South African Law Reform Commission

DISCUSSION PAPER 123

STATUTORY LAW REVISION:

(LEGISLATION ADMINISTERED BY THE DEPARTMENT OF DEFENCE)

PROJECT 25

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South African Law Reform Commission

The South African Law Reform Commission Act, 1973 (Act 19 of 1973) established the South African Law Reform Commission (SALRC).

The members of the SALRC are –

The Honourable Madam Justice Yvonne Mokgoro (Chairperson)
The Honourable Mr. Justice Willie Seriti (Vice Chairperson)
Professor Cathi Albertyn
The Honourable Mr Justice Dennis Davis
Mr Thembeka Ngcukaitobi
Advocate Dumisa Ntsebeza SC
Professor PJ Schwikkard
Advocate Mahlape Sello

The Secretary is Mr Michael Palumbo. The project leader responsible for this investigation is Advocate Dumisa Ntsebeza SC. The researcher assigned to this investigation is Ms Maureen Moloi.

On 31 July 2008, Ms Mabandla, the Minister of Justice and Constitutional Development appointed the following advisory committee members who assisted the SALRC to develop this Consultation Paper, namely:

Mr Aifheli Enos Tshivhase of the University of Cape Town and a military law officer in the South African National Defence Force (part-time);
Advocate Thandi Norman, a practising Advocate at the Durban Bar; and
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Preface

This discussion paper has been prepared to elicit responses from respondents on the SALRC's preliminary findings and proposals contained in this discussion paper. The SALRC has liaised with the Department of Defence in the phases of this investigation leading to the development of this discussion paper and acknowledges the valuable assistance it received, particularly from officials in the Legal Services section. This discussion paper was developed to serve as a basis for the SALRC's further deliberations in the development of a report. This discussion paper contains the SALRC's **preliminary proposals**. The views, conclusions and recommendations that follow should not be regarded as the SALRC's final views. The discussion paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act of 2000. Respondents are requested to submit written comment and representations to the SALRC by 31 August 2011 at the address appearing on the previous page. Comment can be sent by e-mail or by post.

This discussion paper is also available on the Internet at http://salawreform.justice.gov.za/dpapers.htm

Any enquiries should be addressed to the researcher allocated to the project, Ms Maureen Moloi. Contact particulars appear on the previous page.

The proposed Defence and Related Matters Laws Repeal and Amendment Bill is contained in Annexure A. Schedule 1 of the proposed Bill consists of Acts that may be wholly repealed. Schedule 2 consists of Acts that may be repealed to the extent set out in the third column of that Schedule while Schedule 3 consists of Acts that may be amended to the extent set out in the third column of that Schedule. Annexure B reflects the 41 statutes administered by the Department of Defence as at 21 November 2008.

Preliminary proposals and questions for comments

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution, redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are approximately 2800 Acts in the statute book. Originally the SALRC identified 45 statutes (20 principal Acts and 25 amendment Acts) that are administered by the Department of Defence (see Annexure B). The list of statutes was confirmed by the Department of Defence on 21 November 2008. It was later discovered that three of the Acts were not administered by the Department of Defence.[1] After the establishment of the Department of Military Veterans, the Military Veterans Act 17 of 1999 was taken off the list.[2]

2. After its analysis of these statutes, the SALRC proposes that:

(i) The Acts set out in the Defence and Related Matters Laws Repeal and Amendment Bill, contained in Annexure A, be repealed as a whole for the reasons set out in Chapter 2 of this discussion paper;

(ii) The Acts set out in Schedule 2 of the proposed Bill contained in Annexure A, be repealed to the extent set out in that Schedule, for the reasons set out in Chapter 2 of this discussion paper;

(iii) The provisions of Acts set out in Schedule 3 of the proposed Bill, found in the same Annexure referred to above, be amended for the reasons set out in Chapter 2 of this discussion paper.

3. Furthermore, it is possible that some of the statutes recommended for repeal are still useful, and should thus not be repealed. Moreover, it is also possible that there are statutes or provisions that are not identified for repeal in this discussion paper but are of no

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[1] The advisory committee discovered that the National Key Points Act 102 of 1980 was transferred from the then Department of Defence to the Department of Safety and Security in 2004. The National Key Points Amendment Act 44 of 1984 and the National Key Points Amendment Act 47 of 1985 as well as the principal Act will be handed over to the researcher dealing with Safety and Security legislation.

[2] The SALRC liaised with officials responsible for Legal Services in the Department of Defence. See also Proclamation 92 of 2009 published on 28 December 2009 in Government *Gazette No* 32844 as regards the transfer of functions and powers to the new Ministry.

practical utility and could be repealed. These should be identified and brought to the attention of the SALRC.

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Chapter 1

A INTRODUCTION

(a) The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (the SALRC) are set out as follows in the South African Law Reform Commission Act 19 of 1973: to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof, including –

- the repeal of obsolete or unnecessary provisions;
- the removal of anomalies;
- the bringing about of uniformity in the law in force in the various parts of the Republic; and
- the consolidation or codification of any branch of the law.

1.2 In short, the SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

(b) History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC undertook a revision of all pre-Union legislation as part of its project 7 that dealt with the review of pre-Union legislation. This resulted in the repeal of approximately 1 200 ordinances and proclamations of the former Colonies and Republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its project 25 on statute law: the establishment of a permanently simplified, coherent and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act No 94 of 1981) which repealed approximately 790 post-Union statutes.

1.4. In 2003 Cabinet approved that the Minister of Justice and Constitutional Development co-ordinates and mandates the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. This section prohibits unfair discrimination based on race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in the previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis

in the current investigation will be on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated right from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality clause) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A recent provisional audit, by the SALRC, of national legislation remaining on the statute book since 1910, established that there are in the region of 2 800 individual statutes, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose anymore, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

B. WHAT IS STATUTORY LAW REVISION?

1.7 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.[3] Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or "live". If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.8 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.[4] Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

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[3] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

[4] See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 6 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

1.9 In the context of this investigation, the statutory law revision process also targets statutory provisions that are obviously at odds with the Constitution, particularly section 9 thereof.

1.10 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:[5]

(a) references to bodies, organisations, etc that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
(b) references to issues that are no longer relevant as a result of changes in social or economic conditions;
(c) references to Acts that have been superseded by more modern legislation or by an international convention;
(d) references to statutory provisions (i.e. sections, schedules, etc) that have been repealed;
(e) repealing provisions e.g. "Section 28 is repealed/shall cease to have effect";
(f) commencement provisions once the whole of an Act is in force;
(g) transitional or savings provisions that are spent;
(h) provisions that are self-evidently spent – e.g. a once-off statutory obligation to do something becomes spent once the required act has duly been done;
(i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.11 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows:[6]

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had their object the continuance of previous temporary enactments for periods now gone by effluxion of time;
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking

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5 See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 7 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

6 Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March1984; p 3 of Chapter 2 (p 6 of 21) accessed from http://lawcommissionofindia.nic.in/51-100/Report96.pdf on 20 February 2009.

effect or on the happening of some event or on the doing of some act authorised or required;

- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate;
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.12 Statutory provisions usually become redundant as time passes.[7] Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as "pump-priming" provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.13 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.[8] Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

(a) revive anything not in force or existing at the time at which the repeal takes effect; or
(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or

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7 *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 9 and 10 accessed from http://lawcommission.justice.gov.uk/docs/background-notes.pdf on 20 February 2009.

8 *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 8 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 20 February 2009.

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.14 The methodology adopted in this investigation is to review the statute book by department – the SALRC identifies a national government department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the SALRC, it is published for general information and comment. Finally, the SALRC develops a report in respect of each department that reflects the comment on the discussion paper and contains a draft Bill proposing amending legislation.

C. THE INITIAL INVESTIGATION

1.15 In the early 2000s the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALS) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational structure of revising the South African statute book for constitutionality, redundancy and obsoleteness. CALS pursued four main avenues of research in their study conducted in 2001:[9]

- First, a series of role-player interviews were conducted with representatives of all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.
- Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned were compiled. The three most problematic categories of

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9 "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

legislative provision were identified, and an analysis made of the Constitutional Court's jurisdiction in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

- Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared against a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the outcomes revealed that a targeted revision of the statute book, in accordance with the guidelines, produced surprisingly effective results.
- Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries have conducted or are conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differ.

1.16 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- the Recognition of Customary Marriages (August 1998);
- the Review of the Marriage Act 25 of 1961(May 2001);
- the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- Traditional Courts (January 2003);
- the Recognition of Muslim marriages (July 2003);
- the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- Customary Law of Succession (March 2004); and
- Domestic Partnerships (in March 2006)

D. SCOPE OF THE PROJECT

1.17 This investigation focuses not only on obsolescence or redundancy of provisions but also on the question of the constitutionality of provisions in statutes. In 2004 Cabinet endorsed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation will be limited to those statutes or provisions in statutes that:

- differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences will be left to the judicial process.

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.[10] However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is not foreseen that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

E. ASSISTANCE BY GOVERNMENT DEPARTMENTS AND STAKEHOLDERS

1.21 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered "inside" knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the

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10 Cathi Albertyn prepared a 'Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006.

SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This will ensure that all relevant provisions are identified during this review, and dealt with responsively and without creating unintended negative consequences.

F. CONSULTATION WITH THE DEPARTMENT OF DEFENCE

1.22 The SALRC submitted its consultation paper containing preliminary findings and proposals to the Department of Defence in April 2010 for its consideration. The purpose of the consultation paper was to consult with the Department of Defence on the preliminary findings and proposals contained in the consultation paper and for the department to confirm that it has no objection to the provisionally proposed repeals and amendments. During July 2010 the Department of Defence submitted its comment to the SALRC on the preliminary findings and proposals contained in the consultation paper. The SALRC acknowledges the valuable assistance it received, particularly from officials in the Legal Services section.

CHAPTER 2

Repeal and amendment of legislation administered by the Department of Defence

A. INTRODUCTION

2.1 The name 'Department of Defence' was changed to the 'Department of Defence and Military Veterans' on 10 May 2009 when President Jacob Zuma announced the appointment of the new Cabinet.[11] The emphasis which the new name placed on the administration of military veterans' affairs was taken a step further on 28 December 2009 when the separate Department of Military Veterans was proclaimed in Government Gazette No 32844 of 28 December 2009. The new Department then became responsible for the administration of the Military Veterans' Act 17 of 1999 and the Department of Defence reverted to its original name.

2.2 The Department derives its mandate primarily from section 200(2) of the Constitution of the Republic of South Africa. This mandate is given substance by the Defence Act 42 of 2002, the White Paper on Defence (1996), the Defence Review (1998) and delegated legislation and other legislation that guides the execution of the Defence Strategy.[12] The primary object of the Department (through the South African National Defence Force) is to defend South Africa against external military aggression, to protect the sovereignty and the territory and the people of South Africa in accordance with the Constitution as well as the principles of international law regulating the use of force, in order to secure an environment of peace and prosperity for all. This Department oversees the South African National Defence. To this end, the Department of Defence is responsible for the following:

- defending the country against aggressors
- promoting security
- supporting the people of South Africa

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11 President's Minute 690 of 6 July 2009. See also Proclamation 44 of 2009 published on 1 July 2009 in Government *Gazette No* 32367 as regards the transfer of functions and powers to the new Ministries.

12 See also e.g. the Military Discipline Supplementary Measures Act 16 of 1999.

2.3 The responsibilities of the different branches (programmes)[13] in the Department of Defence are as follows:

- Programme 1: Administration:

The Administration Programme oversees the activities of the Department by formulating policy, providing strategic direction, and organising the Department in terms of its structure and force design to achieve the objectives of defence. It provides services in the areas of corporate management, planning and reports, human resources, legal matters, religious guidance, corporate communications, Reserve Force issues and defence foreign relations. Administration provides services with regard to the directives in the area of political direction, which is the responsibility of the Minister of Defence, and departmental direction, which is the responsibility of the Secretary for Defence.

- Programme 2: Landward Defence

The purpose of this programme is to provide prepared and supported landward defence capabilities for the defence and protection of South Africa.

- Programme 3: Air Defence

The Air Defence Programme provides prepared and supported air defence capabilities for the defence and protection of South Africa. To defend and protect South Africa by maintaining and providing prepared and supported air combat forces, services and facilities that meet Government's requirements.

- Programme 4: Maritime Defence

The purpose of the Maritime Defence Programme is to provide prepared and supported maritime defence capabilities for the defence and protection of the Republic of South Africa.

- Programme 5: Military Health Support

The purpose the Military Health Support Programme provides prepared and supported medical combat support elements and services. The objective is to provide prepared and supported military medical health capabilities, services and facilities that meet the requirements of Government in support of the defence of South Africa. The Military Health Support Programme provides medical combat support and other medical services. It maintains military health and training facilities, including specialist facilities such as the Institutes for Maritime and Aviation Medicine.

