

**SOUTH AFRICAN LAW REFORM COMMISSION**

**Project 25: Statute Law**

**REPORT**

**THE REPEAL OF THE BLACK ADMINISTRATION ACT  
38 OF 1927**

**March 2004**



**To Ms B S Mabandla, MP, Minister for Justice and Constitutional Development**

I have the honour to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's Report on the Repeal of the Black Administration Act 38 of 1927.

**MADAM JUSTICE Y MOKGORO  
CHAIRPERSON**

## INTRODUCTION

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

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The committee was assisted by Messrs P van Wyk and H Potgieter, who may be contacted for further information.

This report reflects the state of laws discussed herein as on 31 October 2003.

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## **CHAPTER 1 INTRODUCTION**

### **1.1 THE BACKGROUND TO THE INVESTIGATION**

1.1.1 Six years after the establishment of the new democratic order in South Africa, the enactment of the Constitutions of 1993 and 1996 and the development of completely new branches of law, Government has now set high on its agenda the repeal of those statutes on the statute book that are either redundant, obsolete or in conflict with constitutional imperatives.

1.1.2 One case in point is the Black Administration Act 38 of 1927 (hereafter referred to as “the BAA”). This Act has been one of the principal mechanisms for regulating African people’s lives under apartheid and the fact that it remains on the statute book is an embarrassment to the new South African constitutional democracy.

1.1.3 The South African Law Reform Commission (“the Commission”) has been mandated with the task of revising the South African statute book for constitutionality, redundancy and obsolescence. Together with the German Technical Co-operation, the Commission embarked on a “Feasibility Study on the Revision of the Statute Book”. The repeal of the BAA and a review of the Interpretation Act 33 of 1957 have been identified as requiring immediate attention. This Report reflects the Commission’s recommendations in respect of the repeal of the BAA. Research on the review of the Interpretation Act has also commenced.

1.1.4 The German Technical Co-operation, in consultation with the Commission, appointed a firm of consultants to do the necessary research and to make recommendations with regard to the repeal of the BAA.

1.1.5 The overall aim of the investigation is to repeal the BAA as a whole, but there are certain provisions in the BAA that may well have to remain due to the fact that they constitute rights that are not unconstitutional and still serve a purpose. There are provisions that are administered by other government departments and which should rather fall within the jurisdictions of those departments.

## **1.2 A HISTORICAL PERSPECTIVE ON THE DEVELOPMENT OF THE BLACK ADMINISTRATION ACT**

1.2.1 The Commission mandated the review of the BAA as part of its programme to purge the South African statute book of provisions that are incompatible with the democratic order under the Constitution of the Republic of South Africa<sup>1</sup> (hereafter referred to as the Constitution).

1.2.2 Prior to Union, the Cape Colony, Natal, Transvaal and Orange Free State had no uniform 'native' policy. All of them (but to a lesser extent the Cape Colony) tended towards racial segregation and the separate administration of Africans in what were then called reserves. With the establishment of Union in 1910 the *status quo* was maintained. All laws in force in the several colonies remained in force<sup>2</sup> while a framework and machinery for 'Native' administration (through a separate Department of Native Affairs) was provided.<sup>3</sup> The administration of 'Native' affairs was vested in the Governor-General-in-Council.<sup>4</sup> This was meant to maintain territorial, political and administrative segregation. The Native Administration Act 38 of 1927 provided the first uniform framework for the system of separate 'Native' administration. As this Act virtually created a government within a government (with legislative, executive and judicial powers and functions) it had to be augmented by a vast array of executive decrees by proclamation or government notice.

1.2.3 The BAA was part of a myriad apartheid laws that created a labyrinthine system of governance of Africans and was one of the principal mechanisms for regulating the lives of Africans under apartheid. It was preceded by the Black Land Act 27 of 1913 and followed in 1936 by the Native Trust and Land Act,<sup>5</sup> both of which set aside what were called 'Native' areas. Much of the edictal and subordinate legislation made under the Act was focused on these areas. Later attempts to justify the segregation of Africans from the mainstream of South African politics, economics and development found expression in the Black Authorities Act,<sup>6</sup> the Self Governing Territories Constitution Act,<sup>7</sup> and the Status Acts<sup>8</sup> in respect of the former Transkei, Bophuthatswana, Venda and Ciskei, as well as many other laws affecting virtually every facet of

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<sup>1</sup> Act 108 of 1996.

