

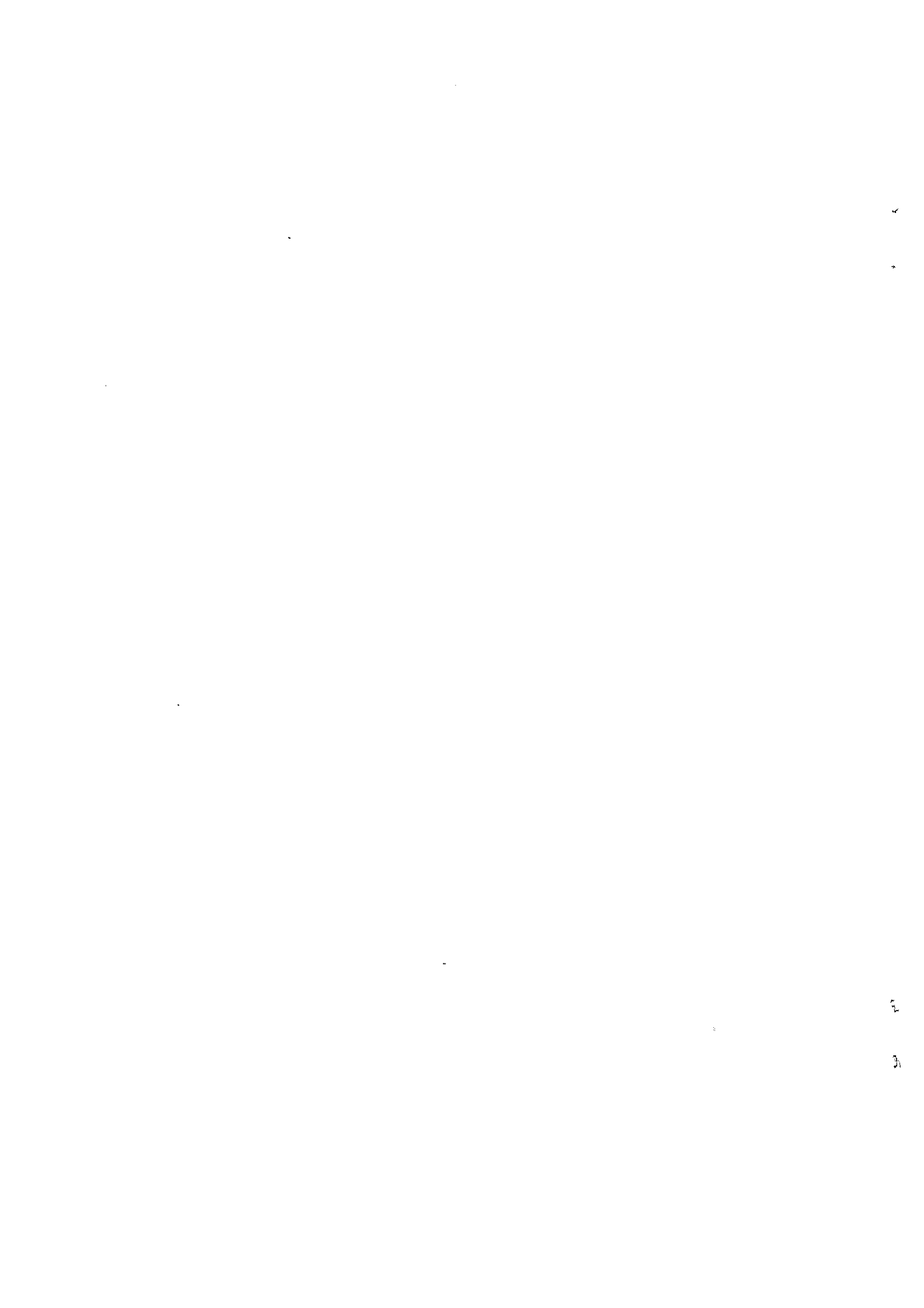
SOUTH AFRICAN LAW COMMISSION

PROJECT 42

INVESTIGATION INTO TIME LIMITS FOR
THE INSTITUTION OF ACTIONS AGAINST THE
STATE

REPORT

October 1985



To Mr H J Coetsee, MP, Minister of Justice.

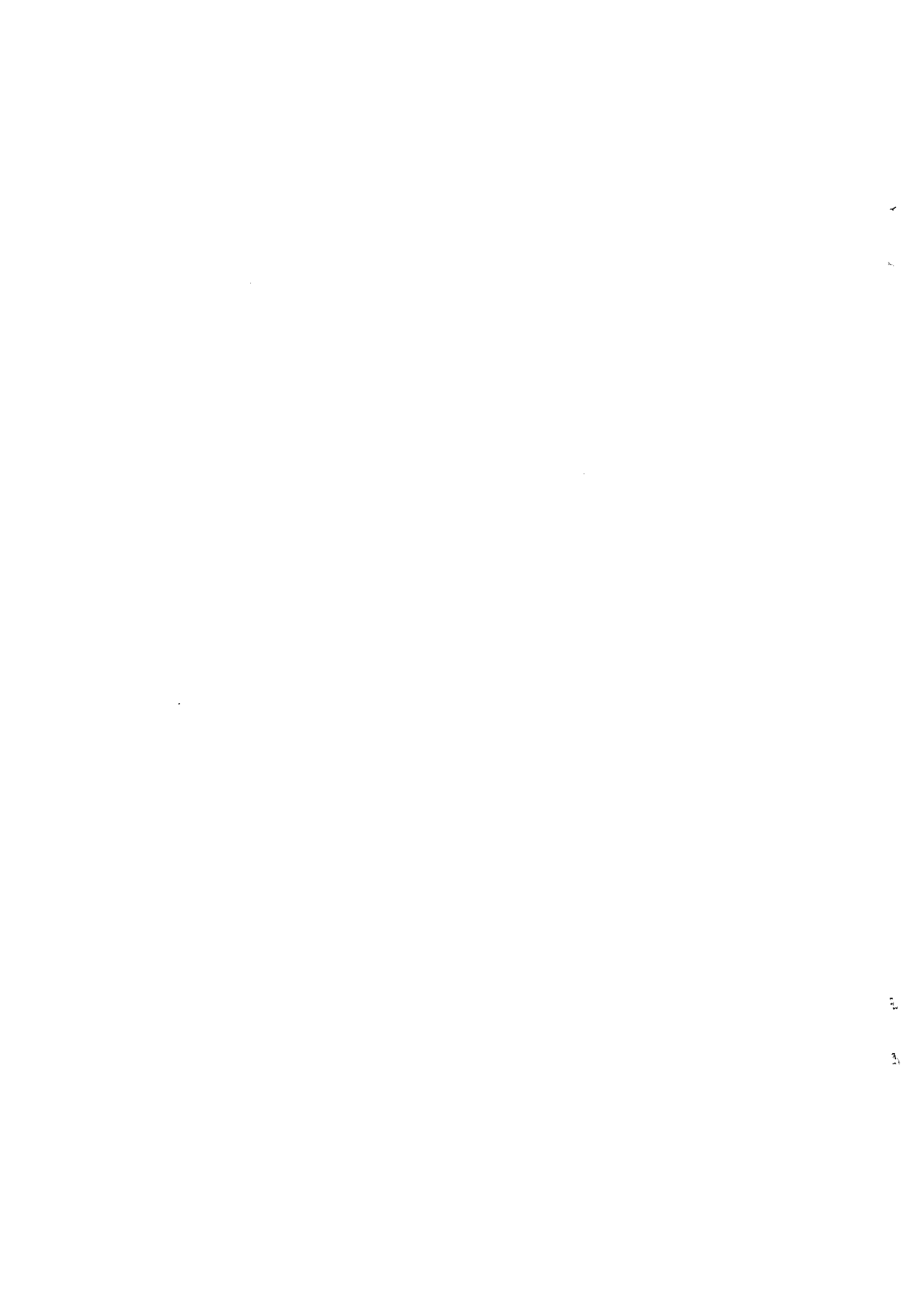
I have the honour to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973 (Act 19 of 1973), for consideration the Commission's report on the investigation into time limits for the institution of actions against the State.



G Viljoen

CHAIRMAN

3 October 1985



INTRODUCTION

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

The members of the Commission are -

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The Honourable Mr Justice H J O van Heerden (Vice-Chairman)

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HIERDIE VERSLAG IS OOK IN AFRIKAANS BESKIKBAAR

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1. INTRODUCTION

1.1 Scope of the investigation

There are several statutory provisions which limit the right of a person to institute a legal claim against the State. The majority of these statutory provisions provide that the plaintiff shall give notice of his intention to institute legal proceedings and that a certain time shall elapse from the date of the notice before legal proceedings may be instituted. Provision is also made for the lapse of the right to institute legal proceedings against the State after the expiry of certain prescribed periods from the date when the cause of action arose. The periods of notice and the expiry periods differ from one statute to another. The purpose of this investigation is to consider objections against the present position and to recommend changes to the present position if desirable.

1.2 The origin of the restrictive provisions

The restrictive provisions were apparently adopted from the English law. J P Coetzee summarises the development in English law as follows:¹

Originally the British sovereign was not subject to the jurisdiction of any court. There could therefore not be any question of civil liability of the State. During the seventeenth century, however, what was known as the "petition-of-right" procedure, which provided for the enforcement of contractual obligations of the State, was developed. This meant that the courts were given jurisdiction over the State after the State had endorsed the words fiat justitia on the documents used to institute proceedings. In the course of time it became the practice to make the endorsement whenever the plaintiff applied for it timeously and to the proper organ of State. The present provisions that the State must be notified that action will be instituted before summons is issued by the plaintiff, can probably be traced back to this practice. The request for a fiat was not only a request that the State submit to jurisdiction but also informed the State as respondent beforehand of the contemplated litigation. This was the only effect that could be achieved by the petition-of-right procedure once it became policy to

1 "Die ontstaan en voortbestaan van spesiale formele voorvereistes vir eise teen die staat" 1980 3 Journal of South African Law 245-261 at 245 (our translation).

grant a fiat in all cases where it was asked for. This procedure did not apply to delictual liability because the British state was not liable in delict at that stage. In 1947 the State was made liable by statute for the delicts of its employees, and the requirement that the petition-of-right procedure be followed before the State could be held liable ex contractu was abolished. At that stage, however, the State had over a period of centuries become used to receiving notice in the form of a petition of right before any civil proceedings could be instituted against it. It follows that a need soon arose for some form of notice of intended actions to the State. In addition the newly created delictual liability placed an exceptional burden on officials. Provision was therefore made by statute for specially short prescription periods and strict requirements of notice. The same need arose in the British colonies.

Within seven years of the establishment by statute of the delictual liability of the State in England, the special prescription periods and notice requirements were abolished.²

The position regarding State liability was not clear in the Roman and Roman-Dutch law. Between 1888 and 1903 laws were passed in the Cape, Natal, Free State and Transvaal to lay down the principle clearly that the State was subject to the jurisdiction of the courts. Provisions laying down special expiry periods and requirements of notice followed shortly afterwards.³

1.3 The nature of the restrictive provisions

The purpose of periods of prescription is to bring about legal certainty. Failure to enforce a claim for a number of years might create the impression that the claim never existed or that it had already been paid.⁴ To promote legal certainty the law provides that a debtor may after the expiry of the

2 Law Reform (Limitation of Actions etc) Act 1954.

3 Coetzee supra 247.

4 J C de Wet "Verjaring (1967)" in Opuscula miscellanea edited by J J Gauntlett, Durban: Butterworths 1979 75-144 at 133.

prescribed period simply refuse to acknowledge the existence of a debt.⁵ In the case of extinctive prescription the enforcement of the claim is approached from the creditor's point of view and any personal circumstances which may excuse or alleviate his "negligence" are taken into account.⁶

In modern times a distinction has been made between expiry periods and prescription periods.⁷ In the case of the expiry period the enforcement of the claim is approached from the debtor's point of view. The period runs without regard to the personal circumstances or grounds for excuse of the creditor.⁸ The expiry period affords special protection to the debtor and may seriously prejudice a creditor. The practical significance of the distinction between prescription periods and expiry periods is that the provisions of the Prescription Act 68. of 1969, which delay or interrupt prescription, do not apply to an expiry period.

In addition to the special expiry periods, many statutes provide for special procedures which require notice of a claim within a certain time after the debt originated and provide that summons may not be issued within a certain time after notice has been given.

2. BACKGROUND TO THE INVESTIGATION

The Department of Justice has addressed the question of uniform expiry periods since as far back as 1954. There was some doubt as to the competence of provincial legislators to enact provisions limiting the institution of legal proceedings. There was also a need for uniform expiry

5 De Wet & Yeats Die Suid-Afrikaanse Kontrakereg en Handelsreg 4de uitgawe deur J C de Wet en A H van Wyk, Durban: Butterworths 1978 at 255.

6 Meintjies v Administrasieraad van Sentraal-Transvaal 1980 1 SA 283 (T) 293C.

7 Magubane v Minister of Police 1982 3 SA 542 (N) 551G; L J Boulle "Prescription and the Police" 1982 South African Law Journal 509-515 at 510. Cf Montsisi v Minister van Polisie 1984 1 SA 619(A) 637F.

8 Meintjies case above at 293D.

periods in subordinate legislation. Initially the idea was that the planned Act would in addition to subordinate legislation also amend all Acts of Parliament which provided for expiry periods in order to lay down a uniform expiry period. The State Law Advisers were of opinion that the relevant statutory provisions differed to such an extent and covered such divergent matters that uniformity was out of the question. Consequently only the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 was proceeded with at that stage. On the strength of representations made to the Department of Justice from time to time another attempt was made during 1970 to prescribe uniform expiry periods in respect of Acts of Parliament. A Draft Bill was submitted to all departments of State. Apparently the idea of a uniform expiry period was abandoned as a result of objections by several departments of State.

In his annual report for 1974 the President of the Transvaal Law Society submitted that there was no reason why there should not be uniform provisions, such as those for provincial and local authorities, for all cases. The Commission included this matter in its programme in 1975. The Commission concluded that, however desirable it might be for the sake of convenience, it was not feasible to introduce a uniform expiry period in view of the divergent nature of the situations for which expiry periods were prescribed. In its report dated 24 May 1977 the Commission recommended that the position remain unchanged.

On 10 August 1981 the Association of Law Societies of the Republic of South Africa requested the Commission to reconsider the matter. The Association once again referred to the need for uniform legislation and expressed the view that the extension of protection of this nature to departments of State gave rise to serious doubts. At its October 1981 meeting the Commission decided to include the investigation in its programme again.

3. CONSULTATION

In a circular to the bodies concerned, they were requested to comment on the following aspects: The purpose of the restrictive provisions; whether the provisions lead to injustice; whether they could be justified; the consequences that the repeal of the provisions would have; the feasibility

of uniform requirements; and the advisability of a discretion for the court to condone non-compliance with the provisions. Comments were also invited on an article by J P Coetzee⁹ in which the author concluded that the State as civil litigant did not really need the special formalities and that they could be abolished.

At its April 1984 meeting the Commission approved a draft bill and memorandum for publication. The draft bill and memorandum are attached as Annexure A.¹⁰ On 4 June 1984 the secretariat forwarded copies of the draft bill and memorandum to 91 persons and bodies which it identified as interested parties. A list of these persons and bodies appears as Annexure B.¹¹ The document was announced in a press statement and a notice in the Government Gazette of 8 June 1984. In response to requests more than 60 copies of the document were distributed by the secretariat. Written comments on the draft bill and memorandum were received from the 47 persons and bodies listed in Annexure C.¹²

4. ARGUMENTS IN FAVOUR OF THE LIMITATION OF PROCEEDINGS AGAINST THE STATE

4.1 Extensive activities and a fluctuating work force

The circumstances under which the State can incur liability are legion. Because of the State's large and fluctuating work force and the extent of its activities, it is impossible to investigate an incident properly long after it has taken place. The keeping of records will cause problems if the expiry period is extended.

9 "Die ontstaan en voortbestaan van spesiale formele voorvereistes vir eise teen die staat" 1980 3 Journal of South African Law 245-261.

10 At 27 below.

11 At 39 below.

12 At 40 below.

4.2 Time-consuming procedures

The State is obliged by law to follow cautious and sometimes cumbersome procedures. Government bodies operate on an annual budget and must be notified of possible claims as soon as possible. The State's attorneys are stationed in central areas, and government bodies cannot always consult a local attorney. The State needs time to deliberate and consider questions of policy and the possibility of settlements. If a settlement can be arrived at unnecessary costs are saved.

4.3 Public interest

The State acts in the public interest and not for gain. Certain sections of the State machinery (for instance the police) are obliged by law to render services in the public interest which expose them to actions. If a plaintiff fails to comply with the notice requirements the State may consider the matter impartially and recommend an ex gratia payment. Because public funds are involved the State must guard against unfounded claims. If the State is the defendant, a plaintiff is assured of payment if he can prove his claim. It follows that the State is an attractive target for unfounded claims. Politically motivated claims may also occur.

5. ARGUMENTS AGAINST THE LIMITATION OF PROCEEDINGS AGAINST THE STATE

5.1 In the first place it is submitted that the above arguments in favour of special limitations are invalid:

- (a) The State is not the only defendant who has extensive activities and a fluctuating work force. Large companies (for instance insurance, construction and transport companies) experience the same problems but do not enjoy special protection. The statutory protection also applies to bodies that do not need it, such as small municipalities. Large organisations (such as the South African Police) are pre-eminently equipped to investigate incidents.