- Programme 6: Defence Intelligence

The purpose of the Defence Intelligence Programme is to provide a defence intelligence and counter-intelligence capability. The measurable objectives is to defend and protect South Africa by providing military intelligence and counter-intelligence products and services that meet the requirements of Government.

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13 *Strategic Business Plan 2009 (MTEF FY 2009/10 to FY 2011/12).*

- Programme 7: Joint Support Purpose

The Joint Support Programme provides joint support capabilities and services to the Department. The objective is to support departmental activities by providing joint logistic, technological and military policing capabilities, services and facilities that meet Government requirements. The Joint Support Programme provides common support capabilities, facilities and services to the Department. It establishes, provides training in, and maintains the following areas: joint logistics, Information Communication Technology and Military Police.

- Programme 8: Force Employment

This programme provides and manages Defence capabilities, including an operational capability to successfully conduct all operations and joint and multinational military exercises; and

- Programme 9: Special Defence Account

The programme Special Defence Account's purpose is to provide for special defence activities and purchases.

B. GENERAL OBSERVATIONS

2.4 Considering the limited review mandate of the SALRC it should be pointed out that this discussion paper forms part of a narrowly focused and text-based statutory review process as is outlined above. The Department of Defence participated in the SALRC audit of legislation, which commenced in 2004. On 21 November 2008, the Department of Defence also updated the list of legislation that formed the focus of this review and submitted their list of legislation to the SALRC.

Where a statute administered by the Department of Defence seems to be free from any provisions that contradict or violate section 9 of the Constitution, it is accordingly not to say that the execution of such statute necessarily takes place in line with the protection afforded by the section 9 equality clause. Therefore, this discussion paper does not reflect on any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed.

2.5 There are a significant number of constitutional issues, anomalies and redundancies in legislation regulating military justice which are receiving the attention of the Department of Defence. Therefore, the analysis below mainly focuses on those aspects of the system of military justice that are considered to be clearly inconsistent with section 9 of the Constitution. The Military Discipline Supplementary Measures Act 16 of 1999 (Military Discipline Act) established South Africa's military courts.[14] These courts are regulated by that Act; the rules of procedure

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[14] Military Discipline Act s 6(1)(a) - (d).

made in terms of that Act; the unrepealed portions of the Defence Act 44 of 1957[15] and the unrepealed portions of its First Schedule[16] which need to be read with the relevant provisions of the Defence Act 42 of 2002. This situation indicates a need to consolidate legislation regulating military courts. The view of the Department of Defence is that it would be best if such consolidation is not effected in piecemeal fashion.

2.6 As far as the discussion on the new Defence Act 42 of 2002 (Theme 2) is concerned, there are duplications and anomalies that need to be considered. With regard to Theme 4 all the Demobilisation Acts were meant for the particular fixed time-frame and circumstances to which those Acts applied and the time-frame and circumstances have passed. There is therefore no purpose to keep these Acts in the statute book

2.7 The SALRC is aware that the Department of Defence presented the Castle Management Act Repeal Bill [B9 - 2008] to Parliamentary Committees in 2008. The SALRC has nevertheless reviewed the Castle Management Act 207 of 1993 as it has done with other Acts.

C. EVALUATION OF LEGISLATION

2.8 This review of the defence-related legislation in this paper does not deal with the statutes in a chronological order as *per* the number and year of each Act, but according to identified themes. The SALRC considers that this approach enhances the clarity of the provisional proposals made. The advisory committee identified the following seven themes (discussed in Chapter 2) in relation to the defence legislation reviewed by the committee: Theme 1 – Legislation Relating to the Administration of Military Justice, Theme 2 - New Defence Act 42 of 2002, Theme 3 - Acts Relating to National Security and Armaments, Theme 4 - Time Specific Acts, Theme 5 – Moratorium, Theme 6 - Property and Finance, Theme 7 - Implementing International Conventions, Prohibiting or Restricting the Use of Certain Weapons.

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15 Defence Act 44 of 1957 ss 104 to 112.

16 First Schedule to the Defence Act 44 of 1957 ss 1, 3 – 60, 69, 80, 81(2), 82, 84, 85, 88, 89, 92, 93(2) - (6), 95, 97, 107, 113, 114, 116, 118 – 128, 129(1) - (3), 130 – 144, 147(1) - (3), and 148 – 154.

2.9 The Department of Defence agreed with almost all the recommendations in the consultation paper and commented in general as follows:

> We place on record that the Department is considering placing the proposed Defence and Related Matters Laws Amendment and Repeal Bill on the Departmental Legislative Programme for 2011. We envisage that further engagements will take place between the Department and the Commission on the actual content of this Bill. We take the opportunity to thank the Commission for the sterling work it has done in compiling the consultation paper and we are committed to engage further on the content of this letter should the Commission deem it necessary to do so.

Theme 1: Legislation relating to the Administration of Military Justice

(a) Introduction

2.9 The existence of military justice systems is a worldwide phenomenon. Military courts play a central role in the delivery of military justice for the large number of men and women in the South African National Defence Force (SANDF) for whom decisions of military courts often have huge practical consequence. These courts wield enormous powers both within and beyond the borders of South Africa. They are empowered among others to impose severe penalties on offending members.

2.10 As already pointed out, there are a significant number of constitutional issues, anomalies and redundancies in legislation regulating military justice which are receiving the attention of the Department of Defence. Therefore, the analysis below focuses on those aspects of the system of military justice that are considered to be clearly inconsistent with section 9 of the Constitution.

(b) Constitutional authority for the establishment of the Military Court System

2.11 The creation of the military court system is constitutionally mandated. Section 200(1) of the Constitution requires the Defence Force to be 'structured and managed as a disciplined military force'. As military discipline cannot be enforced without the creation of appropriate structures, the above-mentioned section necessarily requires the creation of military disciplinary structures. The constitutional validity of a separate military justice system was to a large extent acknowledged in *Minister of Defence v Potsane (Potsane)*.[17]

2.12 In that case, the separate existence of the military prosecuting authority was challenged mainly on two grounds.

- The first was whether the provisions of the Military Discipline Supplementary Measures Act 16 of 1999 (Military Discipline Act) conferring authority on military prosecutors to institute and conduct prosecutions in military courts were inconsistent with the provisions of section 179 of the Constitution. Section 179 provides that "[t]here is a single national prosecuting authority in the Republic". This section creates the office of the National Director of Public Prosecutions (NDPP). The applicants contended that the section invests the NDPP with

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17 2002 (1) SA 1 (CC) para 31.

exclusive prosecutorial authority, which is infringed by the competing authority conferred on military prosecutors by the Military Discipline Act. According to the argument, prosecutions in military courts should be conducted by or under the authority of the NDPP.

- The second contention was that the military prosecutions infringed the right to equality in section 9 of the Constitution.[18]

2.13 However, the Applicants did not challenge the principle of a separate military justice system with jurisdiction to try and punish them (for both civilian and military offences).

2.14 The constitutional attack was directed at only one component of the military justice system, the prosecuting section.

2.15 The High Court (unreported[19]) found in favour of the Applicants. It held that the relevant provisions of the Military Discipline Act conflicted with the Constitution to the extent that they permitted military prosecutions to prosecute civilian offences committed by soldiers in South Africa and accordingly struck down the provisions. The High Court reasoned, among other things, that the words 'there is' mandates that 'there must be' and 'single' means 'sole' or 'one and only'. The Minister of Defence filed a successful appeal against the decision of the High Court in the Constitutional Court. This Court in turn held that 'single' in the context of section 179 does not intend to say 'exclusive' or 'only' but means to 'denote the singular, 'one'.[20] The Court stated, further, that 'where there used to be many, there will now be a single authority and that this interpretation of the provision is "[c]onsistent with the historical context as well as with the corresponding provisions of the Constitution where the diffused powers of state under the previous dispensation were to be brought under single umbrella.".[21]

2.16 On the equality challenge, the Court held:[22]

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18 Section 9(1) provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'.

19 *Potsane v Minister of Defence*, Free State Provincial Division Case number 2463/2000.

20 Potsane at para 26.

21 Potsane at para 26.

22 Potsane at para 44.

> The impugned sections of the Act differentiate between soldiers and other people. Such differentiation is rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable military justice system. The ground of differentiation is not one specified in s 9(3) of the Constitution; it applies equally to all members of the SANDF in their capacity as such. This basis of differentiation can have no adverse effect on their human dignity or have any comparable impact on them. … [t]he] differentiation is therefore not unfair discrimination within the meaning of s 9(3) of the Constitution.

2.17 The above finding suggests two things. First, in the context of military justice, many instances of differentiation between soldiers and other people would be rationally connected to the legitimate government purpose of establishing and maintaining a disciplined military force with a viable system of military justice as mandated by the Constitution. Second, it would be difficult to establish that differentiation between soldiers and other people would have an adverse effect on their human dignity or have any comparable adverse impact on them. This means that where a provision of military justice legislation is pitted against the equality clause, due regard must be had to the Constitutional Court's equality finding in *Potsane*. With this decision a lot of possible equality questions in the context of the military justice system have now become gray areas which should be left to courts or policy choices by the relevant authorities.

(c) Problem areas relevant to this investigation

(i) Military Discipline Supplementary Measures Act 16 of 1999

2.18 The Military Discipline Supplementary Measures Act 16 of 1999 (Military Discipline Act) is the framework legislation for the administration of military justice. Its enactment was a product of a constitutional challenge in *Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others* 1999 (2) SA 471 (C). This case represented a turning point in the history of the South African military court system. It hastened the need for the transformation of some aspects of the military court system and resulted in the above Act which established a completely new system of military courts with the view of satisfying constitutional requirements. The Act's key objectives are to provide for proper administration of military justice and the maintenance of military discipline and to ensure a fair military trial and an accused's access to the High Court of South Africa.[23] It makes provision for several 'military courts' as opposed to 'courts-martial' and it establishes the necessary support structures. Perhaps most importantly, it also makes provision for penalties which may be imposed by military courts. It is noteworthy that the Act appears to be the second most important piece of legislation in South Africa given that section 4(1) of the Act provides that '[i]f any conflict relating to any matter dealt with in this Act

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[23] Section 2.

arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisions of this Act shall prevail.'

2.19 As this Act was enacted post-1996 and intended to meet a constitutional challenge, most of it is in line with the Constitution although there is still room for improvement on certain aspects some of which involve policy choices which do not fall within the scope of this project.[24] However, the following provisions or aspects of the Military Discipline Act require serious attention.

(aa) Section 6(1)(d) Commanding Officer's Disciplinary Hearing

2.20 The Commanding Officer's Disciplinary Hearing (CODH) is statutorily the lowest level of the 'military courts'. The CODH consists of the officer commanding (OC) or an officer subordinate in rank to such OC and of not less than field rank. In the latter case such an officer must be authorised in writing by the relevant OC. Neither the OC nor his delegated officer needs to posses any legal qualification or be appropriately qualified.[25]

2.21 A commanding officer may conduct a disciplinary hearing of any person subject to the Military Discipline Code other than an officer[26] or warrant officer, who has elected in terms of the Act to be heard by a commanding officer, for any military disciplinary offence and may on conviction sentence the offender to any punishment prescribed in section 12(1)(i), (j), (k), (l) and (m) of the Military Discipline Act but subject to a maximum fine of R600, 00.

2.22 The punishments which may be imposed by the CODH are confinement to barracks for a period not exceeding twenty one days in the case of a private or equivalent; corrective punishment for a period not exceeding 21 days in the case of a private or equivalent rank; extra non-consecutive duties for a period not exceeding twenty one days in the case of any other rank

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24 For challenges related to the judicial independence of military courts, see Aifheli E. Tshivhase 'Transformation of military courts' (2009) 24 *SA Public Law* 450. Also by the same author, see 'Military courts in a democratic South Africa: An assessment of their independence' (2006) 6 *New Zealand Armed Forces Law Review* 96.

25 However, the OC or his delegated officer will usually have passed a departmental course in military law.

26 This refers to the commissioned officers whose ranks start from chaplain, then second lieutenant and thereafter progress upwards to General: see *General Regulations for the SANDF* Chapter 3 regulation 1(b). Every officer must hold *either* a permanent commission conferred by the President as the Commander in Chief of the SANDF under Military Discipline Act s 54(1) and (3) *or* a temporary commission conferred by the Minister of Defence in terms Military Discipline Act s 54(4).

than that of an officer or a reprimand.[27] The CODH deals only with guilty pleas. Cases involving any other pleas are remanded and referred to the appropriate court[28] which will usually be but not always the Court of Military Judge.