<sup>2</sup> Section 135 of the South Africa Act 1909.

<sup>3</sup> Sections 14 and 147 of the South Africa Act 1909.

<sup>4</sup> The Governor-General-in-Council was the Governor-General acting by and with the advice of the Executive Council.

<sup>5</sup> Later the Development Trust and Land Act 18 of 1936.

<sup>6</sup> 68 of 1951.

<sup>7</sup> 21 of 1971.

<sup>8</sup> Status of Transkei Act 100 of 1976, Status of Bophuthatswana Act 89 of 1977, Status of Venda Act 107 of 1979 and Status of Ciskei Act 110 of 1981.

the lives of the people of South Africa. The Black Authorities Act 1951 is under the spotlight elsewhere.<sup>9</sup> Fortunately, many of the other statutes have been repealed. However, the continued presence of the Black Administration Act 38 of 1927 on the statute book of South Africa is not in line with the present democratic order — hence the need for this review.

1.2.4 The BAA was first promulgated as the Native Administration Act, 1927. At the time the reference in all the relevant legislation was to “natives”. This later changed to “bantú” and “black”. For the purposes of this Report, reference is made to “African”.

### **1.3 THE STATUS OF THE OLD ORDER LEGISLATION UNDER THE CONSTITUTION**

1.3.1 In terms of the 1993 Constitution<sup>10</sup> (hereafter “the interim Constitution”) laws which immediately before 27 April 1994 were in force in any area which forms part of the national territory of the Republic, continued to remain in force in such area. Under the 1996 Constitution (hereafter “the final Constitution”) all laws which were in force on 4 February 1997 (the date of its commencement) continue to remain in force subject to any amendment or repeal and inconsistency with the new Constitution.<sup>11</sup> Old order legislation (ie legislation enacted before 27 April 1994) does not have a wider territorial or other application than it had before the previous Constitution took effect unless subsequently amended to have a wider application. Old order legislation continues to be administered by the authorities that administered it when the new Constitution took effect. Certain sections of the BAA<sup>12</sup> were repealed by the Status Acts in respect of the TBVC states.<sup>13</sup> This means that such repealed sections (and any others repealed by the legislature in those territories) do not apply in the areas of these former territories.

### **1.4 THE CONSTITUTIONAL ASSIGNMENTS OF CERTAIN SECTIONS OF THE BLACK ADMINISTRATION ACT**

1.4.1 Under section 235(8) of the interim Constitution the President could assign the administration of certain laws to a competent authority within the jurisdiction of the government

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<sup>9</sup> See *Draft White Paper on Traditional Leadership and Governance* (October 2002) of the Department of Provincial and Local Government.

<sup>10</sup> Section 229, Act 200 of 1993.

<sup>11</sup> Item 2 of Schedule 6 of the Constitution.

<sup>12</sup> For example, sections 1, 2(1), (2), (3), (5), (6), (8)*bis* and (8)*ter*, 9, 10, 11, 13, 14 to 19, 25, 26 and 31 in the case of former Transkei.

<sup>13</sup> Status of Transkei Act 100 of 1976, Status of Bophuthatswana Act 89 of 1977, Status of Venda Act 107 of 1979 and Status of Ciskei Act 110 of 1981.

of a province. Any such assignment is regarded as having been made under the similar transitional arrangements in the final Constitution.

1.4.2 The administration of sections 1, 2(7), (7)*bis*, (7)*ter* and (8) and the Natal Code of Zulu Law issued under section 24 of the BAA, were assigned to certain provinces in terms of the 1993 Constitution.

1.4.3 In terms of section 1 the President is the Supreme Chief of all Africans in the Republic and section and 2(7), (7)*bis*, (7)*ter* and (8) make provision for the appointment of persons as either a chief of a tribe or as headman over a tribal settlement. The above sections were assigned to Eastern Cape, Mpumalanga, KwaZulu-Natal, Limpopo, North West and Free State<sup>14</sup> and took effect on 9 September 1994.

1.4.5 Section 24 of the BAA makes provision for the operation of the Natal Code of Zulu Law<sup>15</sup> (the Code). It regulates tribal boundaries, chiefs, personal status, family heads, guardianship, customary marriages and cognate unions, lobolo, family systems, inheritance and succession, medicine men, herbalists and midwives, actionable wrongs, civil procedure and offences and penalties. The Code was assigned to KwaZulu-Natal in terms of Proclamation R166 of 1994<sup>16</sup> and took effect on 31 October 1994.

1.4.6 An investigation was launched into the effect of these assignments as it is particularly important to ascertain which authority, national or provincial, has the power to repeal or amend assigned legislation.

1.4.7 As a point of departure the research focused on the wording of the assignments in an attempt to determine the national and provincial jurisdictions to repeal or amend these sections as well as the Code. The wording is important as only the “administration” of the sections and the Code was assigned.

1.4.8 The relevant part of the first assignment Proclamations reads as follows:

Under section 235(8) of the Constitution of the Republic of South Africa, 1993 (200 of 1993) I hereby –

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<sup>14</sup> Proclamation R139 of 1994 (Government Gazette No. 15951).

<sup>15</sup> Proclamation R151 of 1987.

<sup>16</sup> Government Gazette No. 16049.

- (a) assign the administration of the laws specified in the first column of the Schedule, excluding those provisions (if any) of the said laws which fall outside the functional areas specified in Schedule 6 to the Constitution or which relate to matters referred to in paragraphs (a) to (e) of section 126(3) of the Constitution, to a competent authority within the jurisdiction of each of the governments of the Provinces of the Eastern Cape, Eastern Transvaal, KwaZulu-Natal, Northern Transvaal, North West and Free State, designated in respect of each of such laws by the Premier of the province concerned; and
- (b) determine that the said laws are assigned to the extent specified opposite each such law in the second column of the schedule in so far as such law, or any variation thereof, is applicable in, or in any part of the province concerned.

1.4.9 The Proclamation that contains the assignment of the Code is worded similarly, with the exception that the Code, in total, was assigned to the Province of KwaZulu-Natal only.

1.4.10 The assignments have given rise to several questions relating to the jurisdiction of the various authorities involved. The first question is whether the provinces have the authority to repeal or amend these sections in terms of the assignment Proclamations. If the answer is in the affirmative, the next question is whether this power is exclusively the privilege of the provinces or whether the President may repeal or amend the sections in terms of the Constitution. The third question that has to be addressed is whether Parliament has retained its original power to amend or repeal the sections and the Code.

1.4.11 As to whether the provinces may repeal or amend the sections assigned to them, guidance is given by the Constitutional Court in ***Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another***.<sup>17</sup>

- (a) The Constitutional Court determined the following in this regard.<sup>18</sup>

Firstly, although the Constitution does not expressly empower a provincial legislator to repeal legislation, this is clearly implicit in its powers, provided this legislation that it purports to repeal is provincial legislation. Secondly, the proclamation could only constitute provincial legislation if it was 'legislation that was in force when the Constitution took effect and ...[was] administered (own emphasis) by a provincial government'. The third step is to determine which of the provisions of the proclamation, if any, were administered by the North West. The only basis on which such administration could have been carried out by the North West in this case was under an assignment thereof made by the President to the North West under section 235(8)(a) of the Constitution. Such assignment of administrative

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<sup>17</sup> 2001 (1) SA 500 (CC).

<sup>18</sup> At 512 – 513.

power is limited by s 235(6)(b) to those provisions of the proclamation which 'fall within the functional areas specified in Schedule 6 and which are not matters referred to in Para (a) to (e) of section 126(3)'. It is therefore necessary to determine whether all the provisions of the proclamation fall within one or other of the functional areas specified in Schedule 6. If any provision does not, this means that the administration of such provisions was not assigned to the North West by the President, that the provision itself does accordingly not constitute provincial legislation and could not validly have been repealed by Act 7. Those provisions of the proclamation that fall within the functional areas specified in schedule 6 must, however, satisfy a further negative condition before their administration could have been assigned under section 235(8)(a): they must not deal with matters referred to in Para (a) – (e) of s126(3)). It is only when both these tests are satisfied that the administration of any provisions of the proclamation could have been assigned to the North West by the President. Once assigned, such provisions constituted provincial legislation and could validly have been repealed by Act 7.

- (b) The application of the above assignment criteria to sections 1 and 2(7), (7)bis, (7)ter and (8) of the BAA and the application of section 235 of the interim Constitution lead to the following conclusion:
  - (i) With regard to the question whether the law was subject to assignment by the President: The relevant sections existed when the interim Constitution took effect. It fell within the purview of section 235(6) and its administration was therefore assignable.
  - (ii) With regard to the question whether the assigned sections related to matters which fell within the functional areas specified in Schedule 6: The Commission is of the opinion that although the "supreme chieftaincy" of all Africans in the country (section 1) is not strictly speaking an indigenous law or customary law concept, its original introduction into the law in the 19<sup>th</sup> century created such law. There are various tribes that have supreme chiefs as well. The same applies to section 2(7), (7)bis, (7)ter and (8) that make provision for the appointment of certain persons. Therefore the subject matter of both section 1 and section 2(7), (7)bis, (7)ter and (8) fall within Schedule 6.
  - (iii) With regard to the question whether the law deals with matters referred to in paras (a) - (e) of section 126(3) of the interim Constitution: These particular sections do not fall within the above-mentioned paragraphs.
- (c) In view of the above, the Commission is of the opinion that these sections are provincial legislation and that a provincial legislature may repeal the legislation.
- (d) The application of the above assignment criteria to the Code and the application of

section 235 of the interim Constitution lead to the following conclusion:

- (i) With regard to the question whether the law was subject to assignment by the President: The Code existed when the interim Constitution took effect. It fell within the purview of section 235(6) and its administration was therefore assignable.
  - (ii) The question whether the assigned sections related to matters which fell within the functional areas specified in Schedule 6, presents more difficulty. There are certain provisions of the Code which definitely fall within Schedule 6 but there are certain provisions of the Code (such as actionable wrongs and civil procedure) which do not fall within Schedule 6.
  - (iii) With regard to the question whether the law deals with matters referred to in paras (a) - (e) of section 126(3) of the interim Constitution: There are certain provisions of the Code (such as actionable wrongs and civil procedure) that fall within section 126(3)(b).
- (e) In view of the above analysis of the Code each provision will have to be evaluated to determine whether it falls within the exclusions in paras (a) - (e) of section 126(3) of the interim Constitution. If it does not fall within the exclusions, it constitutes provincial legislation that may be repealed by the provincial legislatures concerned.

1.4.12 From the discussion in 1.4.11 it is clear that the provinces may repeal and amend the legislation assigned to them if it is provincial legislation. It would appear that the provinces have an exclusive right to do so due to the fact that the President may not exercise his right to repeal the legislation assigned in terms of item 14 of Schedule 6 of the Constitution. From the provisions of Schedule 6 of the Constitution the following crystallises:

- (a) In terms of item 14(5) of Schedule 6 to the Constitution, all assignments made under the 1993 Constitution are regarded to be assignments under the present Constitution. Furthermore, in terms of item 14(2) the President may repeal those provisions to which an assignment applies, where the assignment does not apply to the whole of any piece of legislation. Item 14(1), (2) and (5) provides as follows:

(1) Legislation with regard to a matter within a functional area listed in Schedule 4 or 5 to the new Constitution and which, when the new Constitution took effect, was administered by an authority within the national executive, may be assigned by the President, by proclamation, to an authority within a provincial executive designated by

the Executive Council of the province.

(2) To the extent that it is necessary for an assignment of legislation under subitem (1) to be effectively carried out, the President, by proclamation, may-

- (a) amend or adapt the legislation to regulate its interpretation or application;
- (b) where the assignment does not apply to the whole of any piece of legislation, repeal and re-enact, with or without any amendments or adaptations referred to in paragraph (a), those provisions to which the assignment applies or to the extent that the assignment applies to them; or
- (c) regulate any other matter necessary as a result of the assignment, including the transfer or secondment of staff, or the transfer of assets, liabilities, rights and obligations, to or from the national or a provincial executive or any department of state, administration, security service or other institution.

(3) ...

(4) ...

(5) Any assignment of legislation under section 235 (8) of the previous Constitution, including any amendment, adaptation or repeal and re-enactment of any legislation and any other action taken under that section, is regarded as having been done under this item.

- (b) The interim Constitution had a provision similar to item 14(2) of Schedule 6 of the final Constitution, but these powers seem, in at least one respect, to differ fundamentally from each other. In item 14(2) the President's powers to so change the assigned law "**at any time after the assignment**" no longer appears. This inevitably creates the impression that the President cannot now, long after the date of the assignment, effect such changes by subordinate legislation, e.g. by proclamation. The relevant introductory wording of item 14(2), creates the impression that a power so to change the assigned law after the date of assignment cannot by implication be inferred. It is uncertain whether this result really accords with the underlying intention, but, in any case, it would seem dangerous to accept that such powers have been retained in the absence of express mention thereof. The most acceptable interpretation then would seem to be that the President does not have the power to repeal or amend the legislation under item 14(2)(b) of the Schedule concerned.

1.4.13 From the discussion in paragraph 1.4.12 it would appear that the President may not repeal or amend any assigned legislation by proclamation under Schedule 6 of the final Constitution. The remaining question is whether Parliament has retained its inherent right to amend or repeal legislation that has been assigned by proclamation, and if so, whether it has preference over the provincial legislatures.

- (a) The legislative authority of Parliament is determined by sections 43 and 44 of the Constitution which respectively provide as follows:

In the Republic, the legislative authority-

- (a) of the national sphere of government is vested in Parliament, as set out in section 44;
- (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
- (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156.

(1) The national legislative authority as vested in Parliament-

- (a) confers on the National Assembly the power-
  - (i) to amend the Constitution;
  - (ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and
  - (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and
- (b) confers on the National Council of Provinces the power-
  - (i) to participate in amending the Constitution in accordance with section 74;
  - (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and
  - (iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.

(2) Parliament may intervene, by passing legislation in accordance with section 76 (1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4 is, for all purposes, legislation with regard to a matter listed in Schedule 4.

(4) When exercising its legislative authority; Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.

- (b) Section 44(1)(a)(ii) confers the power on Parliament to pass legislation on the same subject matter that provincial legislatures may. However, the Commission is of the opinion that section 43 read with section 44 of the Constitution does not confer on Parliament the power to make laws in the provincial sphere of government. Consequently, Parliament can neither make provincial legislation nor repeal existing provincial legislation. In view of the conclusion in paragraph 4.1.11 that the assigned

provisions of the Act and the Code are provincial legislation, the Commission is of the opinion that Parliament cannot repeal the said sections of the Act and the Code.

- (c) However, Parliament may, in terms of section 146 of the Constitution, in certain circumstances pass legislation which is in conflict with the assigned sections of the Act and the Code. In such a case the legislation made by Parliament shall prevail if the requirements of section 146(2) or (3) of the Constitution are met. If the legislation made by Parliament prevails with respect to all aspects of the assigned sections of the Act and the Code, the effect thereof will be as if the assigned sections of the Act and the Code have been repealed.

1.4.14 As a general rule it may be stated that legislation assigned by the President under the Constitution becomes provincial legislation. Although not expressly stated by the Constitution, the provinces, once the legislation becomes provincial legislation, have the power to repeal or amend the legislation so assigned. Due to the lapse of time the President may not exercise his constitutional right to amend or revoke assigned legislation by means of proclamation. By the same token Parliament does not have the power to amend provincial legislation, except in certain circumstances.

1.4.15 It must be pointed out that the conclusions drawn by the Commission regarding –

- (a) the power of the relevant provinces to repeal provincial legislation;
- (b) the President's inability to repeal the assigned sections of the BAA and the Code in terms of item 14 of Schedule 6 of the Constitution; and
- (c) Parliament's inability to make laws in the provincial sphere of government and therefore to repeal existing provincial legislation,

were supported by a legal opinion obtained from the State Law Advisers at the Commission's request.<sup>19</sup>

## **1.5 THE METHODOLOGY FOLLOWED**

1.5.1 The study into the repeal of the BAA consists of three phases. The first phase culminated in a first interim Report which identified those sections of the BAA that, on the surface, appeared redundant or inconsequential and which could be repealed immediately. Consultations were held with various experts, national and provincial government departments and other

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<sup>19</sup> Opinion no. 229/2004, dated 25 June 2003.

organisations. The comment received, together with comment received during phase 2 (see par 1.5.2) was evaluated and incorporated into the first interim Report. Since the first interim report has not been published separately, the recommendations made in that report have been incorporated in this Report (see Chapter 2).

1.5.2 The second phase consisted of a series of investigations into the BAA. The first investigation highlighted those sections of the BAA that created a detailed system of governance and of which the outright repeal did not represent a satisfactory solution. The next step was to identify those sections of the BAA that are supportive of other sections or are standard provisions found in legislation. These sections cannot be repealed outright until the last vestiges of this particular Act are removed. The last part of the investigation focused on sections that had been earmarked for repeal as a result of other studies undertaken by the Commission and will be repealed once the legislation proposed in terms of those studies are promulgated. The results of phase 2 of the study informed Chapter 3 of this Report.

1.5.3 The third and final phase will consist of an investigation into legislation with racial connotations or legislation which contains discriminatory provisions as a residue of the BAA, as well as subordinate legislation promