



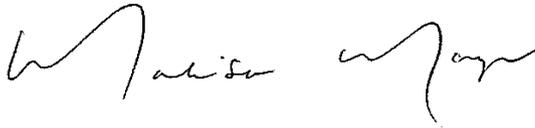
**REPORT ON LEGISLATION ADMINISTERED
BY DEPARTMENTS OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

**PROJECT 25:
STATUTORY LAW REVISION**

SEPTEMBER 2015

**TO MR TM MASUTHA, MP, (ADV) MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended) for your consideration and referral to the Minister of Cooperative Governance and Traditional Affairs, the Commission's report on Project 25: Statutory Law Revision (Legislation administered by the Departments of Cooperative Governance and Traditional Affairs).

A handwritten signature in black ink, appearing to read 'M M L Maya', written in a cursive style.

JUDGE M M L MAYA

CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION

17 SEPTEMBER 2015

South African Law Reform Commission

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

The members of the Commission are –

Judge Mandisa Lindelwa Maya (Chairperson)
Judge Narandran (Jody) Kollapen (Vice-Chairperson)
Professor M Carnelly
Professor Vinodh Jaichand
Mr Irvin Lawrence
Professor AW Oguttu
Advocate Mahlape Sello
Ms Thina Siwendu

The Secretary of the SALRC is Mr Nelson Matibe. The Project Leader responsible for this investigation is Mr Irvin Lawrence. The SALRC official assigned to this investigation is Mr Linda Mngoma. The Commission's offices are situated at Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

On 30 July 2008, Ms BS Mabandla, the then Minister of Justice and Constitutional Development, appointed the following advisory committee members to assist with this investigation:

Mr Mlungisi Tenza, Durban University of Technology
Mr Tshepo Madlingozi, University of Pretoria
Professor Nic Olivier, University of Pretoria
Ms Anel du Plessis, University of North-West
Ms Rolien Roos, University of North-West
Professor Margaret Beukes, University of South Africa
Professor Hennie van As, Nelson Mandela Metropolitan University
Dr Daniel Pretorius, Bowman Gilfillan Attorneys
Mr Jason Brickhill, Legal Resources Centre

Correspondence should be addressed to:

The Secretary

South African Law Reform Commission

Private Bag X668

Pretoria

0001

Telephone: (012) 622 6349 or (012) 622 9334

Fax: 0867598597

E-mail: LMngoma@justice.gov.za

Website: <http://www.justice.gov.za/salrc/index.htm>

Table of contents

Executive Summary

A. Introduction	x
B. Discussion Paper 120	xi
C. Draft Cooperative Governance and Traditional Affairs Laws Amendment and Repeal Bill	xv
D. Summary of recommendations	xx
E. Concluding remarks	xxii

Chapter 1. Project 25: Statutory Law Revision

A. Introduction	1
1. The objects of the South African Law Reform Commission	1
2. History of the investigation	1
B. What is statutory law revision	2
C. The initial investigation	5
D. Scope of the project	7
E. Assistance by government departments and stakeholders	8
F. Consultation with CoGTA	8

Chapter 2. Explanatory notes on the Draft Cooperative Governance and Traditional Affairs General Laws Amendment and Repeal Bill

A. Introduction	10
B. Statutes administered by CoGTA	13
C. General observations	13
D. Recommendations for the repeal and amendment of legislation	15
1. Statutes recommended for repeal by the Department of Justice and Constitutional Development	15
(a) Black Laws Amendment Act 46 of 1937	16

(b) Black Laws Amendment Act 79 of 1957	17
(c) Black Laws Amendment Act 42 of 1964	18
(d) Black Laws Amendment Act 63 of 1966	21
(e) Black Laws Amendment Act 56 of 1968	22
(f) Second Black Laws Amendment Act 27 of 1970	23
(g) Third Black Laws Amendment Act 49 of 1970	25
(h) Black Laws Amendment Act 23 of 1972	26
(i) Black Laws Amendment Act 119 of 1977	27
(j) Black Laws Amendment Act 12 of 1978	28
2. Statute recommended for repeal by the Department of Home Affairs	29
(a) Black Laws Amendment Act 76 of 1963	29
3. Statutes recommended for repeal by CoGTA	
(a) Promotion of Local Government Affairs Amendment Act 116 of 1984	39
(b) Promotion of Local Government Affairs Amendment Act 45 of 1985	39
(c) Pension Benefits for Councillors of Local Authorities Act 105 of 1987	40
(d) Witpoort Adjustment Act 19 of 1993	42
(e) Disestablishment of the Local Government Affairs Council Act 59 of 1999	43
(f) South African Olympic Hosting Act 36 of 1997	44
(g) Local Government Affairs Amendment Act 56 of 1993	45
(h) Local Government Affairs Second Amendment Act 117 of 1993	47
4. Statutes recommended for repeal by the relevant provincial legislatures	
(a) Civil Protection Act 67 of 1997	47
(b) Regional Services Councils Act 109 of 1985	48
(c) KwaZulu and Natal Joint Services Act 84 of 1990	50

(d) Abolition of Development Bodies Act 75 of 1986	51
(e) Local Government Affairs Second Amendment Act 117 of 1993	52
5. Statutes recommended for amendment by CoGTA	
(a) Fire Brigade Services Act 99 of 1987	53
(b) Abolition of Development Bodies Act 75 of 1986	55
(c) Organised Local Government Act 52 of 1997	60
(d) Transfer of Staff to Municipalities Act 17 of 1998	61
6. Statutes reviewed and recommended for retention	
(a) Traditional leaders and Governance Framework Act 41 of 2003	62
(b) National House of Traditional Leaders Act 10 of 1997	65
(c) Promotion of Local Government Affairs Act 91 of 1983	67
(d) Lekoa City Council Dissolution Act 61 of 1991	67
(e) Repeal of Local Government Laws Act 42 of 1997	70
(f) Remuneration of Public Office Bearers Act 20 of 1998	70
(g) Local Government: Municipal Demarcation Act 27 of 1998	71
(h) Local Government: Municipal Structures Act 117 of 1998	71
(i) Local Government: Municipal Systems Act 32 of 2000	72
(j) Repeal of Volkstaat Council Provisions Act 30 of 2001	73
(k) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act	73
(l) Disaster Management Act 57 of 2002	74
(m) Local Government: Municipal Property Rates Act 6 of 2004	74
(n) Intergovernmental Relations Framework Act 13 of 2005	75
Annexure A:	
Cooperative Governance and Traditional Affairs Laws Amendment and Repeal Bill	76
Annexure B:	
Statutes recommended for repeal by the Department of Justice and Constitutional Development	87

Annexure C:	
Statute recommended for repeal by the Department of Home Affairs	88
Annexure D:	
Statutes recommended for repeal by the relevant Provincial Legislatures	89
Annexure E:	
Statutes administered by CoGTA	91
Annexure F:	
List of respondents to Discussion Paper 120	94
Bibliography	95
List of cases	95
List of legislation	95

Executive Summary of the Report

A. Introduction

1. Since the advent of constitutional democracy in 1994, no comprehensive review of the statute book for constitutionality, redundancy or obsolescence was undertaken, although a number of Acts were amended or repealed by Parliament on an *ad hoc* basis. To address this unsatisfactory state of affairs, in 2004 the South African Law Reform Commission (SALRC) included in its law reform programme an investigation into statutory law revision. The purpose of this investigation is two-fold: (a) to align the South African statute book with the right to equality entrenched in section 9 of the Constitution of the Republic of South Africa, 1996; and (b) to provide a statute book that is free from obsolete and unnecessary matter.

2. In August 2004, the SALRC commenced its review of legislation administered by the Department of Cooperative Governance and Traditional Affairs (hereinafter CoGTA) and developed a Consultation Paper setting out provisional findings and proposals.¹ On 28 July 2009, the SALRC wrote a letter to the then Acting Director-General: CoGTA, Mr Elroy Africa, requesting comments on the provisional findings and proposals for legislative changes contained in the Consultation Paper and Draft Cooperative Governance and Traditional Affairs General Laws Amendment and Repeal Bill (hereinafter the Draft Bill) that was attached to the letter. On 22 October 2009, comments and input were received from the Acting Director-General: CoGTA. The comments are discussed below.

¹ Among the changes made by the President of the Republic of South Africa on the appointment of a new Cabinet on 10 May 2009, was the change in the name of the Department from 'Provincial and Local Government' to 'Cooperative Governance and Traditional Affairs.' Furthermore, in terms of Proclamation No.R.82 of 2009 published in Government Gazette No.32763 dated 1 December 2009, two Departments were created, namely: the Department of Cooperative Governance and the Department of Traditional Affairs with effect from 1 December 2009.

B. Discussion Paper 120

3. The SALRC concurs with CoGTA's comments that the Promotion of Local Government Affairs Act, 1985 (Act No. 45 of 1985) be repealed; and that the Regional Services Councils Act, 1985 (Act No. 109 of 1985) and the KwaZulu and Natal Joint Services Act, 1990 (Act No. 84 of 1990) be recommended for repeal by the relevant provincial legislatures to whom they were assigned. The Local Government Transition Act Second Amendment Act, 1996 (Act No. 97 of 1996) and the Local Government Municipal Finance Management Act, 2003 (Act No. 56 of 2003) were removed from the list of statutes as suggested by CoGTA.

4. CoGTA did not agree with the SALRC's proposal to amend section 7(1) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) to include a provision making it possible to withdraw recognition of a traditional community by a Premier of a province on the basis that it does not comply with the requirement set out in section 3(2)(b) of the Act. Section 3(2)(b) of the Act requires that one-third of the members of a traditional council should be women. As a result, this proposal was excluded from the SALRC's Discussion Paper that was published for public comments. However, the proposal to amend sections 9(1)(a) and 11(1)(a) to include references to section 9 of the Constitution (equality provision) in addition to 'applicable customary law' in the selection of kings and queens (section 9(1)(a) and senior traditional leaders; headmen and headwomen (section 11(1)(a) respectively, was retained in the Discussion Paper. The letter from the Acting Director-General: CoGTA concludes by stating that CoGTA agrees with the rest of the proposals contained in the SALRC Consultation Paper.

5. In accordance with its policy to consult widely and to involve the public in the law reform process, the SALRC developed a Discussion Paper incorporating comments and input received from CoGTA. This was published in December 2010 as Discussion Paper 120 (the Discussion Paper) for general information and comment.

6. In the Discussion Paper, the SALRC, listed all the principal and amendment legislation administered by CoGTA (a consolidated list of 53 statutes enacted between

1937 and 2005)², or which was inherited by CoGTA from previous administrations; explained the background to statutory law revision; set out the guidelines used by the SALRC to test the constitutionality and redundancy of these statutes; provided detailed findings and proposals for law reform in respect of any statutes found wanting; and appended the Draft Bill, which set out legislation or provisions in legislation which needed to be amended and repealed, and the extent of such repeal. The closing date for submission of public comments to the SALRC was 31 March 2011.

7. The stakeholders to whom the Discussion Paper was distributed included CoGTA, the Department of Rural Development and Land Reform; national and provincial houses of traditional leaders; MECs and heads of provincial government departments responsible for local government and traditional affairs; and municipalities responsible for the administration of the relevant Acts discussed in Chapter 2 of this Report.

8. The SALRC received comments from the Department of International Relations and Cooperation (DIRCO); the Department of the Premier: Provincial Government of the Western Cape; the Registrar of Pension Funds: Financial Services Board; and the Emfuleni Local Municipality. Further comments on the Discussion Paper were received from the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively.

9. In its submission to the SALRC, DIRCO said that the South African Olympic Hosting Act 36 of 1997 should be repealed on the basis that the Act was written for a specific purpose and is now redundant. The Act provides for the execution of the host city contract of the 28th Olympiad in 2004, in the event that it was awarded to the City of Cape Town. Since the City of Cape Town was not appointed for the 2004 Olympics, the Act is redundant on the statute book and should be repealed. The SALRC agrees with this proposal.

10. The Department of the Premier: Provincial Government of the Western Cape, supports all the proposed amendments to the Fire Brigade Services Act, 1987, save for the proposed amendment of section 11(2)(b). Section 11(2)(b) purports to expand the grounds of discrimination (for the payment of a grant-in-aid by an Administrator to any controlling authority) to include all the grounds of non-discrimination listed in section 9(3) of the

² The National House of Traditional Leaders Act, 1997 (Act No. 10 of 1997) was removed from the list after the Discussion Paper phase.

Constitution. Currently, section 11(2)(b) lists only sex, race, colour and religion as grounds upon which discrimination may not occur. The Act was passed prior to the 1996 Constitution. The Western Cape Provincial Government states that the proposed amendment to section 11(2)(b) of the Fire Brigade Services Act is superfluous because the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 is “overarching and will infer the provisions of section 9 of the Constitution into the interpretation of all statutes.” However, the SALRC does not support this view, since the purpose of statutory law revision is to make recommendations for the development of the law which includes the amendment of redundant, obsolete and unconstitutional provisions and the removal of anomalies found in legislation. Lastly, the Western Cape Provincial Government states that it is in the process of repealing the remaining provisions of the Civil Protection Act, 1977 as recommended in this Report.

11. On 18 April 2012, the SALRC enquired from the Registrar of Pension Funds about the usefulness of the Pension Benefits for Councillors of Local Authorities Act 105 of 1987. The Act distinguishes between persons on the basis of population groups. For example, ‘Minister’ is defined in the Act to mean the Minister of Planning, Provincial Affairs and National Housing, acting in concurrence with, among others, the Minister charged with local government affairs of the Ministers’ Council of the House of Assembly, the House of Representatives, or the House of Delegates, according to population group/s involved. Research conducted revealed that the Act was seldom, if ever, applied. The Registrar of Pension Funds stated in their response to the SALRC that Act 105 of 1987 is irrelevant for purposes of the Pension Funds Act. Furthermore, such discriminatory provisions as contained in the Act are inconsistent with both the Pension Funds Act and the Constitution, to which the latter Act is subject. Accordingly, Act 105 of 1987 is recommended in this Report for repeal by CoGTA.

12. Similarly, the Emfuleni Local Municipality was requested to provide advice about the usefulness of the Lekoa City Council Dissolution Act 61 of 1991, which appears to be spent. Although the Accounting Officer of the Emfuleni Local Municipality is of the view that the Act is obsolete, the SALRC recommends that a thorough audit be conducted by CoGTA to establish whether all the obligations imposed by the Act have indeed been fulfilled. Once the audit has been completed, possible repeal of the Act may be considered.

13. Regarding the repeal of the eleven transversal Black Laws Amendment Acts, the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively stated in their submissions to the SALRC that their departments are not the

successors-in-title of the erstwhile Minister for Public Works and Land Affairs, nor of the erstwhile Minister for Plural Relations and Development. The Directors-General proposed that the repeal of these statutes be shared among the following five departments, namely: Departments of Cooperative Governance and Traditional Affairs; Justice and Constitutional Development; Rural Development and Land Reform; Home Affairs; and National Treasury.

14. However, the above approach is not endorsed by the SALRC. Save for the Black Laws Amendment Act, 1963 (Act 76 of 1963), which contains substantive provisions and is thus recommended for repeal by the Minister of Home Affairs, all the other Black Laws Amendment Acts do not contain any substantive provisions. Accordingly, the SALRC recommends that Act 76 of 1963 be repealed by the Minister of Home Affairs. The remaining ten Acts are recommended for repeal by the Minister of Justice and Correctional Services on the grounds of obsolescence, as discussed in Chapter Two of this Report.

15. As stated in paragraph 4 above, the proposal to amend sections 9(1)(a) and 11(1)(a) of the Traditional Leadership and Framework Act, 2003 (Act 41 of 2003) was retained in the Discussion Paper that was published for public comment. However, this recommendation is not supported by CoGTA. In its submission to the SALRC, CoGTA stated that:

the recommendations proposed by the SA Law Reform Commission in respect of traditional leadership are sufficiently dealt with in clause 2 of the Traditional and Khoi-San Leadership and Governance Bill (hereinafter referred to as the TKLGB), which clause contains the guiding principles that will apply to all traditional and Khoi-San communities.

16. According to CoGTA, the TKLGB requires all Traditional and Khoi-San communities to transform and adapt their customary law and customs in accordance with the Bill of Rights in the Constitution. In particular, this requirement is aimed at preventing unfair discrimination and promoting gender equality. Consequently, the proposed amendment of Act 41 of 2003 is not included in this Report.

C. Draft Cooperative Governance and Traditional Affairs General Laws Amendment and Repeal Bill

1. Redundant and obsolete legislation recommended for repeal

- (a) *Promotion of Local Government Affairs Amendment Act, 1984 (Act No. 116 of 1984) and Promotion of Local Government Affairs Amendment Act, 1985 (Act No. 45 of 1985)*

17. The Draft Bill seeks to repeal both the Promotion of Local Government Affairs Amendment Act 116 of 1984 and the Promotion of Local Government Affairs Amendment Act 45 of 1985, in whole, on account of obsolescence. The provisions in these Acts, which amend the principal Act 91 of 1983, were later substituted by other legislation – which rendered these Acts redundant. The proposed repeal of the Promotion of Local Government Affairs Amendment Act 116 of 1984 and the Promotion of Local Government Affairs Amendment Act 45 of 1985 is supported by CoGTA.

- (b) *Pension Benefits for Councillors of Local Authorities Act, 1987 (Act 105 of 1987)*

18. The Draft Bill seeks to repeal the Pension Benefits for Councillors of Local Authorities Act 105 of 1987, in whole, on account of its discriminatory nature and obsolescence. The Act contains provisions that distinguish between persons of different races, through references to differentiated local authorities on the basis of population groups. According to information obtained from the Registrar of Pension Funds, three funds for South African Local Authorities were registered by the Registrar of Pension Funds, namely:

1. the South African Local Authorities Pension Fund (commenced on 1 March 1985);
2. the South African Local Authorities Provident Fund (commenced on 1 October 1985); and
3. the South African Local Authorities Beneficiary Fund (commenced on 1 March 2009).

19. The above funds were established for the benefit of employees and councillors of, among others, the South African Police Service, any provincial legislature, and any 'municipal entity' as defined in the Local Government Municipal Systems Act 32 of 2000. The latest registered rules for these funds do not make reference to the 1987 Act. Given the reality of the Act's current virtual non-application combined with the fact that the Remuneration of Public Office Bearers Act 20 of 1998 now accomplishes the same purpose as the earlier Act, Act 105 of 1987 seems to have been superseded by Act 20 of 1998.

(c) *Witpoort Adjustment Act, 1993 (Act No. 19 of 1993)*

20. The Draft Bill seeks to repeal the Witpoort Adjustment Act 19 of 1993 in whole, subject to finalization of the transitional arrangements contained in section 3(1) of the Disestablishment of the Local Government Affairs Council Act 59 of 1999. The purpose of the Act was to provide for the transfer of certain immovable property and certain rights and obligations of the State to the Local Government Affairs Council.

21. Section 3(1) of Act 59 of 1999 provides that –

the Minister for Provincial and Local Government may, after such consultation as may be necessary, which must include consultation with the persons who, immediately before the commencement of this Act, were members of the Council or in the employ of the Council, make such arrangements as may be necessary for winding up the affairs of the Council and for the finalization of any matter, including matters relating to the employees, assets, liabilities, rights, obligations and finances of the Council.

22. The Local Government Affairs Council referred to above has since been disestablished in terms of section 1 of the Disestablishment of Local Government Affairs Council Act 59 of 1999. According to information obtained from the Pretoria Deeds Office, it appears that most, if not all, of the properties listed in the Schedule to Act 19 of 1993 were transferred to the Local Government Affairs Council, as required by the Act prior to its dissolution. Thus the Act is recommended for repeal provided that the winding up of the affairs of the Local Government Affairs Council have been finalized by the Minister of Co-operative Governance and Traditional Affairs as stipulated in section 3(1) of Act 59 of 1999.

(d) *South African Olympic Hosting Act, 1997 (Act No. 36 of 1997)*

23. The Draft Bill seeks to repeal the South African Olympic Hosting Act 36 of 1997 in whole, on account of obsolescence. The Act provided for the execution of the host city contract if the hosting of the 28th Olympic Games in 2004 were to have been awarded to the City of Cape Town. The Act is now spent, as it was enacted to regulate the Olympic Games of 2004 – which would have been a once-off occasion. According to the submission received from DIRCO, the Act has achieved its original objectives and no longer serves any practical purpose.

(e) *Disestablishment of the Local Government Affairs Council Act, 1999 (Act No. 59 of 1999)*

24. The Draft Bill seeks to repeal the Disestablishment of the Local Government Affairs Council Act 59 of 1999, subject to finalization of the transitional arrangements contained in section 3(1) of the Act. The Act was passed to disestablish the Local Government Affairs Council by repealing the statute which established the Council.

25. Section 3(1) of the Act empowers the Minister for Cooperative Governance and Traditional Affairs to implement such transitional measures as are necessary to wind up the affairs of the Council. This subsection has run its course and the provision is now obsolete and can be repealed. In addition, if the transitional arrangements contemplated in section 3(1) of the Act have run their course, the whole Act is obsolete and can be repealed. Section 3 is the only remaining potentially operative provision of the Act, as the other provisions were included to disestablish the Local Government Affairs Council (section 1); to repeal the statute that established the Council (section 2); and to provide the short title of the Act (section 4).

2. Legislation recommended for partial repeal on the grounds of obsolescence:

(a) *Abolition of Development Bodies Act, 1986 (Act No.75 of 1986)*

26. The Draft Bill seeks to repeal, on grounds of obsolescence, the following sections of the Act:

1. paragraphs (a), (b), (c) and (d) of the definition of ‘development body’;
2. paragraphs (c) and (d) of the definition of ‘public authority’ in section 1;

3. sections 2(1), 3, 5(1A), 5(2), 5(4)(c), 6(1), 7B(1), 7B(2);
4. Schedule 1; and
5. item 2 of Schedule 2.

27 The definitions and provisions proposed for repeal in this Act are glaringly obsolete. Moreover, the Act makes reference to statutes that have now been repealed, including statutes that are proposed in this Report for repeal by CoGTA.

(b) KwaZulu and Natal Joint Services Act 84 of 1990 (section 23)

28. The Draft Bill seeks to repeal section 23 of the KwaZulu and Natal Joint Services Act 84 of 1990. Section 23 of Act 84 of 1990 was not assigned to the province of KwaZulu-Natal in terms of section 235 of the then Interim Constitution of the Republic of South Africa. The rest of the Act is recommended for repeal by the KwaZulu-Natal provincial legislature on the grounds of obsolescence. If the whole of the KwaZulu and Natal Joint Services Act 84 of 1990 is repealed by the KwaZulu-Natal provincial legislature, then section 23 of the Act is redundant and can be repealed by CoGTA.

(c) Local Government Affairs Amendment Act, 1993 (Act No.56 of 1993)

29. The Draft Bill seeks to repeal sections 6 to 13 inclusive, 17 to 21 inclusive, and 36 of the Local Government Affairs Amendment Act 56 of 1993. This recommendation is based on the grounds that these sections amend provisions of the Regional Services Councils Act 109 of 1985 and the KwaZulu and Natal Joint Services Act 84 of 1990, which are both recommended for repeal in this Report.

