Vol 8 No 2 **September 2003**

SALRC BULLETIN

Newsletter of the South African Law Reform Commission

Association of Law Reform Agencies for Eastern and Southern Africa

Towards the end of 2001 a conference was convened in Tanzania on best practices in law reform following a visit of the Law Reform Commission of Tanzania to its South African counterpart. The conference resolved that an Association of Law Reform Agencies for Eastern and Southern Africa be established and a steering committee to take the process forward was elected.

In January 2003 a meeting of the steering committee took place in Tanzania where a draft Constitution for the Association was finalised.

Subsequently a meeting was held in Namibia in August 2003 where representatives of law reform agencies in Eastern and Southern Africa convened to finalise the establishment of the Association, to consider the draft Constitution, to finalise the terms of reference of the Executive Committee of the Association, and to deliberate on the future functioning of the Association.

The Secretary of the South African Law Reform Commission was appointed as treasurer of the Association. As an office bearer the treasurer automatically serves on the executive of the Association.

The next meeting of the Association will be hosted by the South African Law Reform Commission, possibly in February or March 2004.

Issue Papers

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

Stalking (Issue Paper 22)

The investigation into stalking emphasises the need to address the pressing and complex problems relating to stalking with a view to reforming the manner in which it is dealt with in terms of current law.

The Issue Paper broadly defines stalking as any type of harassing and intimidating conduct that causes a person to fear for his or her safety. It identifies different categories of stalkers for example delusional erotomanics, “former intimate” stalkers, sociopathic stalkers, disgruntled clients, cyberstalkers and debt collectors. The Issue

Paper exposits the existing legal response to acts associated with stalking and explores possible reform of civil and criminal remedies.

The three options for reform are as follows:

- Expand or enact similar legislation to the Domestic Violence Act, 1998;
- Amend and adapt section 384 of the Criminal Procedure Act, 1955 which regulates a binding over of persons to keep the peace; or
- Enact independent legislation criminalising stalking.

The closing date for comment on Issue Paper 22 is 30 September 2003.

Prescription Periods (Issue Paper 23)

No comprehensive review of all the provisions providing for different prescription periods - whether of a contractual or delictual nature - has been undertaken to date. 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.

A questionnaire is included in the Issue Paper. A few of the questions raised are the following:

- Should different prescription periods be retained or should different periods of prescription be avoided as far as possible?
- Are all or some of the different prescription periods in section 11 of the Prescription Act justified?
- Are all or some of the different prescription periods in other legislation justified?
- Should there be special protection for public authorities regarding prescription?
- If it is decided that there should be one uniform prescription period for all or most cases, how long should this period be?
- Should it be allowable to contract out of the legislative prescription regime or to modify it by agreement?
- The scope of this review is limited to prescription periods. Is there a need to review other aspects of prescription or prescription in general?

The closing date for comment on Issue Paper 23 is 17 October 2003.

Privacy and Data Protection (Issue Paper 24)

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.

In South Africa the right to privacy is protected in terms of both our common law and in section 14 of the Constitution. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance.

The constitutional right to privacy is, like its common law counterpart, not an absolute right but may be limited in terms of law of

general application and has to be balanced with other rights entrenched in the Constitution.

In protecting a person's personal information, consideration should therefore also be given to competing interests such as the administering of national social programmes, maintaining law and order, and protecting the rights, freedoms and interests of others, including the commercial interests of industry sectors such as banking, insurance, direct marketing, health care, pharmaceuticals and travel services. The task of balancing these opposing interests is a delicate one.

Concern about data protection has increased worldwide since the 1960s as a result of the expansion in the use of electronic commerce and the technological environment. The growth of centralised government and the rise of massive credit and insurance industries that manage vast computerised databases have turned the modest records of an insular society into a bazaar of data available to nearly anyone at a price. The question could no longer be whether information could be obtained, but rather whether it should be obtained and, where it has been obtained, how it should be used.

There are now well over thirty countries that have enacted data protection statutes at national or federal level and the number of such countries is steadily growing. The investigation into the possible development of data privacy legislation for South Africa is therefore in line with international trends.

Early on, it was, however, recognised that information privacy could not simply be regarded as a domestic policy problem. The increasing ease with which personal data could be transmitted outside the borders of the country of origin produced an interesting history of international harmonisation efforts, and a concomitant effort to regulate trans-border data flows.