2.23 Although the Constitution does not define what constitutes a court, the CODH, notwithstanding its inclusion in the hierarchy of military courts established by section 6(1) of the Military Discipline Act can arguably not be accepted as a court because the presiding officers are part of the military command. These officers lack the most basic tenets of judicial independence.[29] The classification of the CODH as a court undermines the notion of 'court' in a constitutional democracy such as ours. It is proposed that both the inclusion of the CODH in the hierarchy of military courts as well as this forum's nature and competencies be carefully considered by the Department of Defence.

(bb) Section 12: Penalties

2.24 Among the penalties which may be imposed by a military court on an officer is the punishment of cashiering. This penalty is not defined in section 12(1)(b)(i) of the Military Discipline Act. An officer sentenced to imprisonment must also be sentenced to be cashiered, and the cashiering must be executed before the officer concerned is lodged in any prison, gaol or other place to serve the sentence of imprisonment. An officer convicted of 'scandalous behaviour'[30] must be sentenced to a single punishment, namely, to be cashiered. 'Cashiering' is the dishonourable dismissal (separation from the service) of an officer coupled with the cancellation of that officer's commission thus barring the convicted offender from holding military office.[31]

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27 Military Discipline Act s 12(i), (j), (k), (l) and (m). No officer may be heard by a commanding officer's disciplinary hearing.

28 See Military Discipline Act: Rules of Procedure made by the Minister of Defence under s 44(4) of this Act (Regulation Gazette No 6564, June 1999), Rule 65.

29 These include aspects such as institutional independence and security of tenure. This is a complex field of constitutional law in respect of which the leading decisions include *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) and *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).

30 Military Discipline Code s 32.

31 See William Winthrop *Military Law and Precedents* (Washington - Government Printing Office - 1920 reprint of 2nd edition 1895) pp 405 - 406; *Manual of Military Law* (7th edition: HMSO - London - 1929) p 465 n 6.

2.25 In the absence of a proper definition of “cashiering” or “cashier”, it is common knowledge within the military that it usually evokes the picture of the sentenced officer being dismissed in a publicly degrading manner involving the destruction of symbols of status such as epaulettes ripped off shoulders, badges and insignia stripped, swords broken, caps knocked away.[32] The execution of this punishment in such a fashion would clearly fall foul of the provisions of section 12(1)(e) of the Constitution[33] which provides for the right “not to be treated or punished in a cruel, inhuman or degrading way.”

2.26 Whilst cashiering has not been known to have been executed in that fashion since the establishment of the SANDF, it is recommended that it be removed from the statute book due to its blatant unconstitutionality and obsoleteness in the South African military justice system.

(cc) Section 34(3): Military Judicial Review Authority

2.27 Persons convicted and sentenced by a military court have the right to automatic, speedy and competent review of the proceedings in terms of section 25 of the MDC. Every acquittal or discharge of an accused is final but every finding of guilty, any sentence imposed and every order made by a military court is subject to the process of review by the review authority.[34] The automatic review of proceedings is considered to be an added benefit for accused persons as its object is to ensure that any proceeding, finding, sentence or order is valid, regular, fair and appropriate, or remedied.

2.28 Should the accused elect to make representations on the finding or sentence of a military court, the matter is referred to the Court of Military Appeals (CMA) for review. Furthermore, the sentences of imprisonment, including a suspended sentence of imprisonment, cashiering, discharge with ignominy, dismissal or discharge from the SANDF cannot be executed prior to confirmation by the CMA. All other sentences by a military court are reviewed by the review authority utilising Review Counsel which may exercise the appeal and review powers conferred on the CMA in terms of section 34(3). Review Counsel are assigned by the Adjutant General

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32 See William Winthrop (note 26 above) p 408, especially footnotes 90, 92 and 94 for detail of some historical instances where this form of punishment was administered in a manner described above. It may be worth pointing out that the Commission was unable to establish an authoritative South African source confirming this version of cashiering.

33 It would also constitute a contravention of the MDC s 16 which proscribes the assaulting or ill-treating of a subordinate.

34 Military Discipline Act s 34(1) - Director of Military Judicial Reviews in consultation with the Chairperson of the Court of Military Appeals determines review counsel policy and issue policy directives which must be observed in the review process: Ibid s 26(3)(b).

(subject to the control of the Minister). They must be appropriately qualified over and above holding a degree in law and function subject to the control of the Director: Military Judicial Reviews.[35]

2.29 The military review authority[36] exercises enormous judicial-type power. It may uphold, vary or substitute a sentence or refuse to uphold a finding and set the sentence and/or finding of a military court aside in terms of section 8(1). Moreover, in terms of section 107, a review authority may direct a military court to give written reasons for any ruling or finding. The finding of the review authority is deemed to be the finding of the court which passed the original sentence or made the original finding or order. This is despite the fact that the review authority is not part of the hierarchy of military courts established in terms of section 6 of the Military Discipline Act. Review Counsel are not statutorily enjoined to comply with the imperative in section 165(2) of the Constitution. They lack the necessary guarantees of judicial independence.

2.30 The difficulty is that in exercising its review powers, the judicial review authority becomes a court of law by fiction. However, review of courts-martial decisions by non-court military entities is not unique to South Africa. It is a common feature in a number of jurisdictions including Namibia, Zimbabwe and the United Kingdom. In *Cooper v The United Kingdom 2003 ECHR 686*, the military review authority of the United Kingdom was challenged. The Court did acknowledge that the Reviewing Authority was an anomalous feature of the British court-martial system and added that it would express its concern about a criminal procedure which empowers a non-judicial authority to interfere with judicial findings.

2.31 But the Court held that the role of the Reviewing Authority did not undermine the independence or impartiality of the court-martial mainly because the final decision in court-martial proceedings will always lie with a judicial authority. This is indeed the case where the right of appeal is exercised. But the reasoning of the ECHR is problematic because it relies on appeal procedures in order to remedy a serious anomaly in the system. A decision of a court martial where the right of appeal to the appeal court has not been exercised will be compromised by a 'non-judicial body' as is the case in terms of the relevant provisions of the Military Discipline Act.

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35 Military Discipline Act s 34(1) - Director of Military Judicial Reviews in consultation with the Chairperson of the Court of Military Appeals determine review counsel policy and issue policy directives which must be observed in the review process: Ibid s 26(3)(b).

36 The CMA is also a review authority as contemplated in Military Discipline Act s 26(1). The discussion in this section relate only to the review authority using review counsel appointed / assigned in terms of Military Discipline Act s 13(2)(b).

2.32 In a separate concurring opinion in *Cooper v The United Kingdom*, Costa J sums up the matter when he says that "I still think that the intervention of the Reviewing Authority is anomalous, unfortunate and archaic and that it would be desirable to put an end to the practice". The case of *Cooper v The United Kingdom* should therefore be approached with caution. It is therefore not surprising to note that the United Kingdom's new Armed Forces Act of 2006 departs from the practice of reviewing decisions of courts-martial by an institution which is not a court. Similarly, New Zealand's Armed Forces Discipline Amendment Act 2 of 2007 establishes a 'Reconsidering Authority' to be composed of a Judge appointed to the authority and two superior commanders.[37] The new authority replaces the Board of Review which was a non-judicial authority which could alter the decision of a court-martial. Furthermore, the new system in Australia excludes the system of automatic review of proceedings by non-judicial authorities. The emerging trend in modern military justice appears to be in favour of discontinuation of automatic reviews of courts-martial decisions by reviewing authorities and entrusting review powers to appeal courts.

2.33 While the value of automatic reviews must be acknowledged, the objective should not be achieved through means that blatantly compromise the dignity of military courts. The changing of court decisions by a non-judicial body amounts to interference with the functioning of the courts as proscribed by section 165(3) of the Constitution. Furthermore, by existence of statutory provisions allowing the changing of courts' decisions by non-judicial officials, is contrary to the constitutional obligation in section 165(4) of the Constitution which requires the adoption of legislative and other measures that assist and protect the courts to ensure, among other things, their independence, impartiality and dignity. A possible solution could be to statutorily convert the review authority into a standing court of military judicial reviews which focuses squarely on the reviews. This will strengthen the dignity and credibility of military courts as courts of law and will also achieve the desired result.

2.34 It is recommended that the current provisions (sections 8 and 107) relating to the powers of the military review authority be revised given their blatant violation of the Constitution.

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[37] Section 151. While the new position in New Zealand does not completely depart from the old position, it certainly represents a step in the right direction given the fact that there would be a judge appointed to the Reconsideration Authority.

(ii) Conflict between the new Defence Act of 2002 and the Military Discipline Supplementary Measures Act of 1999

2.35 Section 3(2) of the new Defence Act of 2002 provides that in the event of any inconsistency between it and any other legislation in force at its commencement other than the Constitution, the Act prevails. Similarly, section 4(1) of the Military Discipline Act provides that "[i]f any conflict relating to any matter dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution or any Act expressly amending this Act, the provisions of this Act shall prevail." There is direct conflict between the two provisions since the two Acts cannot prevail at the same time.

2.36 It is recommended that section 4(1) of the Military Discipline Act be amended to make it subject to the new Defence Act in the event of any conflict between the Defence Act and the Military Discipline Act. The reason for this recommendation is that the new Defence Act is the principal Act in defence matters.

(iii) First Schedule to the Defence Act 44 of 1957

2.37 As noted earlier, the bulk of the old Defence Act of 1957 has been repealed but its First Schedule, which is part of the Military Discipline Code,[38] and its other provisions relating to military discipline have been retained. The First Schedule provides for numerous military offences and punishments for those offences[39] and is supplemented by criminal law and South African law of evidence. The MDC applies to a number of categories of persons including, among others, members of the Regular Force and also, - when they are rendering service or when liable to render service - members of the Reserve Force. Together, the Military Discipline Act and the MDC form the core of military justice system.

2.38 Below is the analysis of those MDC provisions which appear to be blatantly offensive to the Constitution.

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38 The First Schedule together with the rules made by the Minister under s 104 (3) of the Defence Act 44 of 1957 and s 44 (3) read with s 1 (v) of the Military Discipline Act comprise the Military Discipline Code (MDC).

39 To name but a few, the MDC makes provision for the following offences: mutiny; desertion; absence without leave, assaulting a superior officer; assaulting or ill-treating a subordinate; using threatening, insulting or insubordinate language; malingering; disobeying lawful commands or orders; causing or allowing a vessel or aircraft to be hazarded, stranded or wrecked; negligently losing kit, equipment or arms; drunkenness on or off-duty; riotous or unseemly behaviour and conduct to the prejudice of military discipline.

(aa) Section 1 of the MDC: Definition of Imprisonment

2.39 Section 1 of the MDC defines imprisonment as imprisonment "with or without compulsory labour". None of the Correctional Services Act 111 of 1998,[40] the Criminal Procedure Act 51 of 1977[41] and the Criminal Law Amendment Act 105 of 1997[42] provide for the imposition of imprisonment with compulsory labour. In the light of the fact that every soldier sentenced to imprisonment by a military court must be sentenced to be discharged from the service and that discharge must be executed before the imprisonment commences,[43] there can be no rational basis for this differentiation against the prisoner sentenced by a military court. Maintenance of 'military discipline' cannot be used as a justification for the differential treatment of military personnel regarding imprisonment. Consequently, it is recommended that the definition of imprisonment in section 1 of the MDC is at odds with section 9(1) of the Constitution and must be accordingly amended by the repeal of the words "with or without compulsory labour".

(bb) Section 32 of the MDC: Scandalous Behaviour

2.40 The above section makes provision for the offence of scandalous behaviour by an officer. Upon conviction, an officer "shall…be cashiered". As discussed under paragraph 2.25 above, the execution of this form of punishment can be inhuman and degrading. Whilst the offence should be retained it is recommended that the sentence of 'cashiering' be removed from the statute book and, wherever reference is made to it in legislation, be replaced with a viable alternative punishment.

(cc) MDC Provisions which impose onus on an Accused

2.41 The MDC contains the following provisions:-

> Section 24(2) If in any proceedings for a contravention of paragraph (*a*) of sub-section (1), it is proved that any article or property mentioned in that paragraph which is alleged in the charge to have been lost, was issued to the accused and that on a date subsequent to such issue the accused was found not to be in possession of such article or property, it shall be presumed unless the contrary is proved, that such article or property was negligently lost by the accused.

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40 Section 73.

41 Section 276 and s 276A.

42 Section 51.

43 Military Disciple Code s 93(3) and s 93(4)(a).

> Section 26(2) If in any prosecution for a contravention of subsection (1) it is proved that the accused as alleged in the charge was responsible for stores, stocks or moneys in any South African National Defence Force store, office or institution, and that while he was so responsible a deficiency in such stores, stocks or moneys was caused, it shall be presumed, unless a satisfactory explanation to the contrary is given by the accused, that he so negligently performed his duties that the said deficiency was caused.

2.42 Both provisions create a rebuttable presumption requiring an accused to adduce evidence and, in essence, denying the accused the constitutional right to remain silent. It is therefore recommended that sections 24(2) and 26(2) of the MDC be repealed.

