South African Law Reform Commission

DISCUSSION PAPER 143

PROJECT 25

STATUTORY LAW REVISION: LEGISLATION ADMINISTERED BY THE DEPARTMENT OF SOCIAL DEVELOPMENT

CLOSING DATE FOR COMMENTS

31 DECEMBER 2016

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South African Law Reform Commission

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

The members of the Commission who the President appointed in 2013 for a period of five years are –

Honourable Madam Justice M Maya (Chairperson until 31 March 2016)
Honourable Mr Justice J Kollapen (Chairperson from 1 April 2016)
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PREFACE

The object of the South African Law Reform Commission (SALRC) is to do research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law.

The current project 25 investigation of the SALRC into the legislation administered by the Department of Social Development (DSD) emphasizes compliance with the Constitution. Redundant and obsolete provisions that were identified in the course of this investigation are recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution. 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, has been left to the judicial process.

Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

This discussion paper has been prepared to elicit responses from the public on the preliminary findings and proposals on legislation administered by the DSD contained in this paper. The SALRC has liaised with the DSD in the investigation leading to the development of this discussion paper and we acknowledge the valuable assistance we have received from the DSD, particularly from officials in the Legal Services section.

This discussion paper contains the Commission's preliminary proposals. The views, conclusions, and recommendations that follow should not be regarded as the SALRC's final views.

The deadline for comments on this discussion paper is December 2016.

Any enquiries about this paper should be addressed to the researcher allocated to the project, Ms Prinsloo. Her contact particulars appear on the previous page.

Preliminary proposals

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, or which are redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are approximately 2 800 statutes in the statute book. Eleven statutes are administered by the DSD.

2. All legislation administered by the DSD has been reviewed for redundancy or unconstitutionality and the findings are contained in this paper. After analysis of these statutes, the SALRC proposes that the Acts set out in the draft Bill be amended or repealed for the reasons set out in this Discussion Paper and to the extent outlined in the draft Bill.

3. It is possible that some of the provisions or statutes recommended for amendment or repeal are still useful, and thus should not be amended or repealed. Moreover, it is possible that there are statutes or provisions not identified for repeal or amendment in this discussion paper which should be amended or repealed as they no longer have practical utility, but which should be identified. If so, these should be brought to the attention of the SALRC.

CHAPTER 1: BACKGROUND AND SCOPE OF PROJECT 25

A Introduction

1 The objects of the South African Law Reform Commission

1.1 The objects of the SALRC are set out in the South African Law Reform Commission Act 19 of 1973, as follows: 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, modernization or reform thereof, including:[1]

(a) the repeal of obsolete or unnecessary provisions;
(b) the removal of anomalies;
(c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
(d) the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body aiming to renew and improve the law of South Africa on a continual basis.

2 History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, 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, which aims to establish a permanently simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act 94 of 1981, which repealed approximately 790 post-Union statutes.

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[1] Section 4 of the South African Law Reform Commission Act 19 of 1973.

1.4 All legislation enacted prior to 1994, the year which heralded the advent of constitutional democracy in South Africa, remains in force. Numerous pre-1994 provisions do not comply with the country's new Constitution, a discrepancy exacerbated by the fact that some of those provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the (then) Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination, as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004 the SALRC included in its law reform programme an investigation on statutory law to revise all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the current investigation emphasizes compliance with the Constitution. Redundant and obsolete provisions that are identified in the course of this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes exist, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

B What is statutory law revision?

1.8 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.[2] Such 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.

1.9 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.[3] 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 is presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that may be repealed:[4]

(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 (e.g. legislation about tithes or tin mines);
(c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
(d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
(e) repealing provisions e.g. "Section 33 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;

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2 See the Law Commission for England and Wales Background Notes on Statute Law Repeals at 1 available at http://lawcommission.justice.gov.uk/docs/background_notes.pdf Accessed on 28 May 2008.
3 Op cit par 6.
4 Op cit par 7.

(h) provisions that are self-evidently spent - e.g. a one-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.

1.12 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: [5]

(a) 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 as their object the continuance of previous temporary enactments for periods now gone by effluxion of time.

(b) 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 effect or on the happening of some event or on the doing of some act authorised or required.

(c) 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.

(d) Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one.

(e) Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise

(f) 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.

1.13 Statutory provisions usually become redundant as time passes.[6] 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

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5 Law Commission of India Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts March 1984; p 3 of Chapter 2 (p 6 of 21) available at http://lawcommissionofindia.nic.in/51-100/Report96.pdf Accessed on 28 May 2008.

6 Op cit par 9 and 10.

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.

1.14 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 33 of 1957[7] 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

(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.

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 at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of revising the South African statute

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7 With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

8 Law Commission for England and Wales *Background Notes on Statute Law Repeals* par 8.

book for constitutionality, redundancy, and obsoleteness. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001 and submitted to the SALRC in April 2001.[9] These four steps are outlined here.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.

2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.

3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.

4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.16 The SALRC has finalised the following reports, which propose reform of discriminatory areas of the law or the repeal of specific discriminatory provisions:

(a) the Recognition of Customary Marriages (August 1998);

(b) the Review of the Marriage Act 25 of 1961 (May 2001);

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[9] Centre for Applied Legal Studies of the University of the Witwatersrand, Law and Transformation Programme "Feasibility and Implementation Study on the Revision of the Statute Book" Document prepared for the SALRC and the German Technical Co-operation (Deutsche Gesellschaft fur Technische Zusammen Arbeit GmbH) April 2001 available on request from pvanwyk@justice.gov.za and the SALRC Library.

(c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);

(d) Traditional Courts (January 2003);

(e) the Recognition of Muslim Marriages (July 2003);

(f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);

(g) Customary Law of Succession (March 2004); and

(h) Domestic Partnerships (March 2006).

D Scope of the project

1.17 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 is 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.

1.18 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, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed 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, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national

legislation that discriminates unfairly.[10] However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, where anomalies and obvious inconsistencies with the Constitution are identified, recommendations have been made on how to address them.

E Consultation with stakeholders

1.19 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 kind 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 SALRC invites 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 process ensures that all relevant provisions are identified during the review, and are dealt with responsively and without creating unintended negative consequences.

1.20 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a 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 the SALRC undertakes is the development of a discussion paper in respect of legislation of each department. On the paper's being approved by the SALRC, it is published for

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[10] Albertyn C "Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution". Document prepared for the SALRC, February 2006 available on request from pvanwyk@justice.gov.za and the SALRC Library.

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.

F Consultation with the Department of Social Development

1.21 The DSD currently administers the following statutes (with principal Acts indicated in bold):

1) Advisory Board on Social Development Act 3 of 2001
2) Children's Act 38 of 2005
3) Children's Amendment Act 41 of 2007
4) Fund-Raising Act 107 of 1978
5) Fund-Raising Amendment Act 115 of 1991
6) Fund-Raising Amendment Act 19 of 1981
7) Fund-Raising Amendment Act 41 of 1980
8) Fund-Raising Amendment Act 43 of 1994
9) Fund-Raising Amendment Act 82 of 1983
10) Fund-Raising Amendment Act 92 of 1981
11) Health and Welfare Matters Amendment Act 118 of 1993
12) Health and Welfare Matters Second Amendment Act 180 of 1993
13) National Development Agency Act 108 of 1998
14) National Development Agency Amendment Act 6 of 2003
15) National Welfare Act 100 of 1978
16) National Welfare Amendment Act 77 of 1978
17) Non-Profit Organisations Act 71 of 1997
18) Non-Profit Organisations Amendment Act 17 of 2000
19) Older Persons Act 13 of 2006
20) Prevention of and Treatment for Substance Abuse Act 70 of 2008
21) Probation Services Act 116 of 1991
22) Probation Services Amendment Act 35 of 2002
23) Social Assistance Act 13 of 2004
24) Social Assistance Amendment Act 45 of 1994
25) Social Assistance Amendment Act 5 of 2010
26) Social Assistance Amendment Act 6 of 2008

27) Social Service Profession Act 110 of 1978

28) Social Work Amendment Act 102 of 1998

29) Social Work Amendment Act 22 of 1993

30) Social Work Amendment Act 48 of 1989

31) Social Work Amendment Act 52 of 1995

32) South African Social Security Agency Act 9 of 2004

33) Welfare Laws Amendment Act 106 of 1996

34) Welfare Laws Amendment Act 106 of 1997

1.22 The SALRC has reviewed the 12 principal statutes for constitutionality and redundancy. The SALRC wishes to express its appreciation to the Chief Directorate Legal Services of the DSD for its assistance and cooperation in this review.

CHAPTER 2: FORMAL EQUALITY IN THE CONSTITUTION OF SOUTH AFRICA, 1996

A Introduction

2.1 This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution (as described above in par 1.18).

2.2 Equality can be both formal and substantive. Formal equality is manifested once every person has rights, but substantive equality is manifested once the results of a law or conduct are observed for a particular group. Formal equality, where everybody is treated the same, needs to be tempered by substantive equality if a certain group or individual is still hampered by a seemingly equal rule or conduct.[11]

2.3 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 effects or consequences, has been left to be determined by the judicial process. The actual social and economic situations of groups or individuals have to be examined to ascertain whether they in fact have these rights.

2.4 Both these areas will be attended to in the discussion below, although the investigation focuses only on the occurrence of formal equality in the DSD legislation.

B The Equality Clause in the Constitution

2.5 Section 9 of the Constitution of South Africa, 1996 provides as follows with regard to equality:

> ***9 Equality***
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

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[11] Curry I & de Waal J *The Bill of Rights Handbook*, 5th ed Juta& Co (2005) 232 - 233.

other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

2.6 Curry and de Waal in *The Bill of Rights Handbook* state that the formal idea of equality encompasses the fact that people similar in some ways should be treated similarly and that dissimilar people should not be treated the same.[12] Substantive equality encompasses the fact that reasonable accommodation should be made for dissimilar people in order to treat them similarly.[13] This is especially important in South Africa with its history of inequality.[14]

2.7 The specified discrimination grounds are those mentioned in section 9 of the Constitution, namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Analogous grounds are those where discrimination is based on attributes and characteristics where human dignity can possibly be denied or badly affected. It can result in patterns of inequality.

2.8 "Discrimination" refers to differentiation based on illegitimate grounds, namely those stipulated above. By contrast, "differentiation" occurs where people are separated on the basis of legitimate grounds. Rationality is achieved if the reasons for the law or act of separation are legitimate. A court will ascertain whether the purpose of the law makes it possible for differentiation to take place.[15]

2.9 The fairness of discrimination is determined by the position of the complainants in society and whether they have suffered patterns of disadvantage, even if the discrimination is based on a specific ground; the nature of the provision or power and the purpose sought to be achieved by the provision; the extent to which the

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12 Op cit 230 and 231.
13 *MEC for Education Kwazulu-Natal and others v Pillay* 2008 (1) (SA) 474 (CC).
14 Curry & de Waal "Bill of Rights Handbook" 232.
15 Op cit 239 – 259.

discrimination has affected the rights and interests of the complainant; and whether this has led to an impairment of their fundamental dignity.[16]

C Current Legislation and Case Law

2.10 Equality is established by basing rules and conduct of the State (and the behaviour of private persons – the horizontal application of the Constitution) on section 9 of the Constitution.[17]

2.11 In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others,* the following is stated: [18]

> Neither s 8 of the interim Constitution nor s 9 of the 1996 Constitution envisages a passive or purely negative concept of equality; quite the contrary. In *Brink v Kitshoff NO*, O'Regan J, with the concurrence of all the members of the Court, stated:
>
> Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results is the primary purposes of s 8 and, in particular, ss (2), (3) and (4).

2.12 Section 9 of the Constitution sets out the rights every person has in terms of equality. What is important for purposes of law reform is the determination of what constitutes inequality in legislation or government action. A relevant case, as mentioned in the *Bill of Rights Handbook*, is *Harksen v Lane and Others.*

1 The case of Harksen v Lane NO and Others

2.13 In the case of *Harksen v Lane*, judged on the interim Constitution of 1993,[19] the process of determining whether a law has an unequal effect is set out. The case

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16 *Harksen v Lane NO and Others* 1998 (1) (SA) 300 (CC) at 324 (hereinafter referred to as *Harksen).*

17 Act 108 of 1996.

18 (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) at [16]. See www.saflli.org, http://www.saflii.org/za/cases/ZACC/1998/15.html.

involved a woman, married to an insolvent. Her property was "confiscated" together with that of her insolvent husband in terms of section 21 of the Insolvency Act 24 of 1936.

2.14 Mrs Harksen's property was attached upon the insolvency of her husband and she was summonsed to appear at the first meeting of the creditors in the insolvent estate of her husband. She had to produce all documentation relating to her financial affairs and that of her husband.

2.15 One of the questions that needed to be answered was the constitutionality of section 21 of the Act and the portions of sections 64 and 65 that provided for the inquiry into the estate, business affairs or property of the spouse of an insolvent person.

2.16 Section 20(1) states that the effect of the sequestration of the estate of the insolvent is to divest the insolvent of his or her estate, which will then vest in the Master of the High Court until a trustee has been appointed.

2.17 Section 21(1) provides for the vesting of the estate of the solvent spouse in the Master of the High Court and eventually the trustee. Section 21(2) states that the solvent spouse has to prove that his or her properties fall within one of the exceptions mentioned therein.

2.18 The contention was that the vesting of a solvent spouse's property in the Master amounts to unequal treatment of solvent spouses, and discriminates against them. The effect is to impose severe burdens, obligations and disadvantages on them beyond those applicable to other persons the insolvent had dealings or close relationships with, or whose property is found in the possession of the insolvent. It also discriminates against spouses who are not traders.

2 The equality analysis

2.19 The Court per Goldstone J (majority judgment) set out the following equality analysis:[20]

1. Is there differentiation between people or categories of people?

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[19] It is commonly accepted that the previous equality clause, section 8, is broadly similar to the new clause, section 9; Curry & de Waal "Bill of Rights Handbook" 234 - 235.

[20] Curry & de Waal "Bill of Rights Handbook" 235-236 and *Harksen* at 320 – 325.

2. If so, is there a rational connection between the differentiation and the legitimate government purpose it is designed to achieve?
3. If there is no rational connection, the equality provision is being violated.
4. If there is rational connection, there might still be unfair discrimination.
5. Therefore, does the differentiation amounts to discrimination:
   a. Is it on a specific ground? If so, it is presumed to be discrimination, but the presumption is rebuttable.
   b. If it is not on a specific ground, does substantive inequality occur? (The analogous grounds).
6. Does the differentiation amount to unfair discrimination:
   a. If discrimination occurred on a specified ground, it is presumed to be unfair, but the presumption is rebuttable.
   b. If discrimination occurred on an analogous ground, the complainant has to establish unfairness by proving substantive inequality.
7. If discrimination is found to be unfair, a determination in terms of the limitations article 36[21] of the Constitution has to be made to determine whether the discrimination is tenable in society.
8. Is the discrimination fair? If yes, then there is no violation of the equality section.

2.20 In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Constitutional Development,* Justice Ackerman on page 571 to 573 states the following:[22]

> This does not mean, however, that in all cases the rational connection inquiry of stage *(a)* must inevitably precede stage *(b)*. The stage *(a)* rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable.
>
> In *Harksen*, after referring to the emphasis placed on the impact of the discrimination in his judgment in *Hugo,* Goldstone J went on to say:
>
> In para [41] dignity was referred to as an underlying consideration in the determination of unfairness. The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner.
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> . . .

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[21] **36. Limitation of rights**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[22] 1998 (2) SACR 556 (CC).

> In order to determine whether the discriminatory provision has affected complainants unfairly, various factors must be considered. These would include:
>
> *(a)* the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> *(b)* the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.
>
> *(c)* with due regard to *(a)* and *(b)* above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.
>
> These factors, assessed objectively, will assist in giving "precision and elaboration" to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.

2.21 According to Professor Albertyn,[23] *Harksen v Lane* indicates the following with regard to the equality test:

> (a) The contextual assessment of the impact on the rule or conduct is important;
> (b) Due regard has to be paid to the degree of disadvantage suffered by the complainant and his or her group;
> (c) The purpose of the act or conduct;
> (d) The extent to which the complainant's rights and interests are invaded; and
> (e) The weighing of factors in the overall assessment of the importance of human dignity.

2.22 Professor Albertyn, writing about the power of women in traditional law, is of the view that the *Harksen* case unduly prioritises dignity and limits the values and principles that underlie equality, while the purpose of remedying the disadvantage is suppressed. Real freedom of choice and the fulfilment of personhood are denied.[24] She

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[23] Albertyn, C "The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity" 2009 2 Constitutional Court Review 165.

[24] Op cit 185.

considers that a flexible test is required so that courts can respond to disadvantage, stigma, and vulnerability, to differing claims of recognition and redistribution, and to competing claims of power, status, and resources.[25]

2.23 Professor Albertyn points out that freedom of choice and the right to exit into or out of a group need to substantially exist, and women should not be defined by their communities but should participate, contest and redefine norms and standards.[26]

2.24 Professor Albertyn also notes that the question is one of democratising existing customs to allow women to be free to participate in a given culture.[27] She adds another criterion for testing inequality: are there conditions to participate, and is there freedom of choice? She adds the following to the *Harksen* test:

- Focusing on context; and
- Name, describe, and engage in the full set of values and principles.

3 The State's obligation: section 9(4)

2.25 Section 9(4) imposes the obligation on the State to enact legislation that can prevent or prohibit unfair discrimination. Therefore, the Promotion of Equality and the Prevention of Unfair Discrimination 4 of 2000 has been enacted.

2.26 This Act aims to give effect to section 9 read with section 23(1) of schedule 6 of the Constitution to prevent and prohibit unfair discrimination and harassment, to promote equality and eliminate unfair discrimination, and to prevent and prohibit hate speech.

4 The Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)

2.27 In *MEC for Education: Kwazulu-Natal and Others v Pillay,* Chief Justice Langa of the Constitutional Court held as follows:[28]

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25 Op cit 186.
26 Op cit 192.
27 Ibid.
28 *Pillay v MEC for Education: KwaZulu-Natal and Others* 2006 (6) SA 363 (EqC) and *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21; see

> Unfair discrimination, by both the State and private parties, including on the grounds of both religion and culture, is specifically prohibited by s 9(3) and (4) of the Constitution, which read:
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> The Equality Act is clearly the legislation contemplated in s 9(4) and gives further content to the prohibition of unfair discrimination. Section 6 of the Equality Act reiterates the Constitution's prohibition of unfair discrimination by both the State and private parties on the same grounds including, of course, religion and culture. Although this court has regularly considered unfair discrimination under s 9 of the Constitution, it has not yet considered discrimination as prohibited by the Equality Act. Two preliminary issues about the nature of discrimination under the Act therefore arise.
>
> The first is that claims brought under the Equality Act must be considered within the four corners of that Act. This court has held in the context of both administrative and labour law that a litigant cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right. To do so would be to ''fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights'. The same principle applies to the Equality Act. Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins.

2.28 Litigants should make use of the Equality Act rather than the Constitution now that the Promotion of Equality and the Prevention of Unfair Discrimination Act is in force.[29] The following two cases illustrate how the Equality Act functions. The cases are *Pillay v MEC for Education: KwaZulu-Natal and Others* 2006 (6) SA 363 (EqC) and *MEC for Education: KwaZulu-Natal and Others v Pillay* Case 51/06 [2007] ZACC 21.

5 The equality analysis according to the Equality Act

2.29 The issue before the Equality Court in the *Pillay* case was whether the school's refusal to permit a learner to wear a nose stud at school was an act of unfair

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http://www.saflii.org.za MEC for Education: KwaZulu-Natal and Others v Pillay (CCT51/06); [2007] ZACC 21; 2008 (1) SA 474CC;2008 (2) BCLR 99 (CC) (5 October 2007).

[29] Op cit par 40.

discrimination in terms of the Equality Act. The school she attended refused to allow an exception from their Code of Conduct; therefore, she was not allowed to wear the nose stud at school.

2.30 The *Pillay* case, as heard in the Equality Court, found that the appellant had to make out a prima facie case that discrimination had taken place.

2.31 Section 13 of the Promotion of Equality and the Prevention of Unfair Discrimination Act deals with the issue of burden of proof. Section 13 provides that if the complainant makes out a prima facie case of discrimination, (a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or (b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds. If the discrimination did take place (a) on a ground in paragraph (a) of the definition of “prohibited grounds”, then such discrimination is unfair, unless the respondent proves that the discrimination is fair; (b) on a ground in paragraph (b) of the definition of “prohibited grounds”, then it is unfair if one or more of the conditions set out in paragraph (b) of the definition of “prohibited grounds” is established, unless the respondent proves that the discrimination is fair.

2.32 The respondent has to prove that discrimination did not take place or that it is not unfair. Thereafter the court has to determine whether the discrimination is unfair. This is determined by reference to the following (section 14).

2.33 Section 14 of the Promotion of Equality and the Prevention of Unfair Discrimination Act deals with the determination of fairness or unfairness. This section provides that “unfair discrimination” does not include the taking of measures designed to protect or advance persons or categories of persons who have been disadvantaged by unfair discrimination, or members of such groups or categories of persons. In determining whether the defendant has proved unfair discrimination, the following is taken into account:

1. The context.
2. Whether the discrimination impairs or is likely to impair human dignity.
3. The impact or the likely impact of the discrimination on the complainant.
4. The position of the appellant in society and whether she or he suffers from disadvantage or belongs to a group that suffers from such patters of disadvantage.
5. The nature and extent of the discrimination.
6. Whether the discrimination is systemic in nature.

7. Whether the discrimination has a legitimate purpose.
8. Whether and to what extent the discrimination achieves its purpose and whether there are less restrictive and less disadvantageous means to achieve the purpose.
9. Whether and to what extent the respondents have taken steps as being reasonable in the circumstances to address the disadvantage that arises from one or more prohibited ground and to accommodate diversity.
10. Whether the discrimination reasonably and justifiably differentiates or fails to differentiate between persons according to objectively determined criteria intrinsic to the activity concerned.

2.34 In *Pillay* as heard in the Constitutional Court, Justice Langa of the Constitutional Court held that when interpreting the Bill of Rights, a court, tribunal, or forum must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom. Justice Langa states that these values are not mutually exclusive but enhance and reinforce each other.[30]

2.35 In the *Pillay* case, the difference between culture, religion, and voluntary religious practices were analysed. Discrimination on the grounds of both religion and culture was found to have been committed in terms of the Equality Act.[31] The fairness of the discrimination then had to be determined.[32]

2.36 Discrimination on the grounds of religion and culture is prohibited in the Constitution in sections 9, 15 and 30; and in terms of section 14(3)(i)(ii) of the Equality Act. The court held that the school had the duty to reasonably accommodate the learner's subjectively held beliefs regarding the cultural and religious preference of wearing a nose stud. "Reasonable accommodation" was defined as an exercise in proportionality within the specific context of the case.[33]

2.37 Two questions needed to be answered, according to Justice Langa: what would the impact of the wearing of the nose stud as an exemption from the Code of Conduct have been on the school; and what would the impact of the school not granting an exemption from the Code of Conduct to allow the wearing of the nose stud have been on the learner. Exempting the learner from complying with the Code of Conduct by

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30 Op cit par 63.
31 Op cit par 47 - 68.
32 Op cit par 69.
33 Op cit par 69 - 76.

allowing her to wear the nose stud would not have had an enormous impact on the school; whereas the impact on the learner of the school not granting such an exemption from the Code of Conduct would be undesirable.[34] The question was whether the fundamental right to equality had been violated, which in return required the Court to determine what obligations the school bore to accommodate diversity reasonably.[35]

2.38 The Constitutional Court held that even voluntary religious and cultural practices deserve the protection given by the Constitution, if they are sincerely held.[36] The school could have avoided the discrimination by granting the learner an exemption from the Code of Conduct. Therefore, the school unfairly discriminated against her.[37]

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34 Op cit par 77-79; 85 - 91; 94 - 102 and 112.
35 Op cit par 81.
36 Op cit par 65 – 68; 88.
37 Op cit par 71 - 73; 76 - 81; 85 - 91 and 93 - 98.

CHAPTER 3: SOCIAL DEVELOPMENT AND OLDER PERSONS: THE OLDER PERSONS ACT 13 OF 2006

A Introduction

3.1 This chapter deals with the definition of an "older person" as worded in the Older Persons Act 13 of 2006. It also aims to correct spelling mistakes in the Act as published in the *Government Gazette*. It further deals with the right not to incriminate oneself in relation to the Older Persons Act.

B Current legislation

3.2 The principal Act is the Older Persons Act 13 of 2006. No amendment Acts have been passed. The regulations passed in terms of the Act are contained in *Government Gazette* No. 33075 of 1 April 2010, *Government Notice* No. R260. Previous legislation regulating the position of older persons consisted of the Aged Persons Act 81 of 1967, and the Aged Persons Amendments Acts 14 of 1971, 46 of 1976 and 44 of 1994.

C The scope of the Act

3.3 As stated in the long title, the Older Persons Act deals with the protection of older people from abuse in any form, and safeguards the human rights of this vulnerable group in society. The Act also deals with admitting older people who, due to ill health or deteriorating mental ability cannot take care of themselves, to residential institutions. The focus of the Act, however, is to keep older people part of their communities and out of institutions for as long as possible.[38]

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[38] The SALRC Project 122 Report on Assisted Decision-Making is currently being finalized for submission to the Minister of Justice and Correctional Services. It is not envisaged that the recommendations contained therein will impact on the Older Persons Act in any way.

D Inequality, redundancy, and obsolescence

1 Inequality: Definition of older person

3.4 The Older Persons Act defines an "older person" as a person who, for a man, is 65 years or older; and for a woman, is 60 years or older.

3.5 In the case of *Christian Roberts and Others v Minister of Social Development and Others* 2010, the applicants sought an order for the Court to direct that the definitions of the prescribed ages in the relevant legislation should be amended to equalise the ages between men and women. The Social Assistance Act at the time provided that women were eligible for the state-funded old age grant when they attained the age of 60 years, and men when they attained the age of 65. The changes which the applicants sought were as follows: section 1 of the Social Assistance Act of 2004, and the definition of "older person" in the regulation made in terms of the Social Assistance Act should read, respectively: "'prescribed age' means having attained the age of 60 years and 'aged persons' means having attained the age of 60 years." The Court held as follows:[39]

> It brooks no argument that a smooth transition was opted for and has enabled us, the peoples of this Country, to put in place a progressive transition from that evil past of discrimination on the colour of a person's skin. This in itself implies a gradual dismantling of those structures that hoisted apartheid. It is, in my view, nor surprising that the 1962 *Social Development Act* was retained to date, with its discriminatory aspects, with its differentiation of women of the age of 60 and men of the age of 65 years. The mere retention of this Act does not amount, in my view, to an unfair discrimination of men of the age of 65 years. I am consequently not persuaded by the criticism on behalf of the applicants and the *amicus curiae*.
>
> Whilst, I accept that the relevant sections complained of are discriminating against men between the ages of 60 and 64, it is for the applicant to show that such discrimination is unfair, *vide* the Jooste case herein above.[40] The fact that the relevant statutes are discriminatory does not necessarily mean that they are therefore unfair.
>
> The very fact that the democratic government has retained the Social Development Act is in itself indicative that it is addressing the aspect of

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39 Case no 32838/05, Transvaal Provincial Division before Mavundla, J; unreported case. Available at http://www.communitylawcentre.org.za/ court-interventions/ OAP_HC_ judgment.pdf/ download at [34] to [37].

40 *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* (CCT15/98) [1998] ZACC 18; 1999 (2) SA 1; 1999 (2) BCLR 139 (27 November 1998). See www.saflii.org; http://www.saflii.org/za/cases/ZACC/1998/18.html.

> poverty among the aged. The fact that the age differentiation is retained, that in itself (is) not indicative of an unfair discrimination. The respondents contend that the retention of the differentiation is necessary and reasonable to address and protect the gains of women. I am unable to find fault in this contention on behalf of the respondents. In fact, I do accept that women were the most disadvantaged, as pointed out herein below.
>
> I accept that the gender classification in terms of age is discriminatory and favours women against men. I further accept that the contention by the respondents that women, particular African, Coloured and Indian women relatively speaking were the most marginalized in our society. They did not only suffer the brunt of apartheid but also the societal class discrimination.

3.6 The Social Assistance Act 13 of 2004 was amended in 2006 to equalize the eligibility age requirement for men and women. Over a three-year period, commencing on 1 April 2008, the qualifying age for men to receive the social assistance grant was reduced.[41] Since 1 April 2010, men who have attained the age of 60 years qualify for social assistance grants.

3.7 It was noted above that the practice of "differentiation" and the adoption of measures that seek to alleviate disadvantages which are the product of past discrimination, constitute fair discrimination. In view of the amendments made to the Social Assistance Act, the question arises whether the Department is contemplating amending the Older Persons Act too, to effect an equalization of ages and to allow men to qualify as an "older person" when they attain the age of 60 years, as this eligibility requirement has now been amended in the Social Assistance Act.

3.8 To give effect to an equalization of ages it is recommended that the definition of "older people" be amended as follows:

> "'older person' means a person who **[in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older]** <u>has attained the age of 60 years</u>."[42]

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41 Section 10 provides: A person is, subject to section 5, eligible for an older person's grant if- (a) in the case of a woman, she has attained the age of 60 years; and (b) in the case of a man, he has- (i) after 1 April 2008, attained the age of 63 years; (ii) after 1 April 2009, attained the age of 61 years; or (iii) after 1 April 2010, attained the age of 60 years.

42 From the Annual Report of the Department of DSD 2015 as well as its Strategic Plan 2015 – 2020 (on pages 17 and 28), it would seem that by 2016 there is uniformity in the Older Persons Grant with regard to age. It would seem that the old age grant is uniformly applied to men and women at age 60. This relates to the definition of an older person. There is also a move to amend the current Act to address implementation gaps and ensure better protection as stated on page 74 and 85 of the Annual Report.

3.9 However it would seem that the trend in the United Kingdom is to move away from a relatively early retirement age.[43] The same is true for the United States of America.[44] This issue is flagged for the attention of the Department.

2 Obsolescence and redundancy: spelling mistakes

3.10 There are numerous spelling mistakes in the published Older Persons Act. The SALRC suggests that these typographical errors in the Act be corrected. It is apparent that the typographical errors were corrected by the editors of Jutastat on its database. The SALRC considers it prudent that the Department effects amendments to the Act for purposes of legal certainty. The following typographical errors have been detected in the Act:

1. The Preamble needs to be corrected by inserting a semi-colon at the end of the sentence, as follows:
   AND WHEREAS the State must create an enabling environment in which the rights in the Bill of rights must be respected, protected and fulfilled;
2. In Chapter 3, in section 13 of the "Arrangement of Sections" (Table of Content) the word "comrnunity" needs to be replaced with the word "community".
3. In section 2, which deals with the objects of the Act, the numbering of subparagraph *(h)* needs to be replaced with subparagraph (b) as follows:

   The objects of the Act are to–

   (a) maintain and promote the status, well-being, safety and security of older persons;

   [(*h*)](*b*) maintain and protect the rights of older persons;

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43 Watt Nicholas, Wintour Patrick and Elliott Larry "State Pension age to be raised to 70 for today's workers" The Guardian 5 December 2013 available at http://www.theguardian.com/uk-news/2013/dec/05/state-pension-age-raised-to-70-autumn-statement-2013 Accessed on 18 September 2014; "New State Pension age: as we're all told to work longer, when will you be able to retire?" This is Money Financial website 10 March 2016 (updated) available athttp://www.thisismoney.co.uk/money/pensions/article-167980/ new-state-pension-age-retire.html Accessed on18 September 2014.

44 National Academy of Social Insurance "What is the Social Security Retirement Age?" available at http://www.nasi.org/learn/socialsecurity/retirement-age Accessed on 18 September 2014; "The ideal retirement age" US News available at http://money.usnews.com/money/retirement/articles/2013/06/10/the-ideal-retirement-age Accessed on 18 September 2014.

4. In section 2*(c),* a typographical error in the phrase “community-basedcare” needs to be corrected and replaced with the phrase “community-based care”.

5. Section 5(2)*(h)* of section 5 needs to be corrected by the substitution for the (*h*) of *(b).*

6. Section 13(2) needs to be corrected by deleting the full stop between “registration” and “withdrawal”.

7. Section 14(1) needs to be corrected by the substitution for the phrase “caregiversreceive” of the phrase “caregivers receive”.

8. Section 14(3) needs to be corrected by the substitution for the word “musi” of the word “must”.

9. Section 18(3)*(a)* needs to be corrected by the substitution for the word “conditionsbe” of the words “conditions be.”

10. Section 18(3)*(b)* needs to be corrected by the substitution for the word “deterniine” of the word “determine”.

11. Section 19(2) needs to be corrected by the substitution for the phrase “aregistered” of the phrase “a registered”.

12. Section 20(3)(*a*) needs to be corrected by the substitution for the word “bktween” of the word "between”.

13. In paragraph 21(3)*(b)(i),* the full stop needs to be removed between “(*a*)” and “the”.

14. Section 24 needs to be corrected by the substitution for the phrase “(Act No.116of 1998)” of the phrase “(Act 116 of 1998)”.

15. Section 25(4)*(c)* needs to be corrected by the substitution for the phrase “ensureadequateprovision” of the phrase “ensure adequate provision”.

16. Section 25(5)*(a)* needs to be amended by the substitution for the phrase “granttaken” of the phrase “grant taken”.

17. Section 29(10) needs to be corrected by deleting the “I€” before the subsection.

18. Section 31(2) needs to be corrected by the substitution for the phrase “Aperson” of the phrase “A person”.

19. Section 32(2)*(b)* needs to be corrected by the substitution for the phrase “authorisethat” of the phrase “authorise that”.

20. In section 32(7) a space needs to be added before “Any” and after (7):

"(7) Any person to whom any power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to such conditions as the person who effected the delegation or granted the authorisation considers necessary."

21. Section 34(3) needs to be corrected by the substitution for the phrase "the Minister for Safety and Security" of the phrase "the Minister of Police", in view of the name change of the Department of Safety and Security to the South African Police Service.

3 Right against self-incrimination

3.11 Section 28(6) of the Older Persons Act provides as follows:

> (6) A person is guilty of an offence if that person-
> *(a)* obstructs or hinders a social worker or a health care provider in the performance of his or her functions in terms of this section; or
> *(b)* refuses to furnish to a social worker or a health care provider any information in connection with the alleged abuse of an older person at his or her disposal which such officer requires for the purposes of an investigation referred to in subsection (3).

3.12 In terms of section 28(6)(b), a person who refuses to provide any information commits an offence by not informing the investigating social worker of anything he or she knows about an alleged incident of abuse. Conceivably, however, this person may also be the actual abuser. This situation might infringe the right of the person being interviewed not to incriminate him- or herself. Therefore, the person being interviewed needs to be warned of their right to remain silent and not incriminate themself, since they might otherwise disclose criminal conduct and become an accused.

3.13 In *Park-Ross and another v Director: Office for Serious Economic Offences,* the Cape High Court analysed the right against self-incrimination.[45]

> Although I am of the view that the right to remain silent does not extend to investigations and inquiries *dehors* criminal proceedings of arrest and trial, the use of evidence given by a person at such an investigation or inquiry in any subsequent criminal trial of that person would, in my opinion, constitute a violation of his right to remain silent in terms of s 25(3)(c). Indeed, were the position otherwise, it would mean that the underlying right embodied in the section would be circumvented by the

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45 1995 (2) SA 148 (C).

simple technique of compelling a person to speak at a pre-trial investigation. Such a construction, I think, would be untenable.

Section 5(8)(*b*) of the Act, however, excludes the use of such evidence in any subsequent criminal trial of that person. In regard to the section of the English Act permitting questioning by the Director of the Serious Fraud Office, ie s 2(2), which is analogous to s 5(1) of the South African Act, Lord Browne-Wilkinson in a recent decision of the House of Lords, delivered on 25 July 1994, viz Hamilton and Another v Naviede and Director of the Serious Fraud Office (unreported), after referring to the fact that that section had impliedly overridden the privilege against self-incrimination, went on to say:

> 'However, s 2(8) provides the person interrogated with a valuable safeguard which, to a substantial extent, protects him against the consequences of giving self-incriminating answers.'

(Section 2(8) is in very similar terms to s 5(8).)

Those remarks are apposite to the present case. I would, however, go a stage further. The prohibition contained in s 5(8)(b) that '(n)o evidence regarding any questions and answers contemplated in para (a) shall be admissible in any criminal proceedings' obviously relates to direct evidence given by the person interrogated and his answers to questions put to him. But what of derivative evidence, ie evidence discovered in consequence of the answers given by the witness, or what have also been referred to as 'clue facts'? In several Canadian cases a saving feature of interrogations such as those empowered by s 5(1) has been regarded as the exclusion in subsequent proceedings against the witness interrogated of not only his own evidence but also derivative evidence (see Morena v Mnr (1991) 1 CTC 78). While in some cases the exclusion of reliance on the actual incriminating answers seems to have been regarded as a sufficient safeguard (see, for example, Haywood Securities Inc v Inter-Tech Resource Group Inc (1985) 24 DLR (4th) 724 (CA)), particularly where the statute does not have as its avowed object the investigation of suspected criminal conduct and there is merely the speculative possibility that the information yielded might be used in some hypothetical future criminal prosecution, as is the case with a s 5(1) inquiry. It would seem, however, that the preferred view is that derivative evidence should also be excluded. That, for instance, was the view of Wilson J in the Thomson Newspapers case supra at 483 and that of Lambert JA in his dissenting opinion in the Haywood Securities case supra, where he pointed out that all the major legal systems in the common-law world contained protections against the introduction of derivative evidence (or 'clue facts') (see the cases collected in the work by Finkelstein and Finkelstein Constitutional Rights in the Investigative Process at 79 n 213). That view also appears to have found favour with Hurt J in Lynn NO v Kruger (supra). It certainly commends itself to me as preventing what has been graphically referred to as the use of testimony by which the suspect is convicted metaphorically; if not literally, out of his own mouth. (See Kastigar v US 406 US 441, 92 SC 1653 (1972) where, in relation to the position in the United States, it was held that immunity

> from use and derivative use of one's testimony is all that is necessary to supplement the self-incrimination privilege.)[46]

3.14 In *Shaik v Minister of Justice and Constitutional Development and Others,* Justice Ackermann explained the constitutional protection granted to examinees as follows: [47]

> In *Ferreira v Levin* this Court considered, in the context of enquiries and the examination of persons under section 417 of the Companies Act 61 of 1973, the constitutional validity of subsection 417(2)(b) that provided the following:
>
> > "Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him."
>
> The Court held the provision to be constitutionally invalid and one of the issues was the extent of its invalidity. This in turn revolved around the question as to what form of protection, against the use of such examinees' answers against themselves in a subsequent criminal trial, would be valid.
>
> There were three choices:
>
> (*a*) Transactional immunity, that protected examinees from prosecution in respect of any offence disclosed in their answers;
> (*b*) direct and derivative use immunity, that protected the examinees from their answers being used against them and also the exclusion from any subsequent prosecution of evidence derived by the prosecuting authorities from such answers; and,
> (c) direct use immunity that protected the examinees from their answers being used against them, and no more.
>
> The Court opted for the last-mentioned. It came to the conclusion that, in the South African context, mere direct use immunity was sufficient, bearing in mind that the trial judge had a discretion – in appropriate cases – to exclude derivative evidence if that were necessary to ensure a fair trial.

3.15 Thus, a person must answer self-incriminating evidence if a waiver is provided in the relevant legislation that the evidence will not be used to incriminate the person in a later trial, subject to judicial discretion to allow unconstitutionally obtained evidence. A direct-use immunity is thus established. It is suggested that section 28(6)(b) of the Older Person's Act should provide for such a waiver to the witnesses mentioned in section 28(6)(b).

3.16 The SALRC proposes that the following be added after section 28(6)(*b)*:[48]

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[46] Par 546 – 547.

[47] (CCT34/03) [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at [35] to [36] http://www.saflii.org.za/za/cases/ZACC/2003/24.html.

(i) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person for purposes of the investigation referred to in subsection (3): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(ii) No evidence regarding any questions and answers for purposes of an investigation referred to in subsection (3) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

4 Previous legislation to be repealed

3.17 Legislation on older persons which preceded the present Older Persons Act consisted of the Aged Persons Act 81 of 1967, and the Aged Persons Amendments Acts 14 of 1971, 46 of 1976, 44 of 1994, and 100 of 1998. The Older Persons Act of 2006 repealed both the Aged Persons Act of 1967 and the Aged Persons Amendment Act of 1998, in 2010. There is therefore no need for a recommendation in respect of repeal of legislation in this regard.

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[48] Sections 7 and 8 of the National Prosecuting Authority Act 32 of 1998.

CHAPTER 4: SOCIAL DEVELOPMENT AND REHABILITATION: THE PREVENTION OF AND TREATMENT FOR SUBSTANCE ABUSE ACT 70 OF 2008; AND THE PROBATION SERVICES ACT 116 OF 1991

A Introduction

4.1 This chapter discusses the Acts relevant to this topic, namely the Prevention of and Treatment for Substance Abuse Act 70 of 2008 and The Probation Services Act 116 of 1991.

4.2 This chapter also deals with obsolescence and redundancy in these two Acts and their regulations. It further mentions the influence of the New Companies Act 71 of 2008 on these Acts.

B Prevention of and Treatment for Substance Abuse Act 70 of 2008

4.3 The principal Act is the Prevention of and Treatment for Substance Abuse Act 70 of 2008, which was assented to on 19 April 2009 and commenced on 31 March 2013.[49] The Regulations are The Regulations for the Prevention of and Treatment for Substance Abuse in GN 283 *GG* 36 305 of 2 April 2013.

1 The scope of the Act

4.4 The Prevention of and Treatment for Substance Abuse Act 70 of 2008 aims to provide for a comprehensive national response to combat substance abuse; for mechanisms aimed at reducing demand and harm related to substance abuse through prevention, early intervention, treatment and re-integration programmes; for the registration and establishment of treatment centres and halfway houses; for the

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[49] Proclamation 8 *Government Gazette* 36304 of 28 March 2013.

committal of persons to and from treatment centres and for their treatment, rehabilitation and skills development in such treatment centres; for the establishment of the Central Drug Authority; and for matters connected therewith.

2 Obsolescence and redundancy

(a) Obsolescence and redundancy in definitions

4.5 The Prevention of and Treatment for Substance Abuse Act 70 of 2008 defines "youth" as follows: "'youth' as defined in section 1 of the National Youth Commission Act, 1996 (Act 19 of 1996)". However, the National Youth Commission Act has been repealed and replaced by the National Youth Development Agency Act 54 of 2008. It is therefore recommended that the reference to the National Youth Commission Act 19 of 1996 should be replaced with a reference to the National Youth Development Agency Act of 2008 with reference to the definition of youth as defined in Act 54 of 2008:

> "**'youth'** means persons between the ages of 14 and 35."

(b) Obsolescence and redundancy in the Act

4.6 The following Acts, which are mentioned in the Acts under review, have been repealed: The South African Qualification Authority Act 58 of 1995 (repealed by the National Qualifications Framework Act 67 of 2008) and the Companies Act 61 of 1973 (repealed by the Companies Act 71 of 2008).

4.7 In section 6(4), reference is made to the South African Qualifications Authority Act 58 of 1995. This Act is no longer in force. The National Qualifications Framework Act 67 of 2008, which commenced on 1 June 2009, repealed the South African Qualifications Authority Act. Section 6(4) should therefore refer to the National Qualifications Framework Act, 2008 (Act 67 of 2008).

4.8 As the National Youth Development Agency Act 54 of 2008 has repealed the National Youth Commission Act 19 of 1996, references to the National Youth Commission should be to the National Youth Development Agency Act, as defined in the definitions of Act 54 of 2008:

> **1. Definitions**
>
> In this Act, unless the context otherwise indicates-

"Agency" means the National Youth Development Agency established by section 2;

4.9 References to the "Department of Education" in sections 5(1), 8(1), 12(1) and 53(2)(*e*) need to be replaced with the "Department of Basic Education" or "Department of Higher Education and Training", depending on which department is relevant.

4.10 References to Safety and Security in section 5(1) should be to South African Police Service and in this instance Minister of Police.

4.11 The term "Sports and Recreation" in sections 5(1), 8(1),12(1) and 53(2)(*n*) needs to be changed to "Sports and Recreation South Africa" and in sections 5(1) and 8(1) the term "Justice and Constitutional Development" needs to be changed to "Justice and Correctional Services" to accord with the amalgamation of the Department of Justice and Constitutional Development and the Department of Correctional Services. Consequently reference to the term "Correctional Services" should be deleted.

4.12 References to "Local and Provincial Government" in section 53(2)(*q*) need to be updated, as the name of the department was initially changed to "Cooperative Governance and Traditional Affairs". In 2008, the Department was divided into two departments, namely Cooperative Governance and Traditional Affairs. When referring to the old "Department of Local and Provincial Government", the reference should now be to the "Department of Cooperative Governance".[50] The SALRC therefore proposes the following amendments:

1. Amendment of sections 5(1) of Act 70 of 2008

Section 5, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Minister must, together with the National Youth **[Commission]** Development Agency and the Ministers of Finance, **[Education]** Basic

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[50] The information is contained on the website of the Department of Traditional Affairs, http://www.dta.gov.za/index.php/home/about-us.html (accessed on 14 March 2012) and was confirmed via a personal enquiry on 14 March 2012 to the spokesperson of the Department of Cooperative Governance. He indicated that the Department of Cooperative Governance and Traditional Affairs was divided into two departments that report to the same Minister: the Minister of Cooperative Governance and Traditional Affairs. He advised that the Department of Local and Provincial Government should be described as the Department of Cooperative Governance.

Education, Higher Education and Training, Health, Justice and Correctional Services **[Constitutional Development]**, Arts and Culture, Sports and Recreation South Africa, **[Local and Provincial Government]** Cooperative Governance, **[Correctional Services]** and **[Safety and Security]** Police, develop and implement comprehensive intersectoral strategies aimed at reducing the demand and harm caused by substance abuse."

2. Amendment of section 6(4) of Act 70 of 2008

Section 6 is hereby amended by the substitution for subsection (4) of the following subsection:

"(4) The accreditation contemplated in subsection (3) must be provided in terms of the **[South African Qualifications] Authority Act, 1995 (Act 58 of 1995)]** National Qualification Framework Act 67 of 2008."

3. Amendment of section 8(1) of Act 70 of 2008

Section 8 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Minister must, in consultation with the National Youth **[Commission]** Development Agency, South African Police Service and the Ministers of **[Education]** Basic Education, Higher Education and Training, Health, Justice and **[Constitutional Development]** and Correctional Services, Arts and Culture, **[Provincial and Local Government]** Cooperative Government, **[Correctional Services]** and Sports and Recreation South Africa, facilitate the establishment of integrated programmes for the prevention of substance abuse."

4. Amendment of subsection (1) of section 12 of Act 70 of 2008

Section 12 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Minister, in consultation with the National Youth **[Commission]** Development Agency, South African Police Services and Ministers of **[Education]** Basic Education, Higher Education and Training, Arts and Culture, Health, **[Provincial and Local Government]** Cooperative Government, Correctional Services and Sports and Recreation South Africa, must develop guidelines for the establishment of community-based services."

4.13 In section 42 the "give [sic]" needs to be removed, and the word "and" needs to be added after the word "discharged":

42 Admission or transfer to treatment centre

(2) The manager of a treatment centre must notify the Director General-

(a) when an involuntary service user is released on licence in terms of this Act and of the particulars of such release;

(b) if an involuntary service user is released after the expiry of 12 months after an order referred to in section 35 (7) was made, as to why –

(i) such involuntary service user must be not so discharged;

(ii) he or she has not yet been discharged from treatment centre concerned; and

(iii) every 12 months thereafter, if such involuntary service user has not been so discharged, and

give **[[sic]]** further reasons as to why he or she must not be discharged.

4.14 In section 51(1)*(b)* under "Maintenance of discipline in treatment centre, half-way house, out-patient services and community-based services", the word "stablish" should be changed to "establish".

4.15 In section 53 the following amendments are proposed:

Amendment of Section 53 of Act 70 of 2008

Section 53 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by –

(a) the substitution for paragraph (e) of subsection (2) of the following paragraph:

"(e) **[a representative]** representatives of the **[Department of Education]** Departments of Basic Education, and Higher Education and Training, appointed by **[that Department]** those Departments";

(b) the substitution for paragraph (g) of subsection (2) of the following paragraph:

"(g) a representative of the **[Department of Foreign Affairs]** Department of International Relations and Cooperation appointed by that Department;";

(c) the substitution for paragraph (n) of subsection 2 of the following paragraph:

"(n) a representative of the Department of Sport and Recreation South Africa appointed by that Department;";

(d) the substitution for paragraph (q) of subsection 2 of the following paragraph:

"(q) a representative of the Department of **[Provincial and Local Government]** Cooperative Government appointed by that Department;"; and

(e) the substitution for paragraph (r) of subsection 2 of the following paragraph:

"(r) a representative of the **[National Youth Commission]** National Youth Development Agency appointed by that Commission;".

(c) Obsolescence and redundancy in Regulations

4.16 The Regulations for the Prevention of and Treatment for Substance Abuse were passed in 2013 and published under General Notice 283 of 2 April 2013.

4.17 In the Table of Contents and in Chapter 4, the "[sic]" needs to be removed and the chapter name changed to "Chapter 5".

4.18 The numbering in the Table of Contents and in the text of the regulations is incorrect. This is evident in Regulation 42, which numbering is repeated twice instead of continuing to 43. The word "[sic]" needs to be removed in the index next to the number 42, before the word "suitability."

4.19 In Regulation 10, the "[sic]" needs to be removed after the regulation 10(2)(*k*):

Regulation 10 Minimum norms and standards for community-based services states:

…

(2) Aftercare programmes conducted by community-based services must-

…

(k) **[[sic]]** be affordable in relation to the economic class of each person.

4.20 A comma must be added after the name of the regulation mentioned in Regulation 18(1). In addition, the word "days" needs to be added, and the brackets removed, in Regulation 18(1)*(b)*:

18. Termination or withdrawal of registration of community-based services by HOD

(1) Where, in the opinion of the HOD, the service provider has failed to comply with a provision of these Regulations or any condition contemplated in regulation 17(2)(b)**,** the HOD may require the service provider to –

…

(b) require the service provider to, at the end of the 90 days referred to in sub-regulation 1*(a),* provide a written report detailing how the service provider has complied with the conditions referred to in sub-regulation 1(a).

4.21 Regulation 18 further states:

18.Termination or withdrawal of registration of community-based services by HOD

...

(2) If at the end of the period referred to in sub-regulation (1)(a) and after consideration of a report contemplated in sub-regulation 1(b) the HOD is not satisfied that the service provider has complied with **[the]/[any] [[sic]]** condition contemplated in regulation 17(2)(b)**,** the HOD may –

(3) Upon receipt of and after having considered the reasons as contemplated in sub-regulation (2)(b), the HOD may, if he is satisfied that the service provider has no valid reason why such registration should not be withdrawn or terminated**[.],**

(a) terminate or withdraw registration granted in terms of regulations 16 or 17; and

4.22 The full-stop at the end of subregulation (3) must be replaced by a comma; and in subregulation (2) a comma must be inserted after the name of the regulation cited. In addition, “[sic]” needs to be removed, and the department needs to decide whether to use “the” or “any”. One of these words must be retained and the other deleted.

4.23 In regulation 18(3)*(a),* the full stop after “terminated” needs to be replaced with a dash:

(3) Upon receipt of and after having considered the reasons as contemplated in sub-regulation (2)(b), the HOD may, if he is satisfied that the service provider has no valid reason why such registration should not be withdrawn or terminated**[.]–**

4.24 In Regulation 21, the "[sic]" needs to be removed and the numbering corrected; currently there are two paragraphs both numbered *(e)*:

> 21. Guidelines for election and appointment of members of management structure of community-based services
>
> …
>
> (9) Upon receipt of completed nomination forms the selection panel must –
>
> …
>
> *(e)* appoint the nominees who get the most votes after the election contemplated in sub-regulation 21(9)*(d).*
>
> *(e)* **[[Sic]]** prepare appointment letters and request the chairperson of the selection panel to sign such letters; and
>
> (*f*) **[[Sic]]** cause such letters to be delivered to the appointed persons.

4.25 In Regulation 26, the "[sic]" needs to be removed, and in 26(1) the word "a" needs to be replaced with "of the" and in 26(4) the "have" is to be replaced with "has":

> 26. Guidelines for procedure at meetings of management structure of community-based services
>
> (1) A quorum **[a]** **[[sic]]** <u>of the</u> meeting of the management structure shall be constituted by a simple majority of its total members.
>
> …
>
> (4) The chairperson does not have a deliberative vote, but **[have]** <u>has</u> only a casting vote in the case where votes are tied.

4.26 In Regulation 28 the word "centre" needs to be added, as corrected by Jutastat:

> 28. Requirements for registration of treatment centre and private halfway house
>
> (1) Any person who wishes to register a treatment centre or private halfway house must –
>
> …
>
> (*c*) ensure that a treatment <u>centre</u> or a private halfway house complies with the provisions of the Act; and

4.27 In Regulation 35 the word "[sic]" needs to be removed, as does the word "the":

> 35. Composition of management structures of treatment centres and halfway houses

(1) The management structure of **[the]** a **[[sic]]** treatment centre or a halfway house as contemplated in section 29 of the Act must, taking into account, among other things, the appropriate representation of race, gender and disability, be composed of a maximum of two –

4.28 In Regulation 37, the words "is an element" needs to be removed in *(b)(ii);* the second *(b)(ii)* needs to be changed *to (iii);* and the semi-colon after "children" needs to be removed. The second instance of "is an element" also needs to be removed. In regulation 37(*1*)(*b*), the word "of" needs to be deleted:

37. Qualification of members of management structure of treatment centre or halfway house

(1) No person may be nominated for appointment to the management structure of a treatment centre or halfway house, if he or she –

…

(*b*) has, in the preceding five years, whether in the Republic or elsewhere, been convicted of any offence **[of]** which involves –

(*i*) dishonesty **[is an element]**; or

(*ii*) substance abuse; or

[(*ii*)](*iii*) physical and emotional abuse of children; **[is an element;]**

4.29 In regulation 40(1), the brackets in "(36)" need to be removed:

40. Filling of vacancies of members of management structures of treatment centres or halfway houses

(1) If a member of the management structure of a treatment centre or halfway house dies or vacates his or her office, the chairperson must, in accordance with the procedure contained in regulation **[(]**36**[)]** appoint another person in his or her place for the remainder of the deceased's or predecessor's term of office.

4.30 In Regulation 42(1) the word "a" needs to be removed and replaced with the words "of the":

42. Procedure at meetings of management structure of treatment centre or halfway house

(1) A quorum **[a]** of the meeting of the management structure shall be constituted by a simple majority of its total members.

4.31 Regulation 42 needs to be renumbered, as the number has been repeated.

> **[42.]** 43 Suitability for appointment as manager of public treatment centres or public halfway houses

4.32 In regulation 49 subsection (1), the plural form should appear for the words "prison", "health establishment", "public treatment centre", "youth care centre" and "alternative care centre".

4.33 In regulation 49(1)*(b)(ii)* to (*iv*), the definite article "the" and the word "another" must be added. The plural form should appear for the words mentioned above:

> 49. Transfer and retransfer of involuntary persons from prison, health establishment, public treatment centre, youth care centre or alternative care centre
>
> (1) Any person entrusted with the power to transfer involuntary service users from prisons, health establishments, public treatment centres, youth care centres or alternative care centres must –
>
> …
>
> *(b)* if it is established that section 44(2)(*a*) and (*b*) have been complied with, the transferring person must conduct a risk assessment to determine whether the service user is likely to escape from a public treatment centre and whether the involuntary service user is not a danger to –
>
> …
>
> (*ii*) the community;
>
> (*iii*) another service user; and
>
> …
>
> (*iv*). staff members of the public treatment centre.

4.34 In regulation 51 an "s" needs to be added to the word "Condition" in the title, and an "a" must be added before the word "South":

> 51. Conditions for administration or admission of person who is not a South African citizen or permanent resident for treatment, rehabilitation or skills development

3 Influence of the Companies Act 71 of 2008

4.35 Section 29 of the Prevention for and Treatment of Substance Abuse Act deals with the management structure of a treatment centre and halfway house. It provides in subsection (3)*(a)* that the management structure established in terms of subsection (1) must ensure that the treatment centre or halfway house, among others, provides a quality service. The word “comply” needs to be changed to theword ”complies” and the “[sic”] needs to be removed.

4.36 Section 29(3) provides, among others, that the management structure established in terms of subsection (1) must ensure that the treatment centre or halfway house:

> *“(d)* If it is a treatment centre or a halfway house registered in terms of the Non-Profit Organisation Act, 1997 (Act No. 71 of 1997), **[comply]** complies **[sic]** with section 18 of that Act; and
>
> (e) if it is a company registered in terms of the Companies Act, 1973 (Act No 61 of 1973), **[comply]** complies **[sic]** with section 302 of that Act;”

4.37 Section 29(3)(*e*) needs to be changed to reflect the corresponding section in the Companies Act 71 of 2008. Section 10 of the Companies Act 71 of 2008 is also relevant here.

4.38 Section 18 of the Non-profit Organisation Act regulates the duty to provide reports and information:

> 18(1) Every registered non-profit organisation must, in writing, provide the director with –
>
> (*a*) a narrative report of its activities in the prescribed manner together with its financial statements and the accounting officer’s report as contemplated in section 17(1) and (2), within nine months after the end of its financial year;
>
> (*b*) the names and physical, business and residential addresses of its office-bearers within one month after any appointment or election of its office-bearers even if their appointment or election did not result in any changes to its office-bearers;
>
> (*c*) a physical address in the Republic for the service of documents as contemplated in section 16(2);
>
> (*d*) notice of any change of address within one month before a new address for service of documents will take effect; and
>
> (*e*) such other information as may be prescribed.
>
> (2) The director may cause any document or a narrative, financial or other report that is submitted to the director to be scrutinised, or, by means of a notice, require a registered non-profit organisation to submit

any information or document reasonably required in order to enable the director to determine whether the organisation is complying with –

(*a*) the material provisions of its constitution;

(*b*) any condition or term of any benefit or allowance conferred on the organisation in terms of section 11; or

(*c*) its obligations in terms of this section, section 17 and any other provision of this Act.

(3) A registered non-profit organisation must submit the information or document contemplated in subsection (2) within one month after receipt of the notice.

(4) If the accounting officer of a registered non-profit organisation becomes aware of any instance in which the organisation has failed to comply with the financial provisions of this Act or its constitution, the accounting officer must notify the director of the occurrence –

(*a*) within one month after becoming aware of it; and

(*b*) in writing with sufficient detail to describe the nature of the noncompliance.

(5) The duty imposed on an accounting officer in terms of subsection (4) supersedes the duty of confidentiality owed to the organisation by the accounting officer.

4.39 Section 10 of the Companies Act of 2008 provides for a modified application of the Act with regard to non-profit organisations:

10(1) Every provision of this Act applies to a non-profit company, subject to the provisions, limitations, alterations or extensions set out in this section, and in Schedule 1.

(2) The following provisions of this Act, and any regulations made in respect of any such provisions, do not apply to a non-profit company –

(*a*) Part D of Chapter 2 – Capitalisation of profit companies.

(*b*) Part E of Chapter 2 – Securities registration and transfer.

(*c*) Section 66(8) and (9) and section 68 – Remuneration and election of directors.

(*d*) Parts B and D of Chapter 3 – Company secretaries, and audit committees, except to the extent that an obligation to appoint a company secretary, auditor or audit committee arises in terms of –

(i) a requirement in the company's Memorandum of Incorporation, as contemplated in section 34(2); or

(ii) regulations contemplated in section 30(7).

(*e*) Chapter 4 – Public offerings of company securities.

(*f*) Chapter 5 – Takeovers, offers and fundamental transactions, except to the extent contemplated in item 2 of Schedule 1.

(*g*) Sections 146(*d*), and 152(3)(*c*) – Rights of shareholders to approve a business rescue plan, except to the extent that the non-profit company is itself a shareholder of a profit company that is engaged in business rescue proceedings.

(*h*) Section 164 – Dissenting shareholders' appraisal rights, except to the extent that the non-profit company is itself a shareholder of a profit company.

(3) Sections 58 to 65, read with the changes required by the context –

(*a*) apply to a non-profit company only if the company has voting members; and

(*b*) when applied to a non-profit company, are subject to the provisions of item 4 of Schedule 1.

(4) With respect to a non-profit company that has voting members, a reference in this Act to "a shareholder", "the holders of a company's securities", "holders of issued securities of that company" or "a holder of voting rights entitled to be voted" is a reference to the voting members of the non-profit company.

4.40 The Companies Act of 2008 has brought about changes to the Non-Profit Organisation Act and has completely amended the company law of South Africa. Therefore, the SALRC suggests that the above-quoted sections be considered by the DSD in relation to the legislation discussed here, to determine possible redundancy and the need to align the legislation with the provisions of the Companies Act.

C Probation Services Act 116 of 1991

1 Current legislation

4.41 The principal Act is the Probation Services Act 116 of 1991. It commenced on 29 April 1994.[51]

4.42 The amendment Acts are the Health and Welfare Matters Amendment Act 118 of 1993 and the Probation Services Amendment Act 35 of 2002.

4.43 The regulations are the Regulations under the Probation Services Act 1991.[52]

2 The scope of the Act

4.44 This Act aims to establish and implement programmes aimed at combatting crime, and rendering assistance to and treatment of certain persons involved in crime. Under this Act the President can assign two powers, one to the Minister of Social

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[51] Government Notice No 82 in *Government Gazette* 15658, *Regulation Gazette* 5308.

[52] Published in *Government Gazette* No. 15 895 RG No. 5372 No. R 1364 of 5 August 1994.

Development (the old Department of Health and Welfare), and the other to the Premiers of the provinces.[53] The DSD has confirmed that it administers this Act.

3 Obsolescence and redundancy

(a) Obsolescence and redundancy in the Act

4.45 The Probation Services Act refers in section 3A(2) to the Correctional Services Act 8 of 1959. However, except for sections 29, 84F, 97 and Schedule 1 and 2 of the Correctional Services Act of 1959, that Act was repealed by the Correctional Services Act 111 of 1998. Therefore section 3(A) needs to be corrected as follows:

> **3A Treatment of probationers**
>
> (1) Notwithstanding any probation condition imposed by a court, the Director-General may determine and impose further conditions which shall apply in respect of a probationer as part of his probation conditions.
>
> (2) A further condition may include participation in a rehabilitation or other programme as determined in terms of or prescribed under section **[84 (1)]** 64 of the Correctional Services Act, 111 of 1998 [**1959 (Act 8 of 1959)]**.

4.46 As section 84(1) has been repealed, it is suggested that the DSD consider the relevance of section 3A and whether reference to section 64 of the Correctional Services Act 111 of 1998 is apposite.

4.47 Section 7 of the Act refers to the "Minister of State Expenditure". The relevant Minister is now the Minister of Finance. This section should therefore be amended to refer to the "Minister of Finance".

4.48 The proposed amendment to section 7 reads as follows:

> **7. Allowances to members of, and payment of costs incurred by, committees**
>
> (1) A member of a committee who is not an officer in the public service may be paid, while engaged in the business of the committee, such session,

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[53] Respectively by Government Notice No 81 in *Government Gazette* No 15658, *Regulation Gazette* No 5308 on 29 April 1994 and Government Notice No 80 in *Government Gazette* 15658, Regulation No 5308 of 29 April 1994.

subsistence and transport allowances as the Minister may with the concurrence of the Minister of **[State Expenditure]** Finance determine.

4.49 The Act states the following in sections 19 to 21:

> **19. Amendment of section 1 of Act 33 of 1960, as amended by section 1 of Act 50 of 1965, section 15 of Act 62 of 1966, section 16 of Act 102 of 1967, section 1 of Act 74 of 1973 and section 2 of Act 34 of 1986**
>
> Section 1 of the Children's Act, 1960, is hereby amended by the deletion of the definition of "probation officer".
>
> **20. Repeal of section 58 of Act 33 of 1960**
>
> Subject to the provisions of section 2(3) of this Act, section 58 of the Children's Act, 1960, is hereby repealed.
>
> **21. Repeal of Act 98 of 1986**
>
> The Probation Services Act (House of Assembly), 1986, is hereby repealed.

4.50 The Children's Act 33 of 1960 mentioned in section 20 of the Probation Services Act has been repealed by the Children's Act 38 of 2005. Section 21 has repealed an Act that is no longer relevant, namely the Probation Services (House of Assembly) Act 98 of 1986. The retention of the sections mentioned in par 4.50 is deemed unnecessary; however, the sections may be kept in order to indicate the historical progression of the Act.

4.51 In section 15(5), which deals with the liability for patrimonial loss arising from performance of service by volunteers, and section 16(3) of the Regulations to the Act, references are made to the "Department of State Expenditure". These need to be amended to refer to the "National Treasury" instead.

4.52 Section 15(5) reads as follows:

> **15. Liability for patrimonial loss arising from performance of service by volunteers**
>
> …
>
> (5) If any person as a result of the performance of services by a volunteer in terms of this Act has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General may, with the concurrence of the National Treasury, ex gratia pay that person such amount as the Director-General may deem reasonable.

4.53 In section 16(3) the name of the Minister of State Expenditure needs to be changed to the Minister for Finance. Section 16(3) reads as follows:

16. Regulations

…

(3) Regulations affecting State expenditure shall be made only with the concurrence of the Minister of **[State Expenditure]** Finance.

4.54 In section 17(1) and (2) the word "State President" needs to be changed to "President":

"(1) The **[State]** President may by proclamation in the Gazette assign the administration of the provisions of this Act, either generally or in respect of persons belonging to any specific class or category as defined in the said proclamation, to any Minister or partly to one Minister and partly to another Minister or other Ministers, and may in such proclamation specify the powers and functions which shall be exercised and performed by the several Ministers, and may further specify that any power or duty conferred or imposed by this Act upon the Minister shall be exercised or performed by one Minister acting with the concurrence of another Minister."

"(2) The **[State]** President may vary or amend any such proclamation."

4.55 In section 18(2)*(a)* and (3) the word "welfare" needs to be changed to "social; development":

"(a) delegate to the member of the Executive Council of that province responsible for **[welfare]** social development matters in the province any power conferred upon the Minister by this Act, except the power under section 16 to make regulations;"

"(3) The member of the Executive Council of a province responsible for **[welfare]** social development matters in the province may – "

4.56 In section 22 (1) the word "State President" needs to be changed to "President":

"(1) This Act shall be called the Probation Services Act, 1991, and shall come into operation on a date fixed by the **[State]** President by proclamation in the Gazette."

(b) Regulations requiring amendment: obsolescence and redundancy

4.57 The enacting provision of the regulations reads as follows: "The Minister for Welfare and Population Development has, in terms of section 16 of the Probation Services Act, 1991 (Act No. 116 of 1991), made the regulations in the Schedule". This

wording has not been amended by subsequent regulations, as it is an historical fact that the then Minister for Welfare and Population Development made such regulations in 1994. Hence the changed portfolio has not been updated in the original enacting provision.

4.58 Regulation 4(3) of Government Notice 1364 reads as follows:

> 4. Appointment of volunteers.
> …
> (3) The authorised probation officer shall send a copy of each certificate of appointment issued by him, together with the agreement which has been signed by the volunteer in terms of section 9 (2) (c) of the Act, to the Director-General for **[a]** safe-keeping.

4.59 The "a" needs to be deleted so that the sentence ends as follows: "… to the Director-General for safe-keeping."[54]

4.60 In regulation 5(*a*), the word "ser-vice" needs to be changed to read "service" in the original Act printed by the Government Printers.

4.61 Regulation 7 of Government Notice 1364 should be amended as follows:

> 7. Remuneration of volunteers
>
> The allowance referred to in section 13 of the Act, is such amount which is determined by the Department of **[Welfare]** Social Development with the concurrence of the Treasury.

4.62 In the above regulation, the term "Department of Welfare" needs to be replaced by "Department of Social Development."

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[54] Regulations under the Probation Services Act 116 of 1991 (*Government Notice* R1364 In *Government Gazette* 15895 of 5 August 1994).

CHAPTER 5: SOCIAL DEVELOPMENT AND CHILDREN: THE CHILDREN'S ACT 38 OF 2005

A Introduction

5.1 This chapter discusses instances of inequality, obsolescence and redundancy found in the Children's Act and its regulations.

5.2 An invitation is extended to the Department of Social Development to comment on the possible investigation by the SALRC of any topics mentioned in this chapter.

B Current legislation

5.3 The principal Act is the Children's Act 38 of 2005. The amendment Act is the Children's Amendment Act 41 of 2007. The regulations made in terms of the Children's Act 2005 are Government Notice R 250 *Government Gazette* No. 33 067 of 31 March 2010: Regulations relating to Children's Courts and International Child Abduction (Department of Justice and Constitutional Development Regulation), and *Government Gazette* No. 33 067 No. R 261 of 1 April 2010 Children's Act, 2005 General Regulations regarding Children.[55]

1 The scope of the Act

5.4 The aim of the Act is to give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding

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[55] According to the Annual Report of the DSD 2015 and its Strategic Plan 2015-2020 there had been two further proposed amendments to the Children's Act: The Children's Amendment Bill and the Children's Second Amendment Bill. Both these amendment bills have been published in Government Gazette No 37014 of 15 November 2013. Relevant in the amendment bill is the fact that provision is being made for the removal of a child to a temporary safe care without a court order to be placed before the Children's Court for review before the expiry of the next court day and to provide for the review of decisions to remove a child without a court order. The second amendment bill aims to provide that the interim order granted in respect of the removal of a child to temporary safe care be placed before the Children's Court before the expiry of the next court date and that the parents, guardians or care giver be present in court.

children's courts; to provide for partial care of children; to provide for early childhood development; to provide for the issuing of contribution orders; to provide for prevention and early intervention; to provide for children in alternative care; to provide for foster care; to provide for child and youth care centres and drop-in centres; to make new provisions for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-Country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create certain new offences relating to children; and to provide for matters connected therewith.

2 Issues of concern identified by the Department of Social Development

5.5 During a meeting between the SALRC and the DSD legal division, the DSD indicated certain problematic aspects of the Act. These were as follows:

(a) children without any visible means of support;
(b) the extension of foster-care;
(c) the constitutionality of sections 151 and 152 (which deal with the removal of a child to temporary safe care by court order and the removal of a child to temporary safe care without court order, respectively); and
(d) the relationship between section 105 (provision of designated child protection services), section 250 (only certain persons are allowed to provide adoption services) and section 251 (accreditation to provide adoption services).

5.6 The Department further drew the SALRC's attention to the issues of circumcision and virginity testing, as it was felt that culture will play an important role in cases of non-compliance with these provisions. Section 12 of the Act deals with social, cultural and religious practices.[56] Section 12(1) provides that every child has the right

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[56] The Children's Act was preceded by the SALRC's December 2002 report on *Review of the Child Care Act* Project 110 in which, amongst others, the following recommendations were made with regard to circumcision and virginity testing: (Available at http://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf).

9.5 Setting broad principles for child protection measures
After highlighting the deficiencies in the present child protection system in the discussion paper, the Commission proposed a system which included the following features:
Provision for protection against other harmful or potentially harmful cultural practices within both the child protection and criminal justice systems, by (a) prohibiting harmful or potentially harmful cultural practices; (b) regulating (male) circumcision schools; (c)

not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being. Section 12(4) provides that virginity testing of children younger than 16 years is prohibited. Section 12(5) provides that virginity testing of children older than 16 years may be performed only: (a) if the child has given consent to the testing in the prescribed manner; (*b*) after proper counselling of the child; and (c) in the manner prescribed. Section 12(8) provides that circumcision of male children younger than 16 years is prohibited, except when: (a) circumcision is performed for religious purposes in accordance with the practices of the religion concerned and in the manner prescribed; or (*b*) circumcision is performed for medical reasons on the recommendation of a medical practitioner. Section12(9) provides that circumcision of male children older than 16 may be performed only: (a) if the child has given consent to the circumcision in the prescribed manner; (*b*) after proper counselling of the child; and (c) in the manner prescribed.

5.7 Two of the matters raised above fall outside the limited scope of this investigation, and will not be considered in this review. They are (a) the application of the provisions in the Children's Act relating to virginity testing and circumcision; and (b) the relationship between the provision of designated child protection services (only certain persons being allowed to provide adoption services and accreditation to provide adoption services). It should be kept in mind that the current investigation focuses on determining redundancy and compliance with the equality provisions of the Constitution. The DSD could consider requesting the SALRC to investigate these matters.

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prohibiting female genital mutilation; (d) expanding the grounds for refugee status to include the threat of female genital mutilation; and (e) an educative and criminal law approach to virginity testing. As far as the health aspects of virginity testing and male circumcision are concerned, the Commission recommends that the (provincial) Health Departments prepare the necessary legislative enactments. (See page 110 of the Report).

9.6 Harmful cultural practices

The Commission paid specific attention to harmful or potentially harmful cultural practices relating to children in the discussion paper. In this regard it was recommended that harmful or potentially harmful cultural practices be prohibited, that male circumcision be regulated, that female genital mutilation be prohibited, that an educative and criminal law approach to virginity testing be adopted, and expansion of the grounds for refugee status to include the threat of female genital mutilation. The Commission also recommended the inclusion of a prohibition on child betrothals and suggested that a standard minimum age for marriage be set.

The Commission received no submissions on these preliminary proposals. The Commission therefore confirms its preliminary position and recommends the inclusion in the Children's Bill of provisions to this effect. (Footnotes omitted) (See page 115 of the Report.)

3 Inequality, obsolescence and redundancy

(a) Obsolescence and redundancy in the Act

(i) Surrogate motherhood agreements

5.8 The Children's Act now also deals comprehensively with surrogacy. Section 293 of the Children's Act provides that where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the surrogate motherhood agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement. The Act provides further that where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement; and where the husband or partner of a surrogate mother (who is not the genetic parent of the child) unreasonably withholds his or her consent, the court may confirm the agreement.

5.9 The *Commentary on the Children's Act* explains section 293, among others, as follows:[57]

> In terms of sub-s (1) the commissioning parent must obtain the written consent of his or her husband, wife or partner to the agreement. 'Commissioning parent' is defined as 'a person who enters into a surrogate motherhood agreement with a surrogate mother'. But who is the commissioning parent if the person who enters into the agreement is married or in a permanent relationship? One could argue that it makes no real difference which one of the spouses or partners of the commissioning couple enters into the agreement and which one consents, since both parties must ultimately become parties to the agreement. The question is then why the legislator would require the spouse or partner to consent to the agreement if the spouse or partner in any case has to become a party to the agreement as well. The consent requirement presumably limits the commissioning parent's capacity to enter into a fully enforceable surrogate motherhood agreement in the same way that the capacity of a spouse married in community of property is curtailed. Joining the spouse or partner as a party to the agreement ensures that such a party acquires all the rights, duties and obligations arising from the agreement as such. Consent by the spouse or partner is thus necessary to ensure full capacity to act on the part of the (other) contracting spouse or partner and joining such a

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[57] Davel CJ & Skelton AM Commentary of the Children's Act, Jutastat E-publications ISSN 2071-9043 Corresponds to revision Service 6, 2013 of the looseleaf publication, updated to May 2013 Chapter 19 9-11.

> consenting spouse or partner as a party ensures that the agreement is binding on both spouses or partners.
>
> In terms of sub-s (2) the husband or partner of the surrogate mother must likewise give written consent and be joined as a party to the agreement before the court may confirm the agreement. It is submitted that the restriction to a 'husband' in this context must be considered outdated in the light of the enactment of the Civil Union Act. Since a surrogate mother may now legally also marry another woman the provision should be amended to read 'spouse'. The words 'consent to the agreement' would, furthermore, ostensibly also include consent to the artificial fertilisation of the surrogate mother. If the spouse of the surrogate mother does not consent to the artificial fertilisation of his wife, parental responsibility will vest exclusively in the surrogate mother. (Footnotes omitted)

5.10 The SALRC supports the proposal made in the *Commentary on the Children's Act* regarding the updating and replacement in section 293 of the term "husband" with "spouse".[58] It is recommended that this section be amended as follows:

> **293. Consent of [husband,] spouse [wife] or partner**
>
> (1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the **[husband, wife]** spouse or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.
>
> (2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her **[husband]** spouse or partner has given his or her written consent to the agreement and has become a party to the agreement.
>
> (3) Where a **[husband]** spouse or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

5.11 Section 297 of the Children's Act deals with the effect of a surrogate motherhood agreement on the status of a child.[59] It provides in paragraph (e) that

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[58] The Department of Social Development agrees with this proposed change.

[59] **297. Effect of surrogate motherhood agreement on status of child**

(1) The effect of a valid surrogate motherhood agreement is that –

(a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;

(b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;

(c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;

subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place. Section 292 requires that surrogate motherhood agreements must be in writing and confirmed by the High Court.60 Section 293 requires that the husband, wife or partner of the commissioning parent must give written consent to the surrogacy agreement and become a party to the agreement.[61] In the *Commentary on the Children's Act,*[62] the authors propose that instead of referring to sections 292 and 293, section 297 should rather refer to section 298, which deals with the termination of a surrogate motherhood agreement;[63] and to section 300, which deals with a surrogate motherhood agreement being terminated by a termination of pregnancy:[64]

(d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;
(e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and
(f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

(2) Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.

60 **292. Surrogate motherhood agreement must be in writing and confirmed by High Court**

(1) No surrogate motherhood agreement is valid unless –
(a) the agreement is in writing and is signed by all the parties thereto;
(b) the agreement is entered into in the Republic;
(c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
(d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and
(e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.

(2) A court may, on good cause shown, dispose with the requirement set out in subsection (1) *(d)*.

61 **293. Consent of husband, wife or partner**

(1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.

(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.

(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

62 Davel & Skelton "Commentary on the Children's Act" Chapter 19 at 22–23.

63 **298. Termination of surrogate motherhood agreement**

(1) A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.

The prohibition against the termination of a valid surrogate motherhood agreement as described in para *(e)* is made subject to the provisions of ss 292 and 293. Since s 297 as a whole regulates the effect of a valid surrogate motherhood agreement, the validity of the agreement must be assumed for purposes of this section. It makes little sense, therefore, to make the prohibition against termination subject to the validity requirements contained in s 292 and the consent requirement in s 293 meeting. In an effort to ascertain the reasoning behind the provision, it was discovered that in a previous version of s 297, contained in clause 290 of a Children's Bill published for commentary in August 2003, the prohibition on termination was made subject to clause 291 of the said Bill, which allowed for the termination of the agreement by a partial surrogate mother, and clause 293, which confirmed the right of the surrogate mother to terminate her pregnancy in terms of the Choice on Termination of Pregnancy Act. In view of the relevancy of the latter two provisions it seems far more reasonable to assume that the legislator intended to make para *(e)* subject to the provisions of ss 298 and 300. This means that apart from a partial surrogate mother who may terminate the agreement in terms of s 298 and the right of any surrogate mother to terminate the agreement by terminating her pregnancy in terms of the Choice on Termination of Pregnancy Act, the surrogate motherhood agreement may not be terminated after the surrogate mother has been artificially fertilised. Save for the two exceptions mentioned, any attempt by either the surrogate mother or the commissioning parent(s) to rescind the agreement after fertilisation will have no legal effect. In the case of full surrogacy the agreement thus becomes irrevocable once the surrogate mother has been impregnated; in the case of partial surrogacy, the agreement will remain revocable until 60 days after the birth of the child. (Footnotes omitted)

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(2) The court must terminate the confirmation of the agreement in terms of section 295 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 301.

64 **300. Termination of pregnancy**

(1) A surrogate motherhood agreement is terminated by a termination of pregnancy that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996).

(2) For the purposes of the Choice on Termination of Pregnancy Act, 1996, the decision to terminate lies with the surrogate mother, but she must inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to terminate a pregnancy pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds.

5.12 The SALRC finds merit in the suggestion made in the *Commentary on the Children's Act* and requests the DSD to consider the suggestion. The SALRC therefore proposes that section 297 be amended to refer to section 298 and section 300: [65]

> **Amendment of section 297(1)(*e*) of Act 38 of 2005**
>
> Paragraph (*e*) of subsection (1) of section 297 is hereby amended by the substitution for paragraph (e) of the following paragraph:
>
> "(*e*) subject to sections **[292 and 293]** 298 and 300, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place;"

5.13 The phrase "rights of parenthood" is used in sections 297 and 299[66] of the Children's Act. It is proposed in the *Commentary on the Children's Act* that the phrase "rights of parenthood" in sections 297 and 299 should be replaced with the words "parental responsibilities and rights:"[67]

> Despite the importance of this provision and the need for clarity and precision in its wording, the use of the phrase 'rights of parenthood' is regrettable. Since the section was intended to bestow full parental responsibility on the commissioning parent or couple and at the same time to deprive the surrogate mother and her family of all such responsibility (i.e. guardianship, care and contact), the correct term would have been 'parental responsibilities and rights' as defined in s 18 of the Act. The use of this term would have obviated the necessity of referring to 'care' since it is included in the concept of 'parental responsibilities and rights'. Otherwise, it can be argued, the provision should have listed all the incidents of parental responsibility in lieu of the phrase 'rights of parenthood'. (Footnote omitted)

5.14 The SALRC supports the proposal made in the *Commentary on the Children's Act* that the phrase "rights of parenthood" in sections 297 and 299 be replaced with the

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65 The Department of Social Development agrees with this proposed change.

66 **299. Effect of termination of surrogate motherhood agreement**
The effect of the termination of a surrogate motherhood agreement in terms of section 298 is that –
(a) where the agreement is terminated after the child is born, any parental rights established in terms of section 297 are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father;
(b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother, her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth;
(c) the surrogate mother and her husband or partner, if any, or if none, the commissioning father, is obliged to accept the obligation of parenthood;
(d) subject to paragraphs *(a)* and *(b)*, the commissioning parents have no rights of parenthood and can only obtain such rights through adoption; and
(e) subject to paragraphs *(a)* and *(b)*, the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives.

67 Chapter 19 p 24

phrase “parental responsibilities and rights”. Any phrase that refers to a specific concept needs to be used consistently throughout an Act. The SALRC proposes the following amendments to the Act:

Amendment of section 297(1)(*c*) of Act 38 of 2005

Section 297 is hereby amended by the substitution for paragraph (*c*) of subsection (1) of the following paragraph:

“(*c*) The surrogate mother or her husband, partner or relatives has no **[rights of parenthood]** parental responsibilities and rights or care of the child;”

Amendment of section 299(1)(*d*) of Act 38 of 2005

Section 299 is hereby amended by the substitution for paragraph (*d*) of subsection (1) of the following paragraph:

“(*d*) subject to paragraphs (*a*) and (*b*), the commissioning parents have no **[rights of parenthood]** parental responsibilities and rights and can only obtain such rights through adoption;”.

(ii) Repealed Acts

5.15 The Black Administration Amendment Act 9 of 1929, mentioned in section 1(2), was repealed by Act 31 of 2008. The Nursing Act 50 of 1978, mentioned in the definitions section under “midwife”, was repealed by the Nursing Act 33 of 2005:[68] The SALRC therefore proposes the following amendments:

Amendment of section 1 of Act 38 of 2005

Section 1 of Act 38 of 2005 is hereby amended by the substitution for subsection (4) of the following subsection:

(4) Any proceedings arising out of the application of **[the Administration Amendment Act, 1929 (Act 9 of 1929)]**, the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court.

Amendment of section 1 of Act 38 of 2005

Section 1 of Act 38 of 2005 is hereby amended by the substitution for the definition of “midwife” of the following definition –

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[68] The Department of Social Development agrees with this proposed change.

'midwife' means a person **[registered as a midwife]** as defined under the Nursing Act, **[1978 (Act 50 of 1978)]** 2005 (Act 33 of 2005);

(iii) Other

5.16 It is proposed that the words "a" and "an" in section 140 hereunder need to be corrected. The word "a" should be replaced by the word "the", and "an" needs to be inserted before the word "enclosure". The [sic] should also be removed:[69]

140. Child safety at place of entertainment

…

(5)*(a)* A person authorised by a municipality in whose area **[a] [sic]** the premises or an enclosure is situated where entertainment described in subsection (1) is or is to be provided, or on reasonable suspicion is or is to be provided, may enter such enclosure in order to inspect whether subsections (2) or (3) are complied with.

5.17 It is further proposed that the word "of" before the word "or" in section 174(3)(c) needs to be removed. The proposed amendment reads as follows:

Amendment of section 174(3)(c) of Act 38 of 2005

Section 174 is hereby amended by the substitution of paragraph (*c*) of subsection (3) of the following paragraph:

"(*c*) a transfer to another child and youth care centre **[of]** or any other form of placement."

5.18 Section 286(1)*(a)* provides that with due regard to the safety of a child, and without delay, the Director-General: Foreign Affairs must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking. The name "Department of Foreign Affairs" was amended in 2009 to become the "Department of International Relations and Cooperation". Therefore, the reference in section 286(1)*(a)* to "Director-General: Foreign Affairs" needs to be substituted with the expression "Director-General: International Relations and Cooperation".[70]The SALRC therefore proposes the following amendment:

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69 The Department of Social Development agrees with this proposed change.

70 Ibid.

Amendment of section 286(1)(*a*) of Act 38 of 2005

Section 286 is hereby amended by the substitution for paragraph (*a*) of subsection (1) of the following paragraph:

"(*a*) the Director-General: **[Foreign Affairs]** Department of International Relations and Cooperation must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking;".

(b) Regulations: Obsolescence and redundancy[71]

5.19 Regulation 16(4) should be amended by inserting a comma after the word "decision":

16. Appeal against certain decisions

…

(4) The municipal council may, upon receipt of the applicant's or registration holder's written appeal and the official in the employ of the municipality's reasons for the decision**,** confirm, vary or set aside that decision.

5.20 The word "of" should be deleted in regulation 20(1)(*b)* after the word "under." The word "of" should be inserted into regulation 20(2) after the word "period", and a possessive apostrophe should be inserted after the word "days":

20. Closure of partial care facility

(1) When –

(*a*) the registration or conditional registration of a partial care facility has been cancelled as contemplated in section 84 of the Act; or

(*b*) a written notice of enforcement instructing a person or organisation operating an unregistered partial care facility to terminate its operation has been issued under **[of]** section 85 of the Act,

that person or organisation must be allowed a period of not more than 90 days in order to wind up the affairs of that facility and to allow the parents or care-givers of children in that facility to make alternative arrangements for partial care.

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71 General Regulations regarding Children No. R. 261 10 April 2010.

(2) When a person or organisation providing partial care intends to terminate its operation, such person or organisation must give the parents or care-givers of children admitted at such a facility a period of 90 days' written notice of such intention.

5.21 The word "be" must be inserted into regulation 24(1) before the word "provided". A comma must be added after "provided".

24. Application for registration of early childhood development programme

(1) Subject to the provisions of sub-regulation (2), an application for the registration or conditional registration of an early childhood development programme or the renewal of such programme must be lodged with the provincial head of social development of the province where the early childhood development programme is to be provided, and must be in a form identical to Form 16.

5.22 A comma should be inserted into regulation 26(4) after the word "decision":

26. Appeal against certain decisions

…

(4) The municipal council may, upon receipt of the applicant's or registration holder's written appeal and the official in the employ of the municipality's reasons for the decision, confirm, vary or set aside that decision.

5.23 The language in regulation 69(2)(*f)* dealing with foster care schemes is unclear. It is suggested that the words "to whom" be added before the words "these services have been rendered".

69. Functioning and management of cluster foster care scheme

(2) An organisation contemplated in sub-regulation (1) must submit to the provincial head of social development an annual report containing –

…

(*f*) details of child protection services rendered and in respect of which children in the cluster foster care to whom these services have been rendered;

5.24 In regulation 73*(c)* the word "regular" needs to be changed to "regularly"; and in sub-regulation *(j)* the word "the" after "to" needs to be deleted.

73. Rights of children in child and youth care centres

Every child who is cared for in a child and youth care centre has the right to –

…

(c) regularly communicate with and be visited by his or her parent or parents, guardian, next of kin, social worker, probation officer, case manager, religious counsellor, health care professional, psychologist, legal representative, child and youth care worker, unless a court order or his or her care or development programme indicates otherwise or unless he or she chooses otherwise…

…

(*j*) positive discipline appropriate to **[the]** his or her level of development;

5.25 In regulation 78(1), the word “or” needs to be inserted after the first instance of the word “registration”, and the preceding comma must be removed. Later in the sentence two commas must be inserted: the first after “Act” and the second after “such registration”. A comma must be added after “situated”.

78. Application for registration of child and youth care centre

(1) An application for the registration**[,]** or conditional registration of a child and youth care centre by an organisation referred to in section 197 of the Act, or renewal of such registration, must be lodged with the provincial head of social development of the province in which the facility is situated, in a form identical to **Form 48**.

5.26 Regulation 83(*d*) refers to regulation 82*(e).* There is no such regulation. The regulation might be referring to section 82*(e)* of the Act. The same error occurs in sub-regulation 83(4). Clarification is needed.

82. Required skills of staff of child and youth care centres

The persons contemplated in section 209(1) must have some of the training and skills referred to in regulation 75(1): Provided that where any such person is a professional whose profession requires registration, such person must be registered with the relevant professional body.

83. Interviewing process for manager and staff at child and youth care centre

(d) In the case of support staff referred to in regulation 82*(e)* a person or organisation (registration holder) referred to in section 209(1) of the Act, can decide how the interview panel is to be constituted.

5.27 In regulation 84(*c*) the word "than" needs to be added before the number "15". In sub-regulation (*d*)(*ii*) the word "the" needs to be added before the word "child". A comma needs to be added after the word "MEC" in sub-regulation (6)(*b*):

84. Appointment of management board

(1) If a child and youth care centre is established and operated by a department, a provincial department of social development, or municipality in terms of section 197 of the Act, the management board must be appointed according to the following procedure –

…

(*c*) Upon receipt of the nominations a short list of candidates of not more than 15 candidates must be submitted to the Minister, MEC or the Mayor;

(*d*) …

(ii) not more than three from the community in which the child and youth care centre is situated;

(6) A member of a management board must vacate office if –

…

(*b*) he or she resigns after giving at least 30 days' notice in writing to the chairperson, Minister, MEC, Mayor or registration holder referred to in 208(2)(*b*) of the Act, whichever is appropriate; or

4 Other relevant issues outside the scope of the investigation

(a) Access to court

5.28 The Constitutional Court in the case of *C and others vs Department of Health and Social Development, Gauteng*[72] held that the impugned provisions (sections 151

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[72] Case CCT 55/11 [2012] ZACC 1; 2012 (2) SA 208 (CC); 2012 (4) BCLR 329 (CC) available at http://www.constituionalcourt.co.za at [11] to [15].

and 152 of the Children's Act) are inconsistent with the Constitution to the extent that they fail to provide for a child, who had been removed in terms of those provisions, to be brought before the Children's Court for a review of that removal. The Constitutional Court therefore confirmed the declaration of constitutional invalidity made by the High Court. Justice Skweyiya sets out the background of the case as follows:

> Proceedings in the High Court
>
> Mr C and Ms M, together with the Centre for Child Law, promptly approached the High Court with a two-part application. In Part 1 they applied, on an urgent basis, for an order to restore their children to their care. On 24 August 2010 the High Court (*per* Preller J) ordered that Mr C's daughter be returned immediately to his care and that Ms M's children remain at the place of safety for five weeks, pending an investigation into whether they needed alternative care. By order of the Children's Court, they have since been returned to Ms M's care, under the supervision of a social worker.
>
> In Part 2 the applicants sought, among other things: *(a)* a declaratory order in relation to the conduct of the social workers; and *(b)* a declaration of constitutional invalidity of ss 151 and 152 of the Children's Act, to the extent that they fail to provide for judicial review of removal and placement decisions made by social workers or police. This relief was initially opposed by the State, but subsequently was the subject of agreement between the parties, resulting in a draft order handed up to the High Court on 20 January 2011. Nevertheless, written argument was filed and oral argument was heard on 13 May 2011.
>
> On 27 May 2011 the High Court (*per* Fabricius J) observed that, if a child is removed in terms of s 152 of the Children's Act, the matter will be heard for the first time by the Children's Court after the 90 days within which the social worker is required to investigate and compile a report. In contrast, its predecessor, s 12 of the repealed Child Care Act, required that a child removed without a warrant had to be brought before a court within 48 hours for a formal determination of whether that removal was justified, which would also allow a parent to appear and to challenge the removal. The High Court found that although s 152 does require the person conducting a removal to notify the parent, guardian, or caregiver of the child, as well as the clerk of the Children's Court, this does not amount to a notice to appear in court, as was required under the repealed Child Care Act.
>
> Consequently, the High Court declared ss 151 and 152 of the Children's Act unconstitutional to the extent that they fail to provide for a child, who has been removed in terms of those sections and placed in temporary safe care, to be brought before the Children's Court for a review of the removal and placement in temporary safe care.

5.29 Justice Yacoob explained in the case of *C and others vs Department of Health and Social Development, Gauteng*[73] that the North Gauteng High Court declared

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[73] At par 59. Moseneke DCJ, Khampepe J, Nkabinde J and Van der Westhuizen J concurred with Justice Yacoob's judgment.

sections 151 and 152 of the Children's Act unconstitutional only to the extent that the Act does not provide for a child removed from family care to be brought before the Children's Court for automatic review of the removal; and that the Constitutional Court was required to decide whether to confirm this declaration of invalidity. He held as follows:

> [73] In my view, the rights that are limited by the failure to provide for automatic review by a court in the presence of the child and parents are those set out in s 28 of the Constitution concerning children and s 34 of the Constitution concerning access to courts.
>
> [78] I evaluate the law against the requirements of s 34 of the Constitution:
>
> > Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
>
> [79] The child has the right to challenge the appropriateness of his or her removal. Parents, in the exercise of their duty to care for the child, have a duty to challenge the correctness of the removal. Whether a removal has been rightly ordered or effected is a justiciable issue. The fact that the parents have the right to challenge the correctness of the decision is, in my view, neither here nor there. It is in the interests of children for any law that effects the removal of children to provide, at the same time, for proceedings in which the correctness of the removal is tested by a Children's Court in the presence of the child and parents. Section 34 is limited in the s 151 court order because neither the parents nor the children would have had the opportunity to argue that the removal order should not be made, and they would probably not have an opportunity to do so for 90 days. When designated social workers or police officials remove children, s 34 is again limited, perhaps to a somewhat greater extent. This is so because the removal has occurred without any court order, akin to a situation where there is statutory authorisation for people to take the law into their own hands without a court order.
>
> [83] The limitation cannot be justified. Sections 151 and 152 of the Act are inconsistent with the Constitution because they infringe the rights of children and parents in that they fail to provide for automatic review by a court of any removal ordered or affected in terms of these provisions in the presence of the children and parents concerned.

5.30 Justice Yacoob made the following order in C *and others vs Department of Health and Social Development, Gauteng*:

> (2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:
>
> (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court.'

5. An additional paragraph to be numbered *(d)* is read in to s 152(2) of the Act as follows:

(d) ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court.'

6. Section 152(3)*(b)* is severed and replaced by a section reading:

(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and

(iii) the investigation contemplated in section 155(2) is conducted.

5.31 Therefore, to give effect to the order of the Constitutional Court in *C and others vs Department of Health and Social Development, Gauteng*, the SALRC proposes that a section 151(2A) be inserted into the Children's Act 38 of 2005, to provide as follows:

(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court.

5.32 Furthermore, the SALRC proposes that a section 152(2)(d), according to the court order, be inserted into the Children's Act providing as follows:

(d) ensure that:

(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and

(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court.

5.33 Finally, to give effect to the order made in *C and others vs Department of Health and Social Development, Gauteng*, the SALRC proposes that section 152(3)(b) needs to be replaced with the following section:

> (b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that –
>
> (i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;
>
> (ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and
>
> (iii) the investigation contemplated in section 155(2) is conducted.

(b) Foster care[74]

5.34 Section 16 of the repealed Child Care Act 74 of 1983 provided that any order made by a Children's Court under section 15 of that Act shall lapse two years after the date on which the order was made, or after the expiration of a shorter period if the Children's Court determined such a period at the time of making the order. The Act empowered the Minister to extend the validity of an order made by a Children's Court for a further period not exceeding two years at a time, provided that an order could not be so extended to a date after the child's eighteenth birthday. The Child Care Act further provided that the Minister may, if he deems it necessary, order that any former or current pupil of a school of industries whose period of retention has expired or is about to expire, return to or remain in that school, for any further period which the Minister may fix; and the Minister may from time to time extend that period, provided that no such order or extension shall extend the period of retention of any pupil beyond the end of the year in which that pupil attains the age of 21 years.

5.35 Section 186 of the Children's Act now deals with the duration of foster care placement.[75] This section provides that, despite the provisions of section 159, a

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[74] According to the Annual Report of the DSD on pages 75 and 87-88, a Ministerial Committee has, from October 2014, been convened to address the problems experienced with foster care. The outcome of that process will be a legislative review.

[75] **186. Duration of foster care placement**

(1) A children's court may, despite the provisions of section 159(1)*(a)* regarding the duration of a court order, after a child has been in foster care with a person other than a family member for more than two years and after having considered the need for creating stability in the child's life, order that –

(a) no further social worker supervision is required for that placement;

Children's Court may place a child in foster care with a family member for more than two years, and may extend such an order for more than two years at a time, or may order that the foster care placement subsists until the child turns 18 years. Section 159 (1)(*a)* provides that an order made by a Children's Court in terms of section 156 lapses two years after the date on which the order was made (or after such shorter period for which the order was made), and may be extended by a Children's Court for a period of not more than two years at a time.[76]

5.36 The DSD has indicated to the SALRC that the courts have logistical difficulties with the renewal of foster care orders because the orders have to be reconsidered every two years. The DSD proposed that the administrative procedure in terms of the repealed Child Care Act 74 of 1983 should be re-introduced.

5.37 In the matter between the Centre for Child Law (Applicant) and the Minister of Social Development, the South African Social Security Agency and the MECs for Social Development in Limpopo, Mpumalanga, Gauteng, Northwest, Free State,

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(b) no further social worker reports are required in respect of that placement; and
(c) the foster care placement subsists until the child turns 18 years, unless otherwise directed.
(d) ….

(2) A children's court may, despite the provisions of section 159(1)*(a)* regarding the duration of a court order and after having considered the need for creating stability in the child's life, place a child in foster care with a family member for more than two years, extend such an order for more than two years at a time or order that the foster care placement subsists until the child turns 18 years, if –
(a) the child has been abandoned by the biological parents; or
(b) the child's biological parents are deceased; or
(c) there is for any other reason no purpose in attempting reunification between the child and the child's biological parents; and
(d) it is in the best interest of the child.

(3) Despite the provisions of subsections (1) and (2), a social service professional must visit a child in foster care at least once every two years to monitor and evaluate the placement.

[76] **159. Duration and extension of orders**

(1) An order made by a children's court in terms of section 156 –
(a) lapses on expiry of –
(i) two years from the date the order was made; or
(ii) such shorter period for which the order was made; and
(b) may be extended by a children's court for a period of not more than two years at a time.

(2) When deciding on an extension of the period of a court order in terms of subsection (1), the court must take cognisance of the views of –
(a) the child;
(b) the parent and any other person who has parental responsibilities and rights in respect of the child;
(c) where appropriate, the management of the centre where the child is placed; and
(d) any alternative care-giver of that child.

(3) No court order referred to in subsection (1) extends beyond the date on which the child in respect of whom it was made reaches the age of 18 years.

Northern Cape, Kwa Zulu Natal, Eastern Cape and Western Cape (Respondents), the North Gauteng High Court made the following order on 10 May 2011:[77]

> 1. Notwithstanding the provisions of section 314 of the Children's Act 38 of 2005, any foster care order that was granted prior to 1 April 2010 that has not yet expired, shall, when it becomes due to expire, be dealt with under an administrative process following the procedure previously provided for in terms of the Child Care Act 7 4 of 1983 and the regulations thereto.
> 2. The procedure set out in paragraph 1 will continue to be followed until 31 December 2014 or until such time as the Children's Act 38 of 2005 is amended to provide for a more comprehensive legal solution, whichever happens first.
> 3. All foster care orders that have expired since 1 April 2010 are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 May 2011).
> 4. All foster care orders that expired within a period of not more that 2 (two) years prior to 1 April 2011, are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (10 May 2011).
> 5. The MECs for Social Development shall direct the relevant social workers to identify foster care orders referred to in paragraphs 3 and 4 that should be extended, and must extend them administratively following the procedure that was previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.
> 6. The administrative extensions referred to in paragraphs 3 and 4 shall be communicated to the South African Social Security Agency as soon as they are affected.

5.38 This order was followed by the order, below, by the North Gauteng High Court on 22 June 2011, in the matter between the *Centre for Child Law (Applicant) and the Minister of Social Development, the South African Social Security Agency and the MECs for Social Development in Limpopo, Mpumalanga, Gauteng, Northwest, Free State, Northern Cape, Kwa Zulu Natal, Eastern Cape and Western Cape (Respondents)*:[78]

> 1. Notwithstanding the provisions of section 314 of the Children's Act 38 of 2005, any foster care order that was granted prior to 1 April 2010 that has not yet expired, shall, when it becomes due to expire, be dealt with under an administrative process following the procedure previously provided for in terms of the Child Care Act 74 of 1983 and the regulations thereto.
> 2. The procedure set out in paragraph 1 will continue to be followed until 31 December 2014 or until such time as the Children's Act 38

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[77] Case number 21726/11 available at *http://www.justice.gov.za/legislation/notices/2011/20110520_gg34303-n441-childact.pdf.*

[78] Ibid.

of 2005 is amended to provide for a more comprehensive legal solution, whichever happens first.

3. All foster care orders that have expired since 1 April 2010 are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (22 June 2011) excluding all foster care orders that have expired due to the child turning 18 years of age.
4. All foster care orders that expired within a period of not more that 2 (two) years prior to 1 April 2011, are deemed not to have expired and are hereby extended for a period of 2 (two) years from the date of the court order (22 June 2011) excluding all foster care orders that have expired due to the child turning 18 years of age.
5. During the two year period allowed in paragraphs 3 and 4 the MECs for Social Development shall direct the relevant social workers to identify and investigate foster care orders referred to in paragraphs 3 and 4. Subsequent to the investigation, in the case of each foster care order identified, the social worker must decide whether the foster care order must remain extended for the full two year period ordered in paragraph 3 and 4. If a foster care order should not remain extended for the full two year period ordered in paragraph 3 and 4, or should be extended for longer than 2 years, the social worker may approach the Children's Court for an appropriate order in terms of the Children's Act.
6. Nothing in this order shall prevent the Children's Court from hearing a matter and making an appropriate order in terms of the Children's Act when approached by a social worker with an application concerning a foster care order falling within the ambit of this order, which may include terminating or varying the foster care order in terms of section 159 or extending the foster care order in terms of section 186 of the Children's Act.
7. The administrative extensions referred to in paragraphs 3 and 4 shall be communicated to the South African Social Security Agency as soon as they are affected.

(c) Jurisdiction of courts in terms of guardianship

5.39 This issue is being interrogated by the SALRC in its issue paper: Project 100D: Aspects of Family Law and The Law of Persons: Care of and Contact with Minor Children. In *Ex parte Sibisi,*[79] confusion arose about which forum was the correct forum to deal with issues related to the guardianship of children. The judge explains the confusion as follows:

> [7] It seems that the source of the confusion lies in the provisions of s29 of the Act, which reads as follows:
>
> **29 Court Proceedings**
>
> (1) An application in terms of section 22(4)*(b)*, 23, 24, 26(1)*(b)* or 28 may be brought before the High Court, a divorce

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[79] 2011 (1) SA 192 (KZP) available at http://www.saflii.org/za/cases/ZAKZPHC/2010/56.html.

court in a divorce matter or a children's court, as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident.

…

[8] In order to properly understand the provisions of this section it is necessary to consider its terms, in the context of the sections to which it makes reference.

[10] When this distinction is borne in mind, it is clear that s 29 does not confer jurisdiction upon the children's court to hear an application for an order granting guardianship to an applicant, for the following reasons:

[10.1] The provision that an application in terms of the enumerated sections 'may be brought before the High Court, a divorce court in a divorce matter or a children's court' is subject to the words 'as the case may be'. In other words, the appropriate court for the relief envisaged in each of the enumerated sections is the court named in each section. That ss 22(4)*(b)*, 23(1) and 28 share courts, before which the relief envisaged by these sections may be sought, does not justify the conclusion that an order granting guardianship to an applicant may be sought before a children's court, in the face of the express wording of s 24(1) to the contrary.

[10.2] That s 29 is concerned solely with issues pertaining to the territorial jurisdiction of the named courts is made clear by the words 'within whose area of jurisdiction the child concerned is ordinarily resident'. In other words, in order for the courts referred to in the enumerated sections to have jurisdiction, 'the child concerned' must be ordinarily resident within a particular court's 'area of jurisdiction'.

[11] This conclusion is placed beyond doubt by a number of other provisions contained in the Act. It is only necessary for present purposes to refer to s 45(3), which provides as follows:

45. Matters children's court may adjudicate

. . .

(3) Pending the establishment of family courts by an Act of Parliament, the High Courts and Divorce Courts have exclusive jurisdiction over the following matters contemplated in this Act:

(a) The guardianship of a child.

[12] The so-called 'family courts' have not yet been established and consequently it is clear that insofar as children's courts are concerned, the High Court has exclusive jurisdiction in matters concerning the guardianship of a child.

[13] Although not strictly necessary for the purposes of this judgment, I would venture to suggest that on a correct interpretation of the Act, and despite the provisions of s 45(3), the jurisdiction of divorce courts to determine issues pertaining to the guardianship of a child is unclear, in the light of:

[13.1] The provisions of s 22(7) which read as follows:

22. Parental responsibilities and rights agreements

. . .

(7) Only the High Court may confirm, amend, or terminate a parental responsibilities and rights agreement that relates to the guardianship of a child.

[13.2] The provisions of s 24, which provide for an application to grant guardianship to an applicant only being made to the High Court.

[13.3] Section 45(4) which provides as follows:

45. Matters children's court may adjudicate

. . .

(4) Nothing in this Act shall be construed as limiting the inherent jurisdiction of the High Court as upper guardian of all children.

[14] Consequently, intervention by the legislature may be necessary in this regard to clarify the jurisdiction, not only of children's courts, but also divorce courts, to determine the guardianship of children.

5.40 The SALRC suggests that a possible solution might be the review of this issue in the Children's Act.

(d) Section 304 inspections

5.41 Section 304 makes provision for an inspection to take place of any institution mentioned in the Act. People can be interviewed, examined, and asked to provide evidence, all of this without a warrant.

304. Inspection of child and youth care centre, partial care facility, shelter and drop-in centre

(1) A person authorised by the Director-General, a provincial head of social development or a municipality may enter any child and youth care centre, partial care facility, shelter or drop-in centre or any place which on reasonable suspicion is being used as an unregistered child and youth care centre, partial care facility, shelter or drop-in centre, in order –

(a) to inspect that centre, facility, shelter or place and its management; or

(b) to observe or interview any child, or cause a child to be examined or assessed by a medical officer, social worker, psychologist or psychiatrist.

(2)(*a)* An identity card prescribed by regulation must be issued to each person authorised in terms of subsection (1).

(b) When inspecting such a centre, facility, shelter or place, a person authorised in terms of subsection (1) must, on demand, produce such an identity card.

(3) A person authorised in terms of subsection (1) may for the purposes of that subsection-

(a) determine whether the centre, facility, shelter or place complies with-
  (i) the prescribed national norms and standards referred to in section 79,194 or 216 applicable to it;
  (ii) other national norms and standards as may be prescribed by regulation;
  (iii) any structural, safety, health and other requirements as may be required by any law; and
  (iv) the provisions of this Act;

(b) require a person to disclose information, either orally or in writing, and either alone or in the presence of a witness, about any act or omission which, on reasonable suspicion, may constitute an offence in terms of this Act, or a breach of a provision of this Act or of a condition of registration, and require that any disclosure be made under oath or affirmation;

(c) inspect, or question a person about any record or document that may be relevant for the purpose of paragraph *(b)*;

(d) copy any record or document referred to in paragraph *(c)*, or remove such record or document to make copies or extracts;

(e) require a person to produce or deliver to a place specified by the authorised person, any record or document referred to in paragraph *(c)* for inspection;

(f) inspect, question a person about and if necessary remove, any article or substance which, on reasonable suspicion, may have been used in the commission of an offence in terms of this Act or in breaching a provision of this Act or of a condition of registration;

(g) record information by any method, including by taking photographs or making videos; or

(*h)* exercise any other power or carry out any other duty that may be prescribed.

(4) A person authorised in terms of subsection (1) must-

(a) provide a receipt for any record, document, article or substance removed in terms of subsection (3) *(d)* or *(f)*; and

(b) return anything removed within a reasonable period unless seized for the purpose of evidence.

(5) A person authorised in terms of subsection (1) must submit a report to the Director-General, the provincial head of social development or a municipality, as may be appropriate, on any inspection carried out by that person in terms of this section.

5.42 The only issue that arises in regard to answers provided or disclosures made pursuant to section 304(1)(*b*), 304(3)(b), 304(3)(*c*) and 304(3)(*f*), is the right against self-incrimination. As noted above in Chapter 3, the cases of *Shaik v Minister of Justice and Constitutional Development and Others* and *Ferreira v Levin* require a provision that provides for direct-use immunity that will protect the examinees from having their answers or disclosures used against them in criminal proceedings.

5.43 The SALRC therefore proposes that the following provision be inserted after section 304(3):[80]

> (3A)*(a)* The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person or disclosure of information for purposes of an inspection referred to in subsection (3): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.
>
> (*b*) No evidence regarding any questions, disclosure of information and answers for purposes of an inspection referred to in subsection (3) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(e) Influence of the Companies Act 71 of 2008 and the Non-Profit Organisation Act

5.44 Section 183 of the Children's Act provides as follows:

> **183. Cluster foster care**
>
> (1) A cluster foster care scheme must be managed in the following manner:
>
> (*a*) The organisation operating or managing the cluster foster care scheme must be a non-profit organisation registered in terms of the Non-Profit Organisations Act, 1997 (Act No. 71 of 1997);

5.45 Section 10 of the Companies Act 71 of 2008, as quoted in Chapter 4 par 4.39, relates to modified application with respect to non-profit organisations and as such should be considered here.

5.46 The Companies Act of 2008 has brought about changes to the Non-profit Organisations Act which will have an impact on the above-mentioned section of the Children's Act. The SALRC therefore suggests that the relevant changes be studied and incorporated into the Act.

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[80] National Prosecuting Authority Act 32 of 1998 section 28(8)(a).

5 Marriage: forced consent and systemic inequality in terms of marriageable age

5.47 Section 12 of the Children's Act provides that a child who is younger than the minimum age for marriage may not be given out in marriage or engagement; and above that age, the child may only be given out in marriage or engagement with his or her consent. The discussion hereunder relates to the different ages of marriage and investigations done into the feasibility of such age.

5.48 The Marriage Act of 1961, the Recognition of Customary Marriages Act of 1998, and the Civil Unions Act of 2006[81] all make provision for a marriageable age. In the Customary Marriages Act and the Civil Unions Act, the marriageable age is 18 years for both boys and girls. By contrast, in terms of the common law the marriageable age is still the age of adolescence i.e. 12 for girls and 14 for boys. The Marriage Act however requires that the Minister of Home Affairs gives consent to marriages of girls under 15 and boys under 18 in addition to the consent of parents.

5.49 The SALRC Project 25 Discussion Paper 133 on laws administered by the Department of Home Affairs concluded that this amounts to unfair discrimination on the ground of sex as there is no rational purpose for the differentiation between the ages of boys and girls. In this discussion paper the SALRC recommends that this section in the Marriage Act be amended. The issue of marriageable age also touches on the matter of forced marriages and the customary practice of *Ukuthwala*. This is dealt with in the SALRC Project 138 on the practice of *Ukuthwala.* This will therefore not be dealt with further in this paper. The past and current projects dealing with these matters (listed by project number) are as follows:

1. Project 25: Discussion Paper 130. Statutory Law Revision: Legislation administered by the Department of Justice and Constitutional Development (Family law and marriage), October 2011.[82]
2. Project 59: Report on Islamic Marriages and Related Matters, July 2003.[83]
3. Project 109: Report on the Review of the Marriage Act, May 2001.[84]

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81 Section 26 of the Marriage Act 25 of 1961; section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 and section 1 of the Civil Unions Act 17 of 2006.

82 SALC Harmonisation of the common law and indigenous law - Report on customary marriages Project 90 Report (August 1998) p 48 par 11.