- (b) The time-consuming procedures of government bodies can be streamlined through modern means of communication and management techniques. An organisation which is exposed to many claims should develop procedures to deal with claims smoothly and to budget for such claims. A large organisation can cope with an unexpected claim with greater ease than a small business.
- (c) Although it is in the public interest that public funds should not be wasted, it is also in the public interest that well-founded claims should not fail as a result of strict procedural requirements. Officials who consider ex gratia payments on behalf of the State are not always impartial. It is the court's function to decide finally whether a claim is well-founded. Certain organisations such as the Post Office and Transport Services are to a certain extent conducted for profit and this is all the more reason for them to be treated on an equal footing with private concerns. An individual is usually hesitant to embark on legal proceedings against a powerful body like the State.

5.2 Secondly, there are further objections against special limitations on proceedings against the State.

The numerous provisions which lay down different requirements in different Acts create uncertainty. H Lane¹³ commented as follows:

All litigation attorneys regularly tiptoe through the minefields of extinctive prescription, statutory notices and other limiting provisions when claiming on behalf of their clients. Some reach the other side unscathed, but all too many set off these concealed and varied legal mines, and leave behind the limbs, or in some instances the whole corpses of their trusting clients.

13 "Statutory limitations: The enforcement of civil claims" 1982 De Rebus 67-70 at 67.

Although it is said that the provisions serve to facilitate settlements and thus save costs, the interpretation of the limiting provisions leads to many court cases with attendant costs. It is alleged that the restrictive provisions are not applied for the purpose for which they were introduced but that they are abused to evade liability on technical grounds.¹⁴ Allegedly the result of the application of the provisions (even though this is not the intention) is to cover up irregularities.¹⁵

Although a defendant has difficulty in collecting proof of the facts and preparing his case after a long lapse of time, the plaintiff has the same disadvantage. The plaintiff, moreover, bears the onus of proof and it is in his own interests to institute a claim as soon as possible.

6. OPTIONS FOR REFORM

In the draft bill and explanatory memorandum¹⁶ the Commission expressed the view that where the State is delictually liable it should be placed in the same position as an ordinary defendant, unless there are sound reasons for its protection. The curtailment of the right of a person to sue the State may lead to injustice. The draft bill embodies a proposal that all the restrictive provisions known to the Commission be repealed and that a uniform procedure be laid down for the South African Defence Force, the South African Police, the South African Transport Services, provincial administrations and local authorities. For these bodies it was proposed that the ordinary prescription periods apply and provision was made for a requirement that notice be given within six months after the debt became due. It was also proposed that the court should have the power to condone failure to give notice if sound reasons for the failure existed and if the debtor would not be prejudiced.

14 H Lane ibid; R L Selvan "Limitation of actions against the police - reform or repeal?" 1984 De Rebus 469-475 at 471 et seq.

15 Selvan ibid 471.

16 Par 3 above at 4 and Annexure A at 29 below.

The majority of commentators were in principle in favour of the tentative proposals embodied in the draft bill. A few commentators submitted that no exceptions to the ordinary prescription requirements should be allowed. Six departments of State submitted that they were also entitled to special protection (Customs and Excise, Health and Welfare, Agriculture, Prisons, Public Works and Land Affairs, and Mineral and Energy Affairs on behalf of interested parties in terms of the Nuclear Energy Act 92 of 1982). Since the publication of the draft bill and memorandum, section 13 of the Education and Training Amendment Act 74 of 1984 has introduced special protection regarding legal proceedings in respect of anything done or omitted in pursuance of the Education and Training Act 90 of 1979. The South African Police consider that the provisions of the draft bill will prejudice their position unduly and they are opposed to the proposed provisions.

It appeared from the comment on the draft bill and memorandum that the exceptions made in the draft bill could not be justified in that form. If an exception is made for the Police, why not also for the Railway Police and other persons or bodies doing similar work? If an exception is made for the Transport Services, why not also for bodies such as the Post Office, ISCOR and ESCOM? There are numerous departments of State that have a stronger claim to special protection than the smaller local authorities.

It appears that only two approaches can be justified. Either no exceptions will be allowed or an exception will be allowed for all government bodies (departments of State, provincial and local authorities).

If the matter is approached purely from the point of view of legal theory, the appropriate solution is that no exceptions should be allowed. Each defendant has his own particular problems. It is not possible, however, to draft rules which will suit every defendant. For the sake of legal certainty a uniform rule is desirable. A balance should be struck between the interests of the plaintiff and the importance to the defendant that finality

should be reached on claims. In several overseas legal systems the abolition of special protective measures did not lead to problems.¹⁷

In favour of the solution that special protection should be granted to all government bodies, it may be argued that the protective provisions have been in existence since the previous century and that the summary repeal of the provisions would cause too much disruption. Although the protective provisions have been repealed in certain overseas legal systems, local conditions in our developing society probably differ substantially from those in those overseas countries. The main objections against the present position are the lack of uniformity of the provisions and the unfair consequences that sometimes follow from strict application of the provisions. These objections could be met to a large extent if the provisions for all government institutions were made uniform and if the court were given a discretion to condone non-compliance with the restrictive provisions in deserving cases.

The Commission is of opinion that a proposal to place the State and other individuals on a completely equal footing as defendants is not realistic at present. Although the theoretical justification for such a recommendation is weighty, the Commission favours the second possibility which, with the retention of the protective provisions, would bring about uniformity and which contains provisions to eliminate unjust consequences.

7. SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

- (a) no legal proceedings shall be instituted for the recovery of a debt arising from delictual liability against the State, a provincial administration or a local authority, or a person for whose actions the government institution is also liable, unless the defendant has

17 Law Reform Commission of New South Wales Third report on the limitation of actions - Special protections LRC 21 Government Printer 1976 74p par 25 et seq at 14.

been notified in writing of the intended proceedings within six months after the debt became due;

- (b) a court having jurisdiction shall have power to condone failure to comply with the notice requirement if sound reasons exist for the failure or if the defendant was not unreasonably prejudiced by the failure;
- (c) the usual requirements for prescription shall apply to the debts of government institutions; and
- (d) existing statutory provisions which are inconsistent with the above recommendations shall be repealed.

8. DRAFT LEGISLATION

8.1 Introduction

Section 5(5) of the South African Law Commission Act 19 of 1973 provides that if after investigating any matter the Commission is of the opinion that legislation ought to be enacted with regard to that matter, the Commission shall prepare draft legislation for that purpose. A Bill to give effect to the Commission's recommendations is attached as Annexure D.¹⁸ The provisions of the Bill are explained in the following paragraphs.

8.2 Debt arising from delict

8.2.1 The draft bill previously released for comment (Annexure A to this report, hereinafter referred to as the "previous Bill"), referred to a debt arising from delict due to the exercise of or failure to exercise a power or the carrying out of or failure to carry out a duty under certain Acts or in connection with the activities of certain institutions. Since the ambit of the Bill has now been extended to cover all delictual claims against government institutions, different wording became necessary.

18 At 41 below.

8.2.2 The limits of the State's vicarious liability for delicts are obscure.¹⁹ It appears to be preferable to refer to this liability in general terms and not to refer to the "acts of an employee within the scope of his authority" or similar words.

8.2.3 There are different conceptions of the meaning of the word "delict". Sometimes absolute liability is included when this word is used. The Commission has no objection in principle to the application of the Bill to absolute liability as well in terms of the common law. As such liability occurs rarely and since a mere reference to absolute liability might include contractual liability, the purview of the Bill is limited to delicts where fault is a prerequisite and to absolute liability in terms of a statutory provision.²⁰

8.2.4 The Commission decided not to examine as part of this investigation the unfair operation of provisions in certain contracts which lay down periods.²¹ Of the provisions identified for repeal, it appears that only section 64 of the South African Transport Services Act 65 of 1981 applies also to contractual liability. It is only fair that the Transport Services, like any other party who wishes to have special periods in a contract, should contract for this. In view of the statutory protection that exists at present, it would be understandable if the Transport Services did not take the trouble to protect themselves in contracts. The Commission recommends that the said section 64 be repealed with the proviso that the repeal shall not apply to debts arising from contracts entered into before the repeal.

19 N J van der Merwe & P J J Olivier Die onregmatige daad in die Suid-Afrikaanse reg vyfde uitgawe Pretoria: Van der Walt 1985 579p at 505 et seq; W E Scott Middellike aanspreeklikheid in die Suid-Afrikaanse reg Durban: Butterworths 1983 342p at 224.

20 Cf the definition of "delict" in clause 1 of the Bill and sec 11(2) of the Aviation Act 74 of 1962.

21 Cf project 47 Unreasonable stipulations in contracts and the rectification of contracts.

8.2.5 The Commission's recommendations deal with delictual liability. There are numerous provisions in Acts which provide that appeals or reviews should commence and that certain steps in an administrative process should be taken within a certain period. It is not the intention to repeal such provisions. Of the provisions identified for repeal only section 96 of the Customs and Excise Act 91 of 1964 appears to fall in this category. This section clearly also covers claims for repayment, review and so on. The Commission recommends that this section should not be repealed but that it should be amended so as not to apply to cases of delictual liability. The Bill will cover the delictual liability of the Commissioner for Customs and Excise.

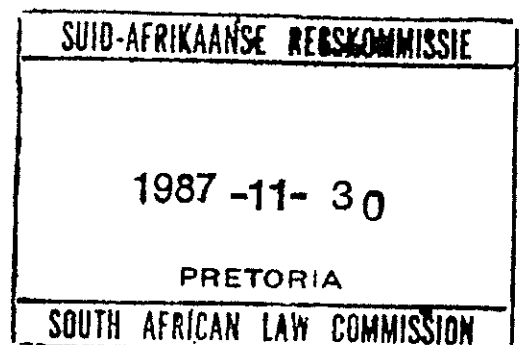
8.2.6 Sections 26 and 65 of the South African Transport Services Act 65 of 1981 deserve special attention. Section 26 deals with claims in respect of livestock killed or injured by a train. Section 65 deals with claims for fire damage caused by burning objects emanating from a train. Both sections require notice within three days. It is not necessary to prove negligence by the Railways Administration before liability for these claims arises. Liability differs from ordinary delictual liability in other respects as well. The Commission is of the opinion that it is preferable to leave this particular type of claim unchanged. The possibility does exist that the usual delictual liability has been preserved.²²

8.2.7 Section 44 of the Nuclear Energy Act²³ contains special provisions regarding the prescription of claims arising from nuclear damage. There can be no doubt that nuclear damage is unusual, and the Nuclear Energy Act contains provisions which differ from the usual rules relating to delictual liability. It is not necessary for the plaintiff to prove negligence by the licensee.²⁴ The creditor has the advantage that provision is made

22 Section 70(6) of the Railways and Harbours Control and Management (Consolidation) Act 70 of 1957 expressly provided for the retention of the usual delictual claims. The present Act does not contain such a provision.

23 Act 92 of 1982.

24 Ibid sec 41.



for security in respect of the liability for nuclear damage.²⁵ The provisions of section 44 do not favour government institutions in the narrow sense. The Commission does not recommend the amendment or repeal of section 44 of the Nuclear Energy Act.

8.2.8 Four of the provisions which would have been repealed in terms of the previous Bill do not deal with delictual liability. They are section 24 of the Rand Water Board Statutes (Private) Act 17 of 1950, section 7 of the Expropriation (Establishment of Undertakings) Act 39 of 1951, section 6 of the Expropriation Act 63 of 1975 and section 64 of the Abattoir Industry Act 54 of 1976. The relevant provisions authorise persons to search for water, lay pipes and enter upon land to investigate or survey it to ascertain whether the property is suitable for expropriation. The Acts provide that all damage caused in the process shall be compensated if proceedings are instituted within six months and one month's prior notice has been given. Because the actions are expressly authorised in the statutes, there can be no question of actionable wrongs. If the limits of the statutory authority are exceeded (by for instance starting a fire negligently) the usual rules for delictual liability will apply. The Commission does not recommend that these provisions be repealed because they do not fall within the purview of the Bill.

8.3 Government bodies and persons who must receive notice

8.3.1 In the first place the Commission recommends that departments of State, provincial administrations and local authorities must be given notice. When this report was completed, developments were under way to establish new local authorities²⁶ and the position of the provinces was being reconsidered. These developments must be taken into consideration when final legislation is considered.

25 Ibid sec 39.

26 Regional Services Councils. See now the Regional Services Councils Act 109 of 1985, especially section 4(1)(b).

8.3.2 The National Transport Commission and the National Parks Board of Trustees referred to in the definition of "government body" in clause 1 of the Bill are bodies corporate and are not government institutions within the narrow sense of this expression. The reasons for the exception in the case of government institutions (extensive activities and a fluctuating work force, time-consuming procedures and public interest) apply to these bodies corporate to a great extent. Because these two bodies corporate enjoy special protection at present, the Commission does not recommend that their protection be removed. Should the protection be extended to all State-connected bodies corporate in a similar position (Universities, ISCOR, ESCOM, the CSIR and several other councils and boards) the ideal that a litigant should be able to find his way through the restrictive provisions with ease, would be defeated. The protection of bodies corporate is accordingly limited to the two institutions that enjoy such protection at present.

8.3.3 Seven of the provisions which will be repealed under the Bill²⁷ in terms of their wording apply only to government institutions or their employees or officers. The rest of the provisions in the Schedule to the Bill do not provide expressly that the protection applies only in favour of government institutions and their employees. It is usually provided that "any person" who does or omits to do anything in pursuance of an Act will be protected. Sometimes the provisions expressly refer to persons who are not employees of government institutions, for instance a chief, headman or Black tribe,²⁸ a sheriff or deputy-sheriff (who is not necessarily a public servant)²⁹ and the governing body of a school.³⁰ It is clear that these provisions were enacted primarily for the protection of government institutions. It would be contrary to the spirit of the Commission's recommendations if all these sections were amended to remove the protection

27 The Schedule to Annexure D at 48 below.

28 Sec 32A of the Black Administration Act 38 of 1927.

29 Sec 37 of the Supreme Court Act 59 of 1959.

30 Sec 42A of the Education and Training Act 90 of 1979.

of the government institutions and their employees but the protection of other persons and bodies were to be retained.

8.3.4 In paragraph 8(a) of the memorandum to the previous Bill³¹ the question was posed whether it is necessary that an employee of a government institution should also be protected. Quite a few of the commentators were opposed to protection of an employee because the reasons for the protection of the employer do not apply to an employee. It is sometimes not clear from the incident resulting in liability that a government institution is vicariously liable and the plaintiff may be prejudiced if protection is afforded to an employee under such circumstances. The majority of commentators were of opinion that the employee should also be protected. They think that an employee acting in an official capacity experiences the same problems as his employer. Even if the employee is protected against actions he will still be subject to disciplinary measures. An employee may be prejudiced if he is not also protected because his employer may already have destroyed the records or the employee may be sued merely because proceedings against the employer are no longer possible. Some commentators stressed that the protection should apply only if the employee incurs liability in the course of his official duties. The Commission is of opinion that an employee or other individual is entitled to protection if his act also incurs vicarious liability for a government institution.

8.4 Uniform provision

8.4.1 One of the main objections against the present position is the bewildering array of provisions which limit legal proceedings against government institutions. Although the circumstances of these bodies differ, the Commission considers that the need for uniformity is of sufficient importance to justify a uniform provision.

8.4.2 Although the Schedule to the Bill contains all relevant provisions known to the Commission, it is not impossible that there are more of these

31 Annexure A below at 31.

provisions tucked away somewhere in the Statute Book. To ensure a uniform arrangement the Commission recommends that even provisions not expressly identified be repealed if they are inconsistent with the provisions of the Bill.³²

8.4.3 Selvan suggests³³ that the protection (if it is retained) should not apply to common-place delicts such as road traffic accidents. The Commission is of opinion that such a provision would cause too many problems and would again lead to anomalies.

8.4.4 A specific practice has already come into being regarding debts in respect of which the provisions of section 8 of the Workmen's Compensation Act 30 of 1941 or the Compulsory Motor Vehicle Insurance Act 56 of 1972³⁴ apply. These provisions were not enacted for the protection of government institutions. In regard to these debts the Commission recommends that the provisions of these Acts cover all cases, also if a government institution or his employee is the defendant.³⁵

8.4.5 The Commission considers that a notice requirement affords sufficient protection and that government institutions are not entitled to special expiry periods. The distinction between expiry and prescription periods may lead to injustice and uncertainty.³⁶ The Commission recommends that, subject to the notice requirement for government

32 Clause 6(1) at 47 below. Cf sec 9 of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.

33 R L Selvan "Limitation of actions against the police - reform or repeal?" 1984 De Rebus 469-475 at 475.

34 The Report of the Commission of Inquiry into Certain Aspects of Compulsory Motor Vehicle Insurance 1981 RP 23/1985 Government Printer: Pretoria 70p par 11.3.3.7 at 21 recommended that the provisions in regard to the prescription of claims be left unchanged.

35 Clause 5 of the Bill, Annexure D at 46 below.

36 L J Boule "Prescription and the Police" 1982 South African Law Journal 509-515.

institutions, the same prescription periods should apply to all defendants.³⁷ The Commission did not go into special prescription periods which cannot affect the State.³⁸

8.5 Notice requirement

8.5.1 The reason for the notice requirement is that government institutions should be notified in good time to enable them to investigate the incident properly. Clause 2(2)(a) of the Bill³⁹ provides that the notice must set out briefly the facts relied on for the intended legal proceedings.

8.5.2 A few commentators submitted that a requirement that the plaintiff must indicate the amount of the debt in the notice imposed too heavy a burden on the plaintiff. Especially in cases where injuries have been sustained the amount can hardly be accurately determined within six months. Another commentator considered that provision for a subsequent increase of the amount would prevent the fixing of unrealistically high amounts in a notice. He also pointed out that it was accepted in Controller of Customs V Guiffre⁴⁰ that the usual meaning of "cause of action"⁴¹ embraced:

every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court.

The Commission is of the opinion that the requirement in the Bill preserves a sound balance between the information required by the defendant and the information which may reasonably be expected from a plaintiff.

37 Clause 4 of the Bill, Annexure D at 46 below.

38 See eg sec 221(4) of the Companies Act 61 of 1973, sec 19 and 24 of the Alienation of Land Act 68 of 1981 and sec 48 and 49(2) of the Attorneys Act 53 of 1979.

39 Annexure D at 44 below.

40 1971 2 SA 81(R) 84A.

(Footnote continued)

8.5.3 Two commentators submitted that a notice period of six months would be too long and would lead to problems. They preferred three months. Selvan⁴² is apparently not satisfied with any period shorter than the usual prescription period. The Commission considers a period of six months to be fair.

8.5.4 A few commentators suggested that the period should run from the date upon which the cause of action arose. This point in time is probably the easiest to determine. However, seeing that there is a close relationship between the Bill and the Prescription Act 68 of 1969, the Commission recommends that the notice period should commence to run at the same point in time as the prescription period. Clause 2(2)(b) of the Bill accordingly provides that the notice period shall begin to run on "the date upon which the debt became due".

8.5.5. A few commentators submitted that a provision such as section 2(2)(c) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 should be included in the Bill. This provision implies that the period shall not commence to run before the plaintiff has knowledge of certain facts. Selvan⁴³ proposes that the period should not be completed until a certain period has elapsed after the plaintiff has become a major or has ceased to be under curatorship or to be prevented by vis major. Clause 2(3) of the Bill⁴⁴ implies that the period shall not commence to run before the plaintiff has certain knowledge or could have had such knowledge. The wording used is similar to the wording of section 12 of the Prescription Act 68 of 1969. According to the Bill, if the plaintiff is a minor, insane or under curatorship, the period shall not commence to

(Footnote continued)

41 Clause 2(1) of the previous Bill required a letter of demand setting out the amount claimed and the cause of action.

42 R L Selvan "Limitation of actions against the police - reform or repeal?" 1984 De Rebus 469-475 at 473.

43 Ibid 475.

44 Annexure D at 45 below.

riin before his tutor or curator has the necessary knowledge. Clause 2(3) does not make provision for cases where a plaintiff is prevented by vis major from recovering a debt. Such cases may be dealt with in terms of the court's powers to condone failure to give notice.⁴⁵ The Appellate Division has also decided⁴⁶ that the failure of a person to fulfil an obligation should not be imputed to him if it was impossible for him to fulfil the obligation.

8.5.6 Clause 2 of the previous Bill provided that the notice should be served within six months by handing it or sending it by registered post. Certain commentators suggested that the Bill should indicate clearly whether the date of posting or the date of receipt was material. Clause 2(2)(b) of the Bill in Annexure D provides clearly that the date of the posting of the notice is material.

8.5.7 In view of the notice requirement it is necessary that the Bill indicate to whom the notice should be posted or delivered. Once again it is necessary to preserve a balance between the interests of the plaintiff and those of the defendant. It is important to the defendant that the notice should reach the person who has to deal with the matter without delay. It is important to the plaintiff that he should be able to determine without too much difficulty to whom notice should be given. One commentator asked why notice could not be served on the State Attorney of the province where the debt arose.⁴⁷ The Rules of Court already provide that in proceedings against the State, Transport Services and provinces documents may be served on the State Attorney. The State Attorney, Pretoria, has indicated that such an arrangement would cause duplication of work and a waste of time because the State Attorney can do nothing without instructions from his client. When documents in connection with legal proceedings are served on the State Attorney he already has or is about to receive instructions

45 Par 8.6 below at 21.

46 Montsisi v Minister van Polisie 1984 1 SA 619(A) 635A.

47 Cf I P Gough "Notice to the State" 1984 Journal of Contemporary Roman-Dutch Law 329-334 at 334.

from his client. The Commission recommends that the notice be delivered or posted to the head of department, provincial secretary or chief executive officer if a department of State, provincial administration or government body respectively, is involved. In all other cases notice shall be given to the person who is sued.

8.5.8 The notice requirement is aimed at the protection of defendants. If a defendant does not invoke this protection, there is no reason why the court should of its own motion interfere in the matter.⁴⁸

8.6 Power to condone

8.6.1 The previous Bill⁴⁹ provided that the court may condone a plaintiff's failure to serve a letter of demand if it is of the opinion that sound reasons exist for the failure. The memorandum to the previous Bill⁵⁰ invited views specifically on the question whether failure on the part of the plaintiff's attorney ought to be taken into account when considering whether the failure should be condoned.⁵¹

8.6.2 Two commentators thought⁵² that condonation should not be possible in the case of failure by a representative. The plaintiff can proceed against his representative or the representative's insurer. Condonation in such cases could lead to abuse. If condonation were granted too readily the limitation on the institution of proceedings would serve no purpose.

48 Clause 2(1)(b) of the Bill in Annexure D at 44 below.

49 Clause 3 in Annexure A at 36 below.

50 Par 8(b) Annexure A at 31 below.

51 Cf sec 24(2)(a)(i) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.

52 One of these commentators was totally opposed to a power to condone.

8.6.3 The vast majority of the commentators favoured a wide discretion to condone above a discretion with all kinds of limitations. The court can see to it that an attorney or other representative does not use the reasonable conduct of his client as an excuse or vice versa. The commentators proposed that in addition to "sound reasons for the plaintiff's failure" condonation should also be possible in cases where the defendant was not prejudiced by the failure to give notice.⁵³

8.6.4 Although it is clear that a notice requirement will serve its purpose if failure to give notice is always condoned, there can be no objection to a power to condone which is related to the reason for the notice. The main reason for the notice requirement is that the defendant should be given notice in good time to enable him to investigate the incident properly. If a defendant is not prejudiced by a late or defective notice there can be no valid objection against condonation of failure to give correct and timely notice. There are several decisions in connection with existing provisions where the court had to decide whether the notice contained sufficient details and whether notice had been given timely to the right person.⁵⁴ If condonation is possible in cases where a defendant was not prejudiced by a failure to give proper notice, court cases regarding minor defects in connection with the notice will no longer be worth while.

8.6.5 If it was impossible for a plaintiff to give notice timely, it would be extremely unfair to leave him with no remedy. The Commission of Inquiry into Security Legislation would according to its report⁵⁵ like to see that the period during which a person was detained in terms of section 6 of the Terrorism Act 83 of 1967 should be left out of account in the calculation of the period within which some step has to be taken before any

53 Cf sec 4 of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970; R L Selvan "Limitation of actions against the police - reform or repeal?" 1984 De Rebus 469-475 at 475.

54 Selvan ibid at 471 et seq.

55 RP 90/1981 Government Printer: Pretoria 241p par 13.6.6 at 200.

proceedings may be instituted. It was mentioned above⁵⁶ that in the Bill recommended by the Commission provision is made for a plaintiff who is a minor, insane or under curatorship but not for a plaintiff who is prevented by vis major from instituting a claim. It appears to be advisable that cases where a plaintiff is prevented by vis major should rather be dealt with in terms of the courts' power to condone a plaintiff's failure on good cause shown for the failure. Such a provision could be applied flexibly and it would not be necessary to enumerate all cases where the provision would apply. The Appellate Division has also decided⁵⁷ that the failure of a person to fulfil an obligation should not be imputed to him if it was impossible for him to fulfil the obligation.

8.6.6 The Commission recommends⁵⁸ that a court having jurisdiction may at the request of the plaintiff condone failure to give notice if the court is satisfied that sound reasons exist for the failure by the creditor or if the defendant was not unreasonably prejudiced by the failure.

8.7 Transitional clause

The memorandum to the previous Bill⁵⁹ called for comment on the question whether the Bill should apply to debts which arose before the commencement of the proposed legislation. A few commentators were of opinion that the amendments in the Bill should also apply to debts which arose before commencement for the reason that as many plaintiffs as possible should enjoy the benefit of the amendments. The majority of commentators, however, were of opinion that the new provisions should not apply to existing debts because such an arrangement would cause too many problems. A defendant who has arranged his position in line with existing legislation may be prejudiced if debts "revive". In the light of comment received and the general rule that legislation should not operate

56 Par 8.5.5 at 19.

57 Montsisi v Minister van Polisie 1984 1 SA 619(A) 635A.

58 Clause 3 of the Bill in Annexure D at 45 below.

59 Par 8(c) of Annexure A at 31 below.

restrospectively, the Commission recommends⁶⁰ that the new provisions shall not apply to any debt which became due before the coming into operation of the proposed Act. The repeal of section 64 of the South African Transport Services Act 65 of 1981 is subject to the proviso that debts arising from a contract entered into before the repeal shall not be affected.

8.8 Notice before summons

8.8.1 Clause 2 of the Bill⁶¹ provides that no legal proceedings as contemplated in the clause shall be instituted unless prior notice has been given. The Bill does not make provision for a lapse of time between the notice and the issue of summons.

8.8.2 Nine commentators were of opinion that this was a shortcoming in the Bill and gave the following reasons for their view. It is unacceptable that a plaintiff may institute proceedings immediately after notice. It is just about impossible for a large institution to decide within three days or so whether an action will be defended. It is unacceptable that a plaintiff need not do anything for two and a half years after the notice. A period of about three months⁶² should elapse between the notice and the issue of summons. The mere institution of proceedings entails high legal costs. Coetzee⁶³ mentions that it is generally accepted that the reason for the notice is to prevent the State from having to incur unnecessary costs in respect of actions which could have been settled before the issue of summons.

60 Clause 6(2) of the Bill in Annexure D at 47 below.

61 Annexure D below at 43.

62 Cf sec 25(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972.

63 J P Coetzee Die aard, inhoud en grondslag van formele vereistes vir litigasie teen die Staat (LLM thesis Rand Afrikaans University) 1979 154p at 130.

8.8.3 Selvan⁶⁴ does not think that a defendant would be seriously prejudiced if he decided to settle after the issue of summons. All that he might lose would be "some inconsiderable legal costs". Coetzee⁶⁵ mentions the following. The procedural steps which an action goes through between the issue of summons and the trial take so long that a short notice requirement makes no material difference to the preparation for the trial. The State is entitled to an especially long period to enter appearance. The only justifiable aim of the statutory requirement is to establish legal certainty by expressly providing the time within which it is reasonable to settle the matter without liability by the defendant for costs. This aim can be achieved without denying a plaintiff his remedy.

8.8.4 It appears that a statutory requirement that a period of notice be given before summons is issued will not have much effect in practice. A summons would certainly prompt a defendant to investigate the matter as soon as possible and to consider it thoroughly. There can be no objection to this. There is enough time available after summons to consider a matter and settle it if advisable. The costs of summons are not considerable. In practice a plaintiff will in his own interests allow a reasonable time between notice and summons, especially as a period of more than two years will usually be available after notice before the claim becomes prescribed. The Commission does not recommend that a period between notice and summons be required by statute.

9. ACKNOWLEDGEMENTS

The Commission expresses its gratitude to the persons and bodies⁶⁶ who commented on the draft Bill and memorandum and in so doing made their specialised knowledge on the subject available to the Commission. The

64 R L Selvan "Limitation of actions against the police - reform or repeal?" 1984 De Rebus 469-475 at 413.

65 Footnote 63 above at 126 et seq.

66 Annexure C below at 40.

Commission also wishes to thank various persons and bodies who, before and after the publication of the draft Bill and memorandum, furnished the Commission with information and comments. Lastly, the Commission wishes to thank the Rand Afrikaans University for the donation of a copy of Coetzee's thesis.⁶⁷

67 Footnote 63 above.

ANNEXURE A

DRAFT BILL AND MEMORANDUM

MEMORANDUM AND DRAFT BILL ON THE LIMITATION OF ACTIONS
AGAINST CERTAIN PUBLIC BODIES

The South African Law Commission is conducting an investigation into the limitation of actions against certain public bodies and would like to receive reasoned suggestions in writing for any improvements in this connection. A memorandum and draft bill are attached for your attention.

The Commission's offices are on the 8th Floor, Nederduits Gereformeerde Kerk Sinodale Sentrum, 228 Visagie Street, Pretoria. Correspondence should be addressed to: The Secretary, South African Law Commission, Private Bag X668, Pretoria, 0001. Telephone (012) 26-1121.

SOUTH AFRICAN LAW COMMISSION

DRAFT BILL ON THE LIMITATION OF ACTIONS AGAINST CERTAIN PUBLIC BODIES

1. There are various statutory provisions in terms of which the right to institute civil actions against the State and government institutions is restricted. Although these provisions vary their common characteristic is that they prescribe relatively short periods within which such actions may be instituted. Many of these provisions also prescribe periods within which the defendant must be notified of the intended action. The object of the Commission's inquiry is to determine whether there is any need in the particular instances for such restrictions in addition to the provisions of the Prescription Act 68 of 1969. With this object in view the provisions in question have been considered against the background of the legislation in which they are embodied. The departments, administrations and bodies concerned with the administration of the said provisions and also the State Attorney who is concerned with the litigation arising therefrom, have been consulted. Cognisance has also been taken of case law and of articles in legal publications in which the object and the effect of provisions of this nature are discussed. Lastly, cognisance has been taken of the approach of other legal systems to similar provisions.

2. Some of the provisions are in the nature of prescription periods while procedural limitations are also imposed. A prescription period is meant to put an end to uncertainty in that a debt becomes extinct after the lapse of a relatively long period. Most of the provisions in question deal with delictual claims for which the period of prescription is three years. The provisions in question, however, require a plaintiff to institute his action within a much shorter period (eg six months) and in addition often prescribe that the defendant must be notified of the intended action within a certain period.

3. The reasons advanced for the existence and retention of the provisions in question are briefly the following -

(a) The State is a large organisation with a large and fluctuating

labour force as a result of which the machinery of the State operates slowly, which makes it difficult or impossible for the State to investigate the facts and circumstances pertaining to an occurrence long after the occurrence, in order to determine whether the claim is justified.

- (b) The State is exposed to delictual claims to an exceptional degree because of the nature of the functions of its officers. Limitation of the State's liability is therefore necessary.
- (c) The State is responsible for public funds and it is therefore in the public interest that it should be protected against unjustified claims.

4. If the principle of State liability as provided for in the State Liability Act 20 of 1957 is consistently applied, the State should not by the limitation on the institution of actions against it be placed in a more favourable position than the ordinary defendant. There are also large organisations other than State institutions that encounter similar difficulties in determining whether actions against them are justified or not. The Commission's view is that where the State is delictually liable it should not be placed in a more advantageous position than the ordinary defendant, unless there are sound reasons for doing so. The curtailment of the right of a person to sue the State may lead to injustice.

5. The Commission's inquiry up to this stage has revealed that in the case of the majority of institutions in whose favour the restrictions operate the frequency of claims is low. In the case of certain institutions, such as the S A Police and the Defence Force, the frequency of claims is relatively high. In respect of these institutions other considerations also play a role, such as the maintenance of law, order and security, which may in certain circumstances give rise to claims. It would seem that there is some justification for making an exception in respect of these institutions and possibly also in respect of the S A Transport Services and local authorities. The Commission is, however, opposed to the absolute exclusion of a plaintiff's claim by means of a short prescription period or expiry period. In the Commission's opinion the ordinary provisions of the Prescription Act 68 of 1969 ought also to apply in such cases with regard to

the commencement of the running of prescription and the interruption of prescription. It is suggested that in respect of the said institutions provision should be made for notification of the claim by a letter of demand which should be delivered to the said institution within six months from the date upon which the debt became due. Failure by the plaintiff to comply with this requirement may be condoned by the defendant and if he refuses to condone the failure the court may, on the application of the plaintiff, waive this requirement if satisfied that sound reasons exist for doing so and that the defendant would not be prejudiced thereby. The object is to ensure that claims are instituted as soon as possible but at the same time not to exclude summarily claims that are for sound reasons instituted late (but within the prescription period).

6. The Commission has prepared a draft Bill which provides for the repeal of the restrictions which are in its opinion not justifiable and for a requirement of notification of claims in respect of those institutions which appear to deserve a measure of protection. It must be emphasised that the Bill does not at this stage reflect the final views of the Commission but that it is being circulated with a view to eliciting reasoned comment.

7. Apart from the statutory provisions referred to in the Bill the under-mentioned provisions have also been considered. The Commission has found that these provisions differ from those indicated for repeal, inter alia in that they do not have as primary object the protection of the State or a state institution as a defendant. The tentative view is that these provisions should be retained, subject to the provisos indicated -

- . sections 8 and 54 of the Workmen's Compensation Act 30 of 1941;
- . section 344(1), (2) and (3) of the Merchant Shipping Act 57 of 1951 (provided that the authorities concerned should investigate the matter further with a view to the repeal of these provisions);
- . section 35 of the General Law Amendment Act 62 of 1955 (provided that the department concerned should consider the embodying of this provision in the rules of court);

- . section 2(6)(b) of the Apportionment of Damages Act 34 of 1956;
- . section 89 of the Customs and Excise Act 91 of 1964;
- . sections 24(1) and 25(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972;
- . section 10(5) of the Expropriation Act 63 of 1975.