(dd) Sections 125 and 126 of the First Schedule to the Defence Act of 1957 (MDC): Unsoundness of mind upon arraignment or during trial within or outside the Republic

2.43 Sections 125 and 126 deal with accused persons suspected to be of unsound mind. The two provisions draw a distinction between an accused arraigned before a military court in the Republic and an accused arraigned before a military court beyond the borders of the Republic.

Arraignment or Trial within the Republic: section 125 of the MDC:

> 125(1) If upon arraignment before a military court in the Republic on a charge of an offence, or at any time during the trial and before the finding, an accused appears to be incapable of understanding the proceedings at the trial, the court shall report the condition of the accused to the magistrate of the district and order that the accused be detained in proper custody until the decision of the magistrate is made known.
> (2) If such accused is not committed by the magistrate to an institution under the provisions of the Mental Disorders Act, 1916 (Act No. 38 of 1916), he may be charged before the same or some other court.
> (3) If the accused is committed by the magistrate to an institution under the provisions of that Act, the charge against him may, in the discretion of the Adjutant-General be withdrawn or may, when the accused is fit to stand his trial, be proceeded with before the same court or be commenced *de novo* before another court.

Arraignment or Trial outside the Republic: section 126 of the MDC:

> 126(1) If when an accused is arraigned before a military court beyond the borders of the Republic on a charge for an offence under this Code, or at any time during the trial and before the finding, it appears to the court that the accused is not capable of understanding the proceedings at the trial, the court shall hear evidence, including medical evidence, to determine whether the accused is capable of understanding the proceedings at the trial so as to make a proper defence.
> (2) If the court finds that the accused is so capable the trial shall proceed.
> (3) If the court finds that the accused is not so capable, it shall order —
> (*a*) that the accused be removed to the Republic and there detained in detention barracks or some other prescribed place pending the signification of the State President's decision; and
> (*b*) that pending his removal to the Republic, he be detained in a hospital, prison, detention barracks or other place as circumstances may permit.

(4) If an accused so found incapable of understanding the proceedings becomes fit to stand his trial, whether before removal to the Republic or thereafter, he may be charged and tried for the offence.

2.44 Problems encountered in the two sections are as follows:

- The procedure described in section 126 of the MDC is consistent with the military court conducting itself as a court of law whereas the procedure described in section 125 of the MDC is not consistent with the military court conducting itself as a court of law to the extent that the military court must defer to the magistrate. This deferral is anomalous and not necessary. It is recommended that section 125 be amended to empower military courts to exercise powers they exercise under section 126.

- Section 125 also refers to the Mental Disorders Act 38 of 1916 the bulk of which was repealed by the Mental Health Act 18 of 1973 whilst the balance of its provisions was repealed by section 344 of the Criminal Procedure Act 51 of 1977. Reference to the repealed Act should therefore be deleted.

- The discretion vested in the Adjutant General to withdraw and re-instate charges in terms of section 125(3) is in conflict with section 23 of the Military Discipline Act which vests the powers to institute and manage prosecutions before military courts in the Military Prosecuting Authority.

- Section 126(3)(a) provides that "(3) If the court finds that the accused is not so capable, it shall order—(*a*) that the accused be removed to the Republic and there detained in detention barracks or some other prescribed place pending the signification of the State President's decision…". It appears anomalous for the President to be involved in making decisions on matters such as this. It is recommended that section 126(3)(a) be revised and an appropriate functionary or institution be identified in lieu of the President.

- Sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977 make provision for a number of processes and protections which must be afforded to an accused person suspected to be of unsound mind. Most of these processes and protections are not provided for in sections 125 and 126 of the MDC. There is no rational justification for not affording accused persons before military courts similar protections. It is recommended that revision of sections 125 and 126 should also ensure that accused

persons suspected to be of unsound mind before military courts be afforded protection similar to that afforded to accused persons before ordinary courts.

(ee) Section 131(1)(a) and (b) of the MDC: Maintenance orders

2.45 Section 131 of the MDC reads:-

> (1) If the General Officer Commanding, South African National Defence Force, is satisfied-
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> (a) that a magistrate's court or a superior court has made an order against a member of the Permanent Force[44] or against any member of the South African National Defence Force performing service in defence of the Republic, for the regular payment of a specified amount towards the maintenance of such member's wife or child, he may order that the member concerned be placed under deductions of pay for the amount of the order of court;
>
> (b) that any member of the Permanent Force or any other member of the South African National Defence Force performing service in defence of the Republic, is not maintaining or adequately maintaining his wife or child, he may order that the member concerned be placed under deductions of pay for such amount as, in all the circumstances of the case, he considers to be reasonable.
>
> (2) Any amount deducted from a member's pay in pursuance of an order made under sub-section (1), shall be paid to the wife of the member concerned or to the legal guardian of the child concerned or to the magistrate of the district in which such wife or guardian resides for distribution to or on behalf of such wife or child as such magistrate may determine.

2.46 There are two areas of concern. The first is the use of the word “may” in paragraphs (a) and (b). The above provisions give the General Officer Commanding SANDF discretion to either make or not make an order for deduction in terms of a maintenance order which has been granted by a court of law. This may arguably encourage non-compliance with court orders. It could likewise also give an impression that the uniformed employees of the Department of Defence are to be treated differently from other fathers who are obliged to comply with similar orders against them. There is no justification for this distinction. In fact it would prejudice the spouses and children who are not being maintained and take the sting out of the maintenance orders. Most importantly, it would also undermine the paramountcy principle which is enshrined in section 28(2) of the Constitution and which the Constitutional Court emphasised *in M v S (Centre for Child Law as Amicus Curiae)* 2007 (12) BCLR, 13 12 (CC**)**.

2.47 The second problem relates to section 131(1)(b). While the situation which the provision is meant to address is understood it does not make provision for the constitutional principle of

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[44] Now “Regular Force”. See s 11(a) and s 52 of the Defence Act of 2002.

procedural fairness in the sense that the member concerned is not afforded an opportunity to be heard before an order is made.

2.48 It is recommended that section 131(1)(a) be amended to replace the word “may” with “must”. It is also recommended that section 131(1)(b) be revised to make provision for the member concerned to be heard before the General Officer Commanding makes an order.

(ff) Section 116 of the MDC: Reviewed Findings of Military Court

2.49 In terms of the above provision ”[a]ny finding, sentence or order of a military court as upheld, substituted or varied by a review authority, shall be deemed to be the finding of the court which passed the original sentence or made the original finding or order”. The powers of the review authority in which reviews are conducted by Review Counsel have already been dealt with under the section dealing with the Military Discipline Act and the proposals made there in respect of that category of review authority are equally applicable here.

2.50 The relevant provisions of the Military Discipline Act should therefore be revised along with the above provision and other provisions expressing the same powers of the military review authority.

(gg) Section 104 of the Defence Act of 1957: Amendment of the Military Discipline Code

2.51 Section 104(2) (a) empowers the President to “insert any new provision in or amend or repeal any provision of the First Schedule”. The President may do this “with the approval by resolution, of Parliament, by proclamation in the Gazette”. This provision is inconsistent with national legislative process as set out in section 75 of the Constitution.

2.52 The above provision should be repealed so as to not detract from the prescribed law-making processes as provided for in the Constitution. However, it must be stated that nothing prevents the President from initiating an amendment to the MDC provided he or she follows the relevant procedures.

2.53 Furthermore, section 104(2(b) provides that “[t]he State President may exercise any of the powers conferred upon him by paragraph (a) with regard to sections 58 to 59 of the First Schedule with retrospective effect: Provided that in so doing he shall not create any offence or increase any penalty.” There is no justification for retrospective law making in the context of this provision and it should also be repealed.

2. Theme 2: The New Defence Act 42 of 2002

(a) Introduction

2.54 The Defence Act 42 of 2002 (the Act) came into force on 23 May 2003 to provide for the defence of the Republic and for matters connected therewith. The Act has extra-territorial application in respect of the persons and conduct regulated by it. It has also a very broad ambit. Amongst other things, it -

- prescribes the Department of Defence's composition;
- establishes the Defence Secretariat; provides for the appointment of the Secretary for Defence as well as the appointee's functions and powers;
- provides for the continued existence of the South African National Defence Force; its composition and structural components as well as the structuring and functions of the Defence Force's Intelligence Division;
- provides for the appointment of the Chief of the Defence Force as well as the appointee's functions and powers;
- regulates the employment of the Defence Force; the powers and duties of members so employed as well as the particular powers accorded to Defence Force members engaged in law enforcement at sea and those appointed as military police officials;
- provides for the establishment of the Council on Defence; the Defence Staff Council; the Reserve Force Council; and other councils;
- regulates the enlistment of persons in the Regular and Reserve Forces; matters pertaining to their service training, military awards and insignia; and limitations on members rights;
- prescribes the Minister of Defence's general powers; the power to make regulations; and the indemnities/exemptions applicable to the Defence Force; and
- further regulates conduct on the declaration of a state of national defence by the President; mobilisation and the making of state of national defence regulations.

(b) Areas requiring attention

(i) Duplication

2.55 Section 103 of the Act provides for the convening of boards of inquiry both in relation to a Defence Force member's absence without leave and in relation to other matters.[45] Section 135 of

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45 Sections 10(b) and 101.

the First Schedule to the Defence Act of 1957 also provides for the convening of boards of inquiry both in relation to a Defence Force member's absence without leave and section 136 in relation to other matters. Section 102 of the Defence Act of 2002 regulates the attendance of persons - including witnesses - at a board of enquiry. Section 137 of the First Schedule to the Defence Act of 1957 does likewise.

2.56 This duplication may be cured by the repeal of sections 135, 136 and 137 of the First Schedule to the Defence Act of 1957.

(ii) Conundrum

2.57 Section 59(3) of the Defence Act of 2002 provides that

> [a] member of the Regular Force who absents himself or herself from official duty without the permission of his or her commanding officer for a period exceeding 30 days must be regarded as having been dismissed if he or she is an officer, or discharged if he or she is of another rank, on account of misconduct with effect from the day immediately following his or her last day of attendance at his or her place of duty or the last day of his or her official leave, but the Chief of the Defence Force may on good cause shown, authorise the reinstatement of such member on such conditions as he or she may determine.

2.58 The wording of section 59(3) is imperative. The requirement to treat the member as if his or her service has been terminated comes into effect by operation of law immediately the absence extends beyond 30 days if the individual's absence was without the permission of his or her commanding officer. The literal effect is that the person must then be treated as if he or she is no longer a member of the Regular Force and hence of the Defence Force. He or she must consequently be treated as no longer subject to either the MDC[46] or the Defence Act of 2002.[47]

2.59 When a Defence Force member has been absent without leave for more than 30 days and is still absent, his or her commanding officer must convene a board of inquiry to inquire into the absence.[48] The requirement to convene a board of inquiry only arises when the situation established by section 59(3) has already come into effect.

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46 In terms of s 3(2)(a) of the Military Discipline Act the MDC applies to all members of the Regular (Permanent) Force.

47 Section 3(1)(a) prescribes that the Act applies to "…all members of the Defence Force and any auxiliary service, and all employees, whether they are posted or employed inside or outside the Republic…"

48 Section 103 of the Defence Act of 2002 and s 135 of First Schedule to Act of 1957.

2.60 It is an offence for a member to be absent without leave.[49] It is not an offence capable of commission by a person who is not a member or who must be treated as if he or she is not a member. He or she is consequently either not subject to the MDC or to be treated as not subject to the MDC.

2.61 The dismissal of an officer[50] and the discharge of another rank[51] are punishments which may be imposed by a competent military court if the offender is tried and convicted for having unlawfully been absent without leave.

2.62 Several observations may be made:

- Although both Regular and Reserve Force members serve voluntarily, section 59(3) does not apply to Reserve Force members. This appears to be justified by the fact that Reserve Force members serve on a part-time basis; and are paid for actual time served during a call up. If the differentiation amounts to discrimination, such discrimination could be found to be fair.
- Section 59(3) has effect whether or not the absence without permission was lawful. However, there are instances in which such an absence would be excusable in law such as unavoidable absences occasioned by serious illness; serious injury; unlawful arrest; capture; or other physical impossibility. Specific provision is in fact made for the protection of members captured by an enemy - section 56(2) (a) of the Defence Act 42 of 2002. This category can be taken as falling outside the ambit of section 59(3) based on the principle that the general provision does not derogate from the specific provision.
- If a person is treated as no longer being a member, that person cannot use prescribed grievance mechanisms to remedy his or her situation as these are available to members only.[52] However, the fact that section 59(3) makes provision for the dismissed person to show good cause to the Chief of the Defence Force as to why he or she should be reinstated appears to provide a mechanism for addressing any concerns which may arise out of operation of this provision.