83 Op cit 9, 46, 69 and par 1.8, 2.26 to 2.8 and 3.86 to 3.118.

84 Op cit 103, par 2.17 to 2.20.

4. Project 110: Report on the Review of the Child Care Act, December 2002.[85]
5. Project 25: Discussion Paper 133: Statutory Law Revision: Legislation Administered by the Department of Home Affairs
6. Project 138: Discussion Paper 132. The practice of *Ukuthwala*.[86]

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85 Op cit 115 par 9.8, p283, and p285 par 20.2.
86 SALRC The Practice of *Ukuthwala* (Project 138) Discussion paper 132 (October 2015).

CHAPTER 6: SOCIAL DEVELOPMENT AND ORGANISATIONS: THE NON-PROFIT ORGANISATIONS ACT 71 OF 1997; AND THE FUND-RAISING ACT 107 OF 1978

A Non-Profit Organisations Act 71 of 1997

6.1 This chapter deals with the Non-Profit Organisation Act and the Fund-Raising Act. Both Acts are considered here to determine whether they contain obsolescence or redundancy, and to determine the influence of the Companies Act 71 of 2008 on these Acts.

1 Current legislation

6.2 The principal Act is the Non-Profit Organisations Act 71 of 1997. This Act was amended by the Non-Profit Organisations Amendment Act 17 of 2000. The regulations which apply to the Act were issued in the *Government Gazette* No. R 1104 of 31 August 1998.[87]

2 The scope of the Act

6.3 The Non-Profit Organisations Act 71 of 1997, in its long title, aims to provide for an environment in which non-profit organisations can flourish; to establish an administrative and regulatory framework within which non-profit organisations can conduct their affairs; to repeal certain provisions of the Fund-Raising Act 107 of 1978; and to provide for matters connected therewith.

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[87] It is understood, according to the Annual Report of the DSD 2015 at page 108, as well as the Strategic Plan 2015 – 2020 at pages 18, and 40, that there are processes underway to amend the Non-profit Organisations Act.

3 Inequality, obsolescence and redundancy

(a) Obsoleteness and redundancy in definitions and the Act

6.4 Chapter I of the Act deals with the interpretation and the objects of the Act. In section 1 of this chapter, the definition section provides that "Minister" means "the Minister for Welfare and Population Development", and that "National Department" means "the national department responsible for welfare". These definitions need to be replaced with, respectively, "the Minister for Social Development" and "the Department of Social Development".

6.5 Chapters I and III of the Fund-Raising Act were repealed by section 33 of the Non-Profit Organisations Act 71 of 1997, to the extent that they apply to fund-raising organisations, branches of such organisations, and any other organisations contemplated in chapter 1 of the Fund-Raising Act.

6.6 Chapter I of the Fund-Raising Act dealt with the collection of contributions by fund-raising organisations, other organisations, and persons; whereas chapter 3 dealt with general and supplementary provisions. These provisions are discussed below under the Fund-Raising Act.

6.7 Section 31 of the Non-Profit Organisations Act refers to section 15 of the Exchequer Act 66 of 1975.[88] Section 15 of the latter Act was repealed by section 94 of the Public Finance Management Act 1 of 1999, which came into operation on 1 April 2000. The aim of the Exchequer Act was to provide for the regulation of the collection,

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[88] **31. Delegation of functions**

(1) Subject to section 15 of the Exchequer Act, 1975 (Act 66 of 1975), the Minister may in writing delegate any of his or her functions in terms of this Act, except those contemplated in sections 8 and 26 to –

(i) any person in the employ of the national department;
(ii) anybody established by or in terms of this Act; or
(iii) any other organ of State responsible for welfare matters, if the head of that organ of State accepts the delegation.

(2) A person or body carrying out a function delegated in terms of subsection (1) must do so subject to the direction of the Minister.

(3) The Minister may-

(a) withdraw a delegation made in terms of subsection (1); and
(b) withdraw or amend any decision made by a person or body in terms of a delegation contemplated in subsection (1).

(4) Until it is withdrawn or amended, any decision made by a person or body in terms of a delegated power contemplated in subsection (1) must be regarded as having been made by the Minister.

(5) Any right or privilege acquired, or any obligation or liability incurred, as a result of a decision in terms of a delegation contemplated in subsection (1) is not affected by any subsequent withdrawal or amendment of that decision.

receipt, control and issue of State moneys and the receipt, custody and control of other State property; the raising and repayment of loans by the State; the granting of certain loans from the State Revenue Fund, and the terms and conditions in regard to the repayment of such loans; the duties and powers of the Treasury; the granting of certain guarantees to the South African Reserve Bank; and matters connected therewith. Only sections 28, 29 and 30 of the Exchequer Act 66 of 1975 are still in force. The Public Finance Management Act 1 of 1999 deals in section 10 with delegations by National Treasury.[89] The question arises whether the reference to section 15 of the State Revenue Fund should rather be to section 10 of the Public Finance Management Act 1 of 1999: The SALRC provisionally recommends the following amendment:

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[89] **10. Delegations by National Treasury**

(1) The Minister may –

(*a*) in writing delegate any of the powers entrusted to the National Treasury in terms of this Act, to the head of a department forming part of the National Treasury, or instruct that head of department to perform any of the duties assigned to the National Treasury in terms of this Act; and

(*b*) in relation to a provincial department or provincial public entity, in writing delegate any of the powers entrusted to the National Treasury in terms of this Act to a provincial treasury, or request that treasury to perform any of the duties assigned to the National Treasury in terms of this Act, as the Minister and the relevant MEC for finance may agree.

(2) A delegation, instruction or request in terms of subsection (1) to the head of a department forming part of the National Treasury, or to a provincial treasury –

(a) is subject to any limitations or conditions that the Minister may impose;

(b) may authorise that head, in the case of subsection (1) (a)-

(i) to sub-delegate, in writing, the delegated power to another National Treasury official, or to the holder of a specific post in the National Treasury, or to the accounting officer of a constitutional institution or a department, or to the accounting authority for a public entity; or

(ii) to instruct another National Treasury official, or the holder of a specific post in the National Treasury, or the accounting officer for a constitutional institution or a department, or the accounting authority for a public entity, to perform the assigned duty;

(c) may authorise a provincial treasury, in the case of sub section (1)(b) –

(i) to sub-delegate, in writing, the delegated power to an official in that provincial treasury, or to the holder of a specific post in that provincial treasury, or to the accounting officer for a provincial department, or to the accounting authority for a provincial public entity; or

(ii) to instruct an official in that provincial treasury, or the holder of a specific post in that provincial treasury, or the accounting officer for a provincial department, or the accounting authority for a provincial public entity, to perform the assigned duty; and

(d) does not divest the Minister of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.

(3) The Minister may confirm, vary or revoke any decision taken by the head of a department forming part of the National Treasury, or by a provincial treasury, as a result of a delegation, instruction or request in terms of subsection (1) (a) or (b), or by a treasury official or accounting officer or accounting authority as a result of an authorisation in terms of subsection (2) (b) or (c), subject to any rights that may have become vested as a consequence of the decision.

Amendment of section 31(1) and (3)(*b*) of Act 71 of 1997

(a) Section 31 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Subject to section **[15]**10 of the **[Exchequer Act, 1975 (Act 66 of 1975)]** Public Finance Management Act 1 of 1999, the Minister may in writing delegate any of his or her functions in terms of this Act**[.]**, except those contemplated in sections 8 and 26 to – "

(b) Section 31 is hereby amended by the substitution for paragraph (*b*) of subsection (3) of the following paragraph:

"(*b*) withdraw or amend **[arty]** any decision made by a person or body in terms of a delegation contemplated in subsection (1);".

6.8 The Non-Profit Organisations Act defines "constitution" as follows:

"**'constitution'** includes a trust deed and memorandum and articles of association."

6.9 The Companies Act 61 of 1973 defined "articles" and "memorandum" as follows:

> **'articles'**, in relation to a company, means the articles of association of that company for the time being in force, and includes any provision, in so far as it applies in respect of that company, set out in Table A or Table B in Schedule 1; and **'memorandum'**, in relation to a company, means the memorandum of association of that company for the time being in force; and in relation to an external company, means the charter, statutes, memorandum of association and articles, or other instrument constituting or defining the constitution of the company.

6.10 The Companies Act 71 of 2008 however defines "memorandum of incorporation" as follows:

> **'Memorandum'**, or **'Memorandum of Incorporation'**, means the document, as amended from time to time, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15, and by which –
> *(a)* the company was incorporated under this Act, as contemplated in section 13;
> *(b)* a pre-existing company was structured and governed before the later of the-
> *(i)* effective date; or
> *(ii)* date it was converted to a company in terms of Schedule 2; or
> *(c)* a domesticated company is structured and governed;

6.11 According to De Jager,[90] the memorandum of incorporation (MOI) in the 2008 Act replaces the previously defined memorandum of association and articles of association. These documents are recognised as the MOI under the new Act. This is confirmed by Descroizilles.[91] The SALRC therefore proposes that the definitions for "memorandum" and "articles of associations" should be deleted and replaced with a definition for "Memorandum" or "Memorandum of Incorporation" as defined in the Companies Act 71 of 2008. The SALRC therefore proposes the following amendment:

> **Amendment of section 1 of Act 71 of 1997**
>
> Section 1 of Act 71 of 1997 is hereby amended by-
>
> (a) The substitution for the definition of "constitution" of the following definition:
>
> "constitution" includes a trust deed and **[memorandum and articles of association]** Memorandum of Incorporation;"

6.12 Section 11 of the Non-Profit Organisations Act deals with the benefits of registration. It provides that the Minister may prescribe benefits or allowances applicable to registered non-profit organisations, after consultation with the committees of the two Houses of Parliament responsible for welfare, and with the concurrence of every Minister whose department is affected by a particular benefit or allowance. The SALRC proposes that the phrase "committees of the two Houses of Parliament responsible for welfare and" be replaced with the phrase "Parliamentary Committees for Social Development of the National Assembly and the National Council of Provinces." The SALRC therefore suggests:

> **Amendment of section 11 of Act 71 of 1997**
>
> Section 11 is hereby amended by the substitution for section 11 of the following section:
>
> "The Minister may prescribe benefits or allowances applicable to registered non-profit organisations, after consultation with the **[Committees of the Houses of Parliament]** Parliamentary Committees for Social Development responsible for **[welfare]** social development and with the concurrence of every Minister whose department is affected by a particular benefit or allowance."

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90 De Jager N, *A Practical Guide to the Implications of the New Companies Act (10) Transitional Provisions* Dec 2010 *De Rebus* 47.

91 Descroizilles, P, *A Practical Guide to the Provisions of the New Companies Act- the memorandum of Incorporation, Shareholders' Agreements and Special Conditions- New Companies Act De Rebus* 2010 Vol 52 Issue 496 p 44.

4 Spelling and punctuation

6.13 The typographical errors noted under this heading have been corrected in the Jutastat database. The errors are thus only noticeable when a reader consults the original *Government Gazette* 18487 of 3 December 1997. The SALRC proposes that these typographical errors be corrected for the purpose of legal certainty.

6.14 The Act defines the term "this Act" as follows: "'this Act' includes "(he regulations made under this Act". The typographical error "(he" needs to be corrected and replaced with the word "the".

6.15 In section 9(5), Panel of Arbitrators and Arbitration Tribunal, "maybe" needs to be replaced with "may be".

6.16 Section 12 deals with the requirements for registration. Section 12(2)*(n)* sets out a procedure by which the organisation "maybe" wound up or dissolved. The word "maybe" needs to be replaced with the words "may be".

6.17 Section 12(2)*(o)* provides that when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met must be transferred to another non-profit organisation having similar objectives. The full stop between the words "that" and "when" needs to be removed.

6.18 Section 12(3)(*d*) provides for appeals against the loss of benefits of membership or against termination of membership, and specifies the procedure for those appeals, and determines the body to which those appeals "maybe" made. The word "maybe" needs to be replaced with the words "may be".

6.19 Section 12(3)(*l*) provides as follows: "determine the purposes for which the funds of the organisation maybe used". The word "maybe" needs to be replaced with the words "may be".

6.20 Section 16 deals with the effect of registration. Section 16(2) provides as follows: "for the purpose of this Act. service of any document directed to a registered non-profit organisation at the physical address most recently provided to the director must be regarded as service of that document on that organisation". The full-stop between "Act" and "service" needs to be deleted and replaced with a comma.

6.21 Section 17 deals with accounting records and reports. Section 17(1)*(a)* provides as follows: "keep accounting records of its income, expenditure. assets and liabilities.

The full-stop between “expenditure” and “assets” needs to be deleted and replaced with a comma.

6.22 Section 17(1)*(b)* provides as follows: “within six months after the end of its financial year, draw up financial statements. which must include at least - …” The full-stop between “statements” and “which” needs to be deleted and replaced by a comma.

6.23 Section 18(2)*(c)* provides as follows: “its obligations in terms of this section. section 17 and arty other provision of this Act”. The full-stop between “section” and “section 17” needs to be deleted and replaced with a comma, and the word “arty” needs to be corrected to “any”.

6.24 Section 20 deals with non-compliance with the Constitution and obligations by a registered Non-Profit Organisation. Section 20(1)*(a)(ii)* provides as follows: “a condition and term of arty benefit or allowance conferred on it in terms of section 11.” The word “arty” needs to be corrected to “any”.

6.25 Section 20(1)*(a)(iii)* provides as follows: “its obligations in terms of sections 17. 18 and 19 and any other provision of this Act”. The full-stop between the numbers “17” and “18” needs to be changed to a comma.

6.26 Section 23 deals with voluntary deregistration and winding up or dissolution. The word “reregister” needs to be corrected to “deregister” whenever it appears in this section, as indicated:

> (1) A registered nonprofit organisation may **[reregister]** <u>deregister</u> voluntarily by sending the director –
>
> *(a)* written notice –
>
> *(i)* stating its intention to **[reregister]** <u>deregister</u> voluntarily and the reasons therefor; and
>
> *(ii)* specifying a date, at least two months after the date of the notice, on which the deregistration is to take effect; and simultaneously
>
> *(b)* a copy of the reports referred to in section 18 (1) for the period from its previous financial year up to the date of the written notice contemplated in this subsection.
>
> (2) If a registered nonprofit organisation resolves to wind itself up or dissolve or is being wound up in terms of any law, the organisation must, within one month after completion of the winding up or dissolution process or the relevant order of court, send to the director –

(a) a written notice –

(i) stating this fact;

(ii) containing certified copies of all relevant documents confirming the winding up or dissolution; and simultaneously

(b) a copy of the reports referred to in section 18 (1) for the period from its previous financial year up to the date of the written notice contemplated in this subsection.

(3) Upon receiving a notice of voluntary deregistration or winding up or dissolution from a registered nonprofit organisation, the director must on the date specified in the notice –

(a) cancel the organisation's certificate of registration, and **[reregister]** deregister it by amending the register; and

(b) notify the organisation in writing of the deregistration and confirm the date on which the amendment was made to the register.

6.27 Section 29 deals with offences. Section 29(1) provides as follows: "It is an offence to cause a non-profit organisation, when it is being wound up or dissolved, to transfer its remaining assets otherwise than in the manner contemplated in section 12(2)(0)." The reference to "section 12(2)(0)" needs to be replaced with a reference to "section 12(2)*(o)".*

6.28 Section 31 deals with delegation of functions. Section 31(1) provides as follows: "Subject to section 15 of the Exchequer Act, 1975 (Act 66 of 1975), the Minister may in writing delegate any of his or her functions in terms of this Act. except those contemplated in sections 8 and 26 to –". In subsection 1, the full-stop between the word "Act" and the word "except" needs to be changed to a comma; and a second comma should be added after the phrase "in sections 8 and 26".[92] In addition, section 31(1)(iii) provides as follows: "any other organ of State responsible for welfare matters. if the head of that organ of State accepts the delegation". The full-stop between "matters" and "if" needs to be changed to a comma.

6.29 In section 31(1)(iii) the word "welfare" needs to be replaced with the term "social development".

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[92] We noted above that the reference to the Exchequer Act, 1975 (Act 66 of 1975) in section 31 is out-dated and that the section needs to be updated with a reference to the Public Finance Management Act, 1999 (Act 1 of 1999).

6.30 Section 31(3)*(b)* provides as follows: “withdraw or amend “arty” decision made by a person or body in terms of a delegation contemplated in subsection (1).” The word “arty” must be corrected to “any”.

6.31 Section 33 deals with the repeal of laws. It provides as follows: “Chapters I and HI of the Fund-Raising Act, 1978 (Act 107 of 1978), are hereby repealed to the extent that they apply to fund-raising organisations, branches of such organisations and any other organisation contemplated in Chapter I of that Act.” The term “HI” must be corrected to “III”.

6.32 Section 34 deals with transitional arrangements. Section 34(2)(b)(ii) needs to be amended by removing the full stop between the references to section 13 and 14 and the full stop needs to be replaced with a comma.

6.33 Section 34(2)(e) needs to be amended by removing the full stop after the word period, and replacing it with a comma.

6.34 In section 34(3), the word [find] after the word “a” needs to be replaced with the word “fund”. The SALRC suggests the following:

Amendment of sections 34(2)(b)(ii); 34(2)(e) and 34(3) of Act 71 of 1997

Amendment of section 34(2)(b)(iii) of Act 71 0f 1997

Section 34 is hereby amended by the substitution for subparagraph (ii) of paragraph (b) of subsection (2) of the following subparagraph:

“(ii) in accordance with the procedure contemplated in sections 13**[.]**, 14 and 15.”

Amendment of section 34(2)(e) of Act 71 0f 1997

Section 34 is hereby amended by the substitution of paragraph (e) of subsection (2) of the following paragraph:

“(e) If the organisation does not submit its application within this period**[.]**, the organisation's registration lapses and the director must –“

Amendment of section 34 (3) of Act 71 of 1997

Subsection 3 of section 34 is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) If an authorised or registered fund-raising organisation, branch of a **[find]** fund-raising organisation or any other organisation contemplated in

subsection (2) (a) fails to comply with the terms and conditions of its authorisation or registration, the procedures contemplated in sections 20, 21 and 22 of this Act apply.".

5 Regulations requiring amendment

6.35 Regulations were made in terms of the Non-Profit Organisations Act.[93] Regulation 12 provides that the Director of Non-Profit Organisations must charge the prescribed fees for inspecting a constitution, report or document; for providing a certified copy or certified extract from a document, constitution or report; and for providing a certified copy of a certificate of registration. Regulation 13 provides that all fees referred to in Regulation 12 must be paid in advance in revenue stamps.

6.36 The Stamp Duties Act 77 of 1968 was repealed by section 103 of the Revenue Laws Amendment Act 60 of 2008. The question arises whether, and if so which, alternative measures were introduced by the DSD after the repeal of the Stamp Duties Act. The SALRC therefore proposes that Regulation 12 be repealed, and an alternative measure for payment of the prescribed fees be set out in Regulation 13.[94]

6 Effect of the Companies Act 71 of 2008 on the Non-Profit Organisations Act

6.37 In the Companies Act 71 of 2008, section 10 and Schedule 1 ("Provisions concerning non-profit organisations") set out the way in which Act 71 of 2008 affects

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93 *Government Gazette* Vol. 398, No. 19199, 31 August 1998 *Regulation Gazette* No. 6280 Government Notice No. R. 1104.

94 Media reports indicated in April 2009 that the South African Revenue Service (SARS) abolished the Stamp Duty Act (77 of 1968) with effect from midnight on 31 March 2009. (Republic of South Africa "Revenue Service on abolition of stamp duty" 31 March 2009 available at http://www.southafrica.info/business/economy/policies /sars-020409.htm Accessed 12 September 2016) The abolition forms part of ongoing efforts to reduce the administrative burden on taxpayers and simplify South Africa's tax system. "The scrapping of the Act follows the whittling down of the scope of stamp duties over the past few years until only property leases of over five years required stamp duties to be paid," SARS said in a statement this week. "This is now done away with from 1 April 2009."

Outstanding duties

The scrapping of the Act is not retrospective, however, and taxpayers remain liable for stamp duties due up to 31 March 2009, and any outstanding stamp duties must still be paid. "Adhesive revenue stamps will only be demonetarised from 1 November 2009, to allow time for other government departments which utilise these to introduce alternative measures," SARS said. "After that date they may not be used for any purpose."

the current legislation on non-profit organisations. As such, these provisions should be considered by the DSD.

6.38 The SALRC proposes that the DSD should consider the Non-Profit Organisations Act, and should effect the required amendments to align the Act with the provisions of the Companies Act 71 of 2008 with regard to non-profit organisations.

B Fund–Raising Act 107 of 1978

1 Current legislation

6.39 The principal Act is the Fund-Raising Act 107 of 1978[95]. Amendments to the Act were affected by the following pieces of legislation: the Fund-Raising Amendment Act 41 of 1980, the Fund-Raising Amendment Act 19 of 1981, the Fund-Raising Amendment Act 92 of 1981, the Fund-Raising Amendment Act 82 of 1983, the Fund-Raising Amendment Act 115 of 1991, and the Fund-Raising Amendment Act 43 of 1994. The Regulations are published in *Government Gazette* 6631 of 24 August 1979.

6.40 A Social Relief Fund Bill is currently being considered by the Social Development Department. The Act which might result from this Bill would eventually repeal the Fund-Raising Act, as mentioned in section 19(1) of the Social Relief Bill.[96]

6.41 The Social Relief Fund Bill aims to consolidate all the relief funds mentioned in the Fund-Raising Act into one Fund. The associated Act would have the following aims: to render relief and assistance to persons and organisations; to provide for the objects, duties and composition of the Board of the Fund; to regulate the collection of monetary contributions from the public; to provide for the declaration of certain occurrences as disasters; and to regulate the Fund's financial and staff matters.[97]

6.42 The briefing document also states that the reason for the new Bill is that the entire Fund-Raising Act is no longer applicable, because of various amendments and

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95 In the Strategic Plan of the DSD, at page 15, it is stated that the DSD is in the process of repealing the remaining part of the Act.

96 Department of Social Development Draft Social Relief Fund Bill (dated 04/06/2003) Available at http://discover.sabinet.co.za/document/PLD25774.

97 Briefing of the Portfolio Committee by the Department of Social Development on the Social Relief Fund Bill: 4 June 2003; Available at www.pmg.org.za;http://www.pmg.org.za/docs/2003/ appendices/030604briefing.htm.

deletions to the Act – which have left only one remaining chapter. At the meeting of the Social Development Portfolio Committee on 21 August 2001, it was stated that the proposed Bill aims to consolidate the various disaster relief funds into one body, to be known as the new Social Relief Fund. The national relief funds to be consolidated are as follows: Disaster Relief Fund, SA Defence Force Fund, Refugee Relief Fund, Social Relief Fund, and the State President's Fund. The proposed consolidation is aimed at enhancing the efficiency of funding operations by pooling the available resources. At the time of the meeting in 2001, the various disaster relief funds were still operational except for the Defence Force Fund, which had been moribund for some time.

6.43 The briefing document further states that the Bill also establishes a National Disaster Fund Board in terms of section 3. It was indicated that the Board was not legally constituted and was thus operating informally, and that the Board needs a legal framework to be efficient in its work. The Board had also indicated that the main motivation for consolidating the various relief funds was to curtail financial and administrative costs. Consolidation would reduce the number of meetings needed and would pool the available resources to enhance service delivery. This Bill, however, is not yet in force.

2 The scope of the Act

6.44 The Fund-Raising Act 107 of 1978 was intended to control the following: the collection of contributions from the public; the appointment of a director of fund-raising; the establishment of a Disaster Relief Fund, a South African Defence Force Fund, and a Refugee Relief Fund; the declaration of certain disastrous events as disasters; and other matters connected therewith.

3 Inequality, obsolescence, and redundancy

(a) Obsolescence and redundancy in definitions

6.45 If the Fund-Raising Act is repealed, the matters hereunder need not be rectified. However and in contrast, if the Department decides to retain the Act on the statute book, the matters hereunder require its attention. Only chapter II of the Act remains intact.

6.46 Section 18(b) of the Fund-Raising Act provides as follows:

> "(b) the board of the South African Defence Force Fund shall be, with due regard to the financial position of that Fund and the requirements of each case, to render such aid as the board may deem fair and reasonable to members and former members of the South African Defence Force and of auxiliary services established and designated in accordance with section 80 (1) of the Defence Act, 1957 (Act 44 of 1957), and their dependants who suffer financial hardship or financial distress arising, directly or indirectly, out of any service or duties contemplated in section 3 (2) of the Defence Act, 1957, performed by such members, and to provide facilities to or for such members and former members who perform or performed such service or duties;"

6.47 The Defence Act 44 of 1957 mentioned in section 18(b) has been repealed by the Defence Act 42 of 2002, except for sections 104, 105, 106, 108, 111, 112 and the first schedule. Reference should therefore be made to the later legislation. Although the Defence Act of 2002 includes a definition of "employee", it also includes a definition of "member" and it is therefore unclear which provisions should be referred to in order to substitute the repealed s 80(1) of the Defence Act of 1957. It is also unclear whether a South African Defence Force Fund provided for in the Fund-Raising Act but not included in the Defence Act of 2002 is still in existence or should be provided for. In addition, the Banks Act 23 of 1965 mentioned in section 22(4) of the Fund-Raising Act has been repealed by the Banks Act 94 of 1990 and should therefore be amended. It is therefore recommended that the following amendments should be considered:

> (b) the board of the South African Defence Force Fund shall be, with due regard to the financial position of that Fund and the requirements of each case, to render such aid as the board may deem fair and reasonable to **[members]** employees and former **[members]** employees of the South African Defence Force and of auxiliary services established and designated in accordance with **[section 80 (1) of]** the Defence Act, **[1957 (Act 44 of 1957)]** 2002 (Act 42 of 2002), and their dependants who suffer financial hardship or financial distress arising, directly or indirectly, out of any service or duties contemplated in **[section 3 (2) of]** the Defence Act, **[1957]** 2002, performed by such **[members]** employees, and to provide facilities to or for such **[members]** employees and former **[members]** employees who perform or performed such service or duties;
>
> 22(4) A board shall deposit all the moneys received by it in an account which it shall open with a banking institution registered in terms of the Banks Act, **[1965 (Act 23 of 1965)]** 1990 (Act 94 of 1990)."

6.48 In section 25, Performance of Administrative Work of Boards, the term "secretary" needs to be replaced by both the terms "Minister of Social Development" and "Head of the Defence Force", in terms of section 22(2)*(iii)*. The SALRC therefore suggests:

> **Amendment of section 25 of Act 107 of 1978**
>
> Section 25 is hereby amended by the substitution for section 25 of the following section:
>
> **Performance of administrative work of boards**
>
> "The administrative work, including the receipt and disbursement of money incidental to the performance of the functions or the exercise of the powers of a board or of any committee of the board shall be performed by officers in the public service designated by the **[Secretary]** Minister of Social Development and the Head of the Defence Force and who shall be under **[his]** their control."

(b) Obsolescence and redundancy in the rest of the Act

6.49 Section 21(1), which deals with the collection of contributions for particular purposes and particular powers of boards, provides that "Notwithstanding anything to the contrary in Chapter I…". This part of the subsection can be deleted because Chapter 1 has been repealed:

> **Amendment of section 21(1) of Act 107 of Act 1978**
>
> Section 21 is hereby amended by the deletion of the proviso to subsection (1):
>
> "(1)**[Notwithstanding anything to the contrary in Chapter I contained,]** No contributions shall be collected for a purpose referred to in section 18, except as provided in this Chapter."

6.50 Subsection 4 of section 23 can be deleted as it refers to provisions of the Act which have been repealed:

> **Amendment of section 23(4) of Act 107 of 1978**
>
> Section 23(4) is hereby amended by the deletion of the whole of subsection (4):
>
> **"[(4) The provisions of subsections (5), (6) (a) and (c), (7), (8) and (11) of section 7 shall mutatis mutandis apply in relation to the collection of contributions by virtue of a permission or special permission granted under subsection (1) or (2).]"**

6.51 In section 26, which deals with the declaration of certain events to be disasters, the term “State President” needs to be replaced with the term “President” wherever it occurs in this section. The SALRC therefore suggests:

> **Amendment of section 26 of Act 107 of 1978**
>
> Section 26 is hereby amended by the substitution for section 26 of the following section:
>
> “(1) If at any time in the opinion of the **[State President]** President it appears that serious material damage or loss or distress has occurred or is likely to occur as a result of a sudden or disastrous event in a particular area, whether in the Republic or elsewhere, and that the relief of the distress of the persons who are or will be affected thereby is likely to be supported by the public generally or by any particular section of the public, he may by proclamation in the Gazette declare such event for the purposes of this Act to be a disaster.
>
> (2) The **[State President]** President may at any time in a like manner withdraw or amend any proclamation referred to in subsection (1).”

(c) Regulations

6.52 Only those regulations for which the enabling sections in the Act have not been repealed are still in force. Therefore regulations 2 to 11 can be deleted.

6.53 The following Acts have been repealed: The Banks Act 23 of 1965 has been repealed by the Banks Act 94 of 1990 and the Building Society Act has been repealed by the Mutual Banks Act 124 of 1993. References to these Acts should be amended.

6.54 The name of the Department of Social Welfare and Development has been changed to the Department of Social Development. This change needs to be reflected in the current regulations.

CHAPTER 7: SOCIAL DEVELOPMENT AND THE ALLEVIATION OF POVERTY: NATIONAL DEVELOPMENT AGENCY ACT 108 OF 1998; ADVISORY BOARD ON SOCIAL DEVELOPMENT ACT 3 OF 2001; AND THE SOUTH AFRICAN SOCIAL SERVICE AGENCY ACT 9 OF 2004

A Introduction

7.1 This chapter deals with the following three Acts: the National Development Agency Act 108 of 1998, the Advisory Board on Social Development Act 3 of 2001, and the South African Social Service Agency Act 9 of 2004.

7.2 The Advisory Board on Social Development Act 3 of 2001 has not yet been put into operation. It was assented to on 16 May 2001 but the date of commencement is yet to be proclaimed.

B National Development Agency Act 108 of 1998

1 Current legislation

7.3 The principal Act is the National Development Agency Act 108 of 1998. Amendments to the Act were affected by the National Development Agency Amendment Act 6 of 2003. No regulations were issued in terms of the Act.

2 The scope of the Act

7.4 The long title of this Act established the National Development Agency, which was intended to promote an appropriate, sustainable relationship between government and civil society organisations in the effort to eradicate poverty and its causes. The Act determines the objects and functions of the Agency; the manner in which it is managed and governed; regulates its staff matters and financial affairs; and provides for connected matters.

3 Inequality, obsolescence, and redundancy

7.5 No inequality, obsolescence, or redundancy was identified in this Act through this review.

7.6 Therefore, no amendments within the mandate of the review are proposed.

C Advisory Board on Social Development Act 3 of 2001

7.7 The principal Act is the Advisory Board on Social Development Act 3 of 2001. This Act is not yet in force. No amendment Acts were adopted and nor were regulations issued. This Act, in its long title, aims to provide for a national advisory structure in the social development sector, which would build partnerships between government and civil society; and for that purpose, to establish a body known as the Advisory Board on Social Development. The Act also provides for the objectives, duties and composition of the Board; and for matters connected therewith.

7.8 The question arises whether the Act has become obsolete, as it has not yet been put into operation – a full 15 years after it was assented to on 16 May 2001.

D South African Social Security Agency Act 9 of 2004

1 Current legislation

7.9 The principal Act is the South African Social Security Agency Act 9 of 2004. No amendment Acts were passed or regulations issued. The Act came into operation on 15 November 2004.

2 The scope of the Act

7.10 This Act provides for the establishment of the Social Security Agency as an agent for the administration and payment of social assistance; the prospective administration and payment of social security by the Agency, and the provision of services related thereto; and matters connected therewith

3 Inequality, obsolescence, redundancy

7.11 Section 5 deals with the Chief Executive Officer (CEO) and other staff of the Agency. Section 5(1) provides as follows:

> 5.(1) The Minister must appoint a fit and proper and suitably qualified South African citizen as the Chief Executive Officer of the Agency.

7.12 The question arises why the CEO must be a South African citizen. It may also be questioned whether provision should similarly be made that the CEO may be a permanent resident in South Africa.

7.13 In the *Larbi-Odam* case,[98] the Constitutional Court held that unless a post requires South African citizenship for some reason (for example, the particular political sensitivity associated with certain posts), employment should be available without discriminating between citizens and permanent residents.

7.14 *Larbi-Odam* dealt with the conversion of temporary teaching posts to permanent ones. Posts held by foreign teachers temporarily employed by the North-West Province were advertised, and the foreign teachers were issued with notices purporting to terminate their employment. The group of foreign teachers could not, according to provincial legislation, be appointed permanently as they were not South African citizens. The applicants brought a High Court application, and submitted that the restriction on their eligibility for permanent employment amounted to unfair discrimination.

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98 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* (CCT2/97) [1997] ZACC 16; 1997 (12) BCLR 1655; 1998 (1) SA 745 (26 November 1997) Available at http://www.saflii.org.za/za/cases/ZACC/1997/16.html.

7.15 The Constitutional Court had to apply the test for unfair discrimination based on the 1993 Constitution. Therefore, discrimination had to be established first; thereafter it had to be determined whether the discrimination was unfair.

7.16 The Court held that differentiation on the basis of citizenship has the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparatively serious manner.

7.17 The Court held that in order to determine whether the discrimination was unfair, the impact of the discrimination on the foreign persons had to be established by considering the nature of the group affected, and the nature of the power.

> [19] I will now apply the above principles to the facts of this case. The disadvantaged group in this case is foreign citizens. Because citizenship is an unspecified ground, the first leg of the enquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether, in the words of *Harksen*,
>
> > '…objectively, the ground is based on attributes and characteristics, which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.
>
> I have no doubt that the ground of citizenship does. First, foreign citizens are a minority in all countries, and have little political muscle.
> …
> [20] … In addition, the overall imputation seems to be that because persons are not citizens of South Africa they are for that reason alone not worthy of filling a permanent post. For all these reasons, I am of the view that the differentiating ground of citizenship in reg 2(2) is based on attributes and characteristics, which have the potential to impair the fundamental human dignity of non-citizens hit by the regulation.
>
> [23] To determine whether the discrimination in this case is unfair, regard must be had primarily to the impact of the discrimination on the appellants, which in turn requires a consideration of the nature of the group affected, the nature of the power exercised, and the nature of the interests involved. …
>
> [24] A distinction should be drawn between the impact of the regulations on permanent residents and their impact on temporary residents. In my view, the regulations clearly constitute unfair discrimination as regards permanent residents of South Africa. They have been selected for residence in this country by the Immigrants Selection Board, some of them on the basis of recruitment to specific posts. Permanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasised by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform. Indeed, this is the view of the

Department of Home Affairs, in its reply to the following question posed by the Department of Education of the North-West Province:

> 'Where permanent residence has been lawfully acquired by an expatriate teacher in terms of the South African Citizenship Act 88 of 1995 and such is confirmed by the Department of Home Affairs, is the said expatriate teacher entitled to the right to permanent employment and residence like any other South African Citizen whose citizenship has been acquired by birth?'

The following response was given by the Regional Director:

> '(T)he policy of the Department of Home Affairs is that an expatriate lawfully in possession of a South African Permanent Residence Permit be granted the same privileges as South African Citizens. …'

[25] I hold that reg 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence, and commitment is a harsh measure.

[26] I also hold that this unfair discrimination is not justified under s 33(1) of the interim Constitution. The application of s 33(1)

> '… involves the weighing up of competing values, and ultimately an assessment based on proportionality. …In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'

Unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus, it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.

7.18 The SALRC therefore proposes, in view of the judgment in the *Larbi-Odam case*, that section 5(1) of the South African Social Security Act be amended to allow for a person permanently resident in South Africa to be appointed as the Chief Executive Officer of the Agency. The proposed amendment reads as follows:

> 5.(1) The Minister must appoint a fit and proper and suitably qualified South African citizen <u>or a person permanently resident in South Africa</u> as the Chief Executive Officer of the Agency.

CHAPTER 8: SOCIAL ASSISTANCE, THE DISPERSION OF GRANTS AND THE SOCIAL SERVICE PROFESSION: SOCIAL ASSISTANCE ACT 13 OF 2004; NATIONAL WELFARE ACT 100 OF 1978; AND THE SOCIAL SERVICE PROFESSIONS ACT 110 OF 1978

A Introduction

8.1 This chapter discusses the obsolescence, redundancy and inequality found in the following three Acts: the Social Assistance Act 13 of 2004, the National Welfare Act 100 of 1978, and the Social Service Professions Act 110 of 1978.

8.2 The main issue relating to equality is the treatment of permanent residents in South Africa in terms of the Social Service Professions Act.

B Social Assistance Act 13 of 2004

1 Current legislation

8.3 The principal Act is the Social Assistance Act 13 of 2004. The Amendment Acts passed are the Social Assistance Amendment Act 45 of 1994, the Social Assistance Amendment Act 6 of 2008, and the Social Assistance Amendment Act 5 of 2010. The regulations issued in terms of the Act are as follows:

1. *Government Gazette* No. 27 316 RG No. 8156 No. R 162 of 22 February 2005 Regulations in terms of the Social Assistance Act 13 of 2004;
2. *Government Gazette* No. 28 652 RG of 31 March 2006 No. 8432;
3. *Government Gazette* No. 31 356 RG No. 8948 R 898 of 22 August 2008 Regulations Relating to the Application For and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance;
4. *Government Gazette* No. 34 169 GN R 258 of 13 March 2011, Increase in respect of Social Grants;

5. *Government Gazette* No. 34 618 GN No. R746 of 19 September 2011 Regulations Relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance by the Agency and Social Assistance Appeals by the Independent Tribunal; and
6. *Government Gazette* No. 35205 of 32 Government Notice No. R269 of 3 March 2012 relating to the Application For and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance.

8.4 According to *Gazette* No 28652 of 31 March 2006, Chapter 4 of the Social Assistance Act 13 of 2004 is not yet in force.

2 The scope of the Act

8.5 This Act aims to provide for the rendering of social assistance to persons, to provide for the mechanism to do this, to establish an inspectorate for social assistance, and to provide for matters connected therewith.

3 Inequality, obsolescence, redundancy

(a) Obsolescence and redundancy in definitions

8.6 The terms “foster child”, “foster parent” and “parent” are defined as follows in section 1 of the Act:

> **'foster child'** means a child who has been placed in the custody of –
>
> *(a)* a foster parent in terms of –
> (i) Chapter 3 or 6 of the Child Care Act, 1983 (Act 74 of 1983); or
> (ii) section 72 or 76 of the Child Justice Act, 2008; or
>
> *(b)* a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);
>
> **‘foster parent'** means a person, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law, or a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);
>
> **'parent'** means a parent as defined in the Child Care Act, 1983 (Act 74 of 1983);

8.7 The relevant definitions contained in the Children’s Act provide as follows:

'parent', in relation to a child, includes the adoptive parent of a child, but excludes –

(a) the biological father of a child conceived through the rape of or incest with the child's mother;

(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and

(c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

'foster care' means care of a child as described in section 180 (1) and includes foster care in a registered cluster foster care scheme;

'foster parent' means a person who has foster care of a child by order of the children's court, and includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of a child;

8.8 The SALRC recommends that the definitions of "foster parent" and "parent" in section 1 of the Social Assistance Act should be replaced with the definitions contained in the Children's Act 38 of 2005.

8.9 The sections should read as follows:

'foster child' means a child who has been placed in the custody of –

(a) a foster parent in terms of –

(i) **[Chapter 3 or 6 of the Child Care Act, 1983 (Act 74 of 1983)]** section 180 (1) of the Children's Act 38 of 2005 and includes foster care in a registered cluster foster care scheme; or

(ii) section 72 or 76 of the Child Justice Act, 2008;

[(*b)* a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);]

'foster parent' means a person**[, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law, or a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);]** who has foster care of a child by order of the children's court, and includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of a child;

'parent' [means a parent as defined in the Child Care Act, 1983 (Act 74 of 1983);], in relation to a child, includes the adoptive parent of a child, but excludes –

(a) the biological father of a child conceived through the rape of or incest with the child's mother;

(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and

(c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

8.10 "Foster child" is not defined in section 1 of the Children's Act of 2005. Sections 180 to 190 of the Children's Act deals with foster care, and provides for a child in foster care. "Foster care" for the purposes of the Social Assistance Act could be defined as follows: **'foster care'** means care of a child as described in section 180 (1) and includes foster care in a registered cluster foster care scheme.[99]

8.11 The proposed amendment to the definition of "foster child" reads as follows:

'foster child' means a child who has been placed in the custody of-

(a) a foster parent in terms of –

(i) **[Chapter 3 or 6 of the Child Care Act, 1983 (Act 74 of 1983)]** section 180 (1) of the Children's Act 38 of 2005 and includes foster care in a registered cluster foster care scheme; or

(ii) section 72 or 76 of the Child Justice Act, 2008; **[or]**

8.12 The term "foster child" is still needed for purposes of this Act, as the system of foster care needs to have a mentionable subject.

(b) Obsolescence and redundancy in the rest of the Act

(i) Foster child grants

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[99] **180. Foster care**

(1) A child is in foster care if the child has been placed in the care of a person who is not the parent or guardian of the child as a result of-

(a) an order of a children's court; or

(b) a transfer in terms of section 171.

(2) Foster care excludes the placement of a child-

(a) in temporary safe care; or

(b) in the care of a child and youth care centre.

(3) A children's court may place a child in foster care-

(a) with a person who is not a family member of the child;

(b) with a family member who is not the parent or guardian of the child; or

(c) in a registered cluster foster care scheme.

8.13 Section 8 of the Social Assistance Act provides as follows:

> **8. Foster child grant**
>
> A foster parent is, subject to section 5, eligible for a foster child grant for a child for as long as that child needs such care if –
>
> *(a)* the foster child is in need of care; and
>
> *(b)* he or she satisfies the requirements of the Child Care Act, 1983 (Act 74 of 1983).

8.14 The references in the Social Assistance Act to the Child Care Act are out-dated. Foster care is now described in Chapter 12 of the Children's Act. The requirements for becoming a foster parent are set out in section 182 of the Children's Act.[100] Therefore, section 8(b) of the Social Assistance Act should refer to section 182 of the Children's Act, and should read as follows:

> **8. Foster child grant**
>
> A foster parent is, subject to section 5, eligible for a foster child grant for a child for as long as that child needs such care if –
>
> *(a)* the foster child is in need of care; and
>
> *(b)* he or she satisfies the requirements of **[the Child Care Act, 1983 (Act 74 of 1983)]** section 182 of the Children's Act, 2005 (Act 38 of 2005).

8.15 Section 15 of the Social Assistance Act deals with the appointment of procurators. Section 15(4) provides that stamp duty is not payable in respect of a power of attorney given by an applicant to any person to apply for social assistance on his or her behalf, or in respect of a power of attorney given by a beneficiary to any person to receive payment of any grant on his or her behalf. The Stamp Duties Act

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[100] **182. Prospective foster parent**

(1) Before a children's court places a child in foster care, the court must follow the children's court processes stipulated in Part 2 of Chapter 9 to the extent that the provisions of that Part are applicable to the particular case.

(2) A prospective foster parent must—

(a) be a fit and proper person to be entrusted with the foster care of the child;

(b) be willing and able to undertake, exercise and maintain the responsibilities of such care;

(c) have the capacity to provide an environment that is conducive to the child's growth and development; and

(d) be properly assessed by a designated social worker for compliance with paragraphs *(a), (b)* and *(c).*

(3) A person unsuitable to work with children is not a fit and proper person to be entrusted with the foster care of a child.

(4) Subsections (2) and (3), read with such changes as the context may require, apply to any person employed at or involved in a non-profit organisation managing a cluster foster care scheme.

relevant to section 15(4) has been repealed by the Revenue Laws Amendment Act 60 of 2008, and the provision therefore seems redundant.

8.16 Section 22(1) needs to be amended in the following way:

> "(1) Notwithstanding anything to the contrary in any law, **[as]** an organ of state must, at the request of the agency, and subject to subsection (3), furnish it with all relevant information relating to an applicant or beneficiary."

8.17 In section 27(2)*(a),* which deals with the functions of the Inspectorate,[101] reference is made to the Inspectorate of Special Operations in terms of section 7(1)*(a)* of the National Prosecuting Authority Act 32 of 1998. The Inspectorate of Special Operations (the Scorpions) was replaced with the Directorate for Priority Crime Investigation, also known as the Hawks, which resorts under the Department of Police. In the *Glenister* judgment, Parliament was given 18 months to amend the legislation.[102]

8.18 The South African Police Service Amendment Act 57 of 2008 provides, among others, for establishing a separate division in the South African Police Service, to be known as the Directorate for Priority Crime Investigation; and for the transfer of powers, investigations, assets, budget and liabilities of the Directorate of Special Operations (established in terms of the National Prosecuting Authority Act of 1998) to the South African Police Service. The SALRC is of the view that consideration should be given to the amendment of section 27(2)(*a*) to align it with the amendments effected by the South African Police Service Amendment Act 57 of 2008. The proposed amendment reads as follows:

> (2) The Inspectorate may –
>
> (a) of its own accord or upon receipt of a complaint, investigate any alleged contravention of this Act by any person, and may, where appropriate, refer such investigation to the Directorate for Priority Crime Investigations established by section 17C of the South African Police Service Act, 1995

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[101] Section 27 (2)(a):

> (2) The Inspectorate may –
>
> (a) of its own accord or upon receipt of a complaint, investigate any alleged contravention of this Act by any person, and may, where appropriate, refer such investigation to the South African Police Service, the Agency or the Inspectorate of Special Operations established by section 7(1)(a) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), or any other organ of state established by law which has the appropriate powers to investigate and act on any alleged contravention of this Act.

[102] *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC).

(Act 68 of 1995), the Agency or the **[Inspectorate of Special Operations established by section 7 (1) (a) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)]**, or any other organ of state established by law which has the appropriate powers to investigate and act on any alleged contravention of this Act; and

(c) Regulations requiring amendment

8.19 The Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in Respect of Eligibility for Social Assistance[103] provide, in Regulation 27, for the powers of the Agency to suspend, increase or decrease the amount of social grants on review.

> **27. Powers of Agency to suspend, increase or decrease amount of social grant on review**
>
> …
>
> (2) The Agency must review the social grant –
>
> *(a)* in case of a foster child grant, on expiry of the court order.

8.20 The SALRC noted above, in Chapter 5 at par 5.36, that the DSD has indicated to the SALRC that the courts have logistical difficulties with the renewal of foster care orders, which have to be reconsidered every two years. The DSD has therefore proposed that the administrative procedure in terms of the repealed Child Care Act 74 of 1983 should be re-introduced. Reference is also made above in paragraphs 5.37 and 5.38 to the order made in the matter between the Centre for Child Law (Applicant) and the Minister of Social Development, the South African Social Security Agency and the MECs for Social Development in Limpopo, Mpumalanga, Gauteng, Northwest, Free State, Northern Cape, Kwa Zulu Natal, Eastern Cape and Western Cape (Respondents) which the North Gauteng High Court issued on 10 May 2011.

8.21 The SALRC suggests that regulation 27(2)*(c)* be brought in line with the proposal made by the DSD in respect of foster care orders by Children's Courts.

8.22 "Child Care Act" is defined in the Regulations as meaning the Child Care Act, 1983 (Act No. 74 of 1983). Regulation 7(a) provides that in addition to the requirements contemplated in section 8 of the Act, a foster parent is eligible for a foster care child grant if the child is placed in his or her custody in terms of the Child Care Act 1983.

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[103] *Government Gazette* R 898 of 22 August 2008.

8.23 The SALRC proposes that references to the Child Care Act 74 of 1983 should be replaced with references to the Children's Act 38 of 2005 or to section 182 of the Children's Act (which deals with the eligibility of prospective foster parents). Regulation 7 should read as follows:

> **7. Persons eligible for foster child grant**
>
> *(a)* In addition to the requirements contemplated in section 8 of the Act, a foster parent is eligible for a foster child grant if the–
>
> (i) **[the]** child is placed in his or her custody in terms of **[the Child Care Act 1983]** section 182 of the Children's Act 38 of 2005;
>
> (ii) child remains in his or her custody; and
>
> (iii) foster parent is a South African citizen, a permanent resident or a refugee.
>
> Provided that a foster parent may not be eligible for a foster child grant for more than six children if the children are not his or her siblings or blood relatives.

8.24 In September 2011, Regulations Relating to the Lodging and Consideration of Applications for Reconsideration of Social Assistance Application by the Agency and Social Assistance Appeals by the Independent Tribunal were made.

8.25 Regulation 2(4)*(a)(ii)* thereof provides that the information contemplated in sub-regulation (3) must, in the case of a beneficiary, be the same information which was provided to the Agency when the review contemplated in "Regulations 27" of the 2008 Regulations was made; and must be based on the information provided by the social worker to the Agency as contemplated in Regulation 28(3)*(d)* and *(e)* of the 2008 Regulations when the Agency refused to authorise the continuation of the payment of the foster child grant.

8.26 The expression "Regulations 27" as mentioned above needs to be substituted with the expression "Regulation 27".

4 Issues outside the mandate of the investigation: the right against self-incrimination

8.27 Section 22 of the Social Assistance Act deals with information to be furnished to the Agency by third parties. In section 22(1), a typographical correction is needed. In

the sentence “Notwithstanding anything to the contrary in any law,..” the word “as” needs to be replaced with the word “an”. The proposed amendment reads as follows:

> **22. Information to be furnished to Agency by third parties**
>
> (1) Notwithstanding anything to the contrary in any law, **[as]** an organ of state must, at the request of the agency, and subject to subsection (3), furnish it with all relevant information relating to an applicant or beneficiary.

8.28 Section 24 deals with the Inspectorate for Social Assistance. This provision has not yet commenced. However, in October 2012 the Portfolio Committee on Social Development noted that the Inspectorate will commence operating in 2015.[104]

8.29 In its *Strategic Plan 2011/12 – 2012/13*, the DSD notes that 2014 is its target date for the establishment of policy and legislation governing the Inspectorate for Social Security.[105] The DSD explains the need to establish the Inspectorate for Social Security as follows:[106]

> It is in this context that Outcome 12 “an efficient, effective and developmental oriented public service and an empowered, fair and inclusive citizenship” provides a pedantic crucible for the establishment of an Inspectorate for Social Security (ISS).
>
> The need to establish an Inspectorate finds credence in the desire for the Department to maintain the integrity of the social security framework and systems. This will be achieved through enforcement of policy and regulatory compliance which should significantly reduce any leakages, strengthen and foster stringent controls, curb various forms of financial misconduct and any form of abuse.
>
> The Inspectorate would be a dedicated and formidable institution with the capacity and capability to independently enforce accountability, compliance and integrity of the social assistance system.

8.30 The commencement date of the following sections has yet to be proclaimed:

- section 25, which deals with the independence of the Inspectorate;
- section 26, which deals with the funding and employees of the Inspectorate;

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104 The Budgetary Review and Recommendation Report of the Portfolio Committee on Social Development on the performance of the Department of Social Development for the 2011/12 financial year, dated 23 October 2012 Available at http://www.pmg.org.za/files/ doc/2012/ comreports/121024pcsocdevbrrr.htm.

105 Department of Social Development Strategic Plan 2011/12 – 2013/14 Available at http://www.dsd.gov.za/ Strategic plan 2011/12 – 2013/14.

106 Ibid.

- section 27, which deals with the functions of the Inspectorate;[107] and
- section 28, which deals with the power of the Inspectorate to request information and to subpoena.[108]

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[107] **27. Functions of Inspectorate**

(1) The Inspectorate must –

(a) conduct investigations to ensure the maintenance of the integrity of the social assistance frameworks and systems;

(b) execute internal financial audits and audits on compliance by the Agency with regulatory and policy measures and instruments;

(c) investigate fraud, corruption and other forms of financial and service mismanagement and criminal activity, within the Agency and in connection with its functions, duties and operations;

(d) establish a complaints mechanism; and

(e) in general, do everything necessary to combat the abuse of social assistance.

(2) The Inspectorate may –

(a) of its own accord or upon receipt of a complaint, investigate any alleged contravention of this Act by any person, and may, where appropriate, refer such investigation to the South African Police Service, the Agency or the Inspectorate of Special Operations established by section 7(1)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), or any other organ of state established by law which has the appropriate powers to investigate and act on any alleged contravention of this Act; and

(b) investigate any matter in respect of social assistance referred to the it by the Minister, the Director-General of the Department or the Chief Executive Officer of the Agency.

(3) The Minister must, in consultation with the Executive Director, in writing, authorise those employees of the Inspectorate appointed as inspectors to perform the functions contemplated in subsections (1) and (2) and to exercise the powers contemplated in section 28.

(4) The Minister must, subject to this Act and all other applicable law by notice in the *Gazette*, prescribe procedures regarding the protection of the identity and integrity of a complainant or other source of information.

[108] **28. Power of Inspectorate to request information and to subpoena**

(1) An organ of state must at the request of the Executive Director furnish the Executive Director with the prescribed information relating to an applicant or beneficiary and with any additional information requested, if such information is necessary for an investigation in terms of this Act.

(2) A financial institution as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), must at the request of the Executive Director or an inspector, furnish him or her with the prescribed information relating to the assets and investments of an applicant or beneficiary, and with any additional information requested if such information is necessary for an investigation in terms of this Act.

(3) Any person who, in terms of subsection (1) or (2), furnishes information obtained by that person before the commencement of this Act must, when doing so, inform the person about whom such information is furnished of that fact in writing.

(4) Any person who applies for a grant in terms of this Act is deemed to have agreed, by making such an application, that any other person who holds personal information relevant to that application may, without requesting permission from him or her, make that information available to the Executive Director.

(5) An inspector may for the purposes of performing the functions contemplated in section 27(1) and (2)(a)-

(a) subpoena a person who can furnish information of material importance concerning a matter under investigation, or who is reasonably assumed to have under his or her control a book, document or thing that may have a bearing on the investigation, to appear before him or her within a reasonable period and to produce that book, document or thing, as the case may be;

8.31 In Section 27(2)(*b*) the "the" after the word "to" needs to be removed. The following amendment is proposed:

> **Amendment of section 27(2)(b)**
>
> Section 27 is hereby amended by the substitution for paragraph (b) of subsection (2) of the following paragraph:
>
> "(b) investigate any matter in respect of social assistance referred to **[the]** it by the Minister, the Director-General of the Department or the Chief Executive Officer of the Agency.".

8.32 The DSD's Strategic Plan 2012–2015 envisages that the Inspectorate for Social Security will ensure the integrity of the Social Assistance Framework and Systems will be established by March 2015.[109]

8.33 The Agency and the Inspectorate can subpoena a person to appear before them to produce possibly incriminating evidence. The Agency and the Inspectorate can also force any person to appear before it, if that person may be able to furnish information of material importance or if he or she controls a book, document or thing relevant to the investigation. In terms of sections 23(1)(*a*) and 28(5)(*a*), such a person can be required to furnish that information or produce such book, document or thing for this reason. Sections 23(3) and 28(7) provide that the rules about privilege which are applicable in the case of a person who has been subpoenaed to give evidence or to produce a book, document or thing before a court of law, would apply in respect of the examination of such a person (including the production of a book, document or thing).

8.34 As noted above in Chapter 3, the cases of *Shaik v Minister of Justice and Constitutional Development and Others*[110] and *Ferreira v Levin*[111] require a clause to be

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(b) administer an oath to that person or cause that person to make an affirmation if that person was or could have been subpoenaed in terms of paragraph (a) and he or she is present at the enquiry;

(c) cross-examine any person referred to in paragraph *(b).*

(6) A subpoena to appear before an inspector must be in the prescribed form and must be served on the person by registered mail or in the same manner in which it would have been served if it had been a subpoena issued by the clerk of a magistrate's court.

(7) The rules with regard to privilege which are applicable in the case of a person who has been subpoenaed to give evidence or to produce a book, document or thing before a court of law apply in respect of the examination of a person and the production of a book, document or thing contemplated in subsection (5).

109 The 2015 Annual Report of the DSD indicates on page 66 that the Inspectorate was established in the Social Security branch of the Department of Social Development as a transitional provision.

110 (CCT34/03) [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) http://www.saflii.org.za/za/cases/ZACC/2003/24.html.

inserted to provide for direct-use immunity. Such a clause is needed to protect examinees from their answers or disclosures being used against them in criminal proceedings. The SALRC therefore proposes that sections 23 and 28 be amended to provide as follows:

23. Power of Agency to investigate

(1) The Agency may, in the performance of its functions, inquire into any matter concerning the rendering of social assistance, and may for such purpose –

(a) subpoena any person who can furnish information of material importance concerning the matter under investigation, or who is reasonably assumed to have under his or her control a book, document or thing that may have a bearing on the investigation, to appear within a reasonable period before it and to furnish such information or to produce such book, document or thing, as the case may be;

(b) through its representative administer an oath to that person or cause that person to make an affirmation if that person was or could have been subpoenaed in terms of paragraph *(a)* and he or she is present at the enquiry;

(c) through its representative cross-examine any person referred to in paragraph *(b)*.

(2) A subpoena to appear before the Agency must be in the prescribed form and must be served on the person by registered mail or in the manner in which it would have been served had it been a subpoena issued by the clerk of a magistrate's court.

(3) The rules with regard to privilege, which are applicable in the case of a person who has been subpoenaed to give evidence or to produce a book, document or thing before a court of law, apply in respect of the examination of a person and the production of a book, document or thing contemplated in subsection (1).

"(4) No evidence regarding any questions, disclosure of information, or answers obtained for the purpose of an investigation shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)."; and

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[111] *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell No and Others* 1996 (1) SA 984 (CC).

28. Power of Inspectorate to request information and to subpoena

(1) An organ of state must at the request of the Executive Director furnish the Executive Director with the prescribed information relating to an applicant or beneficiary and with any additional information requested, if such information is necessary for an investigation in terms of this Act.

(2) A financial institution as defined in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990), must at the request of the Executive Director or an inspector, furnish him or her with the prescribed information relating to the assets and investments of an applicant or beneficiary, and with any additional information requested if such information is necessary for an investigation in terms of this Act.

(3) Any person who, in terms of subsection (1) or (2), furnishes information obtained by that person before the commencement of this Act must, when doing so, inform the person about whom such information is furnished of that fact in writing.

(4) Any person who applies for a grant in terms of this Act is deemed to have agreed, by making such an application, that any other person who holds personal information relevant to that application may, without requesting permission from him or her, make that information available to the Executive Director.

(5) An inspector may for the purposes of performing the functions contemplated in section 27 (1) and (2) *(a)*-

(a) subpoena a person who can furnish information of material importance concerning a matter under investigation, or who is reasonably assumed to have under his or her control a book, document or thing that may have a bearing on the investigation, to appear before him or her within a reasonable period and to produce that book, document or thing, as the case may be;

(b) administer an oath to that person or cause that person to make an affirmation if that person was or could have been subpoenaed in terms of paragraph *(a)* and he or she is present at the enquiry;

(c) cross-examine any person referred to in paragraph *(b)*.

(6) A subpoena to appear before an inspector must be in the prescribed form and must be served on the person by registered mail or in the same manner in which it would have been served if it had been a subpoena issued by the clerk of a magistrate's court.

(7) The rules with regard to privilege which are applicable in the case of a person who has been subpoenaed to give evidence or to produce a book, document or thing before a court of law apply in respect of the examination of a person and the production of a book, document or thing contemplated in subsection (5).

"(8) No evidence regarding any questions, disclosure of information, or answers obtained for the purpose of an investigation shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)."

C National Welfare Act 100 of 1978

8.35 The principal Act is the National Welfare Act 10 of 1978. The whole of the National Welfare Act was assigned to the provinces by Proclamation R7 in *GG* 16992 of 23 February 1996, excluding the following sections:

- sections 2, 3, 4, 20 and 22A (1) and (2) *(a)* and *(b)*
- sections 1, 18 and 21 *(d)* and *(g)* in so far as they apply or relate to those sections listed in the above bullet point.

8.36 The sections not assigned to the provinces were repealed by section 13 of the Advisory Board on Social Development Act 3 of 2001, a provision which will come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

8.37 The Advisory Board of Social Development Act 3 of 2001 is not yet in force. The question arises why this Act has not yet commenced, 15 years after its adoption.

8.38 The Amendment Acts adopted are the National Welfare Amendment Act 77 of 1978, the Health and Welfare Matters Amendment Act 118 of 1993, the Health and Welfare Second Amendment Act 180 of 1993, the Welfare Laws Amendment Act 106 of 1996, and the Welfare Laws Amendment Act 106 of 1997.

8.39 As the SALRC is presently dealing only with national legislation in this investigation, the scrutiny of provincial legislation for equality, obsolescence, or redundancy falls outside of the purview of this investigation.

D Social Service Professions Act 110 of 1978

1 Current legislation

8.40 The principal Act is the Social Service Profession Act 110 of 1978. The Act was amended by the Social and Associated Workers Act 68 of 1985, the Social Work Amendment Act 48 of 1989, the Social Work Amendment Act 22 of 1993, the Social Work Amendment Act 52 of 1995, Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996, the Welfare Laws Amendment Act 106 of 1996, and the Social Work Amendment Act 102 of 1998.

8.41 A Draft Social Service Professions Bill was published in *Government Gazette* Notice 137 of 2008[112] for comment.[113]

2 The scope of the Act

8.42 The Social Work Amendment Act 102 of 1998 changed the title of the Act from the "Social Work Act" to the "Social Service Professions Act".

8.43 The aim of the Social Service Professions Act is to provide for the establishment of a South African Council for Social Services Professions, and to define its powers and functions; as well as to provide for the registration of social workers, student social workers, social auxiliary workers, and persons practising other professions in respect of which professional boards have been established.

3 Obsolescence and redundancy

8.44 The Maintenance and Promotion of Competition Act 96 of 1979, referred to in section 28(4)*(c)* of the Social Service Professions Act, has been repealed by the Competition Act 89 of 1998. Similarly, the Public Accountants and Auditors Act 80 of 1991, referred to in section 13 (2)*(a)*, has been repealed by the Auditing Professions Act 26 of 2005. The Mental Health Act 18 of 1973, referred to in sections 6(1)(*f*) and

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112 *Government Gazette* No 30688 Vol 511 of 25 January 2008.

113 On page 73 of the 2015 Annual Report of the DSD it is stated that the Social Services Professions Act is being reviewed. On page 84 it is stated that a Social Service Bill for practitioners was finalized.

20(1)(*f*), was repealed by the Mental Health Care Act 17 of 2002. Only chapter 8 of the 1973 Mental Health Act is still in force.

8.45 The references in the Social Service Professions Act to the National Policy for General Education Affairs Act 76 of 1984, and to the Minister of National Education, are out-dated. The requirements for the education and training of social service professionals, as well as requirements about the nature, content and duration of the curricula for and practical training of those professionals, involve matters of education and training at the tertiary level. Therefore, these references should be to the Higher Education Act of 1997. The SALRC proposes that the references in section 28 of the Social Service Professions Act should refer to "section 3 of the Higher Education Act of 1997" and to "the Minister of Higher Education and Training".

8.46 Section 1 of the Social Service Professions Act defines "Director-General" as the "Director-General: Welfare". This definition should be changed to refer to the "Director-General: Social Development". In addition, "Minister" is defined (in section 1) as the "Minister for Welfare and Population Development." This definition should be changed to refer to the "Minister of Social Development".

8.47 In light of the above, the SALRC proposes the following amendments:

Amendment of section 1 of Act 110 of 1978

Section 1 of Act 110 of 1978 is hereby amended:

(a) by the substitution for the definition of "Director-General of the following definition:

"Director-General" means the Director-General: **[Welfare;]** Social Development;"

(b) by the substitution for the definition of "Minister" by the following definition:

"Minister" means the Minister **[for Welfare and Population]** of Social Development in the national sphere of government;"

Amendment of section 5(1)(c)(ii) of Act 110 of 1978

Section 5 is hereby amended by the substitution for subparagraph (ii) of paragraph (c) of subsection (1) of the following subparagraph:

"(ii) one shall be in the employment of the **[Department of Welfare]** Department of Social Development in the national sphere of government;"

Amendment of section 5(1)(c)(vi) of Act 110 of 1978

Section 5 is hereby amended by the substitution for subparagraph (vi) of paragraph (c) of subsection (1) of the following subparagraph:

"(vi) one shall be nominated by the **[Minister of Education]** Minister of Higher Education and Training in the national sphere of government;"

Amendment of section 5(1)(c)(viii) of Act 110 of 1978

Section 5 is hereby amended by the substitution of subparagraph (viii) of paragraph (c) of subsection (1) for the following subparagraph:

"(viii) one shall be nominated by the heads of the departments responsible for **[welfare matters]** social development in the provincial sphere of government."

Amendment of section 6(1)(f) of Act 110 of 1978

Section 6 is hereby amended by the substitution of paragraph (f) of subsection (1) for the following paragraph:

"(1) A member of the council shall vacate his or her office if –

(f) the member becomes a patient or a State patient as defined in section 1 of **[the Mental Health Act, 1973 (Act 18 of 1973)]** the Mental Health Care Act 17 of 2002;".

8.48 The SALRC further suggests that sections 13, 20 and 28 be amended as follows:

13. Book-keeping and auditing

Section 13 is hereby amended by the substitution of paragraph (a) of subsection (2) for the following paragraph:

"(2)*(a)* The records, statements of account and balance sheet referred to in subsection (1), shall be audited by a person registered as an accountant and auditor under the [Public Accountants' **and Auditors' Act, 1991 (Act 80 of 1991)]** Auditing Professions Act 26 of 2005, and appointed by the council."

20. Removal from, rectification in and restoration to register of names

Section 20 is hereby amended by the substitution for paragraph (f) of section (1) of the following paragraph:

"(f) is detained as a mentally ill person under the **[Mental Health Act, 1973 (Act 18 of 1973)]** Mental Health Care Act 17 of 2002;"

28. Regulations

Section 28 is hereby amended by –

(a) the substitution of paragraph (c) of subsection (1) for the following paragraph:

"*(c)* subject to the general policy determined by the Minister of **[National Education]** Higher Education and Training in terms of **[section 2 (1) *(d)* of the National Policy for General Education Affairs Act, 1984 (Act 76 of 1984)]** section 3 of the Higher Education and Training Act , the minimum requirements for the education and training, and the nature, content and duration of the curricula and practical training, which shall be a requirement for the acquisition of a prescribed qualification;"; and

(b) the substitution for paragraph (c) of subsection (4) of the following paragraph:

"*(c)* subsection (1) *(g*B*)* shall be made with the concurrence of the Competition Board established by **[section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979)** the Competition Act 89 of 1998.".

4 Inequality, obsolescence, redundancy

8.49 Section 5(3) of the Social Service Professions Act deals with persons elected or appointed to the Council. Section 5(3)*(a)(i)* provides that a person elected or appointed to the South African Council for Social Service Professions must be a South African citizen who is resident in the Republic.

8.50 Section 5(3)*(b)* provides that members of the Council can only be elected by persons who are South African citizens who are resident in South Africa.

8.51 The SALRC noted above in Chapter 7 at par 7.13 that in the *Larbi-Odam* case, the Constitutional Court considered whether the exclusion of permanent residents from, respectively, employment and eligibility for social assistance constitutes unfair discrimination. The grounds considered were that the persons who complained could be seen as members of a vulnerable group in society. The judgment in the *Larbi-Odam* case suggests that the exclusion of permanent residents from being appointed, elected

or holding office does constitute unfair discrimination, unless there is a sound political reason for requiring a person to be a South African citizen.[114]

8.52 Section 5(3)*(b)* provides that a person shall be elected by persons who are South African citizens who are resident in the Republic..

8.53 The SALRC proposes that section 5 be amended as follows:

Section 5 of the Social Service Professions Act, 1978 is hereby amended by –

(a) the substitution for subparagraph (i) of paragraph (a) of subsection 3 of the following subparagraph:

"(i) be a South African citizen who is resident in the Republic or a permanent resident; and"

(b) the substitution for paragraph (b) of subsection 3 of the following paragraph:

"(b) A person to be elected in terms of subsection (1) (a) or (b) shall be elected by persons who are South African citizens who are resident in the Republic or who are permanent residents in South Africa.".

5 Regulations requiring amendments

8.54 The SALRC proposes, in light of the *Larbi-odam* decision, that Regulations 2, 7 and 24 be changed as follows:[115]

2. Qualification for persons to be elected or appointed as members of a professional board

A person who is elected or appointed as a member of a professional board in terms of section 28(gD)(viii) of the Act shall –

(a) be a South African citizen who is resident in the Republic or a permanent resident in South Africa; and

7.

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[114] See Chapter 7 above. Par [25] of the judgment: "I hold that regulation 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner may be seen as a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure."

[115] Regulations regarding the election and appointment of members of a professional board, Government Notice R 18 in *Government Gazette* 34 930 of 16 January 2012

Notwithstanding the provisions of regulations 5 and 6, no person shall be entitled to vote at the election if, on the day on which he or she votes, he or she is not a South African citizen or a permanent resident in South Africa.

24. Vacation of office and filling of vacancies

(1) A member of professional board shall vacate his or her office if –

(d) the member ceases to be a South African citizen or to be permanently resident In the Republic or to be a permanent resident;

8.55 The following typographical errors have been identified by the SALRC:

11. Nomination of candidates

(1) No person shall be accepted as a candidate for election unless –

…

(b) he or she is nominated by a person whose name appears on a register kept by the council for the profession concerned: Provided that in the case of a professional board for which the council has not yet **[been]** instituted a register, the nominations be made by a person whose name is on the list of voters provided in terms of regulation 6;

13.

(1) If the number of persons accepted as candidates is equal to or less than the number of members to be elected, the returning officer shall forthwith declare the candidates who were so accepted to be duly elected members and shall cause a notice to that effect to be published in the *Gazette*.

(2)*(a)* If the number of duly elected members referred to in sub-regulation (1) is less **[that]**than the number of members to be elected, the returning officer shall, within 14 days of the publication of the notice referred to in sub-regulation (1), publish a notice referred to in regulation 9(1) with regard to the election of the members still to be elected.

(b) The provisions of these regulations shall apply in the same manner to the nomination and election of such members.

19. Determination of result election

…

(3) No vote cast on a ballot paper which is not received by the returning officer before the hour on the polling day determined by him or **[she]** her shall be taken into account at the counting of the votes recorded at the election.

…

(11) The returning officer shall, as soon as possible reveal the result of the election, including the number of votes recorded for each candidate; to be publishe**[s]**d in the *Gazette*.

E Draft Social Service Professions Bill 2007

8.56 This Bill was published on 25 February 2008,[116] and aims to replace the out-dated Social Service Profession Act 110 of 1978. It also aims to establish the South African Council for Social Service Professions, and to determine its composition, powers and functions of professional boards; to provide for the registration of social service practitioners; to promote and regulate the education, training and professional development of social service practitioners; to regulate the professional conduct of social service practitioners; and to provide for incidental matters.

(a) Obsolescence and redundancy

8.57 Clause 9(1)*(d)* of the Bill deals with the composition of the South African Council for Social Service Professions. It provides that the Council consists of several members to be appointed by the Minister, including one person who is employed by the Department of Education and is designated by the Minister of Education.

8.58 The Bill addresses the matter of the higher education of social service professionals, and therefore the issue of basic education is not relevant in this Bill. Hence, the expressions "Department of Education" and "Minister of Education" in clause 9(1)*(d)* need to be replaced with "Department of Higher Education and Training" and "Minister of Higher Education and Training" respectively.

Composition of Council

9(1) The Council consists of the following members appointed by the Minister

(d) one person employed by the [Department of **Education]** Department of Higher Education and Training, designated by the [Minister of **Education]** the Minister of Higher Education and Training;

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[116] *Government Gazette* No. 30668, Vol 511.

8.59 Clause 11(1) seems to indicate that a person should be a South African citizen and be ordinarily resident in the Republic in order to be appointed to the Council.. It does not seem to indicate that a permanent resident can become a member of the Council, as required by the *Larbi-Odam* case.

> 11(1) A person may not be appointed as a member of the Council if that person –
> *(a)* is not a South African citizen and ordinarily resident in the Republic;

8.60 The subsection can be interpreted as meaning a South African citizen who lives in South Africa. In addition, the double negative is confusing. The SALRC therefore recommends that the wording of the subsection be changed as follows:

> 11(1) A person may be appointed as a member of the Council if that person-
> *(a)* is a South African citizen ordinarily resident in the Republic, or has obtained permanent resident status in the Republic;

8.61 Clause 47 of the Bill deals with disciplinary sanctions. It contains a typographical error. Sub-clause (3) of clause 47 is hereby amended by deleting the word **["of"]** before the word "her" and replacing it with the word "or."

> **47. Disciplinary sanctions**
>
> (3) If any social service practitioner fails to comply with any of the conditions imposed upon him **[of]**or her in terms of subsection (2)*(a)* and the disciplinary committee is satisfied that the non-compliance was not due to circumstances beyond that person's control, the disciplinary committee may impose any of the penalties referred to in subsection (1) as if the imposition of the penalty had never been postponed.

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Annexure A

SOCIAL DEVELOPMENT LEGISLATION AMENDMENT BILL

GENERAL EXPLANATORY NOTE

References are to an Act as it appeared in the relevant *Government Gazette.*

[ ] Words in bold typed in square brackets indicate characters or phrases to be omitted from existing enactments.

_____Words underlined with a solid line indicate characters or phrases to be inserted in existing enactments.

BILL

To amend and repeal certain laws administered by the Department of Social Development containing redundant or obsolete provisions or in need of conformity with the equality provision in the Constitution of the Republic of South Africa; and to provide for matters connected therewith.

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

Repeal of Act 14 of 1971

1. The Aged Persons Amendment Act, 1971 is hereby repealed.

Repeal of Act 46 of 1976

2. The Aged Persons Amendment Act, 1976 is hereby repealed.

Repeal of Act 77 of 1978

3. The Welfare Laws Amendment Act, 1978 is hereby repealed.

"(b) the board of the South African Defence Force Fund shall be, with due regard to the financial position of that Fund and the requirements of each case, to render such aid as the board may deem fair and reasonable to **[members]** employees and former **[members]** employees of the South African Defence Force and of auxiliary services established and designated in accordance with **[section 80 (1) of]** the Defence Act, **[1957 (Act 44 of 1957)]** 2002 (Act 42 of 2002), and their dependants who suffer financial hardship or financial distress arising, directly or indirectly, out of any service or duties contemplated in **[section 3 (2) of]** the Defence Act, **[1957]** 2002, performed by such **[members]** employees, and to provide facilities to or for such **[members]** employees and former **[members]** employees who perform or performed such service or duties;"

Amendment of section 21(1) of Act 107 of Act 1978

4. Section 21 of the Fund-Raising Act, 1978 is hereby amended by the substitution for (1) of the following subsection:

"(1) **[Notwithstanding anything to the contrary in Chapter I contained, n]** No contributions shall be collected for a purpose referred to in section 18, except as provided in this Chapter."

"22(4) A board shall deposit all the moneys received by it in an account which it shall open with a banking institution registered in terms of the Banks Act, **[1965 (Act 23 of 1965)]** 1990 (Act 94 of 1990)."

Amendment of section 23(4) of Act 107 of 1978

5. Section 23(4) of the Fund-Raising Act, 1978 is hereby amended by the deletion of subsection (4):

"**[(4) The provisions of subsections (5), (6) (a) and (c), (7), (8) and (11) of section 7 shall mutatis mutandis apply in relation to the collection of contributions by virtue of a permission or special permission granted under subsection (1) or (2).]**"

Amendment of section 25 of Act 107 of 1978

6. Section 25 of the Fund-Raising Act, 1978 is hereby amended by the substitution for section 25 of the following section:

"The administrative work, including the receipt and disbursement of money incidental to the performance of the functions or the exercise of the powers of a board or of any committee of the board shall be performed by officers in the public service designated by the **[Secretary]** Minister for Social Development and the Head of the Defence Force and who shall be under **[his]** their control."

Amendment of section 26 of Act 107 of 1978

7. Section 26 of the Fund-Raising Act, 1978 is hereby amended by the substitution for section 26 of the following section:

"(1) If at any time in the opinion of the **[State]** President it appears that serious material damage or loss or distress has occurred or is likely to occur as a result of a sudden or disastrous event in a particular area, whether in the Republic or elsewhere, and that the relief of the distress of the persons who are or will be affected thereby is likely to be supported by the public generally or by any particular section of the public, he may by proclamation in the Gazette declare such event for the purposes of this Act to be a disaster.

(2) The **[State]** President may at any time in a like manner withdraw or amend any proclamation referred to in subsection (1)."

Amendment of section 1 of Act 110 of 1978

8. Section 1 of the Social Service Professions Act, 1978 is hereby amended:

(a) by the substitution for the definition of "Director-General of the following definition:

"Director-General" means the Director-General: **[Welfare;]** Social Development"

(b) by the substitution for the definition of "Minister" of the following definition:

"Minister" means the Minister **[for Welfare and Population]** of Social Development in the national sphere of government;"

Amendment of section 5(1)(c)(ii), (vi) and (viii), of Act 110 of 1978

9. Section 5(1)(c) of the Social Service Professions Act, 1978 is hereby amended by-

(a) the substitution for subparagraph (ii) of paragraph (c) of subsection (1) of the following subparagraph:

"(ii) one shall be in the employment of the Department of **[Welfare]** Social Development in the national sphere of government;"

(b) the substitution for subparagraph (vi) of paragraph (c) of subsection (1) of the following subparagraph:

"(vi) one shall be nominated by the Minister of **[Education]** Higher Education and Training in the national sphere of government;"

(c) the substitution for subparagraph (viii) of paragraph (c) of subsection (1) of the following subparagraph:

"(viii) one shall be nominated by the heads of the departments responsible for **[welfare matters]** social development in the provincial sphere of government."

Amendment of section 5(3)(a)(i) and (b) of Act 110 of 1978

10. Section 5 of the Social Service Professions Act, 1978 is hereby amended by-

(a) the substitution of subparagraph (i) of paragraph (a) of subsection 3 of the following subparagraph:

"(i) be a South African citizen who is resident in the Republic or a permanent resident; and"

(b) the substitution for paragraph (b) of subsection 3 of the following paragraph:

"A person to be elected in terms of subsection (1) (a) or (b) shall be elected by persons who are South African citizens who are resident in the Republic or who are permanent residents in South Africa."

Amendment of section 6(1)(f) of Act 110 of 1978

11. Section 6 of the Social Service Professions Act, 1978, is hereby amended by the substitution for paragraph (f) of subsection (1) of the following paragraph:

"(f) the member becomes a patient or a State patient as defined in **[section 1of the Mental Health Act, 1973 (Act No. 18 of 1973)]** the Mental Health Care Act 17 of 2002."

Amendment of section 13(2)(a) of Act 110 of 1978

12. Section 13 of the Social Service Professions Act, 1978 is hereby amended by the substitution for paragraph (a) of subsection (2) of the following paragraph:

"(a) The records, statements of account and balance sheet referred to in subsection (1), shall be audited by a person registered as an accountant and auditor under the **[Public Accountants' and Auditors' Act, 1991 (Act No. 80 of 1991)]** Auditing Professions Act 26 of 2005 and appointed by the council."

Amendment of section 20(1)(f) of Act 110 of 1978

13. Section 20 the Social Service Professions Act, 1978 is hereby amended by the substitution for paragraph (f) of subsection (1) of the following paragraph:

"(f) is detained as a mentally ill person under **[the Mental Health Act, 1973 (Act 18 of 1973)]** the Mental Health Care Act 17 of 2002."

Amendment of section 28(1)(c) and 4(c) of Act 110 of 1978

14. Section 28 the Social Service Professions Act, 1978 is hereby amended by –

(a) the substitution for paragraph (c) of subsection (1) of the following paragraph:

"(c) subject to the general policy determined by the Minister of **[National Education]** Higher Education and Training in terms of section **[2(1)(d) of the National Policy for General Education Affairs Act, 1984 (Act No. 76 of 1984)]** 3 of the Higher Education Act of 1997, the minimum requirements for the education and training, and the nature, content and duration of the curricula and practical training, which shall be a requirement for the acquisition of a prescribed qualification;"

(b) the substitution for paragraph (c) of subsection (4) of the following paragraph:

"(c) subsection (1) (gB) shall be made with the concurrence of the Competition Board established by section 3 of the **[Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979)]** Competition Act 89 of 1998."

Repeal of Act 92 of 1981

15. The Fund-raising Amendment Act, 1981 is hereby repealed.

Amendment of section 3A of Act 116 of 1991

16. Section 3A of the Probation Services Act, 1991 is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) A further condition may include participation in a rehabilitation or other programme as determined in terms of or prescribed under section **[84 (1)]** 64 of the Correctional Services Act, [**1959 (Act 8 of 1959)]** 111 of 1998."

Amendment of section 7(1) of Act 116 of 1991

17. Section 7 of the Probation Services Act, 1991 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) A member of a committee who is not an officer in the public service may be paid, while engaged in the business of the committee, such session, subsistence and transport allowances as the Minister may with the concurrence of the Minister of **[State Expenditure]** Finance determine."

Amendment of section 15(5) of Act 116 of 1991

18. Section 15 of the Probation Services Act, 1991 is hereby amended by the substitution for subsection (5) of the following subsection:

"(5) If any person as a result of the performance of services by a volunteer in terms of this Act has suffered patrimonial loss which cannot be recovered from the State in terms of subsection (1), the Director-General may, with the concurrence of the **[Department of State Expenditure]** National Treasury, ex gratia pay that person such amount as the Director-General may deem reasonable."

Amendment of section 16(3) of Act 116 of 1991

19. Section 16 of the Probation Services Act, 1991 is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) Regulations affecting State expenditure shall be made only with the concurrence of the Minister of **[State Expenditure]** Finance."

Amendment of section 17 (1) and (2) of Act 116 of 1991

20. Section 17 of the Probation Services Act, 1991 is hereby amended by –

(a) the substitution for paragraph (1) of the following paragraph:

"(1) The **[State]** President may by proclamation in the Gazette assign the administration of the provisions of this Act, either generally or in respect of persons belonging to any specific class or category as defined in the said proclamation, to any Minister or partly to one Minister and partly to another Minister or other Ministers, and may in such proclamation specify the powers and functions which shall be exercised and performed by the several Ministers, and may further specify that any power or duty conferred or imposed by this Act upon the Minister shall be exercised or performed by one Minister acting with the concurrence of another Minister."

(b) the substitution for paragraph (2) of the following paragraph:

"(2) The **[State]** President may vary or amend any such proclamation."

Amendment of section 18(2)(a) and (3) of Act 116 of 1991

21. Section 18 of the Probation Services Act, 1991 is hereby amended by –

(a) the substitution for paragraph (a) of subsection (2) of the following paragraph:

"(a) delegate to the member of the Executive Council of that province responsible for **[welfare]** social development matters in the province any power conferred upon the Minister by this Act, except the power under section 16 to make regulations;"

(b) the substitution for subsection (3) of the following subsection:

"(3) The member of the Executive Council of a province responsible for **[welfare]** social development matters in the province may-"

Amendment of section 22 (1) of Act 116 of 1991

22. Section 22 of the Probation Services Act, 1991 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) This Act shall be called the Probation Services Act, 1991, and shall come into operation on a date fixed by the **[State]** President by proclamation in the Gazette."

Repeal of Act 44 of 1994

23. The Aged Persons Amendment Act, 1994 is hereby repealed.

Repeal of Act 45 of 1994

24. The Social Assistance Amendment Act, 1994 is hereby repealed.

Amendment of section 1 of Act 71 of 1997

25. Section 1 of the Non-Profit Organisations Act, 1997 is hereby amended by-

(a) the substitution for the definition of "constitution" of the following definition:

"constitution" includes a trust deed and **[memorandum and articles of association]** Memorandum of Incorporation;"

(b) the substitution for the definition of "Minister" of the following definition:

"Minister" means the Minister for **[Welfare and Population Development]** Minister for Social Development;"

(c) the substitution for the definition of "national department" of the following definition:

"national department" means the national department responsible for **[welfare]** social development;"

(d) the substitution for the definition of "this Act" of the following definition:

"this Act" includes **[(he]** the regulations made under this Act."

Amendment of section 9(5) of Act 71 of 1997

26. Section 9 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for subsection (5) of the following subsection:

"(5) For the purposes of this Act, an Arbitration Tribunal **[maybe]** may be composed of not more than three members of the panel of arbitrators appointed by the chairperson."

Amendment of section 11 of Act 71 of 1997

27. Section 11 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for section 11 of the following section:

"The Minister may prescribe benefits or allowances applicable to registered non-profit organisations, after consultation with the **[Committees of the Houses of Parliament]** Parliamentary Committees for Social Development responsible for **[welfare]** social development and with the concurrence of every Minister whose department is affected by a particular benefit or allowance."