Two crucial international instruments evolved in 1981, namely the so-called CoE (Council of Europe) Convention and the OECD (Organization for Economic Cooperation and Development) 1981 (OECD) Guidelines. These two agreements have had a profound effect on the enactment of national laws around the world, even outside the OECD member countries. They incorporate technologically neutral principles relating to the collection, retention and use of personal information.

Although the expression of data protection in various declarations and laws varies, all require that personal information must be –

- obtained fairly and lawfully;
- used only for the specified purpose for which it was originally obtained;
- adequate, relevant and not excessive to the purpose;
- accurate and up to date;
- accessible to the subject;
- kept secure; and
- destroyed after its purpose is completed.

These principles are known as the "Principles of Data Protection" and form the basis of both legislative regulation and self-regulating control.

In 1995, the European Union furthermore enacted the Data Protection Directive which is important since articles 25 and 26 of the Directive stipulate that personal data from Europe should only flow outside the boundaries of the Union to countries that can guarantee an "adequate level of protection" (the so-called safe-harbour principles).

Privacy is therefore an important trade issue, as data privacy concerns can create a barrier to international trade. Considering the international trends and expectations, information privacy or data legislation will ensure South Africa's future participation in the information market, if the country is regarded as providing "adequate" data protection by international standards.

The effectiveness of data protection provisions in protecting an individual's personality rights will, however, depend largely on how they are applied and interpreted in practice. Four models aimed at the protection of personal information can be identified. Depending on their application, these models can be complementary or

contradictory. In most countries several are used simultaneously.

First of all, there is a general law that governs the collection, use and dissemination of personal information by both the public and private sectors. An oversight body then ensures compliance. This is the preferred model for most countries adopting data protecting laws and was adopted by the European Union to ensure compliance with its data protection regime.

Secondly, some countries have avoided enacting general data protection rules in favour of specific sectoral laws governing, for example, video rental records and financial privacy. In such cases, enforcement is achieved through a range of mechanisms. A major drawback with this approach is that it requires that new legislation be introduced with each new technology - protection therefore frequently lags behind. There is also the problem of a lack of an oversight agency.

Thirdly, data protection can also be achieved - at least in theory - through various forms of self-regulation, in which companies and industry bodies establish codes of practice and engage in self-policing. This is currently the policy promoted by the governments of the United States and Singapore.

Finally, with the recent development of commercially available technology-based systems, data protection has also moved into the hands of individual users. It is possible to employ a range of programs and systems that provide varying degrees of privacy and security of communications.

Governments may find that proposed measures to protect privacy meet the staunch opposition of business interests which see such safeguards as an expense and an unjustified constraint on their right to conduct their business affairs as they wish. On the other hand, business interests may be enhanced by a statutory data protection regime. Many countries, especially in Asia, have developed or are currently developing data protection laws in an effort to promote electronic commerce. These countries recognise that consumers are uneasy with the increased availability of their personal data, particularly with new means of identification and forms of transactions, and therefore that their personal information is being utilised worldwide. Data privacy laws are therefore being introduced, not from a human rights perspective, but rather as part of a package of laws intended to facilitate electronic commerce by setting up uniform rules.

It should be noted that the promulgation of data protection legislation in South Africa will necessarily result in amendments to other South African legislation, most notably the Promotion of Access to Information Act 2 of 2000 and the Electronic Communications and Transactions Act 25 of 2002. Both these Acts contain interim provisions regarding data protection in South Africa.

The Commission is consequently considering proposals for possible law reform with regard to the following issues:

- Whether privacy and data protection should be regulated by legislation.
- How the general principles of data protection could be developed and incorporated in the legislation.
- Whether a statutory regulatory agency should be established.
- If it is a viable option to promote a flexible approach in terms of which industries will develop their own codes of practice (in accordance with the principles set out in the legislation) which could be overseen by the regulatory agency.

The closing date for comment on Issue Paper 24 is 1 December 2003.

Discussion Papers

The following Discussion Paper has been published for general information and comment:

Domestic Partnerships (Discussion Paper 104)

The Discussion Paper deals with the question of the legal recognition and regulation of domestic partnerships – that is, established relationships between people of the same or opposite sex. The Discussion Paper does not come out in favour of any particular option and the idea is to canvass a number of options.

Marriage is currently the only legally recognised form of intimate partnership. Domestic partnerships, on the other hand, are virtually unrecognised and partners are excluded from the rights and obligations which attach automatically to marriage.

The number of people living in these relationships has, however, increased worldwide and also in South Africa. Social customs have changed radically, outdating early notions of marriage as the only form of acceptable relationship. Domestic partnerships have come to be perceived in many cases as functionally similar to marriage.

In the recent past the courts have carried much of the responsibility for crafting family law and policy with regard to domestic partnerships by creatively applying non-family laws, including the law of unjust enrichment, estoppel and contract, to domestic partners who were excluded from family law regimes.

The Constitutional Court has, furthermore, on more than one occasion, upheld constitutional challenges under the equality clause on the ground of sexual orientation. The Constitutional Court has made it clear that same-sex relationships must receive some form of recognition, but has not been prescriptive as to how it should be done. With the extension of statutorily defined benefits (sometimes including domestic partnerships into the definition of "spouse" for various purposes) there has been an increasing recognition of these relationships outside marriage. These developments have led to a patchwork of laws that do not express coherent family policy.

This Discussion Paper therefore includes proposals for possible law reform to recognise and regulate various forms of domestic partnerships. The proposals are aimed at harmonising family law with the provisions of the Bill of Rights and the constitutional values of equality and dignity. Possible amendments to the Marriage Act of 1961 and the promulgation of legislation to deal specifically with registered and unregistered partnerships are proposed.

The legislative proposals can be summarised as follows:

- MARRIAGE AND CIVIL UNIONS

The Commission considers as unconstitutional the fact that there is currently no formal legal recognition of same-sex relationships. Recognition could be effected in a number of ways. The following alternatives have been identified:

a) Same-sex marriage (same-sex relationships)

Option1:
The first option is to make marriage as it is currently known available to both same- and opposite-sex couples by inserting a definition of marriage to that effect in the Marriage Act.

Option 2:
The second option entails the separation of the civil and religious elements of marriage. The Marriage Act of 1961 will therefore only regulate the civil aspect of marriage, namely the requirements and consequences prescribed by law. In practice it will mean that both same- and opposite-sex couples will have to solemnise their marriages before a civil marriage officer. After the civil ceremony couples who value the religious aspects of marriage will then be free to have their marriage blessed by a religious official in a religious ceremony. Religious institutions will have to decide whether their religious blessing is available to same-sex couples or not.

b) Civil unions (same- and opposite sex relationships)

Option 3:
According to this option same-sex couples will be afforded a legal status parallel to that of marriage under a separate institution called a civil union. A civil union will have the same legal consequences as marriage, but will be established through a civil registration procedure and, depending on the circumstances, terminated by mutual agreement or court procedure.

Option 4:
In terms of option 4 the institution of civil union will also be made available to opposite sex couples who object to the moral and religious connotations of traditional marriage.

- REGISTERED PARTNERSHIPS (same- and opposite-sex relationships)

Option 5:
A Registered Partnerships Act is proposed for partners of the same or opposite sex who do not wish to get married but still desire some legal protection. Upon registering their relationship as a partnership with a civil registration officer, parties will be afforded some of the basic rights associated with civil marriage. Depending on the circumstances, termination of a registered partnership will take place either by mutual agreement or court procedure.

The default property regime for registered partnerships will be the accrual system, but parties could agree to use another system. In addition, registered partners will have a mutual duty to support each other during the existence of the relationship; the right to claim damages in the event of the death of a partner; and the right to intestate succession. Where a child is born into a registered partnership between persons of the opposite sex, the male partner will be deemed to be the biological father of that child. There will only be a limited right to maintenance between former registered partners after termination of the registered partnership.

- UNREGISTERED PARTNERSHIPS (same-and opposite-sex relationships)

An Unregistered Partnerships Act is proposed in terms of which same- or opposite-sex couples in unregistered partnerships will be afforded a civil status as if they have formally committed to the relationships, without their having taken any steps to effect such recognition. The Commission distinguishes between de facto and ex post facto relationships in this regard.

Option 6: De facto unregistered partnerships
Option 6 creates rights and obligations for a couple in a conjugal relationship during the existence of the unregistered partnership. Relationships will be assessed in terms of a definition and a list of factors (both set out in the Unregistered Partnership legislation) such as the duration of the relationship and the degree of mutual commitment to a shared life. When the status of the relationship is disputed during its existence, a court may be approached to declare the status of the relationship.

Compared to marriage and registered partnerships the rights and obligations afforded to unregistered partnerships will be limited. The focus will be on regulating the ownership of property accumulated by the partners during and after termination of the relationship. The disposal of such property by one partner will be restricted and there will be a joint liability for household expenses during the relationship. Provision will be made for the equitable division of accumulated property after termination of the relationship and the right to inherit a child's share from a partner who dies intestate. A former partner will be able to claim maintenance from the other partner only under prescribed circumstances.

In order to protect the autonomy of partners in unregistered partnerships, there will be a provision to exclude the legislation by mutual agreement. Where the application of the Act has been so excluded, the parties will still have recourse to the ordinary remedies of the law to the extent that they may be applicable.

Option 7: Ex post facto unregistered partnerships
This option allows former partners in an unregistered partnership who cannot agree about the division of property and maintenance after the partnership has ended, to apply to court for an equitable property division and maintenance order. Such an order may be made only after the court has determined that the relationship indeed qualifies as an unregistered partnership as defined. No rights and obligations are created automatically for the couple during the existence of the relationship. The legislation only becomes relevant to the partners on the breakup of the relationship or the death of one of the partners should they be unable to manage their situation privately.

When making a property division or maintenance order, the focus of the court will be to ensure an equitable settlement of the proprietary disputes between the former partners. The court will be allowed to consider the terms of a domestic partnership agreement between the former partners when deciding the case.

This version of the unregistered partnership proposal will apply to intimate partnerships (conjugal relationships) as well as care partnerships (non-conjugal relationships). Care partners are persons who are in financially or emotionally interdependent relationships that are of a non-conjugal nature.

- CONCLUSION

Owing to the diverse nature of the options mentioned before and the wide variety of relationships under discussion, it would be impossible to select only a single generally valid statutory measure to regulate all relationships. The aim would be to combine the proposals in such a way as to afford the desired protection to parties in domestic partnerships without imposing on their autonomy or over-regulating the position.

The Commission in its effort to consult all interested parties will host a series of workshops during October 2003. Members of the Project Committee will be present to explain and discuss the draft Bill and to note comments.The workshops are scheduled to be held as follows: 7 October (Gauteng), 9 October (Durban), 10 October (East London), 13 October (Bloemfontein), 14 October (Cape Town), 21 October (Pietermaritzburg), 27 October (Polokwane) and 28 October (Nelspruit). Persons interested in attending should contact the Commission at (012) 322 6440 (contact person: Ms C Pienaar).

The closing date for comment on Discussion Paper 104 is 1 December 2003

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

The Secretary
SA Law Reform 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

Reports

The following three reports were submitted to the Minister for Justice and Constitutional Development on 22 July 2003:

Report on Islamic Marriages and Related Matters

Historically, and until the landmark 1999 Supreme Court of Appeal decision in *Amod v Multilateral Motor Vehicle Accidents Fund*, a marriage contracted according to Islamic law was regarded by South African courts as null and void and as being contrary to public policy, with the result that the marriage and its consequences were not legally recognised in any form. The decision in

Amod, however, recognised a monogamous Islamic marriage for the purposes of support only, and did not deal with other crucial issues such as polygyny and the status of respective spouses, maintenance obligations, proprietary consequences of Islamic marriages, termination, etc. More recently, in its decision in *Daniels v Campbell NO and Others* of June 2003, the Cape of Good Hope Provincial Division of the High Court found that parts of the Intestate Succession Act and the Maintenance of Surviving Spouses Act are unconstitutional in that those Acts, in their definitions of "spouse" and "survivor" respectively, do not specifically provide for a husband or wife married in accordance with Muslim rites. However, legislation giving full recognition to such marriages is absent, with the result that gross inequities and hardships arising from the non-recognition of Islamic marriages still prevail.

The Law Reform Commission published a Discussion Paper in December 2001, preceded by an Issue Paper published in July 2000. The Discussion Paper contained a proposed draft Bill which would give recognition to Islamic marriages, and a process of consultation with the Muslim community was conducted on a national scale. The draft Bill now contained in the Report to the Minister, which takes account of divergent views within the Muslim community, marks the Law Reform Commission's completion of its investigation.

The Bill contained and explained in the Report draws a clear distinction between an Islamic marriage and a civil marriage. It is only Islamic marriages that would fall within the ambit of the Bill, with provision being made for Muslims who are married by way of a civil marriage, to exercise an option to have the provisions of the Bill apply to them. Provision is also made for the regulation of proprietary consequences, changes to matrimonial property systems (with due regard to existing and vested rights) and the regulation of polygynous marriages. In terms of the draft Bill all *existing* Islamic marriages would be recognised as valid marriages, for all purposes, upon commencement of the proposed legislation. Parties in an existing marriage are, however, given the option of opting out of the provisions of the Bill, should they so desire. With regard to *future* marriages concluded after the proposed legislation has come into operation, parties would be allowed to elect at the time of the conclusion of the marriage whether the provisions of the Bill should apply to them. The draft Bill covers both monogamous and polygynous Islamic marriages which, if applicable, may exist alongside a civil marriage (ie a marriage registered under the Marriage Act).

It is further recommended that, because the judges of secular courts are by and large non-Muslims, a judge be appointed from the ranks of existing Muslim judges or from Muslim legal practitioners to preside in legal disputes on an *ad hoc* basis, and that, on appeal, the views of two accredited Muslim institutions may be solicited for purposes of commenting on questions of law. The courts may also be assisted by assessors who are experts in Islamic law in the adjudication of all disputes relating to Islamic law. The appointment of assessors means that the court presiding over a dispute involving Islamic law would have the necessary expertise to resolve such disputes effectively.

The Commission's proposed draft Bill in addition addresses the registration of Islamic marriages, the dissolution of such marriages through the pronouncement of a *Talaq* (which, in terms of the proposals, must be confirmed by a court), custody of and access to minor children and maintenance.

In the Commission's view the adoption of its proposed draft Bill by Parliament will go a long way in creating legal certainty with regard to Muslim marriages, will give effect to Muslim values and will afford better protection to women in those marriages in accordance with Islamic and constitutional tenets.

Report on the Apportionment of Damages Act 34 of 1956

The Report contains recommendations and a proposed draft Bill on the Apportionment of Damages Act 34 of 1956 ("the Act").

The major application of the Act has been in the field of delictual claims and mostly in the area of motor vehicle accidents. Where the plaintiff or claimant claims that he or she has suffered loss and the court finds that the claimant was also negligent and that his or her negligence contributed to the loss, the Act requires the court to reduce the damages to which the claimant is entitled as the court thinks just and equitable having regard to the degree to which the claimant was at fault in relation to the loss. The Act also regulates the position where two or more persons (joint wrongdoers) have caused the same loss to another person (the injured person or plaintiff).

The Act has been severely criticised over the years. Since the Act was passed there have been major developments in the law. There is an urgent need for the Act to be changed to keep abreast with these developments.

Under the Act fault is the sole criterion of apportionment. The courts have interpreted fault to mean negligence and to exclude intentional wrongdoing. The South African Law Reform Commission advocates a broader basis for apportionment and recommends that fault should be one of a wide range of relevant factors which the courts are to consider in attributing responsibility for loss. The draft Apportionment of Loss Bill ("the Bill") contained in the Report requires the courts to attribute the responsibility for the loss suffered in proportions that are just and equitable and gives the courts a wide discretion with regard to the method of determining appropriate proportions.

As a result of fault being the sole criterion of apportionment under the Act, the courts have interpreted the Act as being applicable to delictual claims only. With the broader basis for apportionment advocated in the draft Bill, it is possible to extend apportionment to other areas of the law. The Commission supports the application of the draft Bill to all cases covered by the definition of "wrong" which has been widely defined in the Bill to include a breach of a statutory or other legal duty and a breach of a duty of care arising from a contract. The Bill therefore applies to contractual claims where there is liability for breach of a duty of care owed in contract, to breaches of statutory duty and to cases of strict liability in delict and can also be applied to breaches of fiduciary duty including breaches of trust.

Each joint wrongdoer is fully liable to the injured person for the full amount of his or her damages. The injured person may sue any one of the joint wrongdoers for the full amount of his damages. A joint wrongdoer (J1) who has paid the injured person's damages in full may thereafter recover a contribution from the other joint wrongdoer (J2) of the amount for which the latter is responsible. The Commission considered whether this system of joint and several liability should be changed to one where each wrongdoer was responsible for his or her share of the damages and decided that the rule should not be changed at this stage. The purpose of the rule is to ensure full compensation to the injured person even though it might be to the detriment of the wrongdoer.

The present procedure for proceeding against joint wrongdoers is inadequate and in urgent need of reform. The Bill proposes a more efficient and streamlined procedure. While rejecting the abolition of the principle of joint and several liability, the Commission recognises the hardship that the rule may cause. The Commission has therefore proposed measures to liberalise the law of contribution in order to improve the position of the joint wrongdoer. Hardship may be caused to a joint wrongdoer (J1) who cannot recover a contribution from the other joint wrongdoer (J2) because the latter is insolvent or cannot be found. The Commission recommends that provision should be made for the joint wrongdoer (J1) to apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable.