(d) Local Government Affairs Second Amendment Act, 1993 (Act No. 117 of 1993)

30. The Draft Bill seeks to repeal sections 1, 2, 3, 5 and 9 of the Local Government Affairs Second Amendment Act 117 of 1993, on the following grounds:

1. Subsections 1(1), 1(2) and 1(3) of the Act repeal sections 2, 3(2) and 3(3) respectively of the Removal of Restrictions Act 84 of 1967. The latter Act is recommended for repeal as a whole in the Land Use Management Bill by the DRDLR.
2. Sections 2, 3, 5 and 9 of the Act repeal provisions in statutes that have already been repealed.

3. Legislation recommended for amendment on the basis of its discriminatory nature and/or obsolescence:

(a) *Abolition of Development Bodies Act, 1986 (Act No. 75 of 1986)*

31. The Draft Bill seeks to amend the Act by the substitution of new definitions for the definitions of 'Administrator', 'Minister', and 'public authority'; and by the amendment of certain obsolete provisions.

(b) *Fire Brigade Services Act, 1987 (Act No. 99 of 1987)*

32. The Draft Bill seeks to amend the Act by the substitution of new definitions for the definitions of 'Administrator', 'local authority', and 'Minister'; and by the amendment of section 11(2)(b) of the Act to expand the list of grounds of non-discrimination to include those listed in section 9(3) of the Constitution of the Republic of South Africa, 1996.

(c) *Organised Local Government Act, 1997 (Act No. 52 of 1997)*

33. The Draft Bill seeks to amend the definition of 'Minister' in section 1 of the Act in order to correctly identify the Minister of Co-operative Governance and Traditional Affairs as the authority responsible to carry out the functions detailed in the Act. Furthermore, the Draft Bill seeks to amend section 3(2)(a) of the Act to incorporate the grounds of non-discrimination listed in section 9(3) of the Constitution into the criteria used by the national organization when designating representatives to participate in proceedings of the National Council of Provinces (NCOP). The Act currently does not specify which criteria should be applied in this regard.

(d) *Transfer of Staff to Municipalities Act, 1998 (Act No. 17 of 1998)*

34. The Draft Bill seeks to amend the definition of 'municipality' in section 1 of the Act, as it is glaringly obsolete. The Act defines 'municipality' to mean a municipality as defined in section 10 of the Local Government Transition Act 209 of 1993. The latter Act was repealed as a whole by section 36 of the Local Government Laws Amendment Act 19 of 2008.

4. Statutes recommended for repeal by the relevant provincial legislatures

35. Although not included in the Draft Bill, the SALRC recommends the following statutes for repeal by the relevant provincial legislatures to which they were assigned:
 1. Civil Protection Act, 1997 (Act No.67 of 1997);
 2. Regional Services Councils Act, 1985 (Act No.109 of 1985);
 3. Regional Services Councils Amendment Act, 1986 (Act No.78 of 1986);
 4. Regional Services Councils Amendment Act, 1988 (Act No.49 of 1988);
 5. Regional Services Councils Amendment Act, 1991 (Act No.75 of 1991);
 6. Abolition of Development Bodies Act, 1986 (Act No.75 of 1986)
 7. KwaZulu and Natal Joint Services Act 84 of 1990 (excluding section 23); and
 8. Local Government Affairs Second Amendment Act 117 of 1993.

D. Summary of SALRC Recommendations

36. In this Report, the SALRC makes the following recommendations.
 - (a) That the following Acts be repealed as a whole:
 1. Promotion of Local Government Affairs Amendment Act, 1984 (Act No.116 of 1984);
 2. Promotion of Local Government Affairs Amendment Act, 1985 (Act No.45 of 1985);
 3. Pension Benefits for Councillors of Local Authorities Act, 1987 (Act 105 of 1987);
 4. Witpoort Adjustment Act, 1993 (Act No.19 of 1993);
 5. South African Olympic Hosting Act, 1997 (Act No.36 of 1997); and
 6. Disestablishment of the Local Government Affairs Council Act, 1999 (Act No.59 of 1999).

(b). That the specified provisions in the following Acts be repealed:

1. Paragraphs (a), (b), (c) and (d) of the definition of 'development body' in section 1; paragraphs (c) and (d) of the definition of 'public authority' in section 1; and sections 2(1), 3, 5(1A), 5(2), 5(4)(c), 6(1), 7B(1), 7B(2), schedule 1, and item 2 of schedule 2 of the Abolition of Development Bodies Act, 1986 (Act No. 75 of 1986).
2. Section 23 of the KwaZulu and Natal Joint Services Act, 1990 (Act No.84 of 1990).
3. Sections 6 to 13 inclusive; 17 to 21 inclusive; and 36 of the Local Government Affairs Amendment Act, 1993 (Act No.56 of 1993).
4. Sections 2, 3, 5 and 9 of the Local Government Affairs Second Amendment Act, 1993 (Act No.117 of 1993).

(c) That the specified provisions in the following Act be amended:

1. Sections 1, 2(4), and 6(2)(b) of the Abolition of Development Bodies Act, 1986 (Act No.75 of 1986).
2. Sections 1 and 11(2)(b) of the Fire Brigade Services Act, 1987 (Act No.99 of 1987).
3. Sections 1 and 3(2) of the Organized Local Government Act, 1997 (Act No.52 of 1997).
4. Section 1 of the Transfer of Staff to Municipalities Act, 1998 (Act No.17 of 1998).

(d) Black Laws Amendment Acts

37. The SALRC recommends that the following ten transversal Black Laws Amendment Acts be repealed in whole by the Department of Justice and Constitutional Development (DOJCD), as they appear to be redundant. These Amendment Acts were used by the pre-democratic South African governments to effect amendments to various racially-based policies and legislation of the apartheid regime. The Acts that are recommended for repeal by the DOJCD on the grounds of obsolescence are the following:

1. Black Laws Amendment Act 1937(Act No.46 of 1937);
2. Black Laws Amendment Act, 1957 (Act No.79 of 1957);
3. Black Laws Amendment Act, 1964 (Act No.42 of 1964);
4. Black Laws Amendment Act, 1966 (Act No.63 of 1966);
5. Black Laws Amendment Act, 1968 (Act No.56 of 1968);
6. Second Black Laws Amendment Act, 1970 (Act No.27 of 1970);
7. Third Black Laws Amendment Act, 1970 (Act No.49 of 1970);
8. Black Laws Amendment Act, 1972 (Act No.23 of 1972);
9. Black Laws Amendment Act, 1977 (Act No.119 of 1977); and
10. Black Laws Amendment Act, 1978 (Act No.12 of 1978).

(e) The following Act is recommended for repeal by the Department of Home Affairs:

1. Black Laws Amendment Act 76 of 1963.

E. Concluding remarks

38. The SALRC has prepared this Report for consideration by the Minister of Justice and Correctional Services in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act No.19 of 1973).

39. The SALRC wishes to express its sincere gratitude to officials at the Departments of Cooperative Governance and Traditional Affairs for their co-operation and assistance during the investigation process.

Chapter 1

Project 25: Statutory Law Revision

A Introduction

1 The objects of the South African Law Reform Commission

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

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

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

2 History of the investigation

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

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

1.5 In 2004 the SALRC included in its law reform programme an investigation into statutory law revision, which entails a revision of all statutes from 1910 to date. While the emphasis in previous investigations was to identify obsolete and redundant provisions for repeal, the emphasis in the current investigation is on compliance with the Constitution. However, all redundant and obsolete provisions identified in the course of the current investigation will also be recommended for repeal. Furthermore, it should be stated from the outset that the constitutional inquiry is limited to statutory provisions that blatantly violate the provisions of section 9 (the equality section) of the Constitution.

1.6 With the advent of constitutional democracy in 1994, the legislation enacted prior to that year remained in force. This has led to a situation where numerous pre-1994 provisions are constitutionally non-compliant. The matter is compounded by the fact that some of these provisions were enacted to promote and sustain the policy of apartheid. A provisional audit by the SALRC of national legislation remaining on the statute book since 1910 established that there were, in 2004, roughly 2800 individual statutes on the statute book at that time. These comprised principal Acts, amendment Acts, private Acts, additional or supplementary Acts and partially repealed Acts. A substantial number of these Acts serve no useful purpose any more, while many others still contain unconstitutional provisions that have already given rise to expensive and sometimes protracted litigation.

B What is statutory law revision?

1.7 Statutory law revision is the review of statutes to determine whether they need updating or are still relevant and enjoy practical application. The purpose of the review is to modernise and simplify those statutes that need modernization or updating and to reduce the size of the statute book to the benefit of legal professionals and all other parties who make use of it. It also ensures people are not misled by obsolete laws on the statute book

which seem to be relevant or 'live' law. If legislation features in the statute book and is referred to in text-books, users reasonably enough assume those statutes still serve a purpose.

1.8 Legislation identified for repeal is selected on the basis that it is no longer of practical utility. Usually this is because these laws no longer have any legal effect on technical grounds because they are spent, unnecessary or obsolete. But sometimes they are selected because, although strictly speaking they do continue to have legal effect, the purposes for which they were enacted either no longer exist or are currently met by alternative means.

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

1.10 Provisions commonly repealed by Repeals of Laws Acts include the following –

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

1.11 The meanings of the terms “expired”, “spent”, “repealed in general terms”, “virtually repealed”, “superseded” and “obsolete” were explained by the Law Commission of India as follows:³

1. Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had their object the continuance of previous temporary enactments for periods now gone by effluxion of time;
2. 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;
3. 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;
4. Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one;
5. Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise;
6. Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.12 The obsolescence of statutes tends to be a gradual process. Usually there is no single identifiable event that makes a statute obsolete; often it is simply a case of legislation being overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. These include commencement and transitory provisions and ‘pump-priming’ provisions (e.g. initial funding and initial appointments to a Committee or a Board) to implement the new legislation. Next to go may be subordinate legislation-making powers that are no longer needed. Then the Committee or Board established by the Act no longer meets and can be abolished.

³

Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984 available at <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> accessed on 29 August 2007.

1.13 Much statutory law revision is possible because of the general savings provisions of section 12(2) of the Interpretation Act 33 of 1957. This 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.

1.14 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 that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the SALRC, the paper is published for general information and comment. Finally, the SALRC develops a report in respect of each department that reflects the comment on the discussion paper, and contains a draft Bill that proposed amending legislation.

C The initial investigation

1.15 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies (CALs) of the University of the Witwatersrand to conduct a study to determine the feasibility, scope and operational

structure of revising the South African statute book for constitutionality, redundancy and obsolescence. CALS pursued four main avenues of research in its study, conducted in 2001, as follows:⁴

First, a series of role-player interviews were conducted with representatives from all three tiers of government, Chapter 9 institutions, the legal profession, academia and civil society. These interviews revealed a high level of support for the project.

Second, an analysis of all Constitutional Court judgments until 2001 was undertaken. Schedules reflecting the nature and outcome of the cases, and the statutes impugned, were compiled. The three most problematic categories of legislative provision were identified, and an analysis was made of the Constitutional Court's jurisdiction in relation to each category. The three categories were: reverse onus provisions; discriminatory provisions; and provisions that infringe the principle of the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled in respect of each category.

Third, sixteen randomly selected national statutes were tested against these guidelines. The outcome of the test was then compared to a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. A comparison of the two sets of outcomes revealed that the targeted revision of the statute book in accordance with the guidelines had produced surprisingly effective results.

Fourth, a survey of five countries (United Kingdom, Germany, Norway, Switzerland and France) was conducted. With the exception of France, all the countries had conducted or were conducting statutory revision exercises, although the motivation for and the outcomes of these exercises differed.

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

1. Recognition of Customary Marriages (August 1998);
2. Review of the Marriage Act 25 of 1961 (May 2001);
3. Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);

⁴ *Feasibility and Implementation Study on the Revision of the Statute Book* prepared by the Law & Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand.

4. Traditional Courts (January 2003);
5. Recognition of Muslim marriages (July 2003);
6. Repeal of the Black Administration Act 38 of 1927 (March 2004);
7. Customary Law of Succession (March 2004); and
8. Domestic Partnerships (in March 2006).

D Scope of the project

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

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

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

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

1.20 The SALRC decided that the project should proceed by scrutinising and revising national legislation which discriminates unfairly.⁵ However, even the section 9 inquiry is fairly limited, dealing primarily with statutory provisions that are blatantly in conflict with section 9 of the Constitution. This is necessitated by, among other considerations, time and capacity. It is unlikely that the SALRC and government departments will have capacity in the foreseeable future to revise all national statutes or the entire legislative framework to determine whether they contain unconstitutional provisions.

E Assistance by government departments and stakeholders

1.21 Cabinet endorsed in 2004 that government departments should be requested to participate in and contribute to this investigation. Sometimes it is impossible to tell whether a provision can be repealed without information that is not readily ascertainable without access to 'inside' knowledge held by a department or other organisation. Examples of this include savings or transitional provisions which are there to preserve the status quo, until an office-holder ceases to hold office or until repayment of a loan has been made. In cases like these, the preliminary consultation paper drafted by the SALRC invites the department being consulted to supply the necessary information. Any assistance that can be given to fill in the gaps will be much appreciated. It is important that the departments concerned take ownership over this process. This will ensure that all relevant provisions are identified during this review, and are dealt with responsively and without creating unintended negative consequences.

⁵ Cathi Albertyn prepared a *Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution*, specifically for the SALRC in February 2006.

F Consultation with CoGTA

1.22 As stated above, the SALRC has reviewed a number of statutes administered by CoGTA with the assistance of its advisory committee appointed to conduct this review.⁶ In July 2009, in accordance with its policy to consult widely and to involve the department likely to be affected by the proposals made, the SALRC developed and submitted to CoGTA a Consultation Paper. The paper explained the background to statutory law revision, set out the guidelines utilised by the SALRC to test the constitutionality and redundancy of statutes administered by CoGTA, and provided detailed findings and proposals for legislative reform in respect of legislation found wanting. A Draft Co-operative Governance Laws Amendment and Repeal Bill setting out statutes which needed to be amended and repealed, and the extent of such repeal, was appended to the Consultation Paper. The SALRC invited CoGTA to peruse the preliminary findings, proposals and questions for comment, and submit comments to the SALRC.

1.23 In October 2009, CoGTA submitted comments to the SALRC. In brief, CoGTA supports the preliminary findings contained in the Consultation Paper referred to above, save for the preliminary proposals in respect of the Traditional Leadership and Governance Framework Act of 2003 relating to the representation of women in traditional communities and traditional councils established in terms of the Act. Accordingly, the provisional proposals contained in this Discussion Paper in respect of the said Act took into consideration the comments and input received from CoGTA.

1.24 After having submitted its Consultation Paper to CoGTA for comment, the SALRC conducted additional research on the eleven Black Laws Amendment Acts and the Witpoort Adjustment Act. On 16 March 2010, the SALRC submitted the findings to CoGTA, the Department of Home Affairs, and the Road Accident Fund (RAF) for comment. The SALRC acknowledges the comments and assistance it received from officials of the Departments of Cooperative Governance and Traditional Affairs and the RAF.

⁶ See list of advisory committee members on page ii of this discussion paper.

CHAPTER 2

EXPLANATORY NOTES ON DRAFT COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS GENERAL LAWS AMENDMENT AND REPEAL BILL

A Introduction

2.1 The mandate of the CoGTA is derived from chapters 3, 5, 6, 7, 9 and 13 of the Constitution of the Republic of South Africa (Act No. 108 of 1996). As a national department, the function of CoGTA is to develop national policies and legislation with regard to Local Government, and to monitor – among others – implementation of the following legislation:

1. Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005);
2. Municipal Property Rates Act, 2004 (Act No. 6 of 2004);
3. Local Government: Municipal Finance Management Act, 2003 (Act No.56 of 2003);
4. Traditional Leadership and Governance Framework Act, 2003, (Act No.41 of 2003);
5. Disaster Management Act, 2002 (Act No.57 of 2002);
6. Local Government: Municipal Systems Act, 2000 (Act No.32 of 2000);
7. Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998);
8. Local Government: Municipal Demarcation Act, 1998 (Act No.27 of 1998);
9. White Paper on Local Government (1998)
10. Organised Local Government Act, 1997 (Act No.52 of 1997);
11. Fire Brigade Services Act, 1987 (Act No.99 of 1987);
12. Local Government: Municipal Property Rates Act, 2004 (Act No.6 of 2004);
13. National House of Traditional Leaders Act, 1997 (Act No.10 of 1997);
14. Remuneration of Public Office Bearers Act, 1998 (Act No.20 of 1998);
15. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2000 (Act No.29 of 2000);
16. The Pension Benefits for Councillors of Local Authorities Act, 1987 (Act No.105 of 1987); and

17. Local Government: Cross-boundary Municipal Act, 2000 (Act No.29 of 2000).⁷

2.2 The Department's mission is to facilitate cooperative governance and to support all spheres of government, as well as the institution of traditional leadership and associated institutions, through:

1. Development and implementation of appropriate policies and regulatory mechanisms to promote integration in government development programmes;
2. Achievement of social cohesion through the creation of enabling mechanisms for communities to participate in governance; and
3. Monitoring and evaluation of cooperation amongst government stakeholders to achieve improved service delivery.⁸

2.3 In this Report, the statutes recommended for repeal as a whole are the following:

1. Promotion of Local Government Affairs Amendment Act, 1984 (Act No.116 of 1984);
2. Promotion of Local Government Affairs Amendment Act, 1985 (Act No.45 of 1985);
3. Pension Benefits for Councillors of Local Authorities Act, 1987 (Act 105 of 1987);
4. Witpoort Adjustment Act, 1993 (Act No.19 of 1993);
5. South African Olympic Hosting Act, 1997 (Act No.36 of 1997); and
6. Disestablishment of the Local Government Affairs Council Act, 1999 (Act No.59 of 1999).

2.4 The statutes proposed for partial repeal are the following:

1. Abolition of Development Bodies Act, 1986 (Act No.75 of 1986);
2. KwaZulu and Natal Joint Services Act 84 of 1990 (section 23);
3. Local Government Affairs Amendment Act, 1993 (Act No.56 of 1993); and
4. Local Government Affairs Second Amendment Act, 1993 (Act No.117 of 1993).

⁷ Cooperative Governance and Traditional Affairs Annual Report 2010/11 on 23.

⁸ Cooperative Governance and Traditional Affairs Annual Report 2010/11 on 22.

2.5 The statutes proposed for repeal by the relevant provincial legislatures are the following:

1. Civil Protection Act, 1997 (Act No.67 of 1997);
2. Regional Services Councils Act, 1985 (Act No.109 of 1985);
3. Regional Services Councils Amendment Act, 1986 (Act No.78 of 1986);
4. Regional Services Councils Amendment Act, 1988 (Act No.49 of 1988);
5. Regional Services Councils Amendment Act, 1991 (Act No.75 of 1991);
6. Abolition of Development Bodies Act, 1986 (Act No.75 of 1986)
7. KwaZulu and Natal Joint Services Act 84 of 1990 (excluding section 23); and
8. Local Government Affairs Second Amendment Act 117 of 1993.

2.6 The statutes proposed for amendment are the following:

1. Abolition of Development Bodies Act, 1986 (Act No.75 of 1986);
2. Fire Brigade Services Act, 1987 (Act No.99 of 1987);
3. Organised Local Government Act, 1997 (Act No.52 of 1997); and
4. Transfer of Staff to Municipalities Act, 1998 (Act No.17 of 1998).

2.7 The statutes proposed for repeal by the Department of Justice and Constitutional Development are the following:

1. Black Laws Amendment Act, (Act No.46 of 1937);
2. Black Laws Amendment Act, 1957 (Act No.79 of 1957);
3. Black Laws Amendment Act, 1964 (Act No.42 of 1964);
4. Black Laws Amendment Act, 1966 (Act No.63 of 1966);
5. Black Laws Amendment Act, 1968 (Act No.56 of 1968);
6. Second Black Laws Amendment Act, 1970 (Act No.27 of 1970);
7. Third Black Laws Amendment Act, 1970 (Act No.49 of 1970);
8. Black Laws Amendment Act, 1972 (Act No.23 of 1972);
9. Black Laws Amendment Act, 1977 (Act No.119 of 1977); and
10. Black Laws Amendment Act, 1978 (Act No.12 of 1978).

2.8 The statute proposed for repeal by the Department of Home Affairs is the following:

1. Black Laws Amendment Act, 1963 (Act No.76 of 1963).

2.9 Towards the end of this chapter, an evaluation is included of a number of statutes which the SALRC proposes be retained. The reasons for their inclusion in this Report were alluded to above and are further discussed below. Save for the statutes listed in paragraphs 2.5, 2.7 and 2.8 above, all the above proposals have been summarised in the proposed Cooperative Governance and Traditional Affairs General Laws Amendment and Repeal Bill, which is attached at Annexure A of this Report.

B Statutes administered by CoGTA

2.10 The SALRC has identified, for purposes of the current review, 53 pieces of legislation as being statutes that are administered by CoGTA (see Annexure E of this Report). The list includes relics from the previous apartheid government's racially-based legislation, which are inconsistent with section 9 of the Constitution of the Republic of South Africa. The SALRC conducted an investigation to determine whether any of these Acts or provisions therein may be repealed as a result of redundancy, obsolescence or unconstitutionality in terms of section 9 of the Constitution. A number of Acts that can be repealed fully or in part, and some Acts that may otherwise be amended, were identified. These Acts are listed in Schedules 1 to 3 of the proposed Cooperative Governance and Traditional Affairs General Laws Amendment and Repeal Bill (see Annexure A) and in Annexures B, C and D of this Report.

C General observations

2.11 Bearing in mind local government's close operation to the people of South Africa and the inevitable impact of local government's decisions or actions on people's rights generally, it is to be made clear that this Report is part of a narrow-focused, text-based statutory review process (as outlined in Chapter One). Where a statute administered by CoGTA seems to be free of any provisions that contradict or violate section 9 of the Constitution of the Republic of South Africa, this does not necessarily mean that the execution of that statute will automatically be in line with the protection afforded by section 9 of the Constitution (the equality section). Therefore, this Report does not reflect on any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed.

2.12 Several post-1996 statutes formed part of the review for purposes of this Report. Without exception, these statutes were found to be compliant with section 9 of the Constitution. However, although not part of the purpose of and core mandate for the current investigation, it has been observed in general that a significant number of provisions contained in several pre-1996 and post-1996 local government statutes require statutory revision in order to:

1. Ensure that local government legislation is aligned with the values and provisions of the Constitution, generally;
2. Ensure that local government legislation is aligned with other legal frameworks and sectoral legislation in South Africa, generally;
3. Improve the statutory regulation of matters related to local government in the context of cooperative governance;
4. Clarify the role and responsibilities of several local government structures, including traditional authorities, and the role and responsibilities of various types of municipalities;
5. Fortify legal certainty with regard to issues such as compulsory decision-making powers on the part of, for example, the MECs for local government;
6. Eliminate discrepancies in and overlaps between different national and provincial legislation regulating local government; and
7. More comprehensively regulate some local government affairs that are currently ill-defined or ambiguous.