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49 Section 14(a) of First Schedule to the Defence Act of 1957.

50 Section 12(1)(b)(ii) of the Military Discipline Act.

51 Section 12(1)(c)(ii) of the Military Discipline Act.

52 Section 61 of the Defence Act of 2002 and section 134 of the First Schedule to the Defence Act of 1957.

2.63 Section 59(3) therefore, could be seen to be procedurally fair despite looking otherwise on the face of it.

(c) Recommendations

2.64 It is recommended that -

- Sections 135, 136 and 137 of the First Schedule to the Defence Act of 1957 should be repealed.

3 Theme 3: Acts relating to National Security and Armaments

(a) Regulation of Foreign Military Assistance Act 15 of 1998

2.65 This Act prohibits and penalises the unauthorised rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident within the Republic and foreign citizens rendering such assistance from within the borders of the Republic; provides for persons to be granted authorisation to offer such assistance and the rendering of such assistance upon the approval of an agreement to do so; provides for the mechanisms for the applications for such authorisations and approvals as well as the criteria to be applied, the records to be kept, the reports to be submitted in respect of such applications, authorisations and approvals; prohibits and penalises any persons - within the Republic or elsewhere - from recruiting, using or training persons for or financing or engaging in mercenary activity, namely, direct participation as a combatant in armed conflict for private gain; provides for the extra-territorial application of the Act and for matters connected therewith.

2.66 The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 will repeal this Act when it comes into operation. In the circumstances, this Act warrants no further comment.

(b) Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006

2.67 This Act prohibits and penalises the unauthorised rendering of foreign military assistance; provides for persons to be granted authorisation to offer such assistance; prohibits and penalises the unauthorised enlistment by South African citizens and permanent residents in any armed force other the South African National Defence Force; provides for persons to be granted authorisation to so enlist; prohibits every South African humanitarian organisation from providing humanitarian assistance in a country where there is an armed conflict or a regulated country unless the organisation has been registered for that purpose; provides for the President to exempt a humanitarian organisation from such registration with the view to expediting the provision of humanitarian relief; provides for the mechanisms for the applications for such registration, authorisations and approvals, as well as the criteria to be applied, the records to be kept, the reports to be submitted in respect of such applications, registrations, exemptions, authorisations and approvals; prohibits and penalises any persons - within the Republic or elsewhere - from directly or indirectly recruiting, using or training persons for or financing any combatant for private gain in an armed conflict, or from participating as a combatant for private gain in an armed conflict; or from *either* directly or indirectly participating in any manner in the

initiation, causing or furthering of an armed conflict; or a *coup d'état*, uprising or rebellion against any government; *or* directly or indirectly performing any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state; provides for the extra-territorial application of the Act; provides for offences and penalties and provides for matters connected therewith.

2.68 Apart from the extended meaning given to mercenary activities including the removal of the "private gain" requirement in some instances as well as the proscription of unauthorised enlistment in armed forces other than the South African National Defence Force, the Act introduces the concept of '*regulated country'* authorising the President to - by proclamation in the *Gazette* - proclaim a country to be a '*regulated country'*, that is, a country in which an armed conflict exists or is imminent. If this mechanism is in fact used, it would be imminently equitable because it could serve to notify persons of a change in circumstances which might see a commercial security activity change into one prohibited by this Act. The definition of '*armed conflict'* [53] has been altered to reflect this concept.

2.69 A further addition relates to its provision that no act is to be construed as assistance or service if it is performed by the South African National Defence Force or the South African Police Service either in fulfilment of international obligations or in terms of any other law or if the act is in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. The breadth of the relevant prohibitions requires this elucidation as to what would constitute acceptable assistance or service.

2.70 The Act has yet to come into operation. Nevertheless, it is our considered opinion that nothing is blatantly unconstitutional in this Act.

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[53] Section 1 defines 'armed conflict' to include any (a) situation in a regulated country proclaimed as such in terms of section 6; and (b) armed conflict in any other country which has not been so proclaimed, between (i) the armed forces of such country and dissident or rebel armed forces or other armed groups; (ii) the armed forces of any states; (iii) armed groups; [iv) armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or (v) any other combination of the entities referred to in subparagraphs (i) to (iv).

(c) Simulated Armaments Transactions Prohibition Act 2 of 1976

2.71 The Simulated Armaments Transactions Prohibition Act 2 of 1976 prohibits an unauthorised person from purporting to represent the State, the Armaments Board or the Armaments Development and Production Corporation of South Africa Limited, in relation to armaments transactions; and to provide for matters connected therewith.

2.72 This Act creates the following offence in terms of section 2:

> Any person who, in the Republic or elsewhere, in any manner whatsoever purports to acquire from any person, whether as the agent or authorized representative of or otherwise on behalf of the State, the board or the corporation, armaments, any information in regard thereto or patents, licences, concessions, rights of manufacture or the like in relation to armaments, or so to inquire about the availability of armaments, any information in regard thereto or patents, licences, concessions, rights of manufacture or the like in relation to armaments, or so to negotiate for the establishment of agencies in the Republic with regard to armaments, patents, licences, concessions, rights of manufacture or the like in relation to armaments, shall be guilty of an offence and on conviction liable to a fine not exceeding five thousand rand or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

In the absence of a requirement that the person must have acted without authority or that the person must have falsely given out that he or she was authorised to represent the board, the corporation or the State or for the existence of any form of intent or other mental basis for culpability on the part of the actor, this provision appears to amount to an absolute prohibition. This appearance is bolstered by the meaning of "purport" which is the transitive verb meaning "to give out as its meaning, to convey to the mind; to seem, claim, profess (to mean, to be, etc)".

2.73 The prohibition of simulated armaments' transactions is probably warranted and in the public interest but the current drafting of section 2 is not within the spirit of our constitutional dispensation and needs to be re-visited.

2.74 Any act contemplated in section 2 which is committed by any person outside the Republic is deemed to have been committed-

-"*also in the Republic"*; and

-"*in any place in the Republic where the accused happens to be*".

2.75 The evidentiary provision warrants reconsideration especially in the light of the shifting of the onus to the accused in section 5(3).[54]

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[54] "…unless the contrary is proved, be sufficient evidence in any proceedings that the person charged with the offence was present at the making of the statement".

2.76 It is therefore recommended that this Act be re-visited and either be repealed and replaced or amended to bring it in line with existing legislation and, more especially, to ensure that it conforms to the letter and the spirit of the Constitution. Consideration may also be given to including the prohibition of simulated armaments' transactions in the Armaments Corporation of South Africa Limited Act 51 of 2003.

(d) National Conventional Arms Control Act 41 of 2002

2.77 National Conventional Arms Control Act 41 of 2002 established the National Conventional Arms Control Committee and seeks to -

> ensure compliance with Government policy in respect of arms control in respect of conventional arms; ensure the implementation of a legitimate, effective and transparent control process; foster national and international confidence in the control procedures; provide for an Inspectorate to ensure compliance with the Act's provisions; provide guidelines and criteria to be used when assessing applications for permits made in terms of the Act; ensure adherence to international treaties and agreements; ensure proper accountability in the trade in conventional arms; provide for matters connected with the work and conduct of the Committee and its secretariat; and provide for matters connected therewith.

2.78 The Act prescribes offences and penalties and provides that any court of law in the Republic may try:

- any citizen or permanent resident of the Republic or any juristic person incorporated or registered in the Republic for such an offence, despite the fact that the act or omission to which the charge relates was committed outside the Republic ; and
- a foreign citizen for an offence contemplated in section 24 which is committed within the Republic.

2.79 The National Conventional Arms Control Act of 2002 repealed sections 3(2)(lA), 4C, 4D and 4E of the Armaments Development and Production Act 57 of 1968. The Act should be retained.

(e) Armaments Corporation of South Africa, Limited, Act 51 of 2003

2.80 This Act provides for the continued existence of the Armaments Corporation of South Africa, Limited, established by section 2 of the Armaments Development and Production Act 57 of 1968, despite the repeal of that Act.

2.81 The Corporation's functions are: the acquisition of defence *matèriel* for the Department of Defence; the management of such technology projects for the Department; the establishment of a programme-management system in support of that acquisition and the technology projects; the provision of a quality-assurance capability in support of that acquisition and the technology projects as well as any other related service required by the Department; the establishment of a system for tender and contract management in respect of defence *matèriel* as well as - in specified circumstances - the procurement of commercial materiel; the disposal of defence materiel in consultation with the person who originally manufactured the materiel; the establishment of a compliance- administration system for the Department as required by applicable international law, the National Conventional Arms Control Act 41 of 2002 and the Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993; the supporting and maintenance of the strategic and essential defence-industrial capabilities, resources and technologies identified by the Department; the provision of defence operational research; the establishment of a defence industrial participation programme management system; the provision of marketing support to defence-related industries in respect of defence materiel, in consultation with the Department and the defence-related industries in question; the management of facilities identified as strategic by the Department in a service level agreement; and the maintenance of such special capabilities and facilities as are regarded by the Corporation not to be commercially viable but which may be required by the Department for security or strategic reasons and the accountability and finances of the Corporation.

2.82 Section 23(1) repealed extensive pre-existing legislation.[55] It is recommended that the Act be retained.

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[55] Armaments Development and Production Act 57 of 1968; Armaments and Development and Production Amendment Act 65 of 1972; Armaments Development and Production Act Amendment Act 20 of 1977; Armaments Development and Production Act Amendment Act 5 of 1978; Armaments Development and Production Act Amendment Act 86 of 1980; Armaments Development and Production Act Amendment Act 56 of 1982; Armaments Development and Production Act Amendment Act 46 of 1992; Armaments Development and Production Act Amendment Act 31 of 1993.

(f) Armaments Corporation of South Africa, Limited, Amendment Act 16 of 2005

2.83 The purpose of this Act was to amend the Armaments Corporation of South Africa, Limited, Act 51 of 2003, so as to remove the Chief of the South African National Defence Force as a member of the Corporation's Board of Directors and to provide for matters connected therewith. This was done by deleting section 6(1)(c) of the Armaments Corporation of South Africa, Limited, Act 51 of 2003 to exclude the qualification in its section 7(4) which reads:

> Subject to section 6(1)(c), no officer or employee as defined in section 1 of the Public Service Act, 1994 (Proclamation 103 of 1994), or person appointed under a special contract contemplated in section 12A of that Act may be appointed as a member of the Board.

This Act has no surviving independent provisions and may be repealed.

(g) Civil Defence Amendment Act 5 of 1969

2.84 The Civil Defence Amendment Act 5 of 1969 amended the provisions of the repealed Civil Defence Act 39 of 1966 relating to the definition, the Directorate of Civil Defence, the performance of functions and duties under the said Act and delegation of powers. This Act has no surviving independent provisions and may be repealed.

4. Theme 4: Time-specific Acts

(a) Demobilisation Act 99 of 1996

2.85 This Act was enacted to provide for the demobilisation of those members of the former non-statutory forces (the Azanian People's Liberation Army and uMkhonto we Sizwe)[56] who did not enter into agreements for temporary or permanent appointment with the South African Defence Force, as contemplated in section 236(8)(d) of the Interim Constitution, and to provide for a demobilisation gratuity to be paid to such member or his or her dependants and to determine the requirements for that gratuity.

2.86 The 'closing date', for the purposes of the submission of applications for such gratuities was fixed generally as 31 March 1999 except for those persons who were entitled to be integrated into the South African National Defence Force in terms of the Termination of Integration Intake Act of 2001. In the latter case the 'closing date' was fixed as 31 December 2002. The particular time-frame and circumstances to which this Act applied have passed and the Act may be repealed.

(b) Demobilisation Amendment Act 128 of 1998

2.87 This Act was enacted to amend the Demobilisation Act of 1996, so as to amend certain definitions; to further regulate the payment of a dependant's benefit; and to effect certain technical amendments; and to provide for matters connected therewith. s the particular time-frame and circumstances to which this Act applied have passed and as it has no independent surviving provisions, this Act may be repealed.

(c) Defence Special Tribunal Act 81 of 1998

2.88 The Defence Special Tribunal Act 81 of 1998 was enacted to enable the Labour Court to act as a special tribunal in the adjudication of disputes connected with the remuneration or any other conditions of service of an employee in terms of a law regulating employment, or with any unfair labour practice by virtue of such a law which arose out of the implementation of transitional arrangements in respect of military institutions or the rationalisation of the Department of Defence; to provide for expeditious procedures for the adjudication of those disputes; and to provide for matters connected with any of them. Section 8 of this Act provided further that it

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56 Section 1 under '*non-statutory forces'*. This definition is referred to in the definition of 'military veteran' in s 1 of the Military Veterans' Affairs Act 17 of 1999.

would cease to have effect on 31 December 2001 and that proceedings brought before the special tribunal before that date were to be continued and concluded as if the Act had not ceased to have effect. As the particular time-frame and circumstances to which this Act applied have passed, this Act may be repealed.