8. In particular the Commission would appreciate views on the following matters.

- (a) The question has been raised why it is necessary that the proposed limitation should also apply in a case where the action is instituted against an employee of an institution referred to in clause 2(1) of the Bill. Please refer in this connection to the relevant provisions of the existing limitations.
- (b) In clause 3 of the Bill it is proposed that the court may, if it is of the opinion that sound reasons exist for the plaintiff's failure to comply with the provisions of clause 2(1), condone his failure. In terms of section 24(2) of the Compulsory Motor Vehicle Insurance Act, 1972 (Act 56 of 1972), the court may grant leave to a third party to comply with the provisions of section 25(1) of that Act if the court is satisfied that by reason of special circumstances the third party or the person instructed by him could not reasonably have been expected to comply with the said provision. It has been suggested that the underlined phrases might lead to different constructions and in particular the question was raised whether failure on the part of the plaintiff's attorney to comply with his instructions ought in special circumstances to be taken into account when considering whether or not the failure should be condoned.
- (c) Should provision be made in the Bill with regard to claims which arise or have arisen before the commencement of the proposed legislation and, if so, on what basis?

To require that, in certain cases where actions for the enforcement of a debt arising from delict are instituted against certain institutions and persons, a letter of demand be served on the institution or person concerned; to repeal certain laws; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the House of Assembly of the Republic of South Africa, as follows:-

Definition.

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

"administration" means the administration of a province;

"institution" means the State, the South African Transport Services, an administration or a local authority;

"local authority" means any institution or body contemplated in section 84(1)(f) of the Republic of South Africa Constitution Act, 1961 (Act No. 32 of

1961), which has been established or constituted by or under any ordinance of a provincial council or in relation to which a provincial council may make ordinances, and a board as defined under section 1 of the Black Affairs Administration Act, 1971 (Act No. 45 of 1971), and a town council or village council as defined under section 1 of the Black Local Authorities Act, 1982 (Act No. 102 of 1982).

Letter of demand
required for insti=
tution of certain
actions.

2. (1) No action for the enforcement of a debt arising from delict due to:

(a) the exercise of or failure to exercise a power conferred, or the carrying out of or failure to carry out a duty imposed, under -

(i) the Defence Act, 1957 (Act No. 44 of 1957);

(ii) the Police Act, 1958 (Act No. 7 of 1958);

or

(b) the exercise of or failure to exercise a power conferred, or the carrying out of or failure to carry out a duty, in

(i) the South African Transport Services;

(ii) an administration;

(iii) a local authority,

shall be instituted against the State, the South African Transport Services, an administration or a local authority, or against an employee of such an institution, unless a letter of demand setting out the amount claimed and the cause of action has been served on the said institution or person within six months of the date on which the debt became due.

(2) (a) The letter of demand shall be served by handing it, or sending it by registered post, to the institution or person concerned.

(b) A letter of demand may be served on -

(i) the Chief of the South African Defence Force, in the case of a claim contemplated in subsection (1)(a)(i);

(ii) the Commissioner of the South African Police, or the Divisional Commissioner of the South African Police in the province where the alleged debt arose, in the case of a claim contemplated in subsection (1)(a)(ii);

(iii) the General Manager of the South African Transport Services, or a System Manager of the South African Transport Services in the province where the alleged debt arose, in the case of a claim contemplated in subsection (1)(b)(i).

(3) The provisions of subsection (1) shall not apply to -

(a) a claim in terms of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972);

(b) a claim to which the provisions of section 8 of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941), apply;

(c) the joinder of a party to an action contemplated in that subsection.

Court may condone plaintiff's failure.

3. The court having jurisdiction may, if it is of the opinion that sound reasons exist for the plaintiff's failure to serve a letter of demand in accordance with section 2(1), condone the failure and order that the letter of demand be served within the time and subject to the conditions which the court may in its discretion determine.

Court not to take mero motu cognisance of plaintiff's failure.

4. A court shall not take cognisance of a plaintiff's failure to comply with section 2(1) or an order referred to in section 3 unless the defendant raises the failure of the plaintiff as a defence.

Repeal of laws.

5. The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

Short title.

6. This Act shall be called the Limitation of Actions against Certain Institutions Act, 1985.

SCHEDULE
LAWS REPEALED

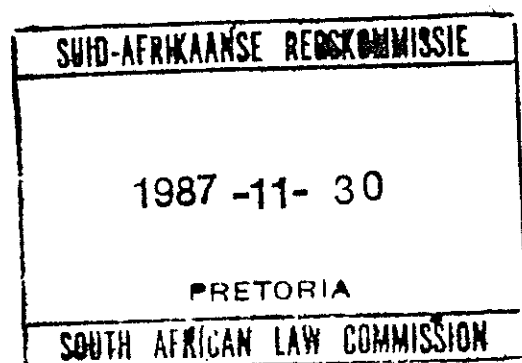
No and Year of law	Title of law	Extent of Repeal
Act No. 38 of 1927	Black Administration Act, 1927	Section 32A
Act No. 17 of 1950	Rand Water Board Statutes (Private) Act, 1950	Saving provisions of sections 24(b)(ii) and 24(j)(ii)
Act No. 39 of 1951	Expropriation (Establishment of Undertakings) Act, 1951	Section 7(3)
Act No. 57 of 1951	Merchant Shipping Act, 1951	Sections 343 and 344(4)
Act No. 44 of 1957	Defence Act, 1957	Section 113
Act No. 54 of 1957	Public Service Act, 1957	Section 29
Act No. 7 of 1958	Police Act, 1958	Section 32
Act No. 8 of 1959	Prisons Act, 1959	Section 90
Act No. 59 of 1959	Supreme Court Act, 1959	Section 37(3)
Act No. 6 of 1962	Archives Act, 1962	Section 13(3)
Act No. 91 of 1964	Customs and Excise Act, 1964	Section 96
Act No. 94 of 1970	Limitation of Legal Pro- ceedings (Provincial and Local Authorities) Act, 1970	The whole
Act No. 45 of 1971	Black Affairs Administration Act, 1971	Section 24A
Act No. 54 of 1971	National Roads Act, 1971	Section 25(1)
Act No. 18 of 1973	Mental Health Act, 1973	Section 68(4)
Act No. 78 of 1973	Occupational Diseases in Mines and Works Act, 1973	Section 128
Act No. 66 of 1974	Post Office Service Act, 1974	Section 46
Act No. 63 of 1975	Expropriation Act, 1975	Section 6(3)
Act No. 54 of 1976	Abattoir Industry Act, 1976	Section 64(3)(b)

No and Year of law	Title of law	Extent of Repeal
Act No. 57 of 1976	National Parks Act, 1976	Section 28
Act No. 104 of 1978	Bureau for State Security Act, 1978	Section 30(1) and (2)
Act No. 65 of 1981	South African Transport Services Act, 1981	Section 64
Act No. 92 of 1982	Nuclear Energy Act, 1982	Section 44
Act No. 102 of 1982	Black Local Authorities Act, 1982	Section 52

ANNEXURE B

PERSONS AND BODIES TO WHOM THE DRAFT BILL AND MEMORANDUM WERE FORWARDED OF THE COMMISSION'S OWN ACCORD

Administration boards (now development boards) (14)
Afrikaanse Handelsinstituut
Association of Chambers of Commerce of South Africa
Clearing Bankers Association of South Africa
Commission for Administration
Customs and Excise
Department of - Agriculture
 Community Development
 Co-operation and Development
 Education and Training
 Environment Affairs
 Health and Welfare
 Mineral and Energy Affairs
 Transport
General Council of the Bar of South Africa
Judges President (6) and Chief Justice
Justice Training
Law Societies (6) and Association of Law Societies
Magistrates' Association of South Africa
National Intelligence Service
P F V Group Broking Services (Proprietary) Limited
Postmaster General
Prisons
Provincial administrations (4)
Regional Court Presidents (6)
South African Defence Force
South African Federated Chamber of Industries
South African Police
South African Transport Services
State Attorneys (5)
United Municipal Executive of South Africa
Universities (17) and university bodies (4)
Prof C F C van der Walt
Workmen's Compensation Commissioner



ANNEXURE C

PERSONS AND BODIES WHO COMMENTED ON THE DRAFT BILL AND MEMORANDUM

Association of Chambers of Commerce of South Africa
Association of General Banks
Prof L G Baxter (University of Natal)
Chamber of Mines of South Africa
Chief Justice
Clearing Bankers Association of South Africa
Commission for Administration
Couzyn Hertzog & Horak Inc
Customs and Excise
Department of - Agriculture
 Health and Welfare
 Justice
 Mineral and Energy Affairs
 National Education (by a staff member)
 Public Works and Land Affairs
 Water Affairs
Development Board - Central Transvaal
 Eastern Transvaal
 Highveld
 Oranje-Vaal
 Southern OFS
Electricity Supply Commission
I P Gough
Joubert Galpin & Searle
Judge President Bloemfontein
Judge President Pietermaritzburg
Law Society of the Cape of Good Hope
Law Society of the Transvaal
M B Massel
Natal Law Society
Natal Provincial Administration
H G Orkin & Co
P F V Group Broking Services (Pty) Ltd
Postmaster General
Prisons
Regional Court President - Cape Town
 Port Elizabeth
 Pretoria
R L Selvan (see 1984 De Rebus 469)
South African Police
South African Transport Services
State Attorney - Bloemfontein
 Port Elizabeth
 Pretoria
Transvaal Provincial Administration
United Municipal Executive of South Africa
Prof P J Visser (University of South Africa)

ANNEXURE D

DRAFT LEGISLATION

BILL

To provide for a uniform notice requirement for the recovery of debts arising from delict from government institutions or persons for whose actions government institutions are liable in law; to repeal or amend provisions in Acts which provide for special notice requirements and periods; and to provide for matters incidental thereto.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows :-

Definitions.