Amendment of sections 12(2)(n) and (o) of Act 71 of 1997

28. Section 12 of the Non-Profit Organisations Act, 1997 is hereby amended by–

(a) the substitution of paragraph (n) of subsection (2) for paragraph (n) of the following paragraph:

"(n) set out a procedure by which the organisation **[maybe]** may be wound up or dissolved;"

(b) the substitution of paragraph (o) of subsection (2) for paragraph (o) of the following paragraph:

"(o) provide that**[.]**, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another non-profit organisation having similar objectives."

Amendment of sections 12 (3)(d) and (l) of Act 71 of 1997

29. Section 12 of the Non-Profit Organisations Act, 1997 is hereby amended by-

(a) the substitution for paragraph (d) of subsection (3) of the following paragraph:

"(d) provide for appeals against loss of the benefits of membership or against termination of membership and specify the procedure for those appeals and determine the body to which those appeals **[maybe]** may be made;"

(b) the substitution for paragraph (l) of subsection (3) of the following paragraph:

"(l) determine the purposes for which the funds of the organisation**[maybe]** may be used;"

Amendment of section 16 (2) of Act 71 of 1997

30. Section 16 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution of subsection (2) for the following subsection:

"(2) For the purposes of this Act**[.]**, service of any document directed to a registered non-profit organisation at the physical address most recently provided to the director must be regarded as service of that document on that organisation."

Amendment of section 17(1)(a) and (b) of Act 71 of 1997

31. Section 17 of the Non-Profit Organisations Act, 1997 is hereby amended by -

(a) the substitution for paragraph (a) of subsection (1) of the following paragraph:

"(a) keep accounting records of its income, expenditure**[.]**, assets and liabilities;"

(b) the substitution for paragraph (b) of subsection (1) for the following paragraph:

"(b) within six months after the end of its financial year, draw up financial statements**[.]**, which must include at least"

Amendment of section 18(2)(c) of Act 71 of 1997

32. Section 18 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for paragraph (c) of subsection (2) of the following paragraph:

"(c) Its obligations in terms of this section **[.]**, section 17 and **[arty]** any other provision of this Act."

Amendment of section 20(1)(a)(ii) of Act 71 of 1997

33. Section 20 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for sub paragraph (ii) of paragraph (a) of subsection (1) of the following subparagraph:

"(ii) a condition or term of **[arty]** any benefit or allowance conferred on it in terms of section 11;"

Amendment of section 20(1)(a)(iii) of Act 71 of 1997

34. Section 20 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for subparagraph (iii) of paragraph (a) of subsection (1) of the following subparagraph:

"(iii) its obligations in terms of sections 17**[.]**, 18 and 19 and any other provision of this Act;"

Amendment of section 23 of Act 71 of 1997

35. Section 23 of the Non-Profit Organisations Act, 1997 is hereby amended by–

(a) the substitution for subsection (1) of the following subsection:

"(1) A registered non-profit organisation may **[reregister]** deregister voluntarily by sending the director-
(a) written notice-
(i) stating its intention to **[reregister]** deregister voluntarily and the reasons therefor; and
(ii) specifying a date, at least two months after the date of the notice, on which the deregistration is to take effect; and simultaneously
(b) a copy of the reports referred to in section 18 (1) for the period from its previous financial year up to the date of the written notice contemplated in this subsection."

(b) the substitution for subsection (3) of the following subsection:

"(3) Upon receiving a notice of voluntary deregistration or winding up or dissolution from a registered non-profit organisation, the director must on the date specified in the notice-

(a) cancel the organisation's certificate of registration, and **[reregister]** deregister it by amending the register; and
(b) notify the organisation in writing of the deregistration and confirm the date on which the amendment was made to the register."

Amendment of Section 29(1) of Act 71 of 1997

36. Section 29 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) It is an offence to cause a non-profit organisation, when it is being wound up or dissolved, to transfer its remaining assets otherwise than in the manner contemplated in section 12 (2) **[0]**(o)."

Amendment of section 31(1), 31(1)(iii) and (3)(b) of Act 71 of 1997

37. Section 31 of the Non-Profit Organisations Act, 1997 is hereby amended by -

(a) the substitution for subsection (1) of the following subsection:

"(1) Subject to section **[15]**10 of the **[Exchequer Act, 1975 (Act 66 of 1975)]** Public Finance Management Act 1 of 1999, the Minister may in writing delegate any of his or her functions in terms of this Act**[.]**, except those contemplated in sections 8 and 26 to-. . ."

(b) the substitution for subparagraph (iii) of subsection (1) of the following subparagraph:

"(iii) any other organ of State responsible for **[welfare]** social development matters**[.]**, if the head of that organ of State accepts the delegation."

(c) the substitution for paragraph (b) of subsection (3) of the following paragraph:

"(b) withdraw or amend **[arty]** any decision made by a person or body in terms of a delegation contemplated in subsection (1)"

Amendment of section 33 of Act 71 of 1997

38. Section 33 of the Non-Profit Organisations Act, 1997 is hereby amended by the substitution for section 33 of the Non-Profit Organisations Act, 1997 of the following section:

"Chapters I and**[HI]**III of the Fund-raising Act, 1978 (Act 107 of 1978), are hereby repealed to the extent that they apply to fund-raising organisations,

branches of such organisations and any other organisation contemplated in Chapter I of that Act."

Amendment of sections 34(2)(b)(ii); 34(2)(e) and 34(3) of Act 71 of 1997

39. Section 34 of the Non-Profit Organisations Act, 1997 is hereby amended by-

(a) the substitution for subparagraph (ii) of paragraph (b) of subsection 2 of the following subparagraph:

"(ii) in accordance with the procedure contemplated in sections 13**[.]**, 14 and 15."

(b) the substitution for paragraph (e) of subsection (2) of the following paragraph:

"(e) If the organisation does not submit its application within this period**[.]**, the organisation's registration lapses and the director must"

(c) the substitution for subsection (3) of the following subsection:

"(3) If an authorised or registered fund-raising organisation, branch of a **[find]** fund-raising organisation or any other organisation contemplated in subsection (2) (a) fails to comply with the terms and conditions of its authorisation or registration, the procedures contemplated in sections 20, 21 and 22 of this Act apply."

Repeal of Act 106 of 1997

40. The National Welfare Amendment Act, 1997 Act is hereby repealed.

Repeal of Act 3 of 2001

41. The Advisory Board on Social Development Act, 2001 is hereby repealed.

Amendment of section 5(1) of Act 9 of 2004

42. Section 5 of the South African Social Security Act, 2004 is hereby amended by the substitution for subsection (1) of the following subsection:

(1) The Minister must appoint a fit and proper and suitable qualified South African citizen or a person permanently resident in South Africa as the Chief Executive Officer of the Agency."

Amendment of section 1 of Act 13 of 2004

43. Section 1 of the Social Assistance Act, 2004 is hereby amended by-

(a) the substitution for the definition of foster child" of the following definition:

"'foster child' means a child who has been placed in the custody of-
(a) a foster parent in terms of-
(i) **[Chapter 3 or 6 of the Child Care Act, 1983 (Act 74 of 1983)]**; section 180 (1) of the Children's Act 38 of 2005, including foster care in a registered cluster foster care scheme; or
(ii) section 72 or 76 of the Child Justice Act, 2008; **[or]**
[(b) a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);]"

(b) the substitution for the definition of "foster parent" of the following definition:

"'foster parent' means a person**[, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law, or a tutor to whom a letter of tutorship has been issued in terms of Chapter IV of the Administration of Estates Act, 1965 (Act 66 of 1965);]** who has foster care of a child by order of the children's court, and includes an active member of an organisation operating a cluster foster care scheme and who has been assigned responsibility for the foster care of a child;"

(c) the substitution for the definition of "parent" of the following definition:

"**['parent' means a parent as defined in the Child Care Act, 1983 (Act 74 of 1983)]**; 'parent', in relation to a child, includes the adoptive parent of a child, but excludes-
(a) the biological father of a child conceived through the rape of or incest with the child's mother;
(b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
(c) a parent whose parental responsibilities and rights in respect of a child have been terminated;"

Amendment of section 8(b) of Act 13 of 2004

44. Section 8 of the Social Assistance Act, 2004 is hereby amended by the substitution for subparagraph (b) of the following subparagraph:

"(b) he or she satisfies the requirements of **[the Child Care Act, 1983 (Act 74 of 1983)]** section 182 of the Children's Act 38 of 2005."

Amendment of section 15 of Act 13 of 2004

45. Section 15 of the Social Assistance Act, 2004 is hereby amended by the substitution for section 15 of the following paragraph:

"**15 Appointment of procurator**

(1) A person applying for or receiving social assistance may, subject to subsection (4), appoint a procurator, by a power of attorney, to apply or receive social assistance on his or her behalf, in accordance with the prescribed requirements.

(2) Nothing in this section prevents a person applying for or receiving social assistance to withdraw a power of attorney made in terms of subsection (1) and to appoint another person as procurator.

(3) In the case of a person who is unable to appoint another as his or her procurator, the Agency, subject to subsection (4), may nominate an adult person or welfare organisation to receive the grant on the beneficiary's behalf, if the person so nominated satisfies the prescribed conditions.

[(4) Stamp duty is not payable in respect of a power of attorney given by an applicant to any person to apply for social assistance on his or her behalf or in respect of a power of attorney given by a beneficiary to any person to receive payment of any grant on his or her behalf.]

(5) A procurator who has knowingly failed to inform the Agency of his or her intention to be absent from the Republic for a period exceeding 90 days, as contemplated in section 16 (3), is unfit to act as procurator and may not continue to act as procurator or be nominated or appointed as procurator, unless the Agency decides otherwise as provided for in section 16 (5)."

Amendment of section 22(1) of Act 13 of 2004

46. Section 22 of the Social Assistance Act, 2004 is hereby amended by the substitution for subsection (1) of section 22 of the following subsection:

"(1) Notwithstanding anything to the contrary in any law, **[as]** an organ of state must, at the request of the agency, and subject to subsection (3), furnish it with all relevant information relating to an applicant or beneficiary."

Amendment of section 23 of Act 13 of 2004

47. Section 23 of the Social Assistance Act, 2004 is hereby amended by the insertion after subsection (3) of the following section:

"(4) no evidence regarding any questions, disclosure of information, or answers obtained for the purpose of an investigation shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)."

Amendment of section 27 of Act 13 of 2004

48. Section 27 of the Social Assistance Act, 2004 is hereby amended by-

(a) the substitution for paragraph (a) of the following paragraph:

(a) of its own accord or upon receipt of a complaint, investigate any alleged contravention of this Act by any person, and may, where appropriate,

refer such investigation to the Directorate for Priority Crime Investigations established by section 17C of the South African Police Service Act, 1995 (Act 68 of 1995), the Agency or the **[Inspectorate of Special Operations established by section 7 (1) (a) of the National Prosecuting Authority Act, 1998 (Act 32 of 1998)]**, or any other organ of state established by law which has the appropriate powers to investigate and act on any alleged contravention of this Act; and

(b) the substitution for paragraph (b) of subsection (2) of the following paragraph:

"(b) investigate any matter in respect of social assistance referred to **[the]** it by the Minister, the Director-General of the Department or the Chief Executive Officer of the Agency."

Amendment of section 28 of Act 13 of 2004

49. Section 28 of the Social Assistance Act, 2004 is hereby amended by the insertion after section (7) of the following section:

"(8) no evidence regarding any questions, disclosure of information, or answers obtained for the purpose of an investigation shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)"

Amendment of section 1 of Act 38 of 2005

50. Section 1 of the Children's Act, 2005 is hereby amended by the substitution for the definition of "midwife" of the following definition-

'midwife' means a person **[registered as a midwife]** as defined under the Nursing Act, **[1978 (Act No. 50 of 1978)]** 2005 (Act 33 of 2005);

Amendment of section 1 of Act 38 of 2005

51. Section 1 of the Children's Act, 2005 is hereby amended by the substitution for subsection (4) of section 1 of the following subsection:

"(4) Any proceedings arising out of the application of **[the Administration Amendment Act, 1929 (Act 9 of 1929)]**, the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court."

Amendment of section 140(5)(a) of Act 38 of 2005

52. Section 140 of the Children's Act, 2005 is hereby amended by the substitution of paragraph (a) of subsection (5) of the following paragraph:

"(5)(a) A person authorised by a municipality in whose area **[a]** the premises or an enclosure is situated where entertainment described in subsection (1) is or is to be provided, or on reasonable suspicion is or is to be provided, may enter such enclosure in order to inspect whether subsections (2) or (3) are complied with."

Amendment of section 151 of Act 38 of 2005

53. Section 151 of the Children's Act, 2005 is hereby amended by the insertion after subsection (2) of section 151 with the following subsection:

"(2A) The court ordering the removal must simultaneously refer the matter to a designated social worker and direct that social worker to ensure that the:
(i) removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
(ii) child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court."

Amendment of section 152(2) of Act 38 of 2005

54. Section 152 of the Children's Act, 2005 is hereby amended by the insertion after paragraph (c) of subsection (2) with the following paragraph:

"(d) ensure that:
(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the removal; and
(ii) The child concerned and the parents, guardian or care-giver as the case may be is, unless this is impracticable, present in court."

Amendment of section 152(3)(b) of Act 38 of 2005

55. Section 152 of the Children's Act, 2005 is hereby amended by the substitution for subparagraph (b) of subsection (3) of the following subparagraph:

"**[(b) refer the matter to a designated social worker for investigation contemplated in section 155 (2); and]**
"(b) refer the matter of the removal before the end of the first court day after the day of the removal to a designated social worker who must ensure that:
(i) the removal is placed before the Children's Court for review before the expiry of the next court day after the referral;
(ii) the child concerned and the parents, guardian or care-giver as the case may be are, unless this is impracticable, present in court; and the investigation contemplated in section 155(2) is conducted."

Amendment of section 174 (3)(c) of Act 38 of 2005

56. Section 174 of the Children's Act, 2005 is hereby amended by the substitution for paragraph (c) of subsection (3) of the following paragraph:

"(c) a transfer to another child and youth care centre **[of]** or any other form of placement."

Amendment of section 286(1)(a) of Act 38 of 2005

57. Section 286 of the Children's Act, 2005 is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

"(a) the Director-General: **[Foreign Affairs]** Department of International Relations and Cooperation must facilitate the return to the Republic of a child who is a citizen or permanent resident of the Republic and who is a victim of trafficking;"

Amendment of section 293 of Act 38 of 2005

58. Section 293 of the Children's Act, 2005 is hereby amended by the substitution thereof for the following section:

"**293 Consent of [husband,] spouse [wife] or partner**

(1). Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the **[husband, wife]** spouse or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.

(2). Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her **[husband]** spouse or partner has given his or her written consent to the agreement and has become a party to the agreement.

(3) Where a **[husband]** spouse or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement."

Amendment of section 297(1)(c) of Act 38 of 2005

59. Section 297 of the Children's Act, 2005 is hereby amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

"(c) The surrogate mother or her husband, partner or relatives has no **[rights of parenthood]** parental responsibilities and rights or care of the child;"

Amendment of section 297(1)(e) of Act 38 of 2005

60. Section 297 of the Children's Act, 2005 is hereby amended by the substitution for paragraph (e) of subsection (1) of the following paragraph:

"(e) subject to sections **[292 and 293]** 298 and 300, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place;"

Amendment of section 299(1)(d) of Act 38 of 2005

61. Section 299 of the Children's Act, 2005 is hereby amended by the substitution for paragraph (d) of subsection (1) of the following paragraph:

"(d) subject to paragraphs (a) and (b), the commissioning parents have no **[rights of parenthood]** parental responsibilities and rights and can only obtain such rights through adoption;"

Amendment of section 304 of Act 38 of 2005

62. Section 304 of the Children's Act, 2005 is hereby amended by the insertion after paragraph (b) of subsection 3 of the following subsection:

"(3A) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person for purposes of the investigation referred to in subsection (3): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers for purposes of an investigation referred to in subsection (3) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)"

Amendment of Preamble of Act 13 of 2006

63. The Preamble to the Older Persons Act, 2006 is hereby amended by the substitution of the following:

"AND WHEREAS the State must create an enabling environment in which the rights in the Bill of Rights must be respected, protected and fulfilled;"

Amendment of Table of Contents of Act 13 of 2006

64. The Table of Contents of the Older Persons Act, 2006 is hereby amended by the substitution for item 13 of the following item:

"13. Registration of [comrnunity] community-based care and support services."

Amendment of section 1 of Act 13 of 2006

65. Section 1 of Older Persons Act, 2006 is hereby amended by the substitution for the definition of "older person" of the following definition-

> "'older person' means a person who **[in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older]** has attained the age of 60 years."

Amendment of section 2 (b) and (c) of Act 13 of 2006

66. Section 2 of the Older Persons Act, 2006 is hereby amended by -

(a) the substitution for paragraph (b) of the following paragraph:

> "The objects of the Act are to-
> **[(h)]**(b) maintain and protect the rights of older persons;"

(b) by the substitution for paragraph (c) of the following paragraph:

> "(c) shift the emphasis from institutional care to **[community-basedcare]** community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;"

Amendment of section 5(2)(h) of Act 13 of 2006

67. Section 5 of the Older Persons Act, 2006 is hereby amended by the substitution for paragraph (h) of subsection (2) of the following paragraph:

> "**[(h)]** (b) respect the older person's inherent dignity;"

Amendment of section 13 (2) of Act 13 of 2006

68. Section 13 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection 2 of the following subsection:

> "(2) The Minister must prescribe conditions for the registration of community-based care and support services, including application for registration, approval of registration, temporary registration**[.]**, withdrawal and termination of registration, and any matter contemplated in subsection (4)."

Amendment of section 14 (1) and (3)(a) of Act 13 of 2006

69. Section 14 of the Older Persons Act, 2006 is hereby amended by -

(a) the substitution for subsection (1) of the following subsection:

"(1) Any person who provides home-based care must ensure that **[caregiversreceive]** caregivers receive the prescribed training."

(b) the substitution for paragraph (a) of subsection (3)of the following paragraph:

"(a) The Minister **[musi]** must keep a register of all caregivers providing home-based care and must prescribe a code of conduct for such caregivers".

Amendment of section 18(3)(*a*) and (*b*) of Act 13 of 2006

70. Section 18 of the Older Persons Act, 2006 is hereby amended by -

(a) the substitution for paragraph (*a*) of subsection (3) of the following paragraph:

"(*a*) refuse the application or grant it subject to such conditions as he or she may determine, and if he or she grants it, direct that a registration certificate specifying those **[conditionsbe]** conditions be issued to the applicant in the prescribed form;"

(b) the substitution for paragraph (*b*) of subsection (3) of the following paragraph:

"(b) subject to such conditions as he or she may determine, grant authority to the applicant to operate the residential facility for such period, not exceeding 12 months, as the Minister may **[deterniine]** determine, and direct that a temporary registration certificate specifying those conditions be issued to the applicant in the prescribed form for that period, and after expiration of the said period, or after notice by the applicant in the prescribed manner that the said conditions have been complied with, whichever occurs first, reconsider the application."

Amendment of section 19(2) of Act 13 of 2006

71. Section 19 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) The operator of **[aregistered]** a registered residential facility must, at all reasonable times, report to the Minister any circumstances which may result in his or her inability to comply fully with any condition contemplated in section 18 (3)."

Amendment of section 20(3)(a) of Act 13 of 2006

72. Section 20 of the Older Persons Act, 2006 is hereby amended by the substitution for paragraph (a) of subsection (3) of the following paragraph:

"(a) facilitates interaction **[bktween]** between the residents of the residential facility and their families, the public in general and that committee;"

Amendment of section 21(3)(b)(i) of Act 13 of 2006

73. Section 21 is hereby amended by the substitution of subparagraph (i) of paragraph (b) of subsection (3) of with the following subparagraph:

"(i) paragraph (a)**[.]**, the required consent may be given by the spouse or partner of the older person concerned or, in the absence of such spouse or partner, an adult child or sibling of the older person, in the specific order as listed;"

Amendment of section 24 of Act 13 of 2006

74. Section 24 of the Older Persons Act is hereby amended by the substitution for section 24 of the following section:

"The provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Domestic Violence Act, 1998 **[(Act No.116of 1998)]** (Act 116 of 1998), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act."

Amendment of 25(4)(c) and (5)(a) of Act 13 of 2006

75. section 25 of the Older Persons Act, 2006 is hereby amended by-

(a) the substitution for paragraph (c) of subsection (4) of the following paragraph:

"(c) take such other steps as may be prescribed to **[ensureadequateprovision]** ensure adequate provision for the basic needs and protection of the older person concerned;"

(b) the substitution for paragraph (a) of subsection (5) of the following paragraph:

"(a) has his or her income, assets or old age **[granttaken]** grant taken against his or her wishes or who suffers any other economic abuse;"

Amendment of section 28(6)(b) of Act 13 of 2006

76. Section 28 of the Older Persons Act, 2006 is hereby amended by the insertion after paragraph (b) of subsection (6) of the following subparagraphs:

"(i) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court shall apply in relation to the questioning of a person for purposes of the investigation referred to in subsection (3): Provided that such a person shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him or her to a criminal charge.
(ii) No evidence regarding any questions and answers for purposes of an investigation referred to in subsection (3) shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955)."

Amendment of section 29(10) of Act 13 of 2006

77. Section 29 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection (10) of the following subsection:

"29 Enquiry into abuse of older person
(10)**[I€]** If, after consideration of the evidence and of any report submitted or furnished in terms of subsection (8), it appears to the magistrate that any allegation in the summons is correct, the magistrate may-
(a) authorise the person concerned to accommodate or care for the older person concerned under such conditions as the magistrate may impose; or

(b) prohibit that person from accommodating or caring for any older person for such period, but not exceeding 10 years, as may be determined by the magistrate."

Amendment of section 31(2) of Act 13 of 2006

78. Section 31 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) **[Aperson]** A person whose name appears in the register contemplated in subsection (1) may not in any way-
(a) operate or be employed at any residential facility;
(b) provide any community-based care and support service to an older person."

Amendment of section 32(2)(b) of Act 13 of 2006

79. Section 32 of the Older Persons Act, 2006 is hereby amended by the substitution for paragraph (b) of sub-section (2) of the following paragraph:

"(b) **[authorisethat]** authorise that Member of the Executive Council to perform any duty imposed upon the Minister by this Act."

Amendment of section 32(7) of Act 13 of 2006

80. Section 32 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection 7 of the following subsection:

"(7) Any person to whom any power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to such conditions as the person who effected the delegation or granted the authorisation considers necessary."

Amendment of section 34(3) of Act 13 of 2006

81. Section 34 of the Older Persons Act, 2006 is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) Any regulation made in terms of subsection (1) which affects the South African Police Service must be made after consultation with the **[Minister for Safety and Security]** Minister of Police."

Amendment of section 1 of Act 70 of 2008

82. Section 1 of the Prevention and Treatment for Substance Abuse Act, 2008 is hereby amended by the substitution for the definition of "youth" of the following definition:

"'youth' **[means 'youth' as defined in section 1 of the National Youth Commission Act, 1996 (Act 19 of 1996).]** means persons between the ages of 14 and 35."

Amendment of section 5(1) of Act 70 of 2008

83. Section 5 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution of subsection (1) for the following paragraph:

"(1) The Minister must, together with the National Youth **[Commission]** Development Agency, and the Ministers of Finance, **[Education]** Basic Education, Higher Education and Training, Health, Justice and **[Constitutional Development]** Correctional Services, Arts and Culture, Sports and Recreation South Africa, **[Local and Provincial Government, Correctional Services]**, and Cooperative Governance, and **[Safety and Security]** Police, develop and implement comprehensive intersectoral strategies aimed at reducing the demand and harm caused by substance abuse."

Amendment of section 6(4) of Act 70 of 2008

84. Section 6 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution for subsection (4) of the following subsection:

…

"(4) The accreditation contemplated in subsection (3) must be provided in terms of the **[South African Qualification[s] Authority Act, 1995 (Act 58 of 1995)]** National Qualification Framework Act 67 of 2008."

Amendment of section 8(1) of Act 70 of 2008

85. Section 8 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Minister must, in consultation with the National Youth **[Commission]** Development Agency, South African Police Service and the Ministers of **[Education]** Basic Education, Higher Education and Training, Health, Justice and **[Constitutional Development]** Correctional Services, Arts and Culture, **[Provincial and Local Government, Correctional Services]** Cooperative Governance, and Sports and Recreation South Africa, facilitate the establishment of integrated programmes for the prevention of substance abuse."

Amendment of section 12(1) of Act 70 of 2008

86. Section 12 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution for subsection (1) of the following subsection:

(1) "The Minister, in consultation with the National Youth **[Commission]** Development Agency, South African Police Services and Ministers of **[Education]** Basic Education, Higher Education and Training, Arts and Culture, Health, **[Provincial and Local Government]** Cooperative Governance, Correctional Services and Sports and Recreation South Africa, must develop guidelines for the establishment of community-based services."

Amendment of section 29(3)(d) and (e) of Act 70 of 2008

87. Section 29 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by-

(a) the substitution for paragraph (d) of subsection (3) of the following paragraph

"(d) If it is a treatment centre or a halfway house registered in terms of the Non-Profit Organisation Act, 1997 (Act No. 71 of 1997), **[comply]** complies **[sic]** with section 18 of that Act; and"

(b) the substitution for paragraph (e) of subsection 3 of the following paragraph:

"(e) if it is a company registered in terms of the Companies Act, 1973 (Act No 61 of 1973), **[comply]** complies [sic] with section 302 of that Act;"

Amendment of section 42(2)(b)(iii) of 70 of Act 2008

88. Section 42 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution for subsection (2) of the following subsection:

"(b) if an involuntary service user is released after the expiry of 12 months after an order referred to in section 35(7) was made, as to why -
(iii) every 12 months thereafter, if such involuntary service user has not been so discharged, and
give **[sic]** further reasons as to why he or she must not be discharged."

Amendment of section 51(1)(b) of Act 70 of 2008

89. Section 51 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) **[Stablish]** Establish the disciplinary procedure to be followed in dealing with violations of such rules;"

Amendment of Section 53 of Act 70 of 2008

90. Section 53 of the Prevention and Treatment for Substance Abuse Act, 2008, is hereby amended by-

(a) the substitution for paragraph (e) of subsection (2) of the following paragraph

"(e) **[a representative]** representatives of the **[Department of Education]** Departments of Basic Education, and Higher Education and Training, appointed by **[that Department]** those Departments";

(b) the substitution for paragraph (g) of subsection (2) of the following paragraph

"(g) a representative of the **[Department of Foreign Affairs]** Department of International Relations and Cooperation appointed by that Department;";

(c) the substitution for paragraph (n) of subsection 2 of the following paragraph:

"(n) a representative of the Department of Sport and Recreation South Africa appointed by that Department;";

(d) the substitution for paragraph (q) of subsection 2 of the following paragraph:

"(q) a representative of the Department of **[Provincial and Local Government]** Cooperative Government appointed by that Department;"; and

(e) the substitution for paragraph (r) of subsection 2 of the following paragraph:

"(r) a representative of the **[National Youth Commission]** National Youth Development Agency appointed by that Commission;

Proposed Amendments to the Social Service Professions Bill, 2007

Proposed amendment of clause 9(1)(d) of the Social Service Professions Bill

1. Clause 9 of the Social Service Professions Bill is hereby amended by the substitution for subparagraph (d) of sub-clause (1) of the following subparagraph:

"one person employed by the **[Department of Education]** Department of Higher Education and Training, designated by the Minister of **[Education]** Higher Education and Training;"

Proposed amendment of clause 11(1)(a) of the Social Service Professions Bill

2. Clause 11 of the Social Service Professions Bill is hereby amended by the substitution for paragraph (a) of the following paragraph:

"A person may be appointed as a member of the Council if that person-
(a) is a South African citizen ordinarily resident in the Republic, or has obtained permanent resident status in the Republic "

Proposed amendment of clause 47(3) of the Social Service Professions Bill

3. Clause 47 of the Social Service Professions Bill is hereby amended by the substitution for subclause (3) of the following subclause:

"(3) If any social service practitioner fails to comply with any of the conditions imposed upon him [of]or her in terms of subsection (2)(a) and the disciplinary committee is satisfied that the non-compliance was not due to circumstances beyond that person's control, the disciplinary committee may impose any of the penalties referred to in subsection (1) as if the imposition of the penalty had never been postponed"