.

- Early childhood development and prevention and early intervention services are recognised as vitally important components of the child protection system.
- Formal measures for the protection of children from abuse and neglect are a central focus of the draft Bill. The draft Bill considers legal provisions and interventions which are designed to deal with children in especially difficult circumstances and situations in which specific children are being harmed, or are at immediate risk of harm, through abuse or neglect. Reporting of children in need of care and protection is made mandatory for certain professionals and voluntary for any other person. Elaborate provisions are made in respect of a national child protection register.
- Partial care; shelters and drop-in centres; children in alternative care, foster care and care by relatives; adoption; and residential care are issues that are dealt with.
- International issues affecting children are addressed. These include, inter alia, inter-country adoptions; trafficking of children across borders; child abductions; and refugee children.
- Issues of grants and social security for children are addressed; and the introduction of a monitoring system in the form of a children's protector to ensure the effective implementation of the draft Children's Bill is proposed.

A number of the more contentious recommendations contained in the report and draft Bill are that -

- childhood begins at birth;
- the age of majority be lowered to 18 years of age;
- more than one (even more than two) persons be allowed to acquire and manage parental rights and responsibilities, or components

- thereof, in respect of the same child at the same time;
- mothers and married fathers be accorded such parental rights and responsibilities automatically, while some unmarried fathers and other persons will have to apply to court to acquire such rights and responsibilities;
  - a child and family court be established at regional court level;
  - a register of persons unsuitable to work with children be created;
  - children of all ages be provided with confidential access to condoms;
  - the common law defense to reasonable chastisement be repealed;
  - municipalities may establish and administer child and youth care centres;
  - child-headed households be recognized by law; and
  - a child grant be payable on a universal basis in respect of all children in need of care and protection.

The draft Bill makes specific provision for inter-sectoral implementation of the Act through a national policy framework to be prepared by the Minister for Social Development. Such framework must reflect core components of the national strategy to secure the protection and well-being of all children in the Republic, performance indicators to measure progress with the achievement of objectives, and measures to ensure adequate funds for securing such protection and well-being of all children.

#### **Report on Traditional Courts And The Judicial Function Of Traditional Leaders**

The report contains draft legislation which is aimed at establishing customary courts and consolidating the different provisions governing chiefs' courts.

The administration of justice in rural South Africa is predominantly carried out by chiefs' courts, which administer justice largely on the basis of customary law. The operation of these courts is governed by a number of statutes, both of the old South

Africa (Black Administration Act 38 of 1927) and of the former homelands and self-governing territories. The continued operation of homeland statutes is sanctioned by item 2 of Schedule 6 of the 1996 Constitution. The President has by proclamation assigned these laws to the relevant provinces.

There is a need to consolidate the different provisions governing these courts and to modernise them so that their operation is in conformity with the principle of democracy and other values underlying the Constitution. Following a request from the Minister of Justice that the matter be expedited, the Commission solicited donor funding and appointed a specialist to develop a position paper along certain guidelines suggested by the Minister. These guidelines included the need for the paper to propose practical solutions, to avoid being overly academic, to draw on legislation in other African countries, and to use existing Departmental materials such as the deliberations and resolutions of the numerous workshops on the subject and Constitutional Assembly documents embodying the submissions and views of the traditional leaders themselves over the years.

To this end, a discussion paper entitled "Traditional Courts and the Judicial Function of Traditional Leaders" was published in May 1999 and circulated for general information and comment. Comments and representations were received by the Commission from traditional leaders, academics, magistrates, women's groups and other interested persons.

Country-wide workshops were held during the period 9 June to 13 July 1999 in all the provinces that have traditional leaders and traditional structures, namely the Eastern Cape, Free State, KwaZulu-Natal, Mpumalanga, North West and Limpopo (formerly, Northern Province). These workshops were well attended with most stakeholders represented. On 9 September 1999 an academic workshop entitled "Customary Courts" organised jointly by the Centre for Indigenous Law (UNISA) and the Congress of Traditional Leaders of South Africa (CONTRALESA) in cooperation with the Commission, was held in Pretoria.

Sixteen presentations were made at the workshop.

A concern was, however, raised with the Commission that women had not been sufficiently represented at these workshops. After discussions on the matter between the Law Commission, the Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Committee, it was decided to host more workshops and consultations with women's groups to solicit their views on the operation of traditional courts. Workshops with women and women's groups were held between 7 and 20 September 1999, in KwaZulu-Natal, Limpopo, Eastern Cape and North West provinces. The workshops and consultations concentrated on rural women and field workers active in the rural development context who would provide a perspective different to that advanced by traditional leaders.

It is clear that wide consultation with stakeholders took place and many written submissions were made to the South African Law Commission on the discussion paper. The Commission also had the benefit of considering numerous precedents set by other African countries. The task team set up by the project committee on customary law to draft a Bill on customary courts had a wealth of information to guide its deliberations. This report attempts to convey a sense of the discussions and debates that took place in the different fora during this process and to express the dilemmas faced by the project committee and the Commission in choosing whatever options have eventually been adopted in the draft Bill.

The Bill recommends that customary courts should be established and that they should have full powers of hearing and determining cases in both criminal and civil matters subject to limitations. The project committee noted that customary courts are inexpensive, simple, informal, accessible and conversant with the community and its laws. It is recommended that Headmen's tribunals which are currently not recognised as courts should be granted formal recognition.

On the question of the composition of customary courts, the Bill recommends that they should continue to be presided over by traditional leaders. However, to avoid gender discrimination, the Bill provides that in constituting the court effect shall be given to section 9(3) of the Constitution and section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 as to the need for the reasonable representation of both men and women in such institutions.

In civil matters, customary courts should have jurisdiction over cases arising out of customary law. Issues relating to dissolution of marriage (whether customary or civil), custody and guardianship of minors, or maintenance, are excluded from the jurisdiction of these courts. As far as criminal jurisdiction is concerned, customary courts can handle offences which were committed in the area of the court's jurisdiction except offences listed in the Schedule attached to the Bill. A monetary ceiling on the jurisdiction of customary courts will be fixed by the Minister from time to time.

Legal practitioners are excluded from these courts. However, a person who is a party to a matter before a customary court may be represented by any other person of his or her choice in accordance with customary law.

The Bill also provides for the establishment of the office of a Registrar for Customary Courts. The role of the Registrar for Customary Courts should be to guide and supervise customary courts, deal with complaints from members of the public about the operation of customary courts, consider the needs of customary courts, arrange for the training of members and clerks of customary courts and where necessary, transfer cases from one customary court to another.

A litigant who is dissatisfied with a decision of a customary court has a right of appeal to a higher customary court and subsequently to a customary court of appeal (if one is established) or to a magistrate's court and then to the High Court.

The Reports are available on the Internet at <http://www.law.wits.ac.za/salc/salc.html>

### New investigation

An investigation into the Review of Administration Orders has been included in the Commission's programme.

The matter has 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 have led to considerable problems and people being abused by so-called "loan sharks" and others. Section 74 is not adequate to deal with the problems.

### Programme of the Commission

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

- 25 Statute law: The establishment of a permanently simplified, coherent and generally accessible statute book
- 59 Islamic marriages and related matters
- 82 Sentencing
- 90 Customary law
- 94 Arbitration
- 96 The Apportionment of Damages Act, 1956
- 107 Sexual offences
- 113 The use of electronic equipment in court proceedings
- 118 Domestic partnerships
- 121 Consolidated legislation pertaining to international cooperation 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

### Invitation

The public is invited to submit proposals for law reform to the Commission and to give information in respect of any of the projects of the Commission.

The Commission is housed in the Sanlam Centre (12<sup>th</sup> Floor), c/o Andries and Schoeman Streets, Pretoria.

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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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