Report on the Use of Electronic Equipment in Court Proceedings (Postponement of Criminal Cases via Audiovisual Link)

The Report contains recommendations and a proposed draft Bill on the use of audiovisual equipment for the postponement

of criminal cases against accused persons who are in custody awaiting trial.

The Commission considered a proposal by role-players in the criminal justice system that legislation should be introduced to provide for the postponement of criminal cases via an audiovisual link where the accused person is in custody awaiting trial. This would mean that accused persons would not have to appear physically in courts for the purpose of a mere postponement of the case. The proposal allows for the use of modern technology and the establishment of "video-conference courts" to remand criminal cases against such persons. In terms of the proposal, audiovisual equipment has to be installed at a court point and a remote point (the prison). The initial proposal was limited to postponements and then only after the first appearance of the accused in a court.

In the course of the investigation the Commission, in particular, considered the constitutionality of the proposal. After careful consideration and consultation with relevant role players the Commission concluded that the proposed procedure would not be unconstitutional. The Commission was, however, sympathetic to the view that since the procedure would introduce an innovation, it ought to be implemented incrementally. The Commission also decided to extend the initial proposal to cover bail applications as well as applications for leave to appeal and the hearing of an appeal in respect of persons in custody.

The Commission recommends that -

- legislation be introduced to provide for the use of audiovisual equipment for the purpose of postponing criminal cases against accused persons who are in custody;
- the procedure provides additionally for bail applications, both before conviction and after conviction pending an appeal;
- it should be in the discretion of the presiding officer to order the accused's physical presence in court;
- the procedure also be available for applications for leave to appeal and appeal proceedings in respect of accused persons in custody;
- the legislation be uncomplicated;
- technical matters be provided for in regulations (especially because of continuous changes in technology);
- a prison or place of detention be defined as a prison in terms of the provisions of the Correctional Services Act 111 of 1998, but excluding police cells;
- juveniles (persons younger than 18) be excluded from the process; and
- the point of departure be to allow the procedure unless, in the discretion of the presiding officer, the accused must in the interests of justice be brought before a court.

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

New investigations

Four new investigations have been included in the Commission's programme:

Review of Aspects of the Law of Divorce

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 do not relate to amendments to the Child Care Act 74 of 1993, but relate 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 is 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 is sufficiently broad to investigate other existing problems relating to the law of divorce, the Commission has decided that an investigation titled "Review of Aspects of the Law of Divorce" be included in the Commission's programme.

Review of Aspects of Matrimonial Property Law

The Commission on Gender Equality referred a complaint of gender discrimination to the South African Law Reform Commission for investigation. The complainant argued that although the banking industry allows married couples to have a joint account, both partners do not enjoy equal status.

The Banking Council commented that the legal environment in South African did not create a framework conducive to the operation of joint bank accounts.

The problems experienced with joint bank accounts relate to matrimonial property law. With a view to ensuring that the scope of the investigation is sufficiently broad to investigate other existing problems relating to the Matrimonial Property Act 88 of 1984, the Commission has decided that an investigation into the "Review of Aspects of Matrimonial Property Law" be included in the Commission's programme.

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.

Abolition of the Oath

It is evident, from a review of recent case law as well as developments elsewhere in the world, that the possibility of reforming the administration of oaths and affirmations in our courts should be investigated. It appears that a very few persons taking the oath understand the religious implications or matters of conscience arising in either taking

an oath or affirmation although they may well appreciate the dangers of being convicted or perjury if they should lie in the witness box.

There are a few options to consider, for example:

- The retention of the oath in the Criminal Procedure Act, the Civil Proceedings Evidence Act or any other legislation governing the taking of an oath or making of an affirmation in affidavits which would be flexible so that it can easily be adapted to religions which are not part of the Judeo-Christian tradition.
- The reversal of the current order so that the affirmation is the "standard" option and an oath the subordinate option.
- The removal of the religious oath and replacement with a non-religious affirmation or promise to tell the truth.

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
82 Sentencing
90 Customary law
94 Arbitration
107 Sexual offences: Adult prostitution
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
128 Review of aspects of the law of divorce
129 Review of aspects of matrimonial property law
130 Stalking
131 Trafficking in persons
132 Abolition of the oath

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 (12th 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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