2.13 Although this Report focuses on matters related to the constitutional equality section alone, in light of the general observations above the SALRC strongly recommends that an extensive statutory review process be initiated in the context of the legislation administered by CoGTA. This review should have a significantly wider scope than that of the current investigation. It should, among others, include the following aspects:

1. Determining the constitutionality of legislation administered by CoGTA with reference to all provisions of the Constitution other than section 9 (since section 9 forms the basis of the current review and Report); and
2. Updating the list of legislation administered by CoGTA, to include all the pre-1994 subordinate legislation which formed the basis for the establishment of municipal structures in the former urban areas and homelands.

D Recommendations for the repeal and amendment of legislation

2.14 For purposes of this Report, the analysis of legislation administered by CoGTA has indicated the need to make a distinction between the following categories of legislation:

1. Legislation recommended for repeal as a whole by CoGTA;
2. Legislation recommended for repeal as a whole by DOJCD;
3. Legislation recommended for repeal as a whole by DHA;
4. Legislation recommended for partial repeal by CoGTA;
5. Legislation recommended for amendment by CoGTA;
6. Legislation recommended for repeal by the relevant provincial legislatures to which the legislation concerned was assigned; and
7. Legislation recommended to be retained without any amendment.

1 Statutes recommended for repeal by the Department of Justice and Constitutional Development

2.15 The review of the Black Laws Amendment Acts entails an extensive transversal analysis involving CoGTA and one or more additional government departments. These Amendment Acts were used by the pre-democratic South African government administrations to effect amendments to various racially-based policies and legislation of the apartheid regime.

2.16 When the new constitutional dispensation took effect in February 1997, the then President of the Republic of South Africa did not re-assign a number of the “old order” statutes to Members of Cabinet, as envisaged by section 97 of the Constitution. Section 97 of the Constitution provides that the President may, by proclamation, transfer to a member of the Cabinet the administration of any legislation entrusted to another member, or any power or function entrusted by legislation, to another member. As a result, the post-1996 government departments have indicated a lack of authority or mandate to repeal those statutes that were not specifically re-assigned by the President.

2.17 In response to the SALRC'S request for comments, the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively, stated that their departments are not the successors-in-title of the erstwhile Minister for Public Works and Land Affairs, nor of the erstwhile Minister for Plural Relations and Development. The Directors-General proposed that the repeal of the statutes in question be shared among the following five departments:

1. Cooperative Governance and Traditional Affairs;
2. Justice and Constitutional Development (DOJCD);
3. Rural Development and Land Reform;
4. Home Affairs (DHA); and
5. National Treasury.

2.18 However, the SALRC does not recommend this approach. Apart from the Black Laws Amendment Act, 1963 (Act 76 of 1963), which contains substantive provisions and is therefore recommended for repeal by the Minister of Home Affairs, none of the other Black Laws Amendment Acts contain any substantive provisions. Thus in essence no specific functions and powers would be transferred by the President to the other Cabinet Ministers because the statutes in question are redundant and obsolete.

2.19 Furthermore, the proposed approach could result in duplication of research already completed by the SALRC. Accordingly, the SALRC recommends that only two Cabinet Members be designated, namely the Minister of Justice and Correctional Services and the Minister of Home Affairs, as Cabinet Members responsible for administering the statutes in question; and then only for the purpose of empowering the said Cabinet Ministers to bring about Bills to repeal all unconstitutional, redundant and obsolete "old order" statutes.

2.20 Against the above background, the SALRC recommends the following ten transversal Black Laws Amendment Acts for repeal by the DOJCD on the grounds of obsolescence, as discussed below.

(a) Black Laws Amendment Act 46 of 1937

2.21 The purpose of the Black Laws Amendment Act 46 of 1937 was "to amend the laws relating to Blacks in urban areas, to the regulation of the recruiting and employment of Black labourers and to the acquisition of land by Blacks."

2.22 All the sections of the Act have been repealed, save for sections 36 and 42.⁹ Section 36 of the Black Laws Amendment Act 46 of 1937 amends the definition of 'Minister' in section 7 of the Agricultural Holdings (Transvaal) Registration Act 22 of 1919, as follows: "'Minister' shall mean the Minister of Public Works and Land Affairs or any other Minister who may be authorized for the time being to discharge the duties of that Minister."

2.23 However, the above amendment was later substituted by section 3 of the Abolition of Racially Based Land Measure Act 108 of 1991, which renders section 36 of the Black Laws Amendment Act 46 of 1937 redundant. As this is the only remaining section of the Act, the SALRC recommends that the whole Black Laws Amendment Act 46 of 1937 be repealed by the DOJCD.

(b) Black Laws Further Amendment Act 79 of 1957

2.24 The purpose of the Black Laws Further Amendment Act 79 of 1957 was "to amend the Black Administration Act, 1927, the Development Trust and Land Act, 1936, the Blacks (Urban Areas) Consolidation Act, 1945, the Black Services Levy Act, 1952, and the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952."

2.25 In terms of the President's Minute No. 13 of 10 June 1994, the whole of Act 38 of 1927, excluding sections 2(2) and (6), 11, 11A, 12, 20, 21A, 22, 22bis and 23, was assigned to the Minister of Rural Development and Land Reform as the Minister responsible for the administration of this Act.

2.26 Section 1 of Act 79 of 1957 amends section 2(6) of the Black Administration Act 38 of 1927. However, section 2(6) was later substituted by section 9(1)(b) and (c) of Act 46 of 1962,¹⁰ and repealed by section 1(1) of Act 28 of 2005.¹¹ This means that section 2(6) of Act 79 of 1957 is redundant.

2.27 Section 2 of Act 79 of 1957 substitutes section 9 of the Black Administration Act 38 of 1927. However, Section 9 of Act 38 of 1927 was later amended by section 1 of Act 63 of

⁹ Section 42 of the Act is the short title and date of commencement.

¹⁰ Black Laws Amendment Act 46 of 1962.

¹¹ Repeal of the Black Administration Act Amendment Act 28 of 2005.

1966¹² and repealed by section 2 of Act 34 of 1986.¹³ This means that section 2 of Act 79 of 1957 is redundant.

2.28 Subsection 3(1) of Act 79 of 1957 amends section 10 of the Black Administration Act 38 of 1927. However, section 10 of Act 38 of 1927 was amended by section 2(1) of Act 70 of 1974¹⁴ and repealed by section 2 of Act 34 of 1986. This means that section 3(1) of Act 79 of 1957 is redundant.

2.29 Subsection 3(2) of Act 79 of 1957 provides as follows:

(2) Anything done by the State President under the provisions of subsection (1), (2) or (3) of section ten of the Black Administration Act, 1927 (Act 38 of 1927), prior to the date of commencement of this Act, shall be deemed to have been done by the Minister of Plural Relations and Development under the said subsections as amended by subsection (1) of this section.

2.30 The whole of section 10 of Act 38 of 1927 was repealed by section 2 of Act 34 of 1986; therefore, section 3(2) of Act 79 of 1957 is also redundant.

2.31 Section 4 of Act 79 of 1957 amends section 29 of the Black Administration Act 38 of 1927. However, section 29 of Act 38 of 1927 was amended by section 3 of Act 70 of 1974 and repealed by section 7 of Act 206 of 1993.¹⁵ This means that section 4 of Act 79 of 1957 is redundant.

2.32 Since all the remaining sections of Act 79 of 1957 mentioned above are redundant, the SALRC recommends that the whole Act 79 of 1957 be repealed by the DOJCD.

(c) Black Laws Amendment Act 42 of 1964

2.33 The purpose of the Black Laws Amendment Act 42 of 1964 was “to amend the Black Labour Regulation Act, 1911; to repeal the Black Service Contract Act, 1932; to

¹² Black Laws Amendment Act 63 of 1966.

¹³ Special Courts for Blacks Abolition Act 34 of 1986.

¹⁴ Black Laws Amendment Act 70 of 1974.

¹⁵ Abolition of Restrictions on Free Political Activity Act 206 of 1993.

amend the Development Trust and Land Act, 1936, the Blacks (Urban Areas) Consolidation Act, 1945, the Black Authorities Act, 1951, the Black Services Levy Act, 1952, the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952, the Blacks (Prohibition of Interdicts) Act, 1956, the Black Transport Services Act, 1957, the Sorghum Beer Act, 1962, and the Better Administration of Designated Areas Act, 1963; and to substitute the word 'native' and derivatives thereof in all laws.”

2.34 Section 14 of Act 42 of 1964 repeals the Black Service Contract Act 24 of 1932. As stated in paragraph 1.13 of Chapter 1 of this Report, much statutory law revision is possible because of the general savings provisions contained in section 12(2) of the Interpretation of Statutes Act 33 of 1957. This section provides that –

- (2) 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;

2.35 Sections 77, 78 and 79 of Act 42 of 1964 amend sections 1, 2 and 3 of the Black Authorities Act 68 of 1951 respectively, as follows:

1. Section 77 of Act 42 of 1964 amends section 1 of Act 68 of 1951 by the substitution for the definition of 'tribal authority'. However, this definition was later substituted by section 39(1) of the Self-governing Territories Constitution Act 21 of 1971. The latter Act was repealed by the Constitution of the Republic of South Africa 200 of 1993, which in turn was repealed by the Constitution of the Republic of South Africa, 1996. This means that section 77 of Act 42 of 1964 is redundant.
2. Section 78(a) of Act 42 of 1964 substitutes paragraph (a) of subsection 2(1) of Act 68 of 1951.
3. Section 78(b) of Act 42 of 1964 amends subsection 2(1) of Act 68 of 1951.
4. Section 78(c) of Act 42 of 1964 substitutes subsection 2(2) of Act 68 of 1951.
5. Section 78(c) of Act 42 of 1964 substitutes subsection 2(3) of Act 68 of 1951. However, this subsection was later substituted by section 5(1) of Act 56 of 1968.

6. Section 79(a) of Act 42 of 1964 substituted subsection 3(1) of Act 68 of 1951. However, this subsection was later substituted by section 39(1) of Act 21 of 1971.
7. Section 79(b) of Act 42 of 1964 amends subsection 3(2) of Act 68 of 1951. However, this subsection was later deleted by section 39(1) of Act 21 of 1971.
8. Section 79(c) of Act 42 of 1964 deleted subsections 3(5) and (6) of Act 68 of 1951.

2.36 Section 80 of Act 42 of 1964 amends the Black Authorities Act 68 of 1951 by the substitution for the words 'Governor-General' and 'Union', wherever they occur, of the words 'State President' and 'Republic' respectively.

2.37 The Black Authorities Act 68 of 1951 was repealed as a whole by section 1 of the Black Authorities Act Repeal Act 13 of 2010. As a result, all the provisions of Act 42 of 1964, which amended the Black Authorities Act 68 of 1951, in effect became redundant.

2.38 Section 88 of Act 42 of 1964 amends section 1 of the Blacks (Prohibition of Interdicts) Act 64 of 1956. However, the Blacks (Prohibition of Interdicts) Act 64 of 1956 was repealed by the Abolition of Influx Control Act 68 of 1986. This means that section 88 of Act 42 of 1964 is redundant.

2.39 Section 89 of Act 42 of 1964 amends section 5 of the Blacks (Prohibition of Interdicts) Act 64 of 1956. However, the Blacks (Prohibition of Interdicts) Act 64 of 1956 was repealed by the Abolition of Influx Control Act 68 of 1986. This means that section 89 of Act 42 of 1964 is redundant.

2.40 Section 90 of Act 42 of 1964 amends section 1 of the Black Transport Services Act 53 of 1957. However, the Black Transport Services Act 53 of 1957 was repealed by the Population Registration Act Repeal Act 114 of 1991. This means that section 90 of Act 42 of 1964 is redundant.

2.41 Section 91(1) of Act 42 of 1964 amends section 3 of the Black Transport Services Act 53 of 1957. However, the Black Transport Services Act 53 of 1957 was repealed by the Population Registration Act Repeal Act 114 of 1991. This means that section 91(1) of Act 42 of 1964 is redundant.

2.42 Accordingly, the SALRC recommends that the whole of the Black Laws Amendment Act 42 of 1964 be repealed by the DOJCD.

(d) Black Laws Amendment Act 63 of 1966

2.43 The purpose of the Black Laws Amendment Act 63 of 1966 was “to amend section 9 of the Black Administration Act, 1927, in order to make provision for the holding of a criminal court at a place which has been designated for the hearing of civil cases; to amend that Act by the insertion of section 32A in terms of which certain civil actions become prescribed; to amend section 24 of the Development Trust and Land Act, 1936, in order to apply subsections (1) and (3) of that section to self-governing Black States; to amend section 40bis of the Blacks (Urban Areas) Consolidation Act, 1945, in order to make provision for pensions and other benefits for employees of management boards; to amend section 2 of the Black Affairs Act, 1959, in order to change the constitution of the Commission for Plural Affairs; to amend section 52 of the Transkei Constitution Act, 1963, in order to empower the Legislative Assembly not to pay certain revenues into the Transkeian Revenue Fund; to amend the Black States Development Corporations Act, 1965, by the insertion of section 17A in terms of which corporations are exempted from the payment of certain moneys; and to provide for incidental matters.”

2.44 Section 1 of Act 63 of 1966 amends section 9 of the Black Administration Act 38 of 1927. However, section 9 of Act 38 of 1927 was later substituted by section 2 of Act 98 of 1979, and was then repealed by section 2 of Act 34 of 1986.¹⁶ This means that section 1 of Act 63 of 1966 is redundant.

2.45 Section 2 of Act 63 of 1966 amends the Black Administration Act 38 of 1927 by the insertion of section 32A. However, section 32A of Act 38 of 1927 was later repealed by section 2(1) of Act 40 of 2002.¹⁷

2.46 Section 6 of Act 63 of 1966 amends section 52 of the Transkei Constitution Act 48 of 1963. However, the Transkei Constitution Act 48 of 1963 was repealed by the Constitution of the Republic of South Africa 200 of 1993. This means that section 6 of Act 63 of 1966 is redundant.

¹⁶ Special Courts for Blacks Abolition Act 34 of 1986.

¹⁷ Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002.

2.47 Accordingly, the SALRC recommends that the whole of Act 63 of 1966 be repealed by the DOJCD, due to the fact that all the remaining provisions of the Act are redundant.

(e) Black Laws Amendment Act 56 of 1968

2.48 The purpose of Act 56 of 1968 was “to amend the provisions of the Black Administration Act, 1927, relating to the issue of deeds of grant; to amend the provisions of the Blacks (Urban Areas) Consolidation Act, 1945, relating to locations, Black villages, Black hostels, prescribed areas and management boards; to amend the provisions of the Black Authorities Act, 1951, relating to tribal, community, regional and territorial authorities; to amend the provisions of the Promotion of Black Self-government Act, 1959, relating to representatives of Blacks in urban areas; to amend the provisions of the Sorghum Beer Act, 1962, relating to presumptions and savings; and to provide for incidental matters.”

2.49 Section 1 of Act 56 of 1968 amends the Second Schedule to the Black Administration Act 38 of 1927, by deleting paragraph 2. However, the Second Schedule to Act 38 of 1927 was repealed by section 1(1) of Act 28 of 2005. This means that section 1 of Act 56 of 1968 is redundant.

2.50 Section 4(2) of Act 56 of 1968 provides as follows:

(2) The Management Board of Sebokeng established by Proclamation 65 of 1965, shall be deemed to have been lawfully established with effect from the first day of April, 1965, in accordance with the provisions of section 40bis of the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945), for the area defined in the Schedule to the said Proclamation as amended by Proclamation 96 of 1967, and any act purporting to have been performed by the said Board prior to the commencement of this Act under or by virtue of the provisions of the said section, shall be deemed to have been lawfully performed by that Board under or by virtue of the provisions of that section as amended by this section, and any laws purporting to have been made prior to such commencement under or by virtue of the provisions of the Blacks (Urban Areas) Consolidation Act, 1945, or section 25 of the Black Administration Act, 1927 (Act 38 of 1927), for the area so defined or any portion thereof, shall be deemed to have been lawfully made.

2.51 However, the Blacks (Urban Areas) Consolidation Act, 1945 (Act 25 of 1945) was repealed by the Black Communities Development Act 4 of 1984. Section 25 of Act 38 of

1927 was repealed by section 5(1) of Act 108 of 1991. This means that section 4(2) of Act 56 of 1968 is redundant.

2.52 Section 5(1) of Act 56 of 1968 amends section 2 of the Black Authorities Act 68 of 1951, by substituting subsection (3). Section 5(2) of Act 56 of 1968 provides as follows:

(2) Anything done under the provisions of section 2 of the Black Authorities Act, 1951, at any time prior to the date on which any amendment of that section came into force, shall be deemed to have been done under the said provisions as amended from time to time.

2.53 In view of the fact that the Black Authorities Act 68 of 1951 was repealed by the DRDLR,¹⁸ the remaining provisions of Act 56 of 1968, namely sections 1 and 4(2), are redundant. In light of these two facts, the SALRC accordingly recommends that the Black Laws Amendment Act 68 of 1951 be repealed as a whole by the DOJCD.

(f) Second Black Laws Amendment Act 27 of 1970

2.54 The purpose of Act 27 of 1970 was “to amend section 9bis of the Development Trust and Land Act, 1936, so as to regulate further the auditing of the books and accounts of the South African Development Trust; to amend the Workmen's Compensation Act, 1941, so as to make provision for the exemption of certain Black boards from assessments; to amend section 4 of the Finance Act, 1943, so as to exempt certain Black governments, councils and authorities from the payment of certain taxes; to amend the provisions of the Black Authorities Act, 1951, and of the Development of Self-government for Native Nations in South-West Africa Act, 1968, so as to regulate further the auditing of the books and accounts of Black authorities and executive councils; to amend the said Black Authorities Act, 1951, so as to extend the power to make regulations; to amend the Transkei Constitution Act, 1963, so as to exclude from the Transkeian Revenue Fund revenue derived from certain sources; to provide for the auditing of the accounts of certain local institutions; and to empower the Legislative Assembly in the Transkei to make laws in relation to the preservation of flora and fauna and the destruction of vermin in the Transkei; to amend the Black Laws Amendment Act, 1966, so as to make section 6 thereof

¹⁸ The Black Authorities Act Repeal Act 13 of 2010 repealed the Black Authorities Act 68 of 1951 with effect from 31 December 2010, or the date on which the last of the provinces of KwaZulu-Natal and Limpopo has repealed those provisions which were assigned to them, whichever occurs first.

retrospective; to provide for the transfer of certain movable property to certain Black boards; and to provide for matters incidental thereto.”

2.55 Section 3 of Act 27 of 1970 substitutes section 4 of the Finance Act 37 of 1943. However, the Finance Act 37 of 1943 was later repealed by the Finance and Financial Adjustment Act Consolidation Act 11 of 1977. This means that section 3 of Act 27 of 1970 is redundant.

2.56 Section 4 of Act 27 of 1970 amends section 8 of the Black Authorities Act 68 of 1951 by deleting subsection 3. Section 5 of the Act amends the Black Authorities Act 68 of 1951 by the insertion of section 8A. Section 6 of the Act amends section 17(1) of the Black Authorities Act 68 of 1951, as follows: paragraph (a) substitutes paragraph (a); and paragraph (b) substitutes paragraph (e).

2.57 In view of the fact that the Black Authorities Act 68 of 1951 has been repealed as a whole by the DRDLR,¹⁹ the SALRC recommends that sections 4, 5 and 6 of Act 27 of 1970 also be repealed.

2.58 Section 7 of Act 27 of 1970 amends section 52(1) of the Transkei Constitution Act 48 of 1963, by substituting paragraph (b). Section 8 of the Act amends the Transkei Constitution Act 48 of 1963 by the substitution of section 58. Section 9 of the Act amends part B of the First Schedule to the Transkei Constitution Act 48 of 1963 by inserting item 20A. Section 10 of the Act amends section 6 of the Black Laws Amendment Act 63 of 1966 by adding subsection (2), so that the existing section becomes section (1).

2.59 The Transkei Constitution Act 48 of 1963 was repealed by the Constitution of the Republic of South Africa, Act 200 of 1993. This means that sections 7, 8, 9 and 10 of Act 27 of 1970 are redundant.

2.60 Accordingly, the SALRC recommends that the whole of the Second Black Laws Amendment Act 27 of 1970 be repealed by the DOJCD due to the fact that all the remaining provisions of the Act are redundant.

¹⁹ Footnote 18 above.

(g) Third Black Laws Amendment Act 49 of 1970

2.61 The purpose of the Third Black Laws Amendment Act 49 of 1970 was “to amend section 4 of the Development Trust and Land Act, 1936, so as to regulate further the functions of the Commission for Plural Affairs and its members in relation to the affairs of the South African Development Trust; to amend the Promotion of Black Self-government Act, 1959, so as to regulate further the appointment of representatives of Blacks in urban areas and to define further their powers, functions and duties; to amend the Black Affairs Act, 1959, so as to alter the constitution of the Commission for Plural Affairs; to extend the power to make regulations in regard to the affairs of the said commission; to apply the provisions of the last-mentioned Act in connection with the said commission in respect of South-West Africa; and to substitute the words 'State President' for the word 'Governor-General'; to amend the Urban Black Councils Act, 1961, so as to alter the constitution of urban Black councils; to amend the Transkei Constitution Act, 1963, so as to empower the Legislative Assembly in the Transkei to make laws in relation to customary unions; and to provide for matters incidental thereto.”

2.62 Section 8 of the Third Black Laws Amendment Act 49 of 1970 amends section 3 of the Urban Black Councils Act 79 of 1961 as follows: paragraph (a) substitutes subsection (1), paragraph (b) substitutes subsection (3)(b), and paragraph (c) substitutes subsection (4).

2.63 Section 9 of the Third Black Laws Amendment Act 49 of 1970 amends section 5 of the Urban Black Councils Act 79 of 1961 by substituting paragraph (a).

2.64 Section 10 of the Third Black Laws Amendment Act 49 of 1970 amends section 10(1) of the Urban Black Councils Act 79 of 1961 by substituting paragraph (a).

2.65 Section 11 of the Third Black Laws Amendment Act 49 of 1970 provides as follows:

11 Effect of amendments by this Act to Act 79 of 1961 on existing urban Black councils

The amendments effected to sections 3, 5 and 10 of the Urban Black Councils Act, 1961, by respectively sections 8, 9 and 10 of this Act, shall not affect the

membership of any serving selected member of an urban Black council referred to in section 2 of the first-mentioned Act.

2.66 The Urban Black Councils Act 79 of 1961 was repealed by the Community Councils Act 125 of 1977, which in turn was repealed by the Black Local Authorities Act 102 of 1982. The latter Act was repealed by the Local Government Transition Act 209 of 1993, which in turn was repealed by the Local Government Laws Amendment Act 19 of 2008. This means that sections 8, 9, 10 and 11 of the Third Black Laws Amendment Act 49 of 1970 are redundant. Because these are the only remaining sections of the Act, the SALRC recommends that the whole of the Third Black Laws Amendment Act 49 of 1970 be repealed by the DOJCD.

(h) Black Laws Amendment Act 23 of 1972

2.67 The purpose of Act 23 of 1972 was “to amend the Black Administration Act, 1927, so as to repeal the provision that every Commissioner in the Transvaal shall have the power to solemnize marriages; and to provide that a Black female, who is of age, shall not, in the provinces of Natal and the Transvaal, enter into a marriage without the consent of her father or legal guardian; to amend the Development Trust and Land Act, 1936, so as to increase the extent of the released areas; to amend the South-West Africa Native Affairs Administration Act, 1954 so as to provide for the interpretation of the word 'Black' and certain expressions of which that word forms a part; to amend the Transkei Constitution Act, 1963, so as to empower the Legislative Assembly of the Transkei to make laws in relation to prisons for Black persons, and in relation to motor carrier transportation; to amend the Development of Self-government for Native Nations in South-West Africa Act, 1968, so as to change the names of certain areas in the territory of South-West Africa and to extend the powers of legislative councils; to amend the Second Black Laws Amendment Act, 1970, so as further to regulate the transfer of certain property from the State or the administration of South-West Africa to a Black authority, legislative council, legislative assembly, executive council, cabinet or government; to amend the Black Authorities' Service Pensions Act, 1971, so as to provide for further delegation of powers by certain officers; to amend the National States Constitution Act, 1971, so as to extend the powers of legislative assemblies referred to therein; and to provide for matters connected therewith.”

2.68 Section 1 of Act 23 of 1972 amends section 2 of the Black Administration Act 38 of 1927 by deleting subsection 4. Section 2 of the Act amends Act 38 of 1927 by the insertion of section 22ter. However, section 22ter was later repealed by section 2 of Act 91 of 1985.

2.69 In terms of the President's Minute No. 13 of 10 June 1994, the whole of the Black Administration Act 38 of 1927, excluding sections 2(2) and (6), 11, 11A, 12, 20, 21A, 22, 22bis and 23, was assigned to the Minister of Rural Development and Land Reform as the Minister responsible for the administration of this Act.

2.70 Section 10 of Act 23 of 1972 amends the Second Black Laws Amendment Act 27 of 1970 by the substitution of section 12. However, this section was later substituted by section 10 of the Regional and Land Affairs General Amendment Act 89 of 1993, and was still later repealed by section 27 of the Land Affairs General Amendment Act 11 of 1995. This means that section 10 of the Black Laws Amendment Act 23 of 1972 is redundant and can be repealed.

2.71 Accordingly, the SALRC recommends that the whole of the Black Laws Amendment Act 23 of 1972 be repealed by the DOJCD.

(i) Black Laws Amendment Act 119 of 1977

2.72 The purpose of Act 119 of 1977 was "to repeal the Liquor Licences Ordinance, 1922, and the Liquor Licences Amendment Ordinance, 1928, of the province of the Cape of Good Hope; to amend the provisions of the Development Trust and Land Act, 1936, relating to the moneys to be paid into the South African Development Trust Fund; to amend the provisions of the Blacks (Urban Areas) Consolidation Act, 1945, in order to increase the penalties for certain offences; and to further regulate the appropriation of moneys in the sorghum beer account; to amend the provisions of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952, in order to provide for the issue of identity documents to foreign Blacks; and to enable the Minister of Plural Relations and Development to make regulations; to amend the provisions of the Black Labour Act, 1964, in order to provide for the making of regulations relating to the compulsory provision of goods and services by employers to their Black employees; to amend the provisions of the Black Authorities' Service Pension Act, 1971, relating to the interest to be added to certain amounts; and to provide for the transfer of certain assets and liabilities of the Authorities' Service Pension Fund and the Authorities Service Superannuation Fund to certain other provident funds; and to amend the provisions of the Black Affairs Administration Act, 1971,

relating to pension matters of employees of Administration Boards; and to apply the Limitation of Legal Proceedings (Provincial and Local Authorities) Act, 1970, to all Administration Boards.”

2.73 All sections of Act 119 of 1997 have been repealed apart from section 1. Section 1 of the Act repeals the Liquor Ordinance, 1922 (Ordinance 7 of 1922) and the Liquor Licences Amendment Ordinance, 1928 (Ordinance 3 of 1928) of the province of the Cape of Good Hope. As stated in paragraph 2.27 above, much statutory law revision is possible because of the general savings provisions contained in section 12(2) of the Interpretation of Statutes Act 33 of 1957.

2.74 Since the purpose of the Act has been fulfilled, the SALRC recommends that the whole of the Black Laws Amendment Act 119 of 1997 be repealed by the DOJCD, on the strength of the general savings provisions contained in section 12(2) of the Interpretation of Statutes Act 33 of 1957.

(j) Black Laws Amendment Act 12 of 1978

2.75 The purpose of Act 12 of 1978 was “to amend the Black Administration Act, 1927, so as to extend the jurisdiction of a Commissioner's Court in respect of garnishee orders; to amend the Blacks (Urban Areas) Consolidation Act, 1945, so as to extend exemption from the operation of section 12 of the said Act, further define the expression 'idle person', regulate the suspension of certain orders, further regulate certain enquiries in regard to the summoning of assessors, and provide for the granting of exemptions from the provisions of the said Act; to amend the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952, so as to further regulate the issue of reference books and identity documents; to amend the Promotion of Black Self-government Act, 1959, so as to further regulate the appointment of commissioners-general; to repeal section 16 of the Black Labour Act, 1964; to amend the said Act so as to extend exemption from the operation of section 26 thereof; to amend the Promotion of the Economic Development of National States Act, 1968, so as to further regulate the indemnification of certain persons against loss; to repeal section 46 of the Black Taxation Act, 1969; to amend the National States Constitution Act, 1971, so as to further regulate the withdrawal of moneys from a revenue fund and the auditing of accounts, regulate the creation of new paramount chieftainships and chieftainships, provide for extension of the powers of legislative assemblies, and regulate the exercise of their legislative powers in respect of tribes and office-bearers therein; to regulate certain

matters in areas excised from Black areas; and to provide for matters connected therewith.”

2.76 Section 1 of Act 12 of 1978 amends section 10 of the Black Administration Act 38 of 1927 by substituting subsection 6. However, subsection 10(6) of Act 38 of 1927 was later repealed by section 2 of Act 34 of 1986.²⁰ This means that section 1 of Act 12 of 1978 is redundant and can be repealed.

2.77 Section 10 of Act 12 of 1978 repeals section 16 of the Black Labour Act 67 of 1964. However, the whole Black Labour Act 67 of 1964 was repealed by the Black Communities Development Act 4 of 1984. This means that section 10 of Act 12 of 1978 is redundant and can be repealed.

2.78 Accordingly, the SALRC recommends that the whole of Black Laws Amendment Act 12 of 1978 be repealed by the DOJCD, due to the fact that all the remaining provisions of the Act are redundant.

2 Statute recommended for repeal by the Department of Home Affairs

(a) Black Laws Amendment Act 76 of 1963

2.79 The review of the Black Laws Amendment Act 76 of 1963 was included in the scope of the review of legislation administered by CoGTA. However, further research revealed that the only remaining substantive provision of the Act (that is, section 31) that is still in force deals with a subject matter that falls within the legislative mandate of the Department of Home Affairs. A comprehensive review of the Act is provided below.

2.80 The purpose of the Black Laws Amendment Act 76 of 1963 was “to amend the Black Labour Regulation Act, 1911, the Black Taxation and Development Act, 1925, the Development Trust and Land Act, 1936, the Blacks (Urban Areas) Consolidation Act, 1945, the Prevention of Illegal Squatting Act, 1951, the Black Authorities Act, 1951, the Blacks (Abolition of Passes and Co-ordination of Documents) Act, 1952, and the Urban Black

²⁰ Special Courts for Blacks Abolition Act 34 of 1986.

Councils Act, 1961; to authorize the transfer of certain farms in the district of Rustenburg and Brits; to authorize a partner to a customary union to claim damages from any person who unlawfully causes the death of the other partner to such union; and to provide for the construction of the word 'native' in laws and documents.”

2.81 Sections 13 and 14 of the Act amended sections 8 and 17 respectively of the Black Authorities Act 68 of 1951. However, the latter Act was repealed by the Black Authorities Act Repeal Act 13 of 2010, which came into operation on 1 December 2010.

2.82 Sections 26 to 29 (inclusive) of the Act amend sections 2, 3, 4 and 10 of the Urban Black Councils Act 79 of 1961. However, the latter Act was repealed by the Community Councils Act 125 of 1977, which in turn was repealed by the Black Local Authorities Act 102 of 1982.²¹ This means that sections 13, 14, and 26 to 29 (inclusive) of the Black Laws Amendment Act 76 of 1963 are redundant. Section 33 of the Act is the short title and the date of commencement. Accordingly, the SALRC recommends that sections 13, 14, and 26 to 29 (inclusive) of the Black Laws Amendment Act 76 of 1963 be repealed by the Department of Home Affairs (DHA).

2.83 The only remaining substantive provision of Act 76 of 1963 is section 31 and all its subsections. Section 31 of Act 76 of 1963 provides for a partner to a customary union to claim damages from person who unlawfully caused the death of another partner.

2.84 Prior to the above enactment, the position was that a spouse to a customary marriage could not obtain compensation for loss of support, because this type of marriage was regarded as not bringing about a reciprocal duty of maintenance. The spouse seeking maintenance for himself or herself was held to have had no cause of action.²² Appeal Courts for commissioners' courts, however, held that such a spouse did have a valid cause of action.²³

²¹ The Black Local Authorities Act 102 of 1982 was in turn repealed by the Local Government Transition Act 209 of 1993 which, in turn, was repealed by section 36 of the Local Government Laws Amendment Act 19 of 2008.

²² See, *inter alia*, Mokoena v Laub 1943 WLD 63; Zulu v Minister of Justice 1956 2 SA 128 (N); and SA Nationale Trust en Assuransie Maatskappy, Bpk v Fondo 1960 2 SA 467 (A).

²³ Zithulele v Mangquza 1950 NAC (S) 249; Dhlamini v Mabuza 1960 NAC (N-E) 62; Kabe v Inyanga 1954 NAC (C) 220 and the repealed section 10bis(4) of Act 38 of 1927.

2.85 However, the above decision was cold comfort, because these courts had jurisdiction only in cases where both parties were Africans. The position was rectified in 1963 when legislation was passed to grant a spouse to a customary marriage the right of action to claim for loss of support where his or her spouse was unlawfully killed.²⁴

2.86 Section 31(1) of the Black Laws Amendment Act 76 of 1963 provides that:

A partner to a customary union as defined in section thirty-five of the Black Administration Act, 1927 (Act 38 of 1927), shall, subject to the provisions of this section, be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.

2.87 Firstly, the Black Laws Amendment Act 76 of 1963 uses the definition of 'customary union' as defined in section 35 of the Black Administration Act 38 of 1927. In terms of section 35 of Act 38 of 1927, a 'customary union' is defined as follows:

'customary union' means the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage.

2.88 Since customary marriages are no longer customary unions, the above definition is obsolete and needs to be harmonized with the definition of "customary marriage" given in section 1 of Act 120 of 1998. Section 1 of Act 120 of 1998 defines a customary marriage as follows:

'customary marriage' means a marriage concluded in accordance with customary law.

²⁴ See section 31 of the Black Laws Amendment Act 76 of 1963; Bekker Seymour's Customary Law in Southern Africa (1989) 379-82; Davel Dood van 'n Broodwinner as Skadevergoedingsoorsaak (LLD thesis UP (1984) 419ff.

2.89 Secondly, section 31 of the Black Laws Amendment Act 76 of 1963 was not repealed by Act 120 of 1998. On the basis of the rule that all laws remain in force until repealed by a competent authority, one must ascertain the reason why this law was not repealed. It was obviously not to retain a basis for a claim, because customary marriages are for all purposes recognized as marriages (see subsections 2(1) and (2) of Act 120 of 1998).

2.90 In the matter of *Nontobeko Virginia Gaza v Road Accident Fund & 5 Others SCA* (unreported Case No 314/04), the main issue for determination was whether the widow of a customary marriage, whose husband was at the time of his death also a spouse in a civil marriage with another woman, was owed a duty of support or maintenance by her deceased husband. Were it to be found that such legal duty existed, the further question was whether this legal duty or right to support was worthy of protection by current South African law. The deceased, David Siponono Gaza, had been killed in a motor vehicle accident on 21 February 2000. At the time of his death he was married to the plaintiff, Nontobeko Virginia Gaza, by customary rites. This customary marriage had been registered at the office of the Commissioner of the District of Durban in terms of the Natal Code of Zulu Law (Proclamation R151 of 1987) on 15 July 1987. However, the deceased was also married by civil rites to another woman, Makhosazana Lillian Gaza.

2.91 The civil marriage had been contracted before the conclusion of the plaintiff's customary marriage. Both women claimed for loss of support or maintenance as a result of the negligent death of their husband. The Durban and Coast Local Division granted the wife married by civil rites compensation for loss of support as a result of the negligent death of her husband. By contrast, the plaintiff (the deceased's wife by customary rites) was not granted compensation for loss of support, on the basis that this was excluded by the proviso to section 31 of the Black Laws Amendment Act of 1963 to the effect that "such partner or such other partner is not, at the time of such death, a party to a subsisting marriage".

2.92 Leave to appeal was sought from the Supreme Court of Appeal. Without dealing with the legal issues between the parties, the Supreme Court of Appeal ordered that:

- (i) the judgment of the Durban and Coast Local Division absolving the defendant from the instance in a claim for loss of support by a widow of a customary marriage entered into in terms of the Natal Code of Zulu Law and

which was contracted during the subsistence of a valid civil marriage be abandoned by the defendant (Road Accident Fund) and set aside;

- (ii) Any claimant who falls into the category of a spouse of a customary marriage where one of the spouses was, at the time of death, a spouse to a civil marriage, be compensated for loss of support by the Road Accident Fund.

2.93 Referring to the above decision of the Supreme Court of Appeal, Professors IP Maithufi and JC Bekker²⁵ comment that the court order relating to the relevance of the continued existence of section 31 of the Black Laws Amendment Act of 1963 in its present form has to be commended. They believe law reform in this instance is long overdue, if regard is had to the fact that customary marriages have been elevated by Act 120 of 1998 to the same position as valid marriages – that is, equivalent to civil marriages. The order has the effect of extending the dependant’s action to a widow of a customary marriage which was concluded during the subsistence of a separate valid civil marriage. As already mentioned, the customary marriage so contracted is, in terms of current South African law, invalid in that a spouse to a civil marriage is not competent to contract another marriage. Section 31 of the Black Laws Amendment Act of 1963 may, on this basis, be

²⁵ IP Maithufi and JC Bekker “The Existence and Proof of Customary Marriages for Purposes of Road Accident Fund” *Obiter* 2009. They state, inter alia, the following:

The order granted in this case is in fact an encouragement by the Supreme Court of Appeal towards the reform of marriage law in South Africa. The order has the effect of extending the dependant’s action to a widow of a customary marriage which was concluded during the subsistence of a valid civil marriage. As already mentioned, the customary marriage so contracted is, in terms of current South African law, invalid in that a spouse to a civil marriage is not competent to contract another marriage. It is not surprising therefore that the third respondent, the Minister of Justice and Constitutional Development, was enjoined to review the relevance of the continued existence of section 31 of the Black Laws Amendment Act of 1963 which was enacted before a customary marriage was accorded full recognition as a valid marriage. It is submitted that the continued existence of this section may have been rendered superfluous or redundant by the Recognition of Customary Marriages Act of 1998. Its repeal was obviously overlooked when the Recognition of Customary Marriages Act of 1998 was enacted. The section may, however, still be relevant to customary marriages contracted contrary to the provisions of the Marriage and Matrimonial Property Law Amendment Act of 1988 and its predecessors (Act 38 of 1927, the KwaZulu Act on the Code of Zulu Law and Natal Code of Zulu Law of 1985 and 1987 respectively).

The review ordered, it is submitted, has to take into account the present constitutional dispensation relating to the recognition of marriages, in particular the Bill of Rights as contained in the Constitution of the Republic of South Africa, 1996 (Chapter 2) and the impact of the Recognition of Customary Marriages Act of 1998 on family law in South Africa.

unconstitutional as it unfairly discriminates against spouses married by customary rites. These spouses presently have the same rights as those married by civil rites, including the right to sue for loss of support as a result of the death of the breadwinner.

2.94 The SALRC therefore proposes that section 31(1) of the Black Laws Amendment Act 76 of 1963 be repealed by the DHA.

2.95 Section 31(2) of the Black Laws Amendment Act of 1963 provides that:

No such claim for damages shall be enforceable by any person who claims to be a partner to a customary union with such deceased partner, unless –

2(a) such person produces a certificate issued by a Commissioner stating the name of the partner, or in the case of a union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customary union which was still in existence at the time of death of the deceased partner; and

(b) such person's name appears on such certificate.

(2A) A certificate referred to in subsection (2) shall be accepted as conclusive proof of the existence of a customary union of the deceased partner and the partner or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.

2.96 Earlier consultations conducted by the SALRC with the RAF revealed that in order to prove the existence of a customary 'union' (now marriage), the production of a certificate issued in terms of the Black Laws Amendment Act of 1963 is regarded as conclusive proof of the existence of a valid customary marriage with the deceased spouse (see subsection 31(2A)).²⁶ Conflicting decisions were reached²⁶ by our courts as to the nature of the

²⁶ In terms of *Road Accident Fund v Mongalo* (Cases no: 487/01 and 495/01 Supreme Court of Appeal) [12]:

'Conclusive proof' in s 31(2A) therefore does not mean that evidence of fraud cannot be led to impugn the certificate. Apart from principle, the remaining provisions of s 31 show how unjust the opposite conclusion would be. The section creates an entitlement on the part of the partner to a customary union to claim damages for loss of support from any person who unlawfully causes the death of the other partner (s 31(1)).²⁰ Where it appears from the certificate that more than one customary union partner has survived the deceased, 'all such surviving partners who desire to claim damages for loss of support, shall be joined as plaintiffs in one action' (s 31(3)) (though such a person may later join as a co-plaintiff (s

certificate and the time at which it had to be produced. Despite this conflict, it is clear that what was required was a certificate issued by a commissioner (previously) or a magistrate stating that a customary marriage existed between the claimant and the deceased and was still in existence at the time of death. The issuing of the certificate may be based on the information obtained from a marriage register or from an enquiry held by a magistrate or commissioner, as the case may be.

2.97 Subsection 31(2) of the Black Laws Amendment Act 76 of 1963 need not be retained. In terms of subsection 4(8) of Act 120 of 1998, registration of a customary marriage issued under this section or any other law that provides for the registration of customary marriages constitutes prima facie proof of the customary marriage. The proposed repeal of section 31(2) of the Black Laws Amendment Act of 1963 will not have retrospective effect and will therefore not affect the validity of customary marriages registered in terms of this section. Furthermore, a civil marriage certificate is no more than prima facie proof of the existence of a civil marriage. There is no reason to distinguish between these two types of marriages.

2.98 The continued existence of section 31(2) of the Black Laws Amendment Act 76 of 1963 effectively means that there are two statutes on the statute book that provide for the same subject matter. The first is the obscure provisions of the Black Laws Amendment Act of 1963, and the second is the well-known provisions of the Recognition of Customary Marriages Act. The SALRC therefore recommends that section 31(2) and (2A) be repealed by the DHA.

2.99 Subsections 31(3) and (4) of the Black Laws Amendment Act 76 of 1963 provide that:

(3) Where it appears from the certificate referred to in subsection (2) that the deceased partner was survived by more than one partner to a customary union, all such surviving partners who desire to claim damages for loss of support, shall be joined as plaintiffs in one action.

31(4)(a)). The nub is the provision that the surviving partners must share the damages between them (s 31(5)). The effect of a fraudulently obtained certificate on the genuine customary union partner or partners could therefore be most materially adverse. As Snyders J pointed out, it could never have been the intention of the legislation to license injustice of this kind through fraud.

- (4)(a) Where any action is instituted under this section against any person by a partner to a customary union and it appears from the certificate referred to in subsection (2) that the deceased partner was survived by a partner to a customary union who has not been joined as a plaintiff, such person may serve a notice on such partner who has not been joined as a plaintiff to intervene in the action as a co-plaintiff within a period of not less than fourteen days nor more than one month specified in such notice, and thereupon the action shall be stayed for the period so specified.
- (b) If any partner to a customary union upon whom a notice has been served in terms of paragraph (a), fails to intervene in the action within the period specified in such notice or within such extended period as the court on good cause shown may allow, such partner shall be deemed to have abandoned her claim.

2.100 The above subsections 31(3) and 31 (4) of the Black Laws Amendment Act 76 of 1963 also need not be retained. The SALRC submits that matters relating to the joinder of persons as co-plaintiffs in any action are adequately provided for in the laws and rules governing civil procedure in our courts. Alternatively, the provisions of sections 31(3) and (4) could be re-enacted in the Recognition of Customary Marriages Act of 1998 if it is considered that their repeal might create a lacuna in the law in this regard.

2.101 Subsection 31(5) of the Black Laws Amendment Act 76 of 1963 provides as follows:

If a deceased partner to a customary union is survived by more than one partner to such a union, the aggregate of the amounts of the damages to be awarded to such partners in terms of this section shall under no circumstances exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union.

2.102 The SALRC was advised by the RAF that the usual approach followed by the RAF to assess damages for loss of support is to apportion two parts to each adult and one part to each child. In order to give effect to the above subsection (5), it is common to allocate to multiple spouses a pro-rata share of two parts. For example, if the deceased had four wives, then each wife gets a quarter-share of two parts – which in this particular case would be the equivalent of half a child's share each. The Recognition of Customary Marriages Act 120 of 1998 provides for consultative procedures to be followed for the

conclusion of second and third customary marriages. It also renders community of property the normal matrimonial property regime.

2.103 The RAF has, however, indicated that there are reservations about doing away with the principle embodied in subsection 31(5). It is fact that such a step would have the effect of widening the liability of the RAF and consequently of adding to its financial burden. Such effect would also appear to be unfair to a certain extent. The rationale for this statement is that third parties – that is, persons other than the spouses to a marriage – who are either juristic persons (such as the RAF) or natural persons, regardless of their ethnic background and whether or not they share the culture and traditional customs and usages governing polygamous customary marriage of spouses, should not be adversely affected by the legal recognition of such a marriage. The RAF therefore recommends that the principle embodied in subsection 31(5) should be re-enacted by way of an appropriate amendment to the Recognition of Customary Marriages Act of 1998 when the Black Laws Amendment Act of 1963 is repealed.

2.104 Subsection 31(6) of the Black Laws Amendment Act 76 of 1963 goes hand in hand with subsection 31(2), and subsection 31(7) must be read together with the rest of section 31 of this Act. Subsection 31(6) provides that:

- (6) A partner to a customary union whose name has been omitted from a certificate issued by a Commissioner in terms of subsection (2) shall not by reason of such omission have any claim against the Government of the Republic or the Commissioner if such omission was made bona fide.

2.105 However, Act 120 of 1998 provides for a number of safeguards in this regard. In particular, paragraphs (a) and (b) of subsection 4(5) of Act 120 of 1998 provide that:

- (a) If for any reason a customary marriage is not registered, any person who satisfies a registering officer that he or she has a sufficient interest in the matter may apply to the registering officer in the prescribed manner to enquire into the existence of the marriage.
- (b) If the registering officer is satisfied that a valid customary marriage exists or existed between the spouses, he or she must register the marriage and issue a certificate of registration as contemplated in subsection (4).

2.106 Furthermore, subsection 4(9) of Act 120 of 1998 provides that:

- (9) Failure to register a customary marriage does not affect the validity of that marriage.

2.107 Subsection 31(7) of the Black Laws Amendment Act 76 of 1963 provides that:

- (7) Nothing in this section contained shall be construed as affecting in any manner the procedure prescribed in any other law to be followed in the institution of a claim for damages for loss of support.

2.108 As stated above, subsection 31(7) must be read together with the rest of section 31. If subsections 31(1), (2), (2A), (3), (4) and (6) are repealed, then subsection (7) can also be repealed.

2.109 In summary, the SALRC recommends that subsections 31(1), (2), (2A), (3), (4), (6) and (7) of the Black Laws Amendment Act 76 of 1963 be repealed by the DHA; and that a provision similar to subsection 31(5) of the Act be re-enacted in the Recognition of Customary Marriages Act 120 of 1998. It is further recommended that sections 13, 14, and 26 to 29 (inclusive) of the Black Laws Amendment Act 76 of 1963 be repealed by DHA on the ground of obsolescence.

3 Statutes recommended for repeal by the CoGTA

(a) Promotion of Local Government Affairs Amendment Act 116 of 1984

2.110 The purpose of the Promotion of Local Government Affairs Amendment Act 116 of 1983 is to amend the principal Act, that is, Act 91 of 1983. The Act consists of two sections only, with section 3 being the short title.

2.111 Section 1 of the Act amends the principal Act by substituting the expression 'sections 17 and 17A' for the expression 'section 17' in paragraph (b) of the definition of 'Administrator'. However, the definition of 'Administrator' was later substituted by proclamation R153 of 31 October 1994. This means that section 1 of the Act is redundant.

2.112 Section 2 of the Act amends section 17A of the principal Act. However, section 17A of the principal Act was later repealed by section 36 of Act 19 of 2008. Accordingly, Act 116 of 1984 is redundant and the SALRC recommends that it be repealed as a whole. The proposed repeal of the Promotion of Local Government Affairs Amendment Act 116 of 1984 is supported by the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively.²⁷

(b) Promotion of Local Government Affairs Amendment Act 45 of 1985

2.113 The purpose of the Promotion of Local Government Affairs Amendment Act 45 of 1985 is to amend the principal Act, that is, Act 91 of 1983. There is currently only one remaining section in the Act, namely section 1. This section provides for the amendment of the principal Act by inserting the definition of 'development board' and by substituting the definition of 'local authority' in section 1 of the principal Act, respectively. However, the definition of 'development board' was later deleted by section 1 of Act 56 of 1993, whereas the definition of 'local authority' was later substituted by section 1 of Act 82 of 1988. Accordingly, Act 45 of 1985 is redundant and the SALRC recommends that it be repealed as a whole.

²⁷ Letters received from the Directors-General Cooperative Governance and Traditional Affairs respectively.

2.114 The proposed repeal of the Promotion of Local Government Affairs Amendment Act 45 of 1985 is supported by the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively.²⁸

(c) Pension Benefits for Councillors of Local Authorities Act 105 of 1987

2.115 The purpose of this Act is to authorise a local authority to establish a pension fund or a pension scheme for the benefit of its councillors and their dependants, or to participate in the scheme of such pension fund. The Act sought to authorise a local authority to establish either a pension fund in terms of section 2 or a pension scheme in terms of section 3 for the benefit of its councillors and their dependants, or to participate in the scheme of the established pension fund. It also allowed local authorities to enter into agreements with any person, body or pension fund to manage and administer such pension fund or pension scheme (section 4).

2.116 Section 1 of the Act contains provisions that distinguish between persons of different race groups, through references to differentiated local authorities on the basis of 'population groups'.²⁹ The definitions of 'local authority' and 'Minister' in section 1 of the Act are outdated. The Act also refers in section 1 to legislation that no longer exists. These Acts are the Provincial Government Act 32 of 1961, the Rural Areas Act (House of Representatives) 9 of 1987, and the Black Local Authorities Act 102 of 1982. Section 30(2)(a) of the Black Administration Act 38 of 1927 referred to in the definition of 'local authority' in section 1 of the Act was repealed by section 8(1) of Act 108 of 1991.³⁰

2.117 Research conducted showed that this particular Act was seldom, if ever, applied. For the establishment of and participation in pension funds, the 'general' regulatory Act – that is, the Pension Funds Act 24 of 1956 – was used instead. Given the current virtual non-application of Act 105 of 1987, as set out above, combined with the fact that a post-

²⁸ Footnote 27 above.

²⁹ 'Minister' in section 1 of the Act is defined to mean the 'Minister of Planning, Provincial Affairs and National Housing acting with the concurrence of-

(a) ...

(b) The Minister charged with local government affairs of the Ministers' Council of the House of Assembly, the House of Representatives or the House of Delegates, according to the population group involved; or'

³⁰ Abolition of Racially Based Land Measures Act 108 of 1991.

1994 Act (the Remuneration of Public Office Bearers Act 20 of 1998) accomplishes the same purposes, one may conclude that Act 105 of 1987 has been superseded by the Remuneration of Public Office Bearers Act 20 of 1998.

2.118 According to information obtained from the Registrar of Pension Funds,³¹ –

Three funds for South African Local Authorities were registered by the Registrar of Pension Funds. These are:

1. South African Local Authorities Pension Fund (commenced on 1 March 1985);
2. South African Local Authorities Provident Fund (commenced on 1 October 1985); and
3. South African Local Authorities Beneficiary Fund (commenced on 1 March 2009).

The above funds were established for the benefit of employees and councillors of, among others, the South African Police Service, any provincial legislature and any 'municipal entity' as defined in the Local Government Municipal Systems Act 32 of 2000. The latest registered rules for these funds do not make reference to the 1987 Act.

Since their registration, all these funds have become fully subject to the Pension Funds Act 24 of 1956, which is supervised by the Registrar of Pension Funds at the Financial Services Board. Furthermore, the registered rules of these funds do not contain any discriminatory provisions of the type referred to on pages 15-16 of the SALRC's Discussion Paper and as provided for in the 1987 Act. Such discriminatory provisions would be inconsistent with both the Pension Funds Act and the Constitution to which the latter Act is subject.

2.119 Although a strong argument can be made for the repeal of the Pension Benefits for Councillors of Local Authorities Act 105 of 1987, an operational enquiry might prove otherwise. It is not certain if any of the employers which participate in the Funds mentioned above were previously, or still are, subject to this Act. Accordingly, the SALRC recommends that the Pension Benefits for Councillors of Local Authorities Act 105 of 1987 be considered for repealed by CoGTA.

³¹ Email from senior legal advisor, Registrar of Pension Funds, Financial Services Board, dated 18 April 2012.

(d) Witpoort Adjustment Act 19 of 1993

2.120 The purpose of the Act was to provide for the transfer of certain immovable property and certain rights and obligations of the State to the Local Government Affairs Council; and for matters connected therewith. The immovable property concerned is described in the Schedule to the Act, being various pieces of land of the farm Leeuwfontein 29 HP, district Wolmaransstad, and others in the town of Witpoort, district Wolmaransstad, North-West province.

2.121 In terms of section 2(1) of Act 19 of 1993, all the immovable property described in the Schedule to the Act, and all rights and obligations acquired by or imposed on the State in terms of the Deed of Agreement,³² were transferred to the Local Government Affairs Council established by section 2 of the Local Government Affairs Act (House of Assembly), 1989 (Act 84 of 1989). In terms of section 2(2) of Act 19 of 1993, the Registrar of Deeds was directed to effect the appropriate endorsements in its registers and on the title deeds or other documents in question.

2.122 However, the Local Government Affairs Council referred to above has since been disestablished in terms of section 1 of the Disestablishment of the Local Government Affairs Council Act, 1999 (Act 59 of 1999). Furthermore, in terms of section 2 of Act 59 of 1999, and subject to section 3 of the Act in question, the Local Government Affairs Council Act (House of Assembly) 1989, (Act 84 of 1989) has been repealed.

2.123 Section 3 of Act 59 of 1999 (transitional provisions), to which the proposed repeal of both the Witpoort Adjustment Act 19 of 1993 and the Disestablishment of the Local Government Affairs Council Act 59 of 1999 is subject, provides that –

(1) The Minister for Provincial and Local Government may, after such consultation as may be necessary, which must include consultation with the persons who, immediately before the commencement of this Act, were members of the Council or in the employ of the Council, make such

³²

Deed of Agreement is defined in the Act to mean –

the deed of agreement entered into on 5 December 1911 between Abraham Fischer in his capacity as Minister of Land in the Government of the Union of South Africa and Norman Macrobert in his capacity as agent and attorney of certain owners of immovable property at Witpoort, Transvaal, and registered on 15 January 1912 in the deeds registry in Pretoria under No.5.1912 S.

arrangements as may be necessary for winding up of the affairs of the Council and for the finalization of any matter, including matters relating to the employees, assets, liabilities, rights, obligations and finances of the Council.

2.124 According to information obtained from the Pretoria Deeds Office on 9 March 2010, it appears that most, if not all, of the properties listed in the Schedule to the Act were transferred to the Local Government Affairs Council as required by section 2 of Act 19 of 1993.³³ One may therefore assume that the Local Government Affairs Council, to whom the properties were transferred, was in existence until 6 December 1999, when the Disestablishment of the Local Government Affairs Council Act 59 of 1999 commenced. No provision is made for a successor to this Council.

2.125 Accordingly, if the transitional arrangements contemplated in section 3 of the Disestablishment of the Local Government Affairs Council Act 59 of 1999 (that is, the winding up of all the affairs of the Local Government Affairs Council) have been finalized by the Minister of Co-operative Governance and Traditional Affairs, then Act 19 of 1993 is now spent and should be considered for repealed.

(e) Disestablishment of the Local Government Affairs Council Act 59 of 1999

2.126 The SALRC recommends that the Disestablishment of the Local Government Affairs Council Act 59 of 1999 be repealed. Section 3 of the Act, which empowers the Minister for Cooperative Governance and Traditional Affairs to implement such transitional measures as were necessary to wind up the affairs of the Council, has run its course. Therefore, this provision is now obsolete and can be repealed.

2.127 The Act was passed to disestablish the Local Government Affairs Council by repealing the statute establishing the Council. In addition, the Act was intended to empower the Minister for Cooperative Governance and Traditional Affairs to implement such transitional measures as were necessary to wind up the affairs of the Council. Section 3 of the Act empowered the Minister to make such arrangements as may be necessary regarding matters relating to the employees, assets, liabilities, rights, obligations

³³ For instance, the properties listed in paragraphs (a) to (d) of the Schedule to the Act are held by the Witpoort Verteenwoordigende (Oorgangs) Raad in exactly the same title deed as stated in the Act, whereas the properties listed in paragraphs (e) to (g) of the Schedule appear to have exchanged ownership over time; they are now held in private ownership and the purchase date is reflected as 1998/09/19.

and finances of the Council. With regard to the transitional arrangements provided for in section 3, presumably the Minister has taken all such steps as were necessary, and – subject to confirmation by the Minister and/or relevant officials in the Department – section 3 of the Act is therefore obsolete.

2.128 If the transitional arrangements contemplated in section 3 of the Act have run their course, this Act is now obsolete and can be repealed. Section 3 is the only remaining potentially operative provision of the Act, as the other provisions were included to disestablish the Local Government Affairs Council (section 1), repeal the statute that established the Council (section 2), and provide the short title of the Act (section 4). The SALRC therefore recommends that the Act be repealed if the transitional arrangements contemplated in section 3 of the Act have been finalized by the Minister of Co-operative Governance and Traditional Affairs.

(f) South African Olympic Hosting Act 36 of 1997

2.129 The SALRC recommends that the South African Olympic Hosting Act 36 of 1997 be repealed, since the Act is now spent. It was enacted to regulate the Olympic Games of 2004, which would have been a one-off occasion. The Act achieved its original objectives and no longer serves any practical purpose.

2.130 The Act mainly provided for the execution of the host city contract, if the hosting of the 28th Olympic Games in 2004 were to have been awarded to the City of Cape Town. As it stands, the Act is in line with the Constitution and no observations can be made in terms of the focus of the current investigation. The SALRC proposes that the Act be repealed because it is now spent, as discussed in paragraph 2.129 above.

2.131 Discussion Paper 120 had provisionally proposed, as an alternative, that the Act could be amended to apply to and regulate the hosting of any future Olympic Games in South Africa, generally. This would require rewording some parts of the Act, including the definition of ‘Olympic Games’ (section 1) and sections that make specific reference to the City of Cape Town (such as sections 2(1) to 2(5)).

2.132 However, in its submission to the SALRC, the DIRCO stated that –

We agree with your findings in general but wish to note that we are of the view that the South African Olympic Hosting Act 36 of 1997 which provides for the execution of the host city contract of the 28th Olympiad in 2004 in the event that it was awarded to the City of Cape Town; and for matters connected therewith, should be repealed. As Cape Town did not get the 2004 Olympics, the SALRC argues that the Act may be amended to regulate a future hosting of Olympics in South Africa. We wish to note that the Act which consists of only 3 sections, was written for a specific purpose, namely to cater for Cape Town as the Olympics host city. The Act is redundant on the statute book and should be repealed.

2.133 Accordingly, the SALRC recommends that the Act be repealed by CoGTA. The proposed repeal of the South African Olympic Hosting Act 36 of 1997 is supported by the Directors-General of the Departments of Cooperative Governance and Traditional Affairs respectively.³⁴

(g) Local Government Affairs Amendment Act 56 of 1993

2.134 The purpose of the Local Government Affairs Amendment Act 56 of 1993 is to amend certain laws pertaining to local government. In the main, these laws are the Regional Services Councils Act 109 of 1985, the Abolition of Development Bodies Act 75 of 1986, the KwaZulu and Natal Joint Services Act 84 of 1990, and certain provincial ordinances pertaining to local government.

2.135 Sections 6 to 12 (inclusive) of the Act amend various provisions of the Regional Services Councils Act 109 of 1985. However, since the Regional Services Councils Act 109 of 1985 is recommended in this Report for repeal by the Eastern Cape, Northern Cape, North West, and Western Cape provincial legislatures, the SALRC recommends that sections 6 to 12 (inclusive) of the Act also be considered for repeal by CoGTA.

2.136 Sections 13 to 15 (inclusive) of Act 56 of 1993 amend sections 2(5), 3 and 5 of the Abolition of Development Bodies Act 75 of 1986. Since section 2(5) of the latter Act is recommended for repeal in this Report by the Northern Cape, North West, and Western Cape provincial legislatures, the SALRC recommends that section 13 of Act 56 of 1993 also be considered for repeal by CoGTA. Only sections 3, 5(1A), 5(2) and 5(4)(c) of Act 75

³⁴ Letters received from the Directors-General Cooperative Governance and Traditional Affairs respectively.

of 1986 are recommended for repeal. However, should CoGTA consider repealing the entire Abolition of Development Bodies Act 75 of 1986, the SALRC recommends further that sections 14 and 15 of Act 56 of 1993 should also be considered for repeal by CoGTA.

2.137 Sections 17 to 21 (inclusive) of Act 56 of 1993 amend various provisions of the KwaZulu and Natal Joint Services Act 84 of 1990. However, since the KwaZulu and Natal Joint Services Act 84 of 1990 is recommended in this Report for repeal by the KwaZulu-Natal provincial legislature, sections 17 to 21 (inclusive) of Act 56 of 1993 should also be considered for repeal by CoGTA.

2.138 Sections 22 to 24 (inclusive) of Act 56 of 1993 amend section 141 of Ordinance 8 of 1962 (Orange Free State) and sections 18 and 20 respectively of Ordinance 9 of 1969 (Orange Free State). It is not certain why these two ordinances are still on the statute book. Ordinance 8 of 1962 deals with the establishment of municipalities and municipal councils (chapter II), voters' roll (chapter IV), election of councillors (chapter v), and such other matters. Ordinance 9 of 1969 regulates the establishment of townships and planning of towns. These matters are now provided for in the Local Government: Municipal Structures Act 117 of 1998, which serves as an extensive framework law for the establishment of municipalities in accordance with the requirements related to categories and types of municipalities.

2.139 Section 36 of Act 56 of 1993 (transitional provisions) appears to be spent, and may be considered for repeal if the Regional Services Councils Act 109 of 1985, the KwaZulu and Natal Joint Services Act 84 of 1990, and the assigned provisions of the Abolition of Development Bodies Act 75 of 1986 are all repealed by the relevant provincial legislatures; and the remaining sections of Act 75 of 1986 are repealed by CoGTA.

(h) Local Government Affairs Second Amendment Act 117 of 1993

2.140 The purpose of the Local Government Affairs Second Amendment Act 117 of 1993 was, among others, to amend the Removal of Restrictions Act 84 of 1967, the Black Authorities Act 102 of 1982, the KwaZulu and Natal Joint Services Act 84 of 1990, and the Lekoa City Council Dissolution Act 61 of 1991.

2.141 Sections 2 and 3 of the Act amend sections 14 and 29A respectively of the Black Local Authorities 102 of 1982. However, the Black Local Authorities Act was later repealed

by the Local Government Transition Act 209 of 1993, which in turn was repealed.

2.142 Section 5 of the Act amends section 16 of the KwaZulu and Natal Joint Services Act 84 of 1990. Because the SALRC has recommended the KwaZulu and Natal Joint Services Act 84 of 1990 for repeal by the KwaZulu Natal provincial legislature, it is also recommended that section 5 of the Act be repealed by CoGTA.

2.143 Section 6 of the Act amends Schedule 2 to the Lekoa City Council Dissolution Act 61 of 1991. The Lekoa City Council Dissolution Act 61 of 1991 is recommended for repeal in this report, provided that the transitional arrangements contemplated in section 3 of the Disestablishment of the Local Government Affairs Council Act 59 of 1999 (that is, the winding up of all the affairs of the Local Government Affairs Council) have been finalized by the Minister of Co-operative Governance and Traditional Affairs. If so, then section 6 of the Act is now spent and can be considered for repealed by CoGTA.

2.144 Section 9 of the Act appears to be spent as it refers to Acts that no longer exist. For instance, the section refers to amendment, repeal or substitution by an Administrator by proclamation under section 14 of the Provincial Government Act 69 of 1986. The latter section was repealed by section 230(1) of Act 200 of 1993. Furthermore, the section refers to Ordinances 18 of 1986 of the Cape of Good Hope, Orange Free State, Natal, and Transvaal. All these Ordinances were repealed by sections 27 to 29 (inclusive) of Act 56 of 1993.

2.145 Accordingly, the SALRC recommends that sections 2, 3, 5 and 9 of the Local Government Affairs Second Amendment Act 117 of 1993 be repealed by CoGTA.

4 Statutes recommended for repeal by the relevant provincial legislatures

(a) Civil Protection Act 67 of 1977

2.146 The SALRC recommends that the remaining provisions of the Civil Protection Act 67 of 1977 – that is, sections 2, 2A, 3, 4, 5, 6(1) and 7 – be repealed by the relevant provincial legislatures. This recommendation is made on the grounds that the Act has

become obsolete in as far as the mentioned provisions no longer serve any useful purpose.

2.147 This Act was promulgated on 26 May 1977. Its purpose was to regulate civil defence during emergencies or disasters, and to confer upon provincial councils the power to make ordinances in connection with civil defence in a state of emergency or disaster. However, in terms of Proclamation 153 of 31 October 1994, the administration of sections 2, 2A, 3, 4, 5, 6(1) and 7 of the Act was assigned to the provinces, and thus falls under the competency of the provinces. The Act was then repealed by section 64 of the Disaster Management Act 57 of 2002 (which is dealt with below), which now regulates disaster management, except for the aforementioned sections which are still administered by the provinces.

2.148 The Disaster Management Act stipulates that provisions of the Act that were assigned to a province will continue to apply in the province until repealed by provincial legislation.³⁵ The North West, Free State, Northern Province, Eastern Cape and Mpumalanga Provinces subsequently repealed the abovementioned sections of the Act following the enactment of the Disaster Management Act.³⁶ The SALRC recommends that the remaining provisions of the Act be repealed by the relevant provincial legislatures; that is, Gauteng, KwaZulu-Natal, Limpopo, and the Western Cape provincial legislatures. This recommendation is made on the ground that the Act has become obsolete in as far as the mentioned provisions no longer serve any useful purpose.

(b) Regional Services Councils Act 109 of 1985

2.149 The Act provides for the joint exercise and carrying out of powers and duties in relation to certain functions in certain areas by local bodies within such areas; for the delimitation of regions and the establishment of regional services councils; the constitution, functioning, functions, powers, duties, assets, rights, employees and financing of such councils; and matters connected therewith.

³⁵ Section 64(1)(b) of the Disaster Management Act 57 of 2002.

³⁶ Sections 1 of the North West General Law Amendment Act No.4 of 2005; Free State Local Government Laws Rationalisation Act No.2 of 2004; Northern Province Local Government Laws Rationalisation Act No.5 of 2000, Eastern Cape General Law Amendment Act No.3 of 2013 and section 2 of the Mpumalanga General Laws Repeal and Application Act No.13 of 1998.

2.150 In terms of Proclamation R153 of 31 October 1994, the Regional Services Councils Act No. 109 of 1985 was assigned to a competent authority within the jurisdiction of the government of a province with effect from 31 October 1994.³⁷ The power of the regional services councils (RSCs) to levy and claim RSC levies were vested in the district and metropolitan councils established under the Local Government Transition Act 209 of 1993 (the LGTA), following the dissolution of RSCs. However, the relevant provisions in the LGTA were later replaced by section 93(6) of the Local Government: Municipal Structures Act No. 117 of 1998, which section authorizes district and metropolitan municipalities to levy and claim a regional services levy and a regional establishment levy, as referred to in section 12(1) of the Regional Services Councils Act of 1985.

2.151 The Regional Services Councils Act of 1985 has not been amended to vest the RSC with levying powers in district and metropolitan councils. As a result, the source of the levying power was not the Regional Services Councils Act of 1985 but the Municipal Structures Act of 1998. Section 93(6) of the latter Act was repealed by section 59(1) of the Small Business Tax Amnesty and Amendment of Taxation Laws Act No. 9 of 2006, thereby removing district and metropolitan municipalities' authority to collect these levies, and making the Regional Services Council Act redundant.

2.152 Section 59(1) of the Small Business Tax Amnesty and Amendment of Taxation Laws Act 9 of 2006 provides as follows:

Amendment of section 93 of Act 117 of 1998, as amended by section 11 of Act 33 of 2000 and section 21 of Act 51 of 2002

- 59. (1)** Section 93 of the Local Government: Municipal Structures Act, 1998, is hereby amended by the deletion of subsection (6).
- (2) Despite subsection (1), any regional establishment levy or regional services levy for which liability arose in terms of the Regional Services Council Act, 1985 (Act No. 109 of 1985), or the KwaZulu and Natal Joint Services Act, 1990 (Act No. 84 of 1990), before or on 30 June 2006 may be collected by a municipal council in accordance with the provisions of those Acts.

³⁷ See Proclamation R153 in *Government Gazette* 16049 of 31 October 1994, as amended by Proclamation R31 in *Government Gazette* 16346 of 7 April 1995.

- (3) The liability for any regional establishment levy or regional services levy referred to in subsection (2) in respect of which a summons for the collection thereof has not been issued before or on 30 June 2008 lapses on that date.
- (4) Subsections (1) and (2) are deemed to have come into operation on 1 July 2006.

2.153 The assignment of the Act to the relevant provinces had the effect of changing the status of the Act, to the extent assigned, from national legislation to provincial legislation. Provincial legislation can only be amended or repealed by a provincial legislature. The whole of this Act was later repealed by the KwaZulu-Natal provincial legislature in terms of section 25 of the KwaZulu and Natal Joint Services Act No. 84 of 1990, in so far as the Act applies to that province. Accordingly, the SALRC recommends that the Regional Services Councils Act 109 of 1985 be repealed by the Eastern Cape, Gauteng, Limpopo, Mpumalanga, Northern Cape, North West, and Western Cape provincial legislatures if this has not been done yet.

(c) KwaZulu and Natal Joint Services Act 84 of 1990 (excluding section 23)

2.154 The Act provides for the establishment of Joint Services Boards, Management Committees and rural councils, and matters related to the powers and functions of these bodies. In addition, the Act deals with financial matters related to the said bodies, and provides for the charging of certain levies.

2.155 The whole of KwaZulu and Natal Joint Services Act, 1990, except section 23, was assigned to the province of KwaZulu-Natal in terms of section 235 of the Interim Constitution with effect from 31 October 1994.³⁸ The power of the joint services boards to levy and claim JSB levies were vested in the district and metropolitan councils established under the Local Government Transition Act 209 of 1993, following the dissolution of joint services boards. However, the relevant provisions in the LGTA were later replaced by section 93(6) of the Local Government: Municipal Structures Act No. 117 of 1998, which authorizes district and metropolitan municipalities to levy and claim a regional services levy and regional establishment levy, as referred to in section 16(1) of the KwaZulu and Natal Joint Services Act, 1990.

³⁸

See Proclamation R155 in Government Gazette 16049 of 31 October 1994.

2.156 The KwaZulu and Natal Joint Services Act, 1990 has not been amended to vest the RSC levying powers in district and metropolitan councils. As a result, the source of the levying power was not the KwaZulu and Natal Joint Services Act 1990 but the Municipal Structures Act 1998. Section 93(6) of the latter Act was repealed by section 59(1) of the Small Business Tax Amnesty and Amendment of Taxation Laws Act No. 9 of 2006, thereby removing district and metropolitan municipalities' authority to collect these levies and making the KwaZulu and Natal Joint Services Act redundant.

2.157 The assignment of the Act to the province of KwaZulu-Natal had the effect of changing the status of the Act, to the extent assigned, from national legislation to provincial legislation. Provincial legislation may only be amended or repealed by the relevant provincial legislature. Accordingly, the SALRC recommends that the KwaZulu and Natal Joint Services Act 84 of 1990 be repealed by the KwaZulu-Natal provincial legislature.

2.158 Section 23 of the Act was not assigned. This section provides as follows:

23 Act binding on State and statutory bodies, and effect of certain exemptions from taxes or levies

This Act shall bind the State and all bodies established by or under any law, and no provision contained in any other law published on or before 31 July 1985 providing for an exemption from any taxes or levies shall be applicable to the regional services levy or the regional establishment levy.

2.159 If the whole of the KwaZulu and Natal Joint Services Act 84 of 1990, save for section 23, is repealed by the KwaZulu-Natal provincial legislature, then section 23 of the Act is redundant and may be considered for repeal by CoGTA.

(d) Abolition of Development Bodies Act 75 of 1986 (section 2(5))

2.160 See paragraphs 2.169 – 2.188 for detailed discussion of this statute.

2.161 In terms of Proclamation 61 in *Government Gazette* 16486 of 23 June 1995, the administration of section 2(5) of the Act, as well as section 1 in so far as it applies or relates to section 2(5), was assigned to a competent authority within the jurisdiction of each of the following provincial governments: Eastern Cape, Northern Cape, North-West,

and Western Cape, as designated by the Premier of each province concerned. Section 2(5)(a) of the Act refers to section 8(1)(g) of Ordinance 18 of 1976. However, section 8(1)(g) of the latter Ordinance was repealed by section 1 of the Western Cape Local Government Laws Rationalisation Act 4 of 2010. Furthermore, section 2(5)(a) also refers to the Regional Services Councils Act, 1985 (Act 109 of 1985). The latter Act is recommended for repeal by the Eastern Cape, Gauteng, Limpopo, Mpumalanga, Northern Cape, North West, and Western Cape provincial legislatures. The SALRC therefore recommends that section 2(5) of the Act be repealed by the Western Cape Provincial Legislature as well.

2.162 Since the whole of the Abolition of Development Bodies Act, No. 75 of 1986 has now been repealed by the Eastern Cape provincial legislature,³⁹ the SALRC recommends that the assigned sections of the Act also be repealed by the Northern Cape, North-West, and Western Cape provincial legislatures, to the extent that this has not been done.

(e) Local Government Affairs Second Amendment Act 117 of 1993 (section 1)

2.163 In terms of Proclamation R160 promulgated in *Government Gazette* 16049 of 31 October 1994, section 1 of the Act was assigned to the provinces of the Eastern Cape, Free State, KwaZulu-Natal, and Western Cape. Subsections 1(1), 1(2) and 1(3) of Act 117 of 1993 amend mainly sections 2, 3(2), and 3(3) of the Removal of Restrictions Act 84 of 1967. The Removal of Restrictions Act 84 of 1967 is included as one of the statutes proposed for repeal as a whole in the Draft Spatial Planning and Land Use Management Bill, 2011 by the DRDLR.⁴⁰ The SALRC therefore recommends that subsections 1(1), 1(2), and 1(3) of Act 117 of 1993 be considered for repeal by the provinces of the Eastern Cape, Free State, KwaZulu-Natal, and Western Cape. The Northern Cape provincial legislature has already repealed Act 117 of 1993 in terms of section 1 of the Northern Cape Province Local Government Law Rationalisation Act No. 5 of 2000.

³⁹ The Eastern Cape provincial legislature repealed the whole of Act 75 of 1986 in terms of section 1 of the Eastern Cape General Law Amendment Act No. 3 of 2013 published in Provincial Gazette No. 2965 (Notice No.52) dated 31 May 2013.

⁴⁰ The Draft Spatial Planning and Land Use Management Bill, 2011 was published by the Department of Rural Development and Land Reform for comment in *Government Gazette* No.34270 (Notice No. 280 of 2011) dated 6 May 2011.

5 Statutes recommended for amendment by CoGTA

(a) Fire Brigade Services Act 99 of 1987

2.164 The Act provides for the establishment, maintenance, employment, co-ordination and standardisation of fire brigade services, and any connected matters. This Act was promulgated on 23 October 1987.

2.165 In terms of proclamation R153 published in *Government Gazette* 16049 of 31 October 1994, the administration of the whole of this Act, except for sections 2 and 15, was assigned to a competent authority within the jurisdiction of the government of a province. The bulk of the provisions of the Interim Constitution were later repealed, and provincial Executive Councils responsible for the administration of the provinces were established, with resultant powers and functions being assigned to them by the various Premiers. Therefore, the SALRC recommends that the definition of “Administrator” be repealed, and that of “Minister” be amended, in order to correctly identify the authorities competent to carry out the functions detailed in the Act. In addition, because the terms ‘Administrator’ and ‘Minister’ are used (except in sections 2, 5 and 15) to denote the same competent authority authorised to perform the same function in terms of the Act, it is recommended that these terms be replaced with the phrase ‘MEC for local government’ throughout the Act, except for sections 2, 15 and 17 of the Act.

2.166 Furthermore, the SALRC recommends that the definition of “local authority” be amended so as to comply with section 1 and 12 of the Local Government: Municipal Structures Act 117 of 1998. The following changes to the definitions in the Act are recommended:

‘local authority’ means [an institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act 32 of 1961), and includes-

- (a) a board of management or board as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act 9 of 1987);**
- (b) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);**
- (c) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act 102 of 1982);**

- (d) a local government body established by virtue of the provisions of section 30 (2) (a) of the Black Administration Act, 1927 (Act 38 of 1927);
- (e) a local council established under section 2 of the Local Councils Act (House of Assembly), 1987 (Act 94 of 1987);
- (f) an institution or body declared by the Minister, by notice in the Gazette, to be a local government for the purposes of this Act: Provided that the Minister may only declare an institution or body to be a local government if such institution or body was established by an Act of Parliament and if it, in terms of or by virtue of that Act, exercises powers and performs duties which, in the opinion of the Minister, may be exercised or performed by an institution, body or board contemplated in section 84 (1) (f) of the Provincial Government Act, 1961, or in paragraphs (a) to (e) of this definition;
- (g) any similar institution or body existing or which is established in an area to which the provisions of this Act did not apply before the insertion of section 1 (2) in this Act;] any district municipality, local municipality or metropolitan municipality as defined in section 1 and established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No.17 of 1998);

'Minister' means

- (a) except in [paragraph (f) of the definition of 'local authority' and] sections 2, 15 and 17, the competent authority within the government of a province to whom the administration of this Act in that province has been assigned [under section 235 (8) of the said Constitution] by the Premier of the Province; and
- (b) in [paragraph (f) of the definition of 'local authority' and] sections 2, 15 and 17, the national Minister responsible for [provincial and local government] cooperative governance and traditional affairs;

'MEC for local government' means the Member of the provincial Executive Council responsible for local government in a province.

2.167 Lastly, the SALRC recommends that the grounds of discrimination listed in section 11(2)(b) of the Act be expanded to include all the grounds listed in section 9(3) of the Constitution. Section 11(2)(b) of the Act, which provides for the relevant local authority to pay a grant-in-aid calculated on the prescribed basis to any controlling authority in respect of the establishment or maintenance of its service, lists only sex, race, colour and religion as the grounds upon which discrimination may not occur. In the context of the current review, it is recommended that the grounds of discrimination listed in section 11(2)(b) of the Act should include all the grounds listed in section 9(3) of the Constitution.

2.168 Accordingly, the SALRC recommends that paragraph (b) of section 11(2) be amended as follows:

(2) A grant-in-aid contemplated in subsection (1)-

(a) ...

(b) shall not be paid unless any local authority produces proof to the **[Administrator]** MEC for local government that the local authority does not discriminate in its service between its employees on the basis of sex, race, colour, **[or]** religion or any other ground listed in section 9(3) of the Constitution of the Republic of South Africa, 1996.

(b) Abolition of Development Bodies Act 75 of 1986

2.169 The Act provides for the abolition of certain bodies, and it provided further for the transfer of the powers, assets, liabilities, rights, duties, obligations and staff of such bodies to other public authorities. It was promulgated on 1 July 1986. The Act appears to be in line with section 9 of the Constitution, and with regard to the core mandate of this investigation it does not, per se, require overall amendment. However, certain provisions and definitions in the Act are glaringly obsolete. The SALRC's recommendations for amendments to these specific provisions and definitions are discussed below.

A. Definition of 'development body'

2.170 The development bodies referred to in paragraphs (a) and (b) of the definition of "development body" in section 1 of the Act are the following:

- (a) a development board referred to in section 3 of the Black Communities Development Act, 1984 (Act 4 of 1984);
- (b) the Transvaal Board for the Development of Peri-Urban Areas established by section 2 of the Transvaal Board for the Development of Peri-Urban Areas Ordinance, 1943 (Ordinance 20 of 1943), of the Transvaal.

2.171 Section 2(1) of the Act abolished the development bodies referred to in paragraphs (a) and (b) of the definition of "development body", effective from 1 July 1986. As a result, and with due consideration to the effective date, paragraphs (a) and (b) of the definition of "development body" are redundant and may be repealed.

2.172 The development body referred to in paragraph (c) of the definition of “development body” in section 1 of the Act is the following:

- (c) a divisional council established under section 8 of the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976), of the Cape of Good Hope.

2.173 The whole of Ordinance 18 of 1976 was repealed by section 1 of the Western Cape Local Government Laws Rationalisation Act 4 of 2010, with the exception of the following sections of Ordinance 18 of 1976: sections 2, 65, 121, 126 to 128, 138 to 146, 149 to 152, 154, 155, 164 to 171, 182 to 186, 198, 204, 209, 212, 215, 218, and 219.

2.174 Section 2(2) of the Act provides that –

- (2) Notwithstanding the provisions of any other law, the Minister may by notice in the Gazette abolish any development body referred to in paragraph (c), (d) or (e) of the definition of ‘development body’ with effect from a date mentioned in such notice: Provided that a development body referred to in paragraph (c) of the definition of ‘development body’ shall be abolished not later than 30 June 1990.

2.175 In terms of section 2(5)(a) of the Act, any

1. local area referred to in the repealed section 8(1)(g) of the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976); and
2. any management committee established under section 2 of the Local Authorities (Development according to Community) Ordinance, 1963 (Ordinance 6 of 1963),

which, prior to the abolition of the development body referred to in paragraph (c) is situated or existed in the area of the development body concerned, vested under the Administrator of the province concerned, as if such development body has not been abolished.⁴¹

⁴¹ Paragraph 2(5)(a) of the Act provides as follows:

“Notwithstanding the abolition of a development body referred to in paragraph (c) of the definition of ‘development body’ in section 1 any local area referred to in section 8(1)(g) of the Divisional Councils Ordinance, 1976 (Ordinance 18 of 1976), of the former Province of the Cape of Good Hope, or a management committee established under section 2 of the Local Authorities (Development according to Community) Ordinance, 1963 (Ordinance 6 of 1963), of the former Province of the Cape of Good Hope, which immediately prior to such abolition is situated or existed in the area of the development body concerned, shall remain in existence and the Administrator may, after compliance with the provisions of section 8 of the first-mentioned Ordinance, exercise the powers granted by subsection (1)(g) of that section in respect of any part of a region as contemplated in the Regional Services Council Act, 1985 (Act 109 of 1985), situated outside a municipal area, as if such development body has not been abolished.”

However, section 8 of Ordinance 18 of 1976, which established a divisional council, was later repealed. The SALRC therefore recommends that paragraph (c) of the definition of 'development body' in section 1 of the Act also be repealed.

2.176 The development body referred to in paragraph (d) of the definition of "development body" in section 1 of the Act is the following:

- (d) the Development and Services Board mentioned in section 1 of the Development and Services Board Ordinance, 1941 (Ordinance 20 of 1941) of Natal.

2.177 In terms of Proclamation 26 of 2000 published in *KwaZulu-Natal Gazette* No. 4400 dated 30 November 2000, the Development and Services Board Ordinance 20 of 1941 was amended by the substitution of the expression 'uMsekeli' for the expression 'the Development and Services Board' wherever it appears. The properties that vested under the management of uMsekeli were transferred to the relevant municipalities in terms of the Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998).

2.178 On 15 November 2011, the KwaZulu-Natal Provincial Legislature enacted the KwaZulu-Natal uMsekeli Municipal Support Services Ordinance Repeal Act, 2011 (Act No. 3 of 2011), which repealed the uMsekeli Municipal Support Services Ordinance, 1941 (Ordinance No. 20 of 1941) as a whole. Accordingly, the SALRC recommends that paragraph (d) of the definition of 'development body' in section 1 of the Act also be repealed.

2.179 The bulk of the provisions of the Interim Constitution have been repealed, and provincial Executive Councils have been established and are responsible for the administration of the provinces and the powers and functions assigned to them by the various Premiers. Therefore, the term "Administrator", wherever it appears in the Act, should be substituted in order to correctly identify the authority competent to carry out the functions detailed in the Act. Unless the Act is considered for repeal as a whole, the SALRC recommends that the term 'Administrator' be replaced with the term 'Relevant MEC', and that 'Relevant MEC' is accordingly defined in section 1 of the Act to mean 'Relevant Member of provincial Executive Council'. It is also recommended that the definition of 'Minister' be amended to mean the 'Minister of Cooperative Governance and Traditional Affairs'.

B Definition of ‘public authority’

2.180 The definition of “public authority” in section 1 of the Act is glaringly obsolete. Unless the Act is considered for repeal as a whole, the SALRC recommends that paragraphs (a) and (b) of the definition of ‘public authority’ be amended to correctly reflect the respective appointments of a Minister and Premier of the province. It is proposed that paragraphs (a) and (b) of the definition of ‘public authority’ be amended as follows:

‘public authority’ means-

- (a) a Minister of the Republic appointed under the ‘Constitution of the Republic of South Africa’, 1996 (Act 108 of 1996) [**Constitution Act, 1983 (Act 110 of 1998)**], administering a department of State;
- (b) a[n **Administrator**] ‘Premier of a province’ appointed [in terms of **section 7 of the Provincial Government Act, 1986**] ‘under the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)’;
- (c) ...
- (d) ...
- (e) any other body established by or under any law and approved by the Minister.

2.181 It is further recommended that paragraphs (c) and (d) of the definition of ‘public authority’ in section 1 of the Act be repealed. These paragraphs both define a public authority with reference to a regional services council and local authority as referred to in the Regional Council Services Act, 1985 (Act 109 of 1985). As stated in paragraph 2.153 of this Report, the Regional Services Council Act 109 of 1985 is recommended for repeal on the basis of obsolescence.

2.182 As mentioned in paragraph 2.171 above, section 2(1) of the Act abolished certain development bodies as defined in paragraphs (a) or (b) of the definition of ‘development body’, with effect from 1 July 1986. With due consideration to the effective date, section 2(1) of the Act is now redundant and the SALRC recommends that this section be repealed. It is also recommended that this consequential amendment be reflected in section 2(4) of the Act by repealing the reference to ‘subsection (1)’. Accordingly, the SALRC recommends that section 2(4) of the Act be amended as follows:

- (4) A member or alternate member of any development body abolished in terms of the provisions of subsection [(1) or] (2) shall vacate his office with effect from the date of such abolition.

2.183 Sections 3 5 (administration of laws) and section 6 (interpretation of certain expressions) of the Act appear to have been implemented. Section 3(1)(a) deals with the transfer of assets, liabilities, rights, duties and obligations from the abolished development bodies (mentioned in column 1 of Schedule 1) to the Administrators of the various provinces (mentioned in column 2 of Schedule 1). This transfer took effect on 1 July 1986. Subsequently, in terms of section 3(2)(a) the Minister was to transfer the assets, liabilities, rights, duties and obligations specified in section 3(1)(a) from the Administrators to whom they were vested to a public authority, as defined in the Act, by notice in the Gazette. This transfer was accomplished in respect of items 2 to 14 of Schedule 1 by notice.⁴² The transfer to a public authority was also accomplished in respect of item 1 of Schedule 1 by notice.⁴³ Upon the completion of this process,⁴³ both Schedule 1 and the provisions of section 3 have become redundant.

2.184 Section 5(1A) refers to a regional services council that no longer exists. Section 5(2) refers to the Provincial Government Act 1986. The latter Act was repealed as a whole, with the exception of section 20, by section 230(1) of Act 200 of 1993. Section 5(4)(c) deals with the regulations that the State President may make in terms of the Republic of South Africa Constitution Act 110 of 1983. As the latter Act has been repealed, section 5(4)(c) can be viewed as redundant and the SALRC recommends that it be repealed. The same goes for sections 5(1A) and 5(2) of the Act.

2.185 Sections 6(1)(a) and (c) of the Act make reference to redundant provisions, in terms of column 2 of Schedule 1 and section 4(1) of the Act. Similarly, section 6(1)(b) makes reference to a development body that has been abolished. The SALRC thus recommends that section 6(1) of the Act be repealed. Section 6(2)(b) of the Act should be amended to delete the reference to a provision that has already been repealed.⁴⁴

2.186 Section 7B(1) makes reference to an election contemplated in terms of the Constitutional Affairs Amendment Act 104 of 1985. However, the latter Act was repealed by Schedule 7 of the Interim Constitution. As a result, section 7B(1) of the Act is redundant

⁴² Government Gazette No. 11084 Notice 2885, 31 December 1987.

⁴³ Government Gazette No. 11978 Notice 1335, 30 June 1989, amended by Government Gazette No. 14669 Notice 505, 26 March 1993.

⁴⁴ Section 4 of the Act.

and can be repealed. Section 7B(2) goes hand in hand with section 7B(1), as it makes provision for an elected development body (referred to in paragraph (c) of the definition of 'development body') to continue to exist until the day immediately before the date determined in section 2(2) of the Act (i.e. 30 June 1990). Since this date has come and gone, the SALRC recommends that section 7B(2) also be repealed.

2.187 Section 8 of the Act provides for the repeal and amendment of the laws mentioned in Schedule 2 of the Act. The SALRC recommends that item 2 of Schedule 2 to the Act be repealed, since all the provisions of the Black Communities Development Act 4 of 1984 that are repealed or amended by Schedule 2 were later repealed by section 72(1)(a) of the Abolition of Racially Based Land Measures Act 108 of 1991.

2.188 Since the bulk of the abovementioned remaining provisions of the Act that were not assigned to the provinces are redundant and obsolete, the SALRC recommends that the whole Act be repealed by CoGTA. Alternatively, the SALRC recommends that sections of the Act be repealed by CoGTA.

(c) Organised Local Government Act 52 of 1997

2.189 The purpose of the Act is to provide for the recognition of national and provincial organisations that represent municipalities. The Act further determines procedures by which local government may consult the national and provincial governments, designate representatives to participate in the National Council of Provinces (NCOP), and nominate persons to the Financial and Fiscal Commission.

2.190 The SALRC recommends that the definition of 'Minister' contained in section 1 of the Act be amended so as to correctly identify the Minister of Co-operative Governance and Traditional Affairs as the authority competent to carry out the functions detailed in the Act. The following definition is recommended:

'Minister' means the Minister **[for Provincial Affairs and Constitutional Development]** of Cooperative Governance and Traditional Affairs;

2.191 Section 3(2)(a) of the Act, which provides for the designation of representatives to participate in the NCOP, does not specify which criteria should be applied when assessing the designation of people who may participate in the proceedings of the NCOP. The

SALRC recommends that a reference to the grounds outlined in section 9(3) of the Constitution be included in section 3(2)(a) of the Act, and that such section should be amended as follows:

(2)(a) The national organization must in accordance with criteria determined by it, when necessary, designate not more than 10 persons from the nominees contemplated in subsection (1) as representatives to participate in the proceedings of the National Council of Provinces, provided that such criteria shall not unfairly discriminate directly or indirectly on any ground listed in section 9(3) of the Constitution of the Republic of South Africa, 1996.

(d) Transfer of Staff to Municipalities Act 17 of 1998

2.192 The Act provides for the transfer of certain employees from a provincial administration to designated municipalities, and for matters connected therewith.

2.193 Section 2(1) of the Act empowers the MEC of a province responsible for local government to effect such transfers, subject to the provisions of the Labour Relations Act 66 of 1995 (LRA). Section 2(2) sets out the requirements for a transfer, which include the consent of the affected employee and the concurrence of the designated municipality.

2.194 Sections 3 to 5 of the Act deal with certain ancillary matters, namely accumulated vacation leave, pensions and disciplinary or grievance proceedings. As indicated, the Act empowers provincial MECs responsible for local government to transfer employees of provincial departments to municipalities. This power remains relevant and exercisable. The Act is also sensitive to the need to comply with the related requirements of the LRA. Indeed, in requiring the consent of employees, the Act's requirement is stricter than the LRA, which permits the transfer of employees subject only to consultation and certain procedural requirements.

2.195 However, the definition of 'municipality' in section 1 of the Act appears to be outdated, as it makes reference to section 10 of the Local Government Transition Act, 1993 (Act 209 of 1993). The latter Act was repealed as a whole by section 36 of the Local Government Laws Amendment Act, 2008 (Act 19 of 2008). Therefore, the SALRC recommends that the definition of 'municipality' be aligned with the definition 'local

authority' in section 1 and as established in section 12 of the Local Government: Municipal Structures Act 117 of 1998.⁴⁵

2.196 Accordingly, the SALRC recommends that the definition of 'municipality' be replaced by the following definition of 'municipality':

['municipality' means a municipality as defined in section 10 of the Local Government Transition Act, 1993 (Act 209 of 1993)]

'municipality' means any district municipality, local municipality or metropolitan municipality as defined in section 1 and established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No.17 of 1998);

6 Statutes reviewed and recommended for retention

(a) Traditional Leadership and Governance Framework Act 41 of 2003

2.197 The Act provides a framework for the recognition of traditional communities, for the establishment and recognition of traditional councils to administer the affairs of those communities, and for the recognition of traditional leaders and their removal from office.⁴⁶ The Act also provides for the establishment of a Commission on Traditional Leadership Disputes and Claims. Finally, the Act seeks to transform the institution of traditional leadership to be in line with the Constitution and the Bill of Rights. In the context of the current review, the Act does not contain any glaringly discriminatory provisions. However, the following points should be made.

⁴⁵ Section 1 of the Local Government: Municipal Demarcation Act 27 of 1998 defines 'municipality' to mean 'a municipality mentioned in section 155(6) of the Constitution and includes a municipality which existed when this Act took effect'. However, section 155(6) of the Constitution provides that 'Each provincial government must establish municipalities in its province in a manner consistent with the (national) legislation enacted in terms of subsection (2) and (3) and...' The SALRC submits that the Local Government: Municipal Structures Act 117 of 1998 is the national legislation referred to in subsection 155(6)(2) and (3) of the Constitution.

⁴⁶ Section 31 of the Constitution guarantees the rights of communities to practice a culture of their own choice and create their own cultural institutions, subject to the Constitution. Sections 211 and 212 of the Constitution furthermore recognise and protect the institution, status and role of traditional leadership according to customary law, subject to the Constitution. Towards those ends, and in order to ensure that the institutions of traditional leadership conform to the Constitution, the Act sets out a national framework and norms and standards to define the place and role of traditional leadership.

2.198 The Act promotes the imperatives of affirmative action contained in section 9(2) of the Constitution by requiring, in section 3(2)(b), that one-third of the members of a traditional council should be women. However, the Act is silent on the question of whether the Premier of the province where the traditional council is located can withdraw recognition of the traditional council if it does not comply with this gender requirement. The SALRC Consultation Paper submitted to CoGTA for comment in July 2009 contained a provisional proposal to the effect that section 7(1) of the Act should be amended to include a provision that would enable the withdrawal of recognition of a traditional council if it does not comply with the affirmative action imperatives contained in section 3(2)(b) of the Act.

2.199 However, CoGTA did not agree with the above proposal. In its submission to the SALRC, CoGTA stated as follows:

It should be noted that a traditional council consists of two components, that is, 60% which is selected in terms of custom and customary law by the senior traditional leader from amongst all traditional leaders as well as persons knowledgeable in custom and customary law. The second component consists of 40%, which is democratically elected by members of the community from amongst themselves. Having regard to the foregoing, it is clear that it is not possible to ensure that one third of the members are women, due to the unique nature and history of traditional communities in South Africa. In light of the above we therefore do not agree with your proposed amendment of section 7(1) of the Traditional Leadership and Governance Framework Act, 2003.

2.200 After the SALRC received the above comment from CoGTA, the proposal to amend section 7(1) of the Act (as discussed in paragraph 2.198 above) was excluded from the Discussion Paper that was published for public comments.

2.201 Section 3(2)(d) of the Act permits the Premier of a province to set a lower threshold for the participation of women 'where it has been proved that an insufficient number of women are available to participate in a traditional council.' Given the fact that women constitute at least half the population of every community in South Africa,⁴⁷ it is unclear when this would ever be the case.

⁴⁷

Census data published by Statistics South Africa.

2.202 Regarding succession to the positions of a king, queen, senior traditional leader, headman and headwoman, the draft report had noted that the Act does not outline any specific procedure that needs to be followed when a royal family chooses a successor. The Act simply provides that the royal family concerned must identify a successor ‘with due regard to applicable customary law’. This information appears in section 9(1) with regard to kings and queens, and in section 11(1) for senior leaders and headmen or headwomen.⁴⁸

2.203 In view of the *Shilubana and others v Nwamitwa* judgment,⁴⁹ the Discussion Paper had recommended that section 9(1)(a) and section 11(1)(a) be amended by way of including references to section 9 of the Constitution of the Republic of South Africa, 1996.

2.204 However, this recommendation is not supported by CoGTA. In their submission to the SALRC, CoGTA stated as follows:

[T]he recommendations proposed by the SA Law Reform Commission in respect of traditional leadership are addressed in the Traditional and Khoi-San Leadership and Governance Bill which was published for public comment in Government Gazette No.36856 of 20 September 2013 under General Notice No 947 (hereinafter referred to as the TKLGB). This Bill is at an advanced state and has already been pre-certified by the State Law Advisers. It is therefore not necessary for the Commission to effect any amendments to the relevant national traditional leadership legislation.⁵⁰

⁴⁸ Also in *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), the Constitutional Court ruled that the principle of male primogeniture was unconstitutional: “The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.” The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which came into operation in 2003, also prohibits – in section 8(d) – unfair discrimination on the basis of gender, including “any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between men and women...”

⁴⁹ 2008 (9) BCLR 914 (CC). In this case, the Constitutional Court held at paragraph 81 that – ...customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

⁵⁰ Letter received from the Director-General: Department of Traditional Affairs, dated 1 October 2014.

2.205 CoGTA further stated that the SALRC's proposed amendment of sections 9(1)(a) and 11(1)(a) of the Act, regarding succession to the positions of a king, queen, senior traditional leader, headman and headwoman, are –

sufficiently dealt with in clause 2 of the TKLGB which clause contains the “Guiding principles” that will apply to all traditional and Khoi-San communities. The relevant part of the clauses reads as follows:

12. A kingship or queenship, principal traditional community, traditional community, headmanship, headwomanship and Khoi-San community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-
 - (a) preventing unfair discrimination;
 - (b) promoting equality; and
 - (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.⁵¹

2.206 The SALRC has taken note of the draft TKLGB as published in *Government Gazette* No. 36856 dated 20 September 2013, which proposes to repeal the Traditional Leadership and Governance Framework Act 41 of 2003 as a whole. For this reason, the SALRC has therefore not included in this Report the proposed amendment of sections 9(1)(a) and 11(1)(a) of Act No.41 of 2003.

2.207 For the sake of comprehensiveness and historical memory, and to serve an educational purpose, this section reviews a number of statutes administered by CoGTA that do not, in the framework of the current review, require any immediate legislative action. However, as mentioned earlier, the fact that these statutes meet the requirements set by section 9 of the Constitution does not necessarily imply that they require no legislative review or action; indeed, they may contain inconsistency with other provisions of the Constitution, or other anomalies.

(b) National House of Traditional Leaders Act 22 of 2009

2.208 The Act establishes the National House of Traditional Leaders, made up of three representatives from the different provincial houses of traditional leaders. The Act also

⁵¹ *Government Gazette* No. 36868 Notice 947 dated 20 September 2013.

enumerates the mainly advisory functions that the House has in relation to the national government. The House is set up to, among others, promote the role of traditional leadership within a democratic constitutional dispensation. The Interim Constitution required the new provinces to establish provincial houses of traditional leaders. Apart from Gauteng, Northern Cape and Western Cape, the other six provinces established provincial traditional houses in 1994 and 1995. The House mainly plays an advisory and support role vis-à-vis the national government on matters of customary law and traditional leadership.

2.209 For purposes of the current review, the Act does not contain any glaringly discriminatory provisions. Section 11 of the Act provides for the powers and duties of the House. In terms of this section,⁵² the House is required to ensure transformation and adaptation of customary law and custom in accordance with the provisions of Chapter 2 of the Constitution (Bill of Rights), to prevent unfair discrimination, and to promote gender equality in the succession to traditional leadership positions.

2.210 In its submission to the SALRC, CoGTA stated that

Although the National House Act already requires in section 3(4) that at least one-third of the members of the National House must be women, which principle is repeated in the Framework Act (and in the TKLGB) in respect of other traditional leadership structures, in practice it is sometimes challenging to achieve this requirement. Therefore the TKLGB now includes a new provision that authorizes the National House to determine the reasons why the one-third requirement for female representation on a provincial house, a local house or any traditional or Khoi-San leadership council is not met and to make recommendations in this regard to the Minister, relevant Premier and relevant house or council. It should be noted that in terms of the TKLGB the one-third principle will also apply to the envisaged Khoi-San leadership structures.

2.211 The SALRC has taken note of the draft TKLGB as published in *Government Gazette* No. 36856 dated 20 September 2013, which proposes to repeal the National House of Traditional Leaders Act 22 of 2009 as a whole.

⁵² Section 11(1)(a)(viii) of Act 22 of 2009.

- (c) Promotion of Local Government Affairs Act 91 of 1983 (excluding Chapter 1 and 1A and sections 14 and 15 insofar as it is applied with respect to sections 3(12), 6(1)(b) and 7A, and sections 17A and 17G)⁵³

2.212 The main purpose of the Act is to make provision for the coordination of functions of general interest to local authorities and of those functions of local authorities which should in the national interest be coordinated and for the establishment of a coordinating council and various committees of the council.

2.213 The Act is an extensive statute that also provides for the said bodies' powers and functions. The provisions of the Act relating to demarcation of the areas of jurisdiction of local authorities have been repealed, as these issues are now dealt with under the Local Government: Municipal Demarcation Act 27 of 1998. Accordingly, the references to the demarcation board in the long title of the Act are redundant and can be repealed; however, they are not operative provisions and therefore repeal would serve no purpose. Without an operational review to determine whether in fact the coordinating council established under the Act remains in use, it is not possible to determine whether the remaining provisions of the Act might be redundant. The SALRC assumes that these provisions remain operative. There are no provisions in the Act that seem to conflict with the Constitution. The SALRC therefore recommends that this Act be retained.

- (d) Lekoa City Council Dissolution Act 61 of 1991

2.214 The purpose of the Lekoa City Council Act 61 of 1991 was to provide for the dissolution of the Lekoa City Council, for the establishment of local authorities for certain areas, and for matters connected therewith.

2.215 Section 1 of the Act provides that –

At the commencement of this Act⁵⁴ the Lekoa City Council, a local authority established by Government Notice 2041 of 16 September 1983, shall cease to

⁵³ Chapter 1 (sections 14 and 15) in so far as it has not been assigned to a province (i.e. in so far as it is applied with respect to sections 3(12), 6(1)(b) and (7A)), sections 17A and 17G were repealed by section 36 of Act 19 of 2008. Chapter 1A was repealed by section 43 of Act 27 of 1998.

⁵⁴ The Act came into operation on 22 May 1991.

exist, and every person who or body which immediately prior to that commencement was a member of that council or was authorized or designated in terms of section 29 or 29A of the Black Local Authorities Act, 1982 (Act 102 of 1982), to exercise, perform or fulfil on behalf of or in the place of that council any right, power, function, duty or obligation of that council, shall cease to be such a member or to be so authorized or designated.

2.216 Prior to its dissolution, the Lekoa City Council comprised the townships of Sebokeng, Boipatong, Bophelong and Sharpeville. Section 6 of the Act provided for the designation of the latter four areas, at the commencement of this Act, as development areas under section 33 of the now repealed Black Communities Development Act 4 of 1984.⁵⁵ Section 6 also provided for the establishment of local authorities for such areas by the administrator of the province of the Transvaal. Furthermore, the Act provided for the transfer of such assets, liabilities, duties and obligations which at the date of such establishment vested in the administrator to the local authorities so established.

2.217 In terms of section 2(2) of the Act, the city councils under the names of Refengkgotso and Zamdela were deemed to have been established, under section 2(1)(a) of the now repealed Black Local Authorities Act 102 1982,⁵⁶ by the administrator of the province of the Orange Free State. Section 4 of the Act provided for the transfer of assets, liabilities, rights and obligations of the Lekoa City Council to the city councils so established. In terms of section 5 of the Act, staff in the employ of the Lekoa City Council at the date of the Act's commencement were deemed to be staff in the employ of the administrator of the province of the Transvaal.

2.218 Discussion Paper 120 had provisionally stated that the Act should not be repealed if it still serves any regulatory function, or if any of the duties or obligations imposed by it have not been met or complied with. One of the submissions which the SALRC received in response to the Discussion Paper came from the Accounting Officer of the Emfuleni Local Municipality.⁵⁷ That submission offered the following summary of developments since the date of coming into operation of the Lekoa City Council Dissolution Act, 1991:

⁵⁵ The Black Communities Development Act 4 of 1984 was repealed by Act 108 of 1991.

⁵⁶ The Black Local Authorities Act 102 of 1982 was repealed by Act 209 of 1993, which in turn was repealed by Act 19 of 2008.

⁵⁷ Fax received from Mr Sam Shabalala, the Accounting Officer: Emfuleni Local Municipality, dated 29 May 2012.

1. With the coming into operation of the Local Government Transition Act 209 of 1993, that is, on 20th January 1994, the Demarcation Board was established under the Local Government: Municipal Demarcation Act 27 of 1998 which brought new demarcations within the local government environment. Three metro Substructures were established within the Vaal area, with the exclusion of Sasolburg which was now part of the Free State province.
2. The three metro substructures were the Western Vaal Metro Substructure which comprised of Vanderbijlpark Council, Southern Part of the Sebokeng Council, Boipatong Council and Bophelong Council with its head office in Vanderbijlpark. The Eastern Vaal Metropolitan Substructure comprised of Vereeniging, Kopanong, Northern Part of Sebokeng Council and Evaton Council with its head office in Vereeniging. The Northern Vaal Metropolitan Substructure comprised of Meyerton, Zone 10, Evaton, Drieziek, Stretford, Poortjie, Vaal Marina and Orange Farm.
3. With the introduction of the Local Government: Municipal Structures Act 117 of 1998 and the Local Government: Municipal Systems Act 32 of 2000, new demarcations for the local government were established. The Western Vaal Transitional Metropolitan Substructure and the Eastern Vaal Transitional Metropolitan Substructure as well as the Vaal Oewer Council (which used to fall under the Eastern Services Council based in Randfontein) were brought together under one municipality known as the Emfuleni Local Municipality.
4. There was transfer of staff, assets and liabilities. Furthermore, all land/properties which fall under the jurisdiction of Emfuleni Local Municipality were recorded as such at the Pretoria Deeds Office. It can be said with certainty that following the staff audit which was conducted in March/April 2011 and the report released in June 2011, there are no ghost employees at Emfuleni Local Municipality.

2.219 The Accounting Officer of the Emfuleni Local Municipality states that the only outstanding matters relate to the opening of township registers and development of one spatial development plan for the area. In the opinion of the Accounting Officer, the Lekoa City Council Dissolution Act 61 of 1991 is obsolete.

2.220 It is essential that a thorough audit be conducted by CoGTA, in co-operation with the applicable provincial and local authorities, to establish whether the Act has been complied with and the obligations imposed by the Act have been fulfilled. Such an audit would entail the listing of land (and possibly assets), title deed searches, perusal of staff records, *in situ* records searches for contracts, and so on. It is unclear whether the then administrator of the Free State province indeed transferred the land as required by section 4(2)(b) of the Act. Thus, the SALRC does not at this stage recommend a repeal of the Act,

as we have not yet been able to establish what the factual position is regarding the state of its implementation.⁵⁸ Once the audit has been completed, a possible repeal of the Act may be considered.

(e) Repeal of Local Government Laws Act 42 of 1997

2.221 This Act was promulgated on 3 October 1997. Its purpose was to repeal certain laws pertaining to local government.⁵⁹ As that purpose has now been achieved, the Act serves no further purpose and could probably be repealed.⁶⁰ However, as the only practical effect of repealing this Act would be to replace it with another Act which would have no purpose other than to repeal this Act, the SALRC recommends that the Act be retained.

(f) Remuneration of Public Office Bearers Act 20 of 1998

2.222 The objectives of this Act include, among others, to provide a framework for determining the salaries and allowances of the President, members of the National Assembly, permanent delegates to the NCOP, Deputy President, Ministers, Deputy Ministers, traditional leaders, members of local Houses of Traditional Leaders, members of provincial houses of Traditional Leaders, and members of the National House of Traditional Leaders; and to provide a framework for determining the upper limit of salaries and allowances of Premiers, members of Executive Councils, members of provincial legislatures and members of Municipal Councils; as well as for determining pension and medical aid benefits of office bearers.

2.223 This post-1994 Act provides a framework for determining the salaries and allowances of 'public office bearers', as the short title indicates. Such office bearers include

⁵⁸ The findings in *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T) at 450-454 lead to the cautionary approach in this regard.

⁵⁹ Namely, the Local Government Bodies Franchise Act 117 of 1984; the Prior Votes for Election of Members of Local Government Bodies Act 94 of 1988; section 16 of the Local Government Affairs Amendments Act 56 of 1993; and Schedule 3 of both the Regional Services Council Act 109 of 1985 and the KwaZulu and Natal Joint Services Act 84 of 1990, only in so far as these two Acts amended section 1 of the Local Government Bodies Franchise Act, 1984.

⁶⁰ See section 12(2) of the Interpretation Act 33 of 1957.

traditional leaders, members of local Houses of Traditional Leaders, members of provincial houses of Traditional Leaders, and members of the National House of Traditional Leaders. Therefore, this Act serves as framework legislation.⁶¹ A characteristic of such legislation is the inclusion of broad-based policy and principles.⁶² None of the provisions in the Act appears to be unconstitutional or in conflict with section 9 of the Constitution. On the contrary, the Act is the outcome of a constitutional directive, namely to pass national legislation to provide for a framework to determine salaries, allowances and benefits for public office bearers. Accordingly, the SALRC recommends that the Act be retained.

(g) Local Government: Municipal Demarcation Act 27 of 1998

2.224 The purpose of this Act is to provide criteria and procedures for the determination of municipal boundaries by an independent authority, and to provide for matters connected therewith. The Act also establishes the Demarcation Board. The provisions of this post-1996 Act are neither discriminatory nor unconstitutional. As part of the suite of local government legislation that regulates the entire demarcation process across South Africa, however, some provisions in the Act may in future require further statutory review and amendment to enhance legal certainty (among other possible issues). In terms of the current investigation, the SALRC recommends that the Act be retained as it appears to be in line with section 9 of the Constitution, and remains essential for the purpose of achieving its objectives.

(h) Local Government: Municipal Structures Act 117 of 1998

2.225 The Act serves as an extensive framework law, and provides for the establishment of municipalities in accordance with the requirements related to categories and types of municipalities. It establishes criteria for determining different categories of municipalities and defines the types of municipalities that may be established within each category. The Act aims, among others, to provide for an appropriate division of functions and powers

⁶¹ The Act owes its existence to section 219 (“Remuneration of persons holding public office”) of the Constitution. The Act must further be read in conjunction with the Independent Commission for the Remuneration of Public Office-bearers Act 92 of 1997.

⁶² On the features of framework legislation see eg Nel J and Du Plessis W “An evaluation of NEMA based on a generic framework for environmental framework legislation” 2001 (8) *SAJELP* 1-33 at 3.

between categories of municipalities; to regulate the internal systems, structures and office bearers of municipalities; and to provide for appropriate electoral systems. The provisions of the Act are neither discriminatory nor unconstitutional and appear to have been carefully aligned with the Constitution. Several provisions in the Act may, however, in future require further statutory review and amendment in order to enhance legal certainty, to ensure more comprehensive or clear regulation of matters that fall within the ambit of the objectives of the Act, and to ensure alignment of the Act with other legislation and provisions in the Constitution. In terms of the current investigation, the SALRC recommends that the Act be retained.

(i) Local Government: Municipal Systems Act 32 of 2000

2.226 The Act was promulgated to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and to ensure universal access to essential services that are affordable to all. The Act further defines the legal nature of a municipality; provides for the manner in which municipal powers and functions are exercised and performed to provide for community participation; and aims to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation, and organisational change – which underpin the notion of developmental local government. Further objectives of the Act are to empower poor people and ensure that municipalities put into place service tariffs and credit-control policies that take the needs of poor people into account. With regard to the latter aim, the Act provides a framework for the provision of services, service delivery agreements, and municipal service districts.

2.227 The provisions of the Act are neither discriminatory nor unconstitutional. Having been in force for close to a decade, however, the Act may in future require statutory review and amendment in order to enhance legal certainty, to ensure more comprehensive or clear regulation of matters covered by the Act, and to ensure that the Act is aligned with other statutes and/or the Constitution. (Relevant statutes here include the Intergovernmental Relations Framework Act 13 of 2005, the Promotion of Administrative Justice Act 3 of 2000, and the National Environmental Management Act 107 of 1998.) In terms of the current investigation, the SALRC recommends that the Act be retained as it remains fundamental for the purpose of achieving its objectives.

(j) Repeal of Volkstaat Council Provisions Act 30 of 2001

2.228 This Act was promulgated on 30 April 2001. Its purpose was to repeal sections 184A and 184B(1)(a), (b), and (d) of the Interim Constitution. The new Constitution had repealed the Interim Constitution, except for certain specified sections of the Interim Constitution. The sections which remained in force included (but were not limited to) those which were later repealed by Act 30 of 2001. Because this Act has achieved its objective, namely to repeal the abovementioned provisions of the Interim Constitution, it could itself now be repealed.⁶³ However, the only practical effect of repealing this Act would be to replace it with another Act which would have no purpose other than to repeal this Act. Given that the Interim Constitution has not yet been repealed in its entirety and several other sections of it remain in force, the Act remains applicable and the SALRC proposes that it should be retained.

(k) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002

2.229 This Act gives effect to provisions of the Constitution by providing for the composition of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The Act also provides for additional functions of the said Commission, for the convening of a national consultative conference, for the establishment and recognition of community councils, and for certain related affairs. The Act is aimed at promoting respect for and furthering the protection of the rights of cultural, religious and linguistic communities; and at the promotion of peace, friendship, humanity, tolerance and national unity among and within such communities on the basis of equality, non-discrimination and free association, in order to foster mutual respect among cultural, religious and linguistic communities. The Act essentially complements section 9 of the Constitution, and forms a legal basis in the instance of an infringement of certain constitutional entitlements. For purposes of the current review, the SALRC recommends that the Act be retained, as it continues to play an important role in promoting the rights of cultural and religious groups in the diverse society of South Africa.

⁶³ See section 12(2) of the Interpretation Act 33 of 1957.

(l) Disaster Management Act 57 of 2002

2.230 Chapters 2, 3 and 4 of the Act commenced on 1 April 2004, as did chapters 1, 6 and 8 of the Act in so far as they relate to chapters 2, 3 and 4. The remaining provisions of the Act came into operation on 1 July 2004. The Act provides for an integrated and co-ordinated disaster management policy. The focus of the disaster management policy is on preventing or reducing the risk of disasters, mitigating the severity of disasters, being prepared for emergencies, ensuring a rapid and effective response to disasters, and providing for post-disaster recovery. The Act further establishes national, provincial and municipal disaster management centres and regulates disaster management volunteers. In addition, the Act repealed and replaced the Civil Protection Act 67 of 1977. The provisions of the Act are neither discriminatory nor unconstitutional. The SALRC therefore recommends that the Act be retained, as it remains necessary for the purpose of achieving its objectives.

(m) Local Government: Municipal Property Rates Act 6 of 2004

2.231 The purpose of the Act, among others, is to regulate the power of a municipality to impose rates on property; to exclude certain properties from rating in the national interest; and to make provision for municipalities to implement a transparent and fair system of exemptions, reductions and rebates through their rating policies. The Act appears to be particularly responsive to section 9 of the Constitution; for example, in its establishment of the criteria to be applied in the adoption and content of rates policies (section 3), and in its procedural requirements with regard to community participation (section 4). In the context of the current review, the provisions of the Act are neither discriminatory nor unconstitutional and comply with the Constitution. Some sections of the Act may, however, in future require amendment to enhance legal certainty and to ensure alignment of the Act and other statutes. For purposes of the current review, the SALRC recommends that the Act be retained.

(n) Intergovernmental Relations Framework Act 13 of 2005

2.232 The Act aims, among others, to establish a general legislative framework for government in all three spheres, to promote and facilitate intergovernmental relations and to provide a general legislative framework for mechanisms and procedures to facilitate the settlement of intergovernmental disputes. Section 41(2) of the Constitution required Parliament to promulgate an Act to give effect to the abovementioned objects of the Act. Although various other Acts provided for matters relating to intergovernmental relationships, this Act was required to establish a single legislative framework applicable to all spheres and sectors of government, to ensure that intergovernmental relations are conducted in the spirit of the Constitution – particularly chapter 3.

2.233 Section 4 stipulates that the objects of the Act include facilitation of –

co-ordination in the implementation of policy and legislation, including (a) coherent government, (b) effective provision of services; (c) monitoring implementation of policy and legislation; and (d) realisation of national priorities.

Despite the comments in the *National Lotteries Board case*,⁶⁴ the Act appears to comply with its constitutional mandate and other constitutional provisions, including the equality section. Any differentiation made in terms of the Act will have to be tested against the equality section and additional provisions are not required. It may be noted that some frustration apparently exists about the functioning of structures established by the Act, but such an enquiry falls beyond the scope of the current review. Although the Act emphasises intergovernmental co-operation of executive rather than administrative structures and functionaries, provision is made for the establishment of intergovernmental technical support structures. The establishment of such structures will depend upon the appropriate intergovernmental structure's willingness and desire to establish technical support structures. The CoGTA may consider encouraging the establishment of such structures to ensure co-operation and co-ordination on that level. However, for purposes of the current review, the SALRC recommends that the Act be retained.

⁶⁴ *National Lotteries Board v Robin Leslie Bruss, Brian Jeffrey Miller N.O. and Others* unreported judgment by Claassen J in the Transvaal Provincial Division of the High Court of South Africa on 2 November 2007, case number 13046/06. The obiter remarks contained in par 24 indicated the judge's view that "...regarding the arguments raised in respect of the Intergovernmental Relations Framework Act, I agree with all counsel that it is amazingly poorly drafted and should be revisited by the Legislature with the greatest of urgency." The judge, however, also remarked (obiter) that the Act was not applicable to the present dispute.

Annexure A

COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS GENERAL LAWS AMENDMENT AND REPEAL BILL

GENERAL EXPLANATORY NOTE:

[] Unless otherwise indicated words in bold type in square brackets indicate omissions from existing enactments.

_____ Unless otherwise indicated words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend and repeal certain laws of the Republic pertaining to co-operative governance and traditional affairs containing discriminatory or obsolete provisions

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

Repeal of laws

1. (a) The laws specified in Schedule 1 are hereby repealed.
- (b) The laws specified in Schedule 2 are hereby repealed to the extent set out in the third column of Schedule 3.

Amendment of laws

2. The laws specified in Schedule 3 are hereby amended to the extent set out in the fourth column of the Schedule.

Short title and commencement

3. This Act is called the Co-operative Governance and Traditional Affairs Laws Amendment and Repeal Act, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

Schedule 1

Item No.	No. and year of law	Title or subject of law
1.	116 of 1984	Promotion of Local Government Affairs Amendment Act 116 of 1984
2.	45 of 1985	Promotion of Local Government Affairs Amendment Act 45 of 1985
3.	105 of 1987	Pension Benefits for Councillors of Local Authorities Act 105 1987
4.	19 of 1993	Witpoort Adjustment Act 19 of 1993
5.	36 of 1997	South African Olympic Hosting Act 36 of 1997
6.	59 of 1999	Disestablishment of the Local Government Affairs Council Act 59 of 1999

Schedule 2

Item No.	No. and year of law	Title and subject	Extent of repeal
1.	75 of 1986	Abolition of Development Bodies Act 75 of 1986	1. Repeal paragraphs (a); (b); (c) and (d) of the definition of 'development body' in section 1. 2. Repeal paragraphs (c) and (d) of the definition of 'public authority' in section 1. 3. Repeal sections 2(1); 3; 5(1A); 5(2); 5(4)(c); 6(1); 7B(1); 7B(2) 4. Repeal schedule 1; and Item 2 of Schedule 2.
2.	84 of 1990	KwaZulu and Natal Joint Services Act 84 of 1990	Repeal section 23
3.	56 of 1993	Local Government Affairs Amendment Act 56 of 1993	Repeal sections 6 to 13 inclusive; 17 to 21 inclusive; and 36.
4.	117 of 1993	Local Government Affairs Second Amendment Act 117 of 1993	Repeal sections 2; 3; 5 and 9.

Schedule 3

Item No.	No. and year of law	Title and subject	Extent of amendment
1.	Act 75 of 1986	Abolition of Development Bodies Act of 1986	<p>1. Section 1 of the Act is hereby amended–</p> <p>(a) by the insertion in the said section of the following definition of ‘MEC for local government’:</p> <p style="padding-left: 40px;"><u>‘MEC for local Government’ means the Member of provincial Executive Council responsible for local government in a province.</u></p> <p>(b) by the substitution in the said section for the definition of ‘Minister’ of the following definition:</p> <p style="padding-left: 40px;">‘Minister’ means the Minister of [Constitutional Development and Planning] <u>Cooperative Governance and Traditional Affairs;</u></p> <p>(c) by the substitution in the said section for the definition of ‘public authority’ of the following definition:</p> <p style="padding-left: 40px;">‘public authority’ means-</p> <p style="padding-left: 80px;">(a) a Minister of the Republic appointed under the Constitution of the Republic of South Africa, [1983 (Act 110 of 1983)] 1996, <u>administering a department</u></p>

			<p><u>of State:</u></p> <p>(b) [an Administrator] a <u>Premier of a province appointed [in terms of the Provincial Government Act, 1986] under the Constitution of the Republic of South Africa, 1996;</u></p> <p>(c) ...</p> <p>(d) ...</p> <p>(e) any other body established by or under any law and approved by the Minister.</p> <p>2. The term '<u>MEC for local government</u>' is hereby substituted for the term 'Administrator', where relevant and in the appropriate places in the Act and in the regulations promulgated in terms of the Act.</p> <p>3. Subsection (4) of section 2 is hereby substituted for the following subsection (4):</p> <p>(4) A member or alternate member of any development body abolished in terms of the provisions of subsection [(1) or] (2) shall vacate his office with effect from the date of such abolition.</p> <p>3. Paragraph (b) of subsection 6(2) is hereby substituted for the following paragraph (b):</p>
--	--	--	--

			(b) any person in the service of such development body shall be construed as a reference to a person in the service of the public authority to which the Minister has transferred him or her <u>[in terms of section 4]</u> .
2.	Act 99 of 1987	Fire Brigade Services Act, 1987	<p>1. Section 1 of the Act is hereby amended –</p> <p>(a) by the substitution in the said section for the definition of ‘Administrator’ of the following definition of ‘MEC for local government’:</p> <p><u>‘MEC for local government’ means the Member of provincial Executive Council responsible for local government in a province.</u></p> <p>(b) by the substitution in the said section for the definition of ‘local authority’ of the following definition:</p> <p>‘local authority’ means [an institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act 32 of 1961), and includes-</p> <p>(a) a board of management or board as defined in section 1 of the Rural</p>

			<p>Areas Act (House of Representatives), 1987 (Act 9 of 1987);</p> <p>(b) a regional services council established under section 3 of the Regional Services Councils Act, 1985 (Act 109 of 1985);</p> <p>(c) a local authority as defined in section 1 of the Black Local Authorities Act, 1982 (Act 102 of 1982);</p> <p>(d) a local government body established by virtue of the provisions of section 30 (2) (a) of the Black Administration Act, 1927 (Act 38 of 1927);</p> <p>(e) a local council established under section 2 of the Local Councils Act (House of Assembly), 1987 (Act 94 of 1987);</p> <p>(f) an institution or body declared by the Minister, by notice in the Gazette, to be a local government for the purposes of this Act: Provided that the Minister may only declare an institution or body to be a local government if such institution or body was established by an Act of Parliament and if it, in</p>
--	--	--	--

			<p>terms of or by virtue of that Act, exercises powers and performs duties which, in the opinion of the Minister, may be exercised or performed by an institution, body or board contemplated in section 84 (1) (f) of the Provincial Government Act, 1961, or in paragraphs (a) to (e) of this definition;</p> <p>(g) any similar institution or body existing or which is established in an area to which the provisions of this Act did not apply before the insertion of section 1 (2) in this Act;] <u>any district municipality, local municipality or metropolitan municipality as defined in section 1 and established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No. 17 of 1998);</u></p> <p>(c) by the substitution in the said section for the definition of 'Minister' of the following definition:</p> <p>'Minister' means</p> <p>(a) except in [paragraph (f) of</p>
--	--	--	--

			<p>the definition of 'local authority' and] sections 2, 15 and 17, the competent authority within the government of a province to whom the administration of this Act in that province has been assigned [under section 235 (8) of the said Constitution] <u>by the Premier of the Province;</u> and</p> <p>(b) in [paragraph (f) of the definition of 'local authority' and] sections 2, 15 and 17, the national Minister responsible for [provincial and local government] <u>cooperative governance and traditional affairs;</u></p> <p>2. The phrase '<u>MEC for local government</u>' is hereby substituted for the term 'Administrator', where relevant and in the appropriate places in the Fire Brigade Services Act, 1987 and in the regulations promulgated in terms of the Act.</p> <p>3. Except in sections 1, 2, 15 and 17 of the Fire Brigade Services Act, 1987, the term '<u>MEC for local government</u>' is hereby substituted for the term 'Minister', where relevant and in the appropriate</p>
--	--	--	---

			<p>places in the Act and in the regulations promulgated in terms of the Act.</p> <p>4. Section 11(2)(b) is hereby amended to read as follows:</p> <p>(2) A grant-in-aid contemplated in subsection (1)-</p> <p>(a) ...</p> <p>(b) shall not be paid unless any local authority produces proof to the [Administrator] MEC for local government that the local authority does not discriminate in its service between its employees on the basis of sex, race, colour, [or] religion <u>or any other ground listed in section 9(3) of the Constitution of the Republic of South Africa, 1996.</u></p>
3.	Act 52 of 1997	Organised Local Government Act, 1997	<p>1. Section 1 of the Act is hereby is amended by the substitution for the definition of 'Minister' of the following definition:</p> <p>'Minister' means the Minister [for Provincial Affairs and Constitutional Development] <u>of Cooperative Governance and Traditional Affairs.</u></p> <p>2. Section 3(2) is amended by the substitution for paragraph (a) of the following paragraph:</p> <p>(a)The national organization</p>

			<p>must in accordance with criteria determined by it, when necessary, designate not more than 10 persons from the nominees contemplated in subsection (1) as representatives to participate in the proceedings of the National Council of Provinces, <u>provided that such criteria shall not unfairly discriminate directly or indirectly on any ground listed in section 9(3) of the Constitution of the Republic of South Africa, 1996.</u></p>
4.	Act 17 of 1998	Transfer of Staff to Municipalities Act, 1998	<p>Section 1 of the Act is hereby amended by the substitution for the definition of 'municipality' of the following definition:</p> <p><u>'municipality' means any district municipality, local municipality or metropolitan municipality as defined in section 1 and established in terms of section 12 of the Local Government: Municipal Structures Act, 1998 (Act No. 17 of 1998);</u></p>

Annexure B

Statutes recommended for repeal by the Department of Justice and Constitutional Development

Schedule

Item No.	No. and year of law	Title or subject of law
1.	46 of 1937	Black Laws Amendment Act 46 of 1937
2.	79 of 1957	Black Laws Further Amendment Act 79 of 1957
3.	42 of 1964	Black Laws Amendment Act 42 of 1964
4.	63 of 1966	Black Laws Amendment Act 63 of 1966
5.	56 of 1968	Black Laws Amendment Act 56 of 1968
6.	27 of 1970	Second Black Laws Amendment Act 27 of 1970
7.	49 of 1970	Third Black Laws Amendment Act 49 of 1970
8.	23 of 1972	Black Laws Amendment Act 23 of 1972
9.	119 of 1977	Black Laws Amendment Act 119 of 1977
10.	12 of 1978	Black Laws Amendment Act 12 of 1978

Annexure C

Statute recommended for repeal by the Department of Home Affairs

Schedule

Item No.	No. and year	Title or subject of law
1.	76 of 1963	Black Laws Amendment Act 76 of 1963

Annexure D

Statutes recommended for repeal by the relevant Provincial Legislatures

Schedule

Item No.	No. and year of law	Title and subject	Extent of repeal
1.	67 of 1977	Civil Protection Act 67 of 1977 ⁶⁵	Repeal sections 2, 2A, 3, 4, 5, 6(1) and 7
2.	109 of 1985	Regional Services Council Act 109 of 1985 ⁶⁶	The whole
3.	75 of 1986	Abolition of Development Bodies Act 75 of 1986 ⁶⁷	Repeal section 2(5)
4.	78 of 1986	Regional Services Councils Amendment Act 78 of 1986	The whole
5.	49 of 1988	Regional Services Councils Amendment Act 49 of 1988	The whole
6.	75 of 1991	Regional Services Councils Amendment Act 75 of 1990	The whole
7.	84 of 1990	KwaZulu-Natal Joint Services Act 84 of 1990 ⁶⁸	The whole

⁶⁵ To be repealed by the Eastern Cape; Gauteng; KwaZulu-Natal; Limpopo; Mpumalanga; Northern Cape and Western Cape provincial legislatures

⁶⁶ To be repealed by the Eastern Cape; Gauteng; KwaZulu-Natal; Limpopo; Mpumalanga; Northern Cape; North West and Western Cape provincial legislatures

⁶⁷ To be repealed by the Northern Cape; North West and Western Cape provincial legislatures.

⁶⁸ To be repealed by the KwaZulu-Natal provincial legislature.

8.	117 of 1993	Local Government Affairs Second Amendment Act 117 of 1993 ⁶⁹	Repeal subsections 1(1), 1(2) and 1(3)
----	-------------	---	--

⁶⁹ To be repealed by the Eastern Cape; Free State; KwaZulu-Natal and the Western Cape provincial legislatures.

Annexure E

Statutes administered by CoGTA

No.	Name of Act, number and year
1.	Black Laws Amendment Act, 1937 (Act No.46 of 1937)
2.	Black Laws Amendment Act, 1963 (Act No.76 of 1963)
3.	Black Laws Further Amendment Act, 1957 (Act No.79 of 1957)
4.	Black Laws Amendment Act, 1966 (Act No.63 of 1966)
5.	Black Laws Amendment Act, 1964 (Act No.42 of 1964)
6.	Black Laws Amendment Act, 1968 (Act No.56 of 1968)
7.	Second Black Laws Amendment Act, 1970 (Act No.27 of 1970)
8.	Third Black Laws Amendment Act, 1970 (Act No.49 of 1970)
9.	Black Laws Amendment Act, 1972 (Act No.23 of 1972)
10.	Black Laws Amendment Act, 1977 (Act No.119 of 1977)
11.	Black Laws Amendment Act, 1978 (Act No.12 of 1978)
12.	Civil Protection Act, 1977 (Act No.67 of 1977) – only provisions assigned to the provinces remain [repealed by Act 57 of 2002]
13.	Promotion of Local Government Affairs Act, 1983 (Act No.91 of 1983) to be repealed partially: excluding chapter 1 and 1A; section 14; section 15 in so far as it applies with respect to sections 3(12), 6(1)(b) and 7A; and sections 17A and 17G.
14.	Promotion of Local Government Affairs Amendment Act, 1984 (Act No.116 of 1984)
15.	Promotion of Local Government Affairs Amendment Act, 1985 (Act No.45 of 1985)
16.	Regional Services Councils Act, 1985 (Act No.109 of 1985)
17.	Regional Services Councils Amendment Act, 1986 (Act No.78 of 1986)
18.	Regional Services Councils Amendment Act, 1988 (Act No.49 of 1988)

19.	Regional Services Councils Amendment Act, 1991 (Act No.75 of 1991)
20.	Abolition of Development Bodies Act, 1986 (Act No.75 of 1986)
21.	Abolition of Development Bodies Amendment Act, 1988 (Act No.47 of 1988)
22.	Abolition of Development Bodies Amendment Act, 1990 (Act No.81 of 1990)
23.	Fire Brigade Services Act, 1987 (Act No.99 of 1987) sections 2 and 15
24.	Fire Brigade Services Amendment Act, 1990 (Act No.83 of 1990)
25.	Fire Brigade Services Amendment Act, 2000 (Act No.14 of 2000)
26.	Pension Benefits for Councillors of Local Authorities Act, 1987 (Act No.105 of 1987)
27.	KwaZulu-Natal Joint Services Act, 1990 (Act No.84 of 1990) section 23
28.	Lekoa City Council Dissolution Act, 1991 (Act No.61 of 1991)
29.	Local Government Affairs Amendment Act, 1993 (Act No.56 of 1993)
30.	Local Government Affairs Second Amendment Act, 1993 (Act No.117 of 1993)
31.	National House of Traditional Leaders Act, 2009 (Act No.22 of 2009)
32.	South African Olympic Hosting Act, 1997 (Act No.36 of 1997)
33.	Repeal of Local Government Laws Act, 1997 (Act No.42 of 1997)
34.	Organised Local Government Act, 1997 (Act No.52 of 1997)
35.	Transfer of Staff to Municipalities Act, 1998 (Act NO.17 of 1998)
36.	Remuneration of Public Office Bearers Act, 1998 (Act No.20 of 1998)
37.	Local Government: Municipal Demarcation Act, 1998 (Act No.27 of 1998)
38.	Local Government: Municipal Structures Act, 1998 (Act No.117 of 1998)
39.	Local Government: Municipal Structures Amendment Act, 1999 (Act No.58 of 1999)
40.	Local Government: Municipal Structures Amendment Act, 2000 (Act No.33 of 2000)

41.	Local Government: Municipal Structures Amendment Act, 2002 (Act No.20 of 2002)
42.	Local Government: Municipal Structures Amendment Act, 2003 (Act No.1 of 2003)
43.	Disestablishment of the Local Government Affairs Council Act, 1999 (Act No.59 of 1999)
44.	Remuneration of Public Office Bearers Amendment Act, 2000 (Act No.9 of 2000)
45.	Remuneration of Public Office Bearers Second Amendment Act, 2000 (Act No.21 of 2000)
46.	Local Government: Municipal Systems Act, 2000 (Act No.32 of 2000)
47.	Local Government: Municipal Systems Amendment Act, 2003 (Act No.44 of 2003)
48.	Repeal of Volkstaat Council Provisions Act, 2001 (Act No.30 of 2001)
49.	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act No.19 of 2002)
50.	Disaster Management Act, 2002 (Act No.57 of 2002)
51.	Traditional Leadership and Framework Act, 2003 (Act No.41 of 2003)
52.	Local Government: Municipal Property Rates Act, 2004 (Act No.6 of 2004)
53.	Intergovernmental Relations Framework Act, 2005 (Act No.13 of 2005)

Annexure F

List of respondents to Discussion Paper 120

1. Cooperative Governance and Traditional Affairs
(Mr Elroy Africa, Acting Director-General: CoGTA)
2. Director-General: Department of Traditional Affairs
(Dr MC Nwaila)
3. Director-General: Department of Cooperative Governance
(Mr Vusi Madonsela)
4. Department of the Premier: Provincial Government of the Western Cape
(Corporate Services Centre: Chief Directorate: Legal Services)
5. Emfuleni Local Municipality
(Mr Sam Shabalala, Accounting Officer)
6. International Relations and Cooperation
(Adv JGS De Wet, Chief State Law Adviser)
7. Registrar of Pension Funds, Financial Services Board
(Mr Leslie Primo, Senior Legal Advisor)

Bibliography

Albertyn C *Summary of the Equality Jurisprudence and Guidelines for assessing the SA Statute Book for constitutionality against section 9 of the 1996 Constitution* Unpublished paper prepared for the South African Law Reform Commission 2006

Centre for Applied Legal Studies: University of the Witwatersrand *Feasibility and Implementation Study on the Revision of the Statute Book* Unpublished paper 2001

Department of Cooperative Governance and Traditional Affairs Annual Report 2010/2011

Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts*
The Law Commission of India 15 July 2011 Web 26 September 2011
<<http://lawcommissionofindia.nic.in/>>

List of cases

Bareki NO and Another v Gencor Ltd and Others 2006 (1) SA 432 (T)

Bhe and Others v Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)

National Lotteries Board v Bruss NO and Others 2009 (4) SA 362 (SCA)

Road Accident Fund v Mongalo 2003 (3) SA 119 (SCA)

Shilubana and others v Nwamitwa 2008 (9) BCLR 914 (CC)

List of legislation

Constitution of the Republic of South Africa, 1996

Interpretation Act, 1957 (Act No.33 of 1957)

Proclamation No.R.82, 2009 published in Government Gazette No.32763 dated 1 December 2009