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

"delict" includes an unlawful act for which a defendant is liable without fault in terms of

statutory provisions;

"government body" means -

- (a) a local authority contemplated in section 84(1)(f) of the Provincial Government Act, 1961 (Act No. 32 of 1961);
- (b) a community council established under section 2 of the Community Councils Act, 1977 (Act No. 125 of 1977);
- (c) a development board established under section 3 of the Black Communities Development Act, 1984 (Act No. 4 of 1984);
- (d) the National Transport Commission established under section 3 of the Transport (Co-ordination) Act, 1948 (Act No. 44 of 1948); and
- (e) the National Parks Board of Trustees established under section 5(1) of the National Parks Act, 1976 (Act No. 57 of 1976);

"Minister" means a Minister or Deputy Minister appointed in terms of section 24 or 27 of the Republic of South Africa Constitution Act, 1983

(Act No. 110 of 1983), the State President if he administers a department of State for general affairs as if he were the Minister of the department in question, and a member of an executive council or a Minister referred to in section 5 or 29 respectively of the National States Constitution Act, 1971 (Act No. 21 of 1971);

"State" means the body consisting of the departments of State established under section 24 of the Republic of South Africa Constitution Act, 1983 (Act No. 110 of 1983), the provincial administrations referred to in the first column of Schedule 1 to the Public Service Act, 1984 (Act No. 111 of 1984), and the departments established under section 5(2) of the National States Constitution Act, 1971 (Act No. 21 of 1971).

Notice to be given of legal proceedings intended against government institution.

2. (1) Subject to the provisions of this Act, no legal proceedings for the recovery of a debt arising from delict shall be instituted against the State, a government body, a Minister or other functionary of the State or of a government body in his official capacity or a person for whose actions the State or a government body is in law liable in respect of the debt in question, unless -

(a) the person who or body which is sued

(hereinafter referred to as the defendant) has in terms of subsection (2) been given notice in writing of the intention to institute the legal proceedings in question; or

(b) the defendant consents to the institution of legal proceedings without such notice or does not rely on the failure to give such notice; or

(c) the court has under section 3 condoned the failure to give such notice.

(2) A notice referred to in subsection (1) shall -

(a) set out briefly the facts relied on for the intended legal proceedings; and

(b) be delivered or sent by registered post within six months from the date upon which the debt became due -

(i) if a provincial administration or department of State is involved, to the head of the department concerned (if applicable the head of department referred to in the second column of

Schedule 1 to the Public Service Act,
1984 (Act No. 111 of 1984));

- (ii) if a government body is involved to the chief executive officer of the body concerned; and
- (iii) to any other defendant.

(3) For the purposes of paragraph (b) of subsection (2) a debt shall not be deemed to be due until the creditor (or his tutor or curator if he is a minor or insane or under curatorship) has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor or his tutor or curator, as the case may be, shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care unless the debtor wilfully prevents him from acquiring such knowledge.

Court may condone
plaintiff's failure.

3. If a defendant relies on a creditor's failure to give notice in terms of section 2(2) of the intended legal proceedings, a court having jurisdiction may condone the failure at the request of the creditor if the court is satisfied -

(a) that sound reasons exist for the failure by the creditor, tutor or curator; or

(b) that the defendant was not unreasonably prejudiced by the failure

and the court may, subject to any law relating to the extinction of debts by prescription, grant leave to institute the legal proceedings subject to any conditions regarding notice to the defendant which the court may lay down.

Prescription of debts.

4. Subject to the provisions of this Act, a debt shall be extinguished by prescription as provided in section 344 of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), section 2(6)(b) of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956) or the Prescription Act, 1969 (Act No. 68 of 1969).

Exceptions.

5. The provisions of this Act shall not apply to legal proceedings for the recovery of a debt in respect of which the provisions of section 8 of the Workmen's Compensation Act, 1941 (Act No. 30 of 1941) apply or a debt in terms of the provisions of the Compulsory Motor Vehicle Insurance Act, 1972 (Act No. 56 of 1972), or sections 26 or 65 of the South African Transport

Services Act, 1981 (Act No, 65 of 1981).

Repeal and
amendment of laws.

6. (1) Subject to the provisions of subsection (2) the laws referred to in the Schedule are hereby amended or repealed to the extent set out in the third column of the Schedule and any other law which is inconsistent with the provisions of this Act is hereby repealed to the extent of the inconsistency.

(2) The amendment or repeal of a law in terms of subsection (1) shall not affect any legal proceedings or a requirement regarding notice of legal proceedings in connection with a debt which became due before this Act came into operation.

Short title.

7. This Act shall be called the Limitation of Legal Proceedings against Government Institutions Act, 19__.

SCHEDULE

LAWS AMENDED OR REPEALED

Number and year of law	Short title	Extent of amendment or repeal
Act No. 38 of 1927	Black Administration Act, 1927	The repeal of section 32A
Act No. 57 of 1951	Merchant Shipping Act, 1951	1. The repeal of section 343; and 2. The amendment of section 344 by the deletion of subsection (4)
Act No. 44 of 1957	Defence Act, 1957	The repeal of section 113
Act No. 7 of 1958	Police Act, 1958	The repeal of section 32
Act No. 8 of 1959	Prisons Act, 1959	The repeal of section 90
Act No. 59 of 1959	Supreme Court Act, 1959	The amendment of section 37 by the deletion of subsection (3)
Act No. 6 of 1962	Archives Act, 1962	The amendment of section 13 by the deletion of subsection (3)
Act No. 91 of 1964	Customs and Excise Act, 1964	The substitution for section 96 of the following section: "Notice of action and period for bringing action. 96 (1) <u>Subject to the provisions of subsection (3)</u> , no legal proceedings shall be instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act until one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the

Number and year of law	Short title	Extent of amendment or repeal
		name and place of abode of the person who is to institute proceedings and the name and address of his attorney or agent, if any.
		(2) Subject to the provisions of <u>subsection (3) and section 89</u> , the <u>period of</u> extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of action arising out of the provisions of this Act shall be one year and shall begin to run on the date when the right of action first arose.
		(3) <u>The provisions of this section shall not apply to the recovery of a debt referred to in section 2(1) of the Limitation of Legal Proceedings against Government Institutions Act, 19 .</u>
Act No. 94 of 1970	Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970	The repeal of the whole
Act No. 54 of 1971	National Roads Act, 1971	The amendment of section 25 by the deletion of subsection (1)
Act No. 18 of 1973	Mental Health Act, 1973	The amendment of section 68 by the deletion of subsection (4)
Act No. 78 of 1973	Occupational Diseases in Mines and Works Act, 1973	The repeal of section 128
Act No. 57 of 1976	National Parks Act, 1976	The amendment of section 28 by the deletion of subsection (2)

Number and year of law	Short title	Extent of amendment or repeal
Act No. 125 of 1977	Community Councils Act, 1977	The repeal of section 15
Act No. 104 1978	Bureau for State Security Act, 1978	The repeal of section 30
Act No. 90 of 1979	Education and Training Act, 1979	The repeal of section 42A
Act No. 65 of 1981	South African Transport Services Act, 1981	The repeal of section 64 provided that a debt which arose from a contract entered into before the repeal of this section, shall be recovered as if this section had not been repealed
Act No. 102 of 1982	Black Local Authorities Act, 1982	The repeal of section 52
Act No. 4 of 1984	Black Communities Development Act, 1984	The repeal of section 25
Act No. 65 of 1984	Commission for Administration Act, 1984	The repeal of section 11
Act No. 111 of 1984	Public Service Act, 1984	The repeal of section 34