(d) Termination of Integration Intake Act 44 of 2001

2.89 This Act was enacted to provide for the termination of the intake of members of non-statutory forces (the Azanian People's Liberation Army or uMkhonto we Sizwe) into the South African National Defence Force for integration purposes; to provide for the integration of the members of the said forces who are likely to be granted amnesty; and to provide for matters connected therewith. This Act amended section 236(8)(d) of the Interim Constitution. It made 31 March 2002 the final date by which the affected members could enter into an agreement for temporary or permanent appointment with the South African National Defence Force. As the particular time-frame and circumstances to which this Act applied have passed, this Act may also be repealed.

5. Theme 5: Moratorium

(a) Moratorium Act 25 of 1963

2.90 This Act was enacted to provide for a moratorium in certain circumstances for the protection of citizens and certain non-citizens rendering service in the Citizen Force, the commandos and the South African Police; to provide for the Act's application to members of the Defence Force and the Reserve called up for service under Chapter X of the Defence Act 44 of 1957; and to provide for matters incidental thereto.

2.91 This Act provided moratoria primarily in favour of persons who were obliged to render compulsory military service in terms of the Defence Act of 1957 and who had been allotted to the Citizen Force, the commandos or the South African Police.

2.92 This Act's primary focus hinged on its definition of -

> 'citizen' to mean 'a South African citizen within the meaning of the South African Citizenship Act, 1949 (Act 44 of 1949), and includes a non-citizen to whom the provisions of the repealed section 63 of the Defence Act, 1957 (Act 44 of 1957), have been made applicable by a proclamation issued under section 2(3) of the last mentioned Act and who, when he applied for registration in terms of the first mentioned section, did not declare that he did not intend becoming a South African citizen'; and
>
> 'service' to mean the 'continuous service in the Citizen Force which is rendered during the periods referred to in the repealed section 22(3), or the continuous service in a commando which is rendered during the periods referred to in the repealed section 44(3) of the Defence Act, 1957, or the continuous service which is rendered in terms of Section 34A (10) of the Police Act. 1958 (Act 7 of 1958)[57], by a citizen who has been allotted to the Citizen Force, the commandos or the South African Police in terms of Chapter VIII of the Defence Act, 1957, and includes any service on which a citizen allotted to the Citizen Force or the commandos is employed in terms of the repealed Chapter X of the latter Act, during the periods of continuous service referred to in sections 22(3) and 44(3) of the latter Act, and if such citizen contracts any illness or sustains any injury as a result of such service, he shall be deemed to be rendering service during any period during which he is undergoing treatment in hospital for any such illness or injury if such treatment is commenced during the said periods of continuous service'.

(i) First Moratorium in terms of section 2(1)(a) of the Moratorium Act of 1963

2.93 Whilst rendering prescribed service, such person's obligation to pay contractual debts (excluding the rent for any dwelling house, room or tenement) incurred by him before his service commenced and which become payable after he has commenced to render service were suspended for a period equal to the period during which he rendered service plus one month

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[57] Repealed by the South African Police Service Act 68 of 1995.

except if he received any salary or wages from his employer while rendering service which together with the salary, pay or allowances paid to him as a conscript were not less than the salary or wages which he received from his employer immediately before his service commenced; and except if - in relation to any amount which became payable under a written contract entered into by a person (who was obliged to serve in the Citizen Force or the commandos) before his first period of service has commenced in terms of section 22 or 44 of that Act - that person at the time of entering into the contract failed to inform the other party to the contract in writing that he is obliged to serve in the Citizen Force or the commandos in terms of section 21 or 35 of the Defence Act of 1957 (both repealed by the Defence Act of 2002) and that his first period of service had not commenced.

2.94 This benefit did not apply to the obligation of such person to pay the contractual debts which had been incurred by him and which did not become payable in terms of the contract during the period which he rendered service. In respect of any agreement requiring the regular payment of amounts over a long period, therefore, the beneficiary of this moratorium would be liable to pay his creditor double payments after the expiry of the period of suspension until the amount of the suspended contractual obligations has been paid.

(ii) Second Moratorium in terms of section 2(1)(b(i)) of the Moratorium Act of 1963

2.95 Whilst such person was rendering service for which he was employed - upon compulsory mobilisation or general call out "for service in the prevention or suppression of terrorism[58] or in prevention or suppression of internal disorder in the Republic[59] or in the preservation of life, health or property or the maintenance of essential services" - in terms of section 92[60] of the Defence Act of 1957, all civil remedies whatsoever (subject to some specific exceptions) against such person were suspended during the whole period during which he rendered service and for a further period of one month.

2.96 The language appears to have extended the application of this moratorium to persons who had voluntarily enrolled in either the Citizen Force or the commandos, and - like those serving compulsorily - were consequently liable to the obligatory call out provided for in section 92.

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58 This concept is not reflected in either the Constitution or Defence Act of 2002.

59 This concept is not reflected in either the Constitution or Defence Act of 2002.

60 Repealed by the Defence Act of 2002. Section 92 only applied to members of the Citizen Force, the Reserve and the commandos.

(iii) Third Moratorium terms of section 2(1)(b(ii)) of the Moratorium Act of 1963

2.97 Whilst such person was rendering service other than service in terms of section 92 of the Defence Act of 1957, all civil remedies (subject to some specific exceptions) against such person (in respect of contractual debts incurred by him) were suspended during the whole period he rendered service.

(iv) Extension of Moratoria

2.98 This Act further provided for the President to extend (and later terminate such extension) by Proclamation in the Gazette the application of the provisions of the Moratorium Act 25 of 1963 - changed as necessarily required by the circumstances - to members of the Defence Force and the Reserve called out for service in terms of Chapter X of the Defence Act 44 of 1957.[61]

2.99 In this context, members of the Defence Force capable of being "called out" in terms of either of that Chapter's section 91 or 92 included persons rendering obligatory or voluntary service in the Citizen Force, the Reserve or the commandos. Call out in terms of section 92 has been referred to above whilst section 91 deals with the mobilization or call out of members of the Citizen Force, the Reserve and the commandos "in time of war".

(v) General

2.100 The Moratorium Act did not apparently operate to the benefit of -

- Permanent (now Regular) Force members;
- members of an Auxiliary Service;
- members deemed to be Regular Force members such as Citizen Force members voluntarily rendering temporary whole-time service[62];
- persons serving voluntarily in the Citizen Force or commandos except to the extent that the second moratorium may apply to them; or
    - non-citizens serving voluntarily in the Citizen Force or commandos except to the extent that the second moratorium may apply to them; and
    - extend the first or third moratoria to persons not rendering compulsory military service.

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61 Section 6 of Moratorium Act 25 of 1963.

62 Section 20 of the Defence Act of 1957.

(vi) Current Position:

2.101 The Defence Act of 2002 –

- retained the Auxiliary Service;[63]
- retained neither the commandos nor the former Reserve;
- repealed all the provisions of the Defence Act of 1957 which related to compulsory military service and the affected individuals' concomitant allotment to the then Citizen Force, the commandos or the South African Police; repealed sections 91 and 92 which permitted the mobilization of the former Citizen Force, Reserve and the commandos;
- provided - in addition to its employment as contemplated in section 201(2) of the Constitution[64] - for the "employment of the Defence Force for service inside the Republic or in international waters, in order to-
    (a) preserve life, health or property in emergency or humanitarian relief operations;
    (b) ensure the provision of essential services;
    (c) support any department of state, including support for purposes of socio-economic upliftment; and
    (d) effect national border control".[65]

2.102 The new Defence Act also introduced the compulsory mobilization of persons for service in the Defence Force (after the declaration of a state of national defence)[66] if it is necessary to supplement the number of serving members;[67] replaced the repealed section 92*ter*, by means of section 58 which in limited circumstances permits the compulsory retention of persons in service after the expiration of their contracts or the extension of their contract periods; did not remedy the non-extension of the Moratorium Act's provision's to the benefit of-

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63 Sections 5(a), 16 and 17 of the Defence Act of 2002.

64 Section 201(2) of the Constitution provides that the President may authorise the employment of the Defence Force (a) in co-operation with the police service; (b) in defence of the Republic; or (c) in fulfilment of an international obligation.

65 Section 18(1) of the Defence Act of 2002.

66 See s 201(2) of the Constitution.

67 Section 90.

- Permanent (now Regular) Force members;
- members of an Auxiliary Service;
- persons serving voluntarily in the Reserve Force; or
- non-citizens serving in the Reserve Force, the Regular Force or an Auxiliary Service.

2.103 The probable direct consequences include the following:

- Neither the first moratorium nor the third moratorium can have effect.
- It is also probable that the second moratorium is no longer capable of application in the absence of a mobilization or general call out competence (akin to that in the repealed section 92) to compulsorily call out Reserve Force members. One employment envisaged in the repealed section 92, namely, "in the preservation of life, health or property or the maintenance of essential services" is reflected in the new Act's Section 18(1)(a) and (b).
- Though section 58 of the new Defence Act provides for the compulsory extension of serving Reserve Force members' service beyond that voluntarily undertaken by them, it does not extend the compulsory service to which section 92*ter* applied.

(vii) Conclusion

2.104 This Act's retention in its present form would probably not serve any purpose as it is unlikely that any one of the moratoria is capable of being applied; and does not reflect the language or relevant concepts of either the Constitution or the Defence Act of 2002.

(viii) Recommendation:

2.105 It is recommended that this Act be repealed and that the Defence Act of 2002 be amended to provide for appropriate moratoria which, in prescribed circumstances, will be available to members of the South African National Defence Force's Regular and Reserve Forces as well as to members of the Auxiliary Service and to persons who might be affected by mobilization in terms of section 90 of the new Defence Act.[68]

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[68] Public comment was invited on Defence Amendment Bill B 6 - 2008 which seeks, among other things, to impose obligations to serve (compulsory call out) on Reserve Force members. This development tends to heighten the need to re-visit this legislation.

(b) Moratorium Amendment Act 4 of 1969

2.106 The Moratorium Amendment Act 4 of 1969 was enacted to amend the provisions of the Moratorium Act of 1963 relating to service and to extend the protection under that Act to certain non-citizens. It has no independent surviving provisions and may be repealed.

(c) Defence Amendment Act 26 of 1973

2.107 The sole "surviving" provision of the Defence Amendment Act 26 of 1973, section 3, substituted the definition of "service" in the Moratorium Act 25 of 1963. This Act has no independent surviving provisions and may be repealed.

(d) Defence Amendment Act 1 of 1976

2.108 Section 10 of the Defence Amendment Act 1 of 1976, which is the sole surviving provision of this Act, substituted the definition of "service" in the Moratorium Act 25 of 1963. It is recommended that this Act be repealed when Act 25 of 1963 is repealed, amended or substituted.

(e) Moratorium Amendment Act 27 of 1977

2.109 The Moratorium Amendment Act 27 of 1977 was enacted to amend the Moratorium Act of 1963 so as to include in the definition of "service' certain service rendered by a citizen allotted in terms of Chapter VIII of the Defence Act of 1957, to the South African Police; and to provide for the suspension of the obligation of a citizen rendering service to pay certain debts which become payable while he is rendering service; and to provide for incidental matters. It has no independent surviving provisions and may be repealed.

(f) Moratorium Amendment Act 48 of 1978

2.110 The Moratorium Amendment Act 48 of 1978 was enacted to amend the Moratorium Act of 1963 so as to make other provision for the suspension of the obligation of a citizen rendering service to pay certain debts; and to provide for matters connected therewith. It has no independent surviving provisions and may be repealed.

6. Theme 6: Property and Finance

(a) Defence Endowment Property and Account Act 33 of 1922

2.111 The purpose of the Defence Endowment Property and Account Act 33 of 1922 was to give effect to the agreement between the Governments of the United Kingdom and the then Union of South Africa in terms of which the latter assumed responsibility for the land defences of the Union and for any military measures which it may be necessary to take for the defence and security of the Union with effect from 1 December 1921. In consequence of the Union's assumption of those responsibilities the Government of the United Kingdom further agreed to transfer the title in land held by its War Department and Admiralty to the Government of the Union which was then to hold and use that endowment property exclusively for the benefit of the defence force organizations and establishments and land defences of the Union or to conserve the value of them for the benefit of the said organizations, establishments and defences.

2.112 The Act transferred the specifically identified defence endowment property (War Department and Admiralty) to the Union's Government together with the War Department's obligations and liabilities as these existed at the date given after each property's description in the Act's Schedule. The Act further provides for the registration of the endowment property and for exceptions to the obligation to hold and maintain endowment property for the use and benefit of the South African Defence Force or any portion of it. In respect of the proceeds of endowment property, disposal of proceeds of endowment property the monies received for property sold; as interest on those sums; as rental; and compensation received in respect of servitudes granted, the Act prescribes that the amounts received are to be paid into the Consolidated Revenue Fund for application "…to the construction of permanent defence works and buildings in such sums as Parliament may from time to time appropriate for that purpose."

2.113 The Department of Defence indicated that this Act must be retained. The SALRC does not know what the practical importance of this Act is beyond the fact that the Department of Defence holds specific property whereas other departments do not and that the value of the proceeds from the property (income/sale) appear to be "reserved" (subject to parliamentary oversight) for the Department of Defence's construction of permanent defence works notwithstanding the proceeds having been paid over to the fiscus. On that basis, it may be prudent to retain the status quo. The Act should be retained.

(b) Defence Endowment Property and Account Amendment Act 17 of 1929

2.114 The Defence Endowment Property and Account Amendment Act 17 of 1929 amended section 3 of the Defence Endowment Property and Account Act 33 of 1922. It has no remaining independent provisions and may be repealed.

(c) The Defence Special Account Act 6 of 1974

2.115 The Defence Special Account Act 6 of 1974 established the Special Defence Account which is credited with moneys appropriated by Parliament for the account, moneys appropriated by Parliament by an Appropriation or other Act for the requirements of the Department of Defence;[69] interest derived from the investment of moneys standing to the credit of the account; the proceeds derived from the sale of armaments purchased in accordance with the Act's provisions;[70] refunds of expenditure incurred on the account at any time; and moneys accruing to the account from any other source including profits from any amount invested with the Public Investment Commissioners.[71] The Act further provides for a Commitment Authority;[72] the utilization of and accounting for the moneys in the account;[73] audit; and related matters including the one that differentiates this account from other fiscal accounts, namely, that "...any unexpended balance in the account at the close of any financial year, including accrued interest on investment balances and other receipts, shall be carried forward as a credit in the account to the next succeeding financial year". It is recommended that this Act be retained.

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69 Section 1(b) which will be deleted by the Defence Special Account Amendment Act 18 of 2005 when it is brought into operation by proclamation.

70 Section 1(cA). This provision will be substituted by s 1(b) of the Defence Special Account Amendment Act 18 of 2005 from the date when the Act is brought into operation by proclamation.

71 Section 3. This provision will be substituted by s 4 of the Defence Special Account Amendment Act 18 of 2005 when the Act is brought into operation by proclamation.

72 Section 1A. This provision will be repealed by s 2 of the Defence Special Account Amendment Act 18 of 2005 when the Act is brought into operation by proclamation.

73 Section 2. Section 2(1)(a); 2(1) (c),2(2) and 2(4) will be substituted by the Defence Special Account Amendment Act 18 of 2005 (s 3(a), 3(b), 3(c) and 3(d)) from the date when the Act is brought into operation by proclamation.

(d) Defence Special Account Amendment Act 17 of 1981

2.116 The Defence Special Account Amendment Act 17 of 1981 amended the Defence Special Account Act 6 of 1974 by substituting sections 1(b) and 2 of that Act. As it has no substantive surviving provision, consideration may be given to its repeal.

(e) Defence Special Account Amendment Act 71 of 1995

2.117 The purpose of the Defence Special Account Amendment Act 71 of 1995 was to amend the Defence Special Account Act 6 of 1974 by substituting sections 1(b), 1(1), 2(1)(a), 2(2), 2(3) and the proviso of 2(4) of that Act. As it has no substantive surviving provision, consideration may be given to its repeal.

(f) Defence Special Account Amendment Act 18 of 2005

2.118 When the Defence Special Account Amendment Act 18 of 2005 comes into operation it will amend the Defence Special Account Act 6 of 1974 to bring it in line with specified Acts of Parliament by deleting section (1)(b), repealing s1A and by substituting sections 1(cA), 2(1)(a), 2(1)(c), 2(4) and 3. None of the changes are inconsistent with the Constitution. This Amendment Act will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(g) Castle Management Act 207 of 1993

2.119 In December 1921, the Government of the Union of South Africa (as the Republic of South Africa was then called) assumed responsibility for the land defences of the Union and for any military measures which may be necessary to take for the defence and security of the Union. Accordingly, the United Kingdom transferred to the Union all the rights, title and interests in certain lands situated in the Union, together with buildings on such lands. The land occupied by the Castle of the Cape of Good Hope, set out fully in the Schedule to the Defence Endowment Property and Account Act of 1922 was one of such land. The Castle Management Act 207 of 1993 established the Castle Control Board for the purposes of preserving and protecting the military and cultural heritage of the Castle; optimizing the tourism potential of the Castle; and maximizing the accessibility to the public of the whole or any part of the Castle which is not used by the South African National Defence Force; provided for the constitution of the Board, its' powers and functions; the purchase of the Castle by the Board; to provide for the employment of staff by the Board; and also provided for related matters.

(i) Persons disqualified from being members of the Board

2.120 Section 7 of the Act provides:

> No person shall be appointed or remain a member of the Board if such person -
> (a) …
> (b) …
> (c) …
> (d) …
> (e) …
> (f) has reached the age of 70 years;
> (g) at the relevant time is, or during the preceding six months has been , an office bearer or employee of any party, movement, organisation or body of a political nature; or
> (h) has in terms of any law been nominated as a candidate for election as a member of any legislative body or has under any law been appointed or designated as such member.

2.121 Section 7(f) discriminates unfairly on the basis of age in that it implies that persons who are 70 years of age are incapable of dealing with functions and duties of the Castle's Board. Age is a listed ground of discrimination in section 9 of the Constitution and the discrimination is therefore unfair. The limitation is also unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom as outlined in section 36 of the Constitution.

2.122 Sections 7(g) and 7(h) also appear - at first blush - to offend against the Constitution's provisions proscribing unfair discrimination on the basis of belief and previous political affiliations.

(ii) Context

2.123 The powers and functions of Board to be exercised in the achievement of its object - are subject to the qualification that the Board may do nothing which will affect the rights which any trust or body, the Defence Force or any Citizen[74] Force Regiment enjoyed with respect to the occupation and use of any part of the Castle immediately prior to the commencement of this Act, except in so far as may be necessary to give effect to the Act's provisions; and include the competences to – arrange, in consultation with, and subject to the consent of, the Defence Force or a Reserve Force Regiment, for visits of a specialized nature by specific persons or groups of persons to areas of the Castle occupied by that Force or Reserve Force Regiment; enter into contracts with the Defence Force, against payment by the Board or any other specified party, for

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[74] Now Reserve Force. See s 11(b) and s 53 of the Defence Act of 2002.

the rendering of a ceremonial or any other service or function by that Force in, or with regard to, the Castle; subject to any applicable law, enter into contracts with the Defence Force, against payment by the Board or any other specified party, for the operation of a restaurant, cafe or bar in the Castle during hours agreed upon between the Board and that Force; and purchase the Castle "notwithstanding the fact that the Castle is at any time or may at any time be required for the purposes of the Defence Force or any Citizen Force[75] Regiment contemplated in the Defence Endowment Property and Account Act, 1922..."

2.124 The Castle is therefore to be used for military purposes including the housing of, presumably, the headquarters of Reserve Force (part-time) Regiments. This fact requires a closer look for purposes of determining its effect on the question raised.

2.125 The constitutional, non-partisan conduct required of the Defence Force entails its absolute loyalty to the reigning Constitution and through it to the government of the day. As the Defence Force[76] must act, and teach and require its members to act in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic;[77] the loyalty to the Constitution must be both informed and principled.

2.126 The loyalty to the Constitution must be appropriate to a democratic and constitutional State. Neither the Defence Force,[78] nor any of its members, may, in the performance of their functions prejudice a political party interest that is legitimate in terms of section 199(7)(a) of the Constitution; or further, in a partisan manner, any interest of a political party in terms of section 199(7)(b). The Constitutional Court has expressed itself in this respect when it stated that "[t]his provision is of profound political importance as it underlines the principle that in a democracy the armed forces and police must act in a manner which is non-partisan and which is perceived by all citizens to be even-handed."[79]

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75 Now Reserve Force.

76 Section 199(5) of the Constitution refers to "security forces".

77 Section 199(5) of the Constitution.

78 Section 199(7) refers to "security forces".

79 *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 at para 86.

2.127 In considering a challenge to the constitutionality of a regulation[80] related to military trade unions, the Court referred to the special circumstances of the military, "the importance of the constitutional requirement of political neutrality on the part of the SANDF" and declared that "association" should be understood to be a relationship between a military union and another union which might give rise to a suggestion[81] that the SANDF is not politically neutral. The Court held that the limitation on section 23(4)(c) of the Constitution contained in regulation 13(a) is justified in the light of the special circumstances of the military and was therefore not unconstitutional.[82]

2.128 The constitutional imperative to avoid even the suggestion of conduct which is non-partisan or politically neutral is clear.

2.129 In the circumstances, the limitation in sections 7(g) and 7(h) is necessitated by the Constitution itself.

(iii) General observations

2.130 The Act refers to a post which no longer exists, namely, that of the officer commanding of the Defence Force's Western Province Command; and refers to a designation which no longer exists, namely, "the Minister of State Expenditure"; and does not refer to the Public Finance Management Act 1 of 1999.

2.131 It is recommended that –

- Section 7(f) be repealed; and
- the relevant provisions of the Act be revised to address the observations made above.

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80 General Regulations Ch XX sub-regulation (a) of regulation 13 which then read:
"A military trade union shall not affiliate or associate with –
(a) any labour organization, labour association, trade union or labour federation that is not recognized and registered; and
(b) any political party or organization."

81 Emphasis added.

82 *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 para 86.

(h) Defence Amendment Act 43 of 1954

2.132 The Defence Amendment Act 43 of 1954, amended sections 3 and 4 of Defence Endowment Property and Account Act 32 of 1922.[83] The Act has no remaining independent provisions and may be repealed.

7. Theme 7: Acts implementing International Conventions, prohibiting or restricting the use of certain weapons

(a) Anti-Personnel Mines Prohibition Act 36 of 2003

2.133 This Act enacts the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction into the Republic's law.[84] The Act will take effect on a date fixed by the President by proclamation in the *Gazette*.[85] The Act should be retained and given effect.

(b) Prohibition or Restriction of Certain Conventional Weapons Act 18 of 2008

2.134 This Act enacts the Convention on Prohibitions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects and the Convention's Protocols I to IV into the Republic's law.[86] The Act will take effect on a date fixed by the President by proclamation in the *Gazette*. This can, however, only take place once the Minister of Defence has published a notice in the *Gazette* setting out the Convention's English-language text as in force on the commencement date.[87] The Act should be retained and given effect.

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83 Sections 1 and 2 respectively. Section 3 was repealed by s 152(1) of the Defence Act of 1957.

84 Section 2.

85 Section 34.

86 Section 2.

87 Section 17.

Annexure A

DEFENCE AND RELATED MATTERS LAWS REPEAL AND AMENDMENT BILL

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments

DEFENCE AND RELATED MATTER LAWS REPEAL AND AMENDMENT BILL

To repeal and amend certain laws of the Republic

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

1. Repeal or amendment of laws

(1) The laws specified in Schedule 1 are hereby repealed.

(2) The laws specified in Schedule 2 are hereby repealed to the extent set out in the third column of that Schedule.

(3) The laws specified in Schedule 3 are hereby amended to the extent set out in the third column of that Schedule.

2. Short title and commencement

(1) This Act shall be called the Defence and Related Matters Laws Repeal and Amendment Act, 2011, and comes into operation on a date determined by the President by proclamation in the Gazette.

SCHEDULE 1
Section 1(1)

No. and year of	Title or subject of law repealed	Extent of repeal
Act 17 of 1929	Defence Endowment Property and Account Amendment Act, 1929	The whole
Act 43 of 1954	Defence Amendment Act, 1954	The whole
Act 25 of 1963	Moratorium Act 25, 1963	The whole
Act 5 of 1969	Civil Defence Amendment Act, 1969	The whole
Act 26 of 1973	Defence Amendment Act, 1973	The whole
Act 1 of 1976	Defence Amendment Act, 1976	The whole
Act 2 of 1976	Simulated Armaments Transactions Prohibition Act, 1976	The whole
Act 27 of 1977	Moratorium Amendment Act, 1977	The whole
Act 48 of 1978	Moratorium Amendment Act, 1978	The whole
Act 17 of 1981	Defence Special Account Amendment Act, 1981	The whole
Act 71 of 1995	Defence Special Account Amendment Act, 1995	The whole
Act 99 of 1996	Demobilisation Act, 1996	The whole
Act 81 of 1998	Defence Special Tribunal Act, 1998	The whole
Act 128 of 1998	Demobilisation Amendment Act, 1998	The whole
Act 44 of 2001	Termination of Integration Intake Act, 2001	The whole
Act 16 of 2005	Armaments Corporation of South Africa, Limited Amendment Act, 2005	The whole

SCHEDULE 2

Section 1(2)

No. and year of law	Short title	Extent of repeal
Act 44 of 1957	Defence Act, 1957 First Schedule to the Defence Act, 1957	Section 104 (2) Definitions of "imprisonment" and "superior court" in subsection (1) of section 1 and sections 24 (2), 26 (2), 125, 126, 135, 136 and 137
Act 207 0f 1993	Castle Management Act, 1993	Subsection (f) of section 7

SCHEDULE 3

Section 1(3)

No. and year of law	**Short title**	**Extent of amendment**
Act 44 of 1957	First Schedule to the Defence Act, 1957	1. Subsection (2) of section 29 of the First Schedule to the Defence Act is hereby substituted with the following subsection: "(2) For the purposes of this section, the expression 'discharged with disgrace' means **[cashiered]**, dismissed with ignominy, discharged with ignominy, dismissed because of misconduct or discharged on account of imprisonment". 2. Section 32 of the First Schedule to the Defence Act is hereby substituted with the following section: "32 Scandalous Behaviour Any officer who behaves in a scandalous manner unbecoming the character of an officer and an honourable person **[gentleman],** shall be guilty of an offence and shall on conviction be sentenced to dismissal with ignominy **[cashiered].**" 3. Section 93(3) of the First Schedule to the Defence Act is hereby substituted with the following subsection: "(3) An officer sentenced to imprisonment shall also be sentenced to dismissal with ignominy **[be cashiered]**, and the latter sentence shall be executed before the officer concerned is lodged in any prison, gaol or other place to serve the sentence of imprisonment." 4. Section 114 of the First Schedule to the Defence Act is hereby substituted with the following section: **114 "Court of Military Appeals [C*ouncil of review]* to hear argument in certain cases** In any case in which a sentence of twelve months imprisonment or more or of dismissal with ignominy **[cashiering]** has been imposed, or where application has been made by the offender in terms of section 34 (5) of the Military Discipline Supplementary Measures Act, 1999 (Act 16 of 1999) **[*one hundred and twelve*]** for the review of the proceedings of his or her case, the Court of Military Appeals [**council of review]** shall, at the request of the offender, allow the offender or his or her counsel and the officer who prosecuted at the trial or any other person appointed for the purpose by the Director: Military Prosecutions **[Adjutant-General]** in his or her stead, to appear before it and hear argument on the issues in the case." 5. Subsection (3) of section 129 of the First Schedule to the Defence Act is hereby substituted with the following subsection: "(3) Whenever a competent court convicts a person subject to this Code of having in contravention of section 24 negligently lost, damaged or destroyed his

		equipment, arms, kit or any other property issued to him at public expense for personal use in the execution of his duties, it shall order that such equipment, arms, kit or other property be replaced or repaired and that the costs involved in such replacement or repair be recovered from the person concerned: Provided that no such order shall be made in the case of a sentence of dismissal with ignominy **[cashiering]**, dismissal from the South African National Defence Force, discharge with ignominy from the South African National Defence Force or discharge from the South African National Defence Force, if the said equipment, arms, kit or other property has at the time of sentence become the property of the accused pursuant to the regulations." 6. Section 131 of the First Schedule to the Defence Act is herby substituted with the following subsection: "131 Maintenance Orders (1) If the Chief of the **[General Officer Commanding**,] South African National Defence Force, is satisfied- (a) that a magistrate's court or a superior court has made an order against a member of the Regular **[Permanent]** Force or against any member of the South African National Defence Force performing service in defence of the Republic, for the regular payment of a specified amount towards the maintenance of such member's spouse **[wife]** or child, the Chief of the South African National Defence Force must **[may]** order that the member concerned be placed under deductions of pay for the amount of the order of court; (b) that any member of the Regular **[Permanent]** Force or any other member of the South African National Defence Force performing service in defence of the Republic, is not maintaining or adequately maintaining his or her spouse **[wife]** or child, the said Chief may order that the member concerned be placed under deductions of pay for such amount as, in all the circumstances of the case, the Chief of the South African National Defence Force considers to be reasonable provided that the said Chief must inform the member concerned of what is being considered and allow that member a reasonable period within which to make representations in that regard. (2) Any amount deducted from a member's pay in pursuance of an order made under sub-section (1), shall be paid to the spouse **[wife]** of the member concerned or to the legal guardian of the child concerned or to the magistrate of the district in which such spouse **[wife]** or guardian resides for distribution to or on behalf of such spouse **[wife]** or child as such magistrate may determine."
Act 16 of 1999	Military Discipline	1. Section 1 of the Military Discipline Supplementary Act is hereby amended by the insertion of the following

	Supplementary Act, 1999	definition after the definition of 'disciplinary hearing' of the following definition: "dismissal with ignominy" means the termination of the service of an officer with the cancellation of the officer's commission whether the commission is temporary or permanent;" 2. Section 4(1) of the Military Discipline Supplementary Act is hereby substituted with the following section: "4 (1) If any conflict relating to any matter dealt with in this Act arises between this Act and the provisions of any other law, save the Constitution, the Defence Act, 2002 or any other Act expressly amending this Act, the provisions of this Act shall prevail." 3. Paragraph (b) of subsection 1 of section 12 of the Military Discipline Supplementary Act is hereby substituted with the following paragraph: *(b)* in the case of an officer— (i) **[cashiering]** dismissal with ignominy; or (ii) dismissal from the South African National Defence Force;" 4. Subsection (2) of section 34 of the Military Discipline Supplementary Act is hereby substituted with the following subsection: "(2) Every sentence of imprisonment, including a suspended sentence of imprisonment, **[cashiering]** dismissal with ignominy, discharge with ignominy, dismissal or discharge shall be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed". 5. The Military Discipline Supplementary Act is hereby amended by the insertion after Chapter 6 of the following Chapter: "**Chapter 6A Capacity of accused to understand proceedings; mental illness and criminal responsibility of accused** **37A Principles relating to an accused's capacity to understand proceedings** An accused who is charged with the commission of an offence and who is by reason of mental illness or defect not capable of understanding the proceedings so as to make a proper defence, shall not be tried for as long as the accused's condition continues to exist. **37B Principles relating to an accused person's mental incapacity or diminished responsibility** (1) A person who commits an act or an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or defect which makes him or her incapable-

		(a) of appreciating the wrongfulness of his or her act or omission; or (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission. (2) If a military court finds that the accused at the time of the commission of the act or omission in question was criminally responsible but that his or her capacity to appreciate the wrongfulness of the act or omission or to act in accordance with an appreciation of its wrongfulness was diminished by reason of mental illness or defect, the military court shall take the fact of such diminished responsibility into account when sentencing the accused. **37C Procedure to be applied with regard to the capacity of accused to understand proceedings** (1) If it is alleged at proceedings before a military court sitting in the Republic that the accused is by reason of mental illness or mental defect or for any other reason not capable of understanding the proceedings so as to make a proper defence, or if it appears to the court at such proceedings that the accused might for such a reason not be capable of understanding the proceedings so as to make a proper defence, the court shall – subject to section 37F of this Act – have and exercise the competences specified in section 77 of the Criminal Procedure Act, 1977. (2) If any person who while beyond the borders of the Republic is charged with an offence is, in the opinion of two registered medical practitioners appointed by the Defence Force's senior military medical authority in the area concerned, suffering from a mental illness or mental defect and by reason thereof or for any other reason not capable of understanding the proceedings so as to make a proper defence, he or she shall be committed by his or her commanding officer's disciplinary hearing or other military court to such hospital, prison, correctional training facility or other secure place as the circumstances may permit and shall be detained therein in safe custody until his or her removal to the Republic and appearance before a military court sitting in the Republic can reasonably be effected. **37D Procedure to be applied with regard to mental illness or mental defect of accused** (1) If it is alleged at proceedings before a military court sitting in the Republic that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall– subject to section

		37F of this Act – have and exercise the competences specified in section 78 of the Criminal Procedure Act, 1977. (2) If any person who while beyond the borders of the Republic is charged with an offence is, in the opinion of two registered medical practitioners appointed by the Defence Force's senior military medical authority in the area concerned, suffering from a mental illness or mental defect or is for any other reason not criminally responsible for the offence charged, he or she shall be committed by his or her commanding officer's disciplinary hearing or other military court to such hospital, prison, correctional training facility or other secure place as the circumstances may permit and shall be detained therein in safe custody until his or her removal to the Republic and appearance before a military court sitting in the Republic can reasonably be effected. **37E Panel for purposes of enquiry and report under sections 77 and 78 of the Criminal Procedure Act, 1977** (1) Section 79 of the Criminal Procedure Act, 1977, shall apply in respect of the panel which is required to enquire into and report on a matter referred to it by the direction of the court made in terms of section 77 or section 78 of the Criminal Procedure Act, 1977, read with section 37C or section 37D of this Act, whichever is applicable. (2) The Adjutant General shall assign persons to the functions of Clerk of the Court in each of the regions within the Republic within which military courts may sit and ensure that the lists provided by the Director General Health in terms of section 79 (9) of the Criminal Procedure Act, 1977, are made available to those Clerks of the Court. **37F Appeal and review** (1) In sections 77 and 78 of the Criminal Procedure Act, 1977, the references to "appeal" constitute – in relation to every trial or proceeding before a military court – references to appeal to the Court of Military Appeals and do not derogate from the right of every person convicted by a military court or affected by a decision of the Court of Military Appeals from taking the case and decision on review to the High Court. (2) The Court of Military Appeals shall have the competence to make the orders envisaged in subsection 77 (10) and 78 (9) of the Criminal Procedure Act, 1977, and may allow or refuse an appeal against a finding under subsection (6) of section 77 or subsection (6) of section 78 of the Criminal Procedure Act, 1977." Paragraph (a) of subsection 7 of section 54 of the Defence Act 2002 is hereby substituted with the following

Act 42 of 2002	Defence Act, 2002	paragraph: "(a) on the date on which a sentence of **[cashiering]** dismissal with ignominy imposed on him or her is confirmed;"

ANNEXURE B

LIST OF STATUTES ADMINISTERED BY THE DEPARTMENT OF DEFENCE

Number	Name of Act, number and year
1.	Defence Endowment Property and Account Act 33 of 1922
2.	Defence Endowment Property and Account (Amendment) Act 17 of 1929
3.	Defence Amendment Act 43 of 1954
4.	Defence Act 44 of 1957 (certain sections still apply)
5.	Moratorium Act 25 of 1963
6.	Armaments Development and Production Act 57 of 1968 (to be repealed)
7.	Armaments Amendment Act 63 of 1968
8.	Moratorium Amendment Act 4 of 1969
9.	Civil Defence Amendment Act 5 of 1969
10.	Armaments Amendment Act 39 of 1971
11.	Armaments Development and Production Amendment Act 65 of 1972 (to be repealed)
12.	Defence Amendment Act 26 of 1973 (certain sections still apply)
13.	Defence Special Account Act 6 of 1974
14.	Defence Amendment Act 1 of 1976 (certain sections still apply)
15.	Simulated Armaments Transactions Prohibition Act 2 of 1976
16.	Armaments Development and Production Amendment Act 20 of 1977
17.	Moratorium Amendment Act 27 of 1977
18.	Armaments Development and Production Amendment Act 5 of 1978 (to be repealed)
19.	Moratorium Amendment Act 48 of 1978
20.	Armaments Development and Production Amendment Act 86 of 1980 (to be repealed)
21.	Defence Special Account Amendment Act 17 of 1981
22.	Armaments Development and Production Amendment Act 56 of 1982 (to be repealed)
23.	Armaments Development and Production Amendment Act 46 of 1992 (to be repealed)
24.	Armaments Development and Production Amendment Act 31 of 1993 (to be repealed)

25.	Castle Management Act 207 of 1993
26.	Defence Special Account Amendment Act 71 of 1995
27.	Demobilisation Act 99 of 1996
28.	Regulation of Foreign Military Assistance Act 15 of 1998
29.	Defence Special Tribunal Act 81 of 1998
30.	Demobilisation Amendment Act 128 of 1998
31.	Military Discipline Supplementary Measures Act 16 of 1999
32.	Demobilisation Amendment Act 43 of 2001
33.	Termination of Integration Intake Act 44 of 2001
34.	National Conventional Arms Control Act 41 of 2002
35.	Defence Act 42 of 2002
36.	Anti-Personnel Mines Prohibition Act 36 of 2003
37.	Armaments Corporation of South Africa, Limited Act 51 of 2003
38.	Defence Special Account Amendment Act 18 of 2005
39.	Armaments Corporation of South Africa, Limited Amendment Act 16 of 2005
40.	Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006
41.	Prohibition or Restriction of Certain Conventional Weapons Act 18 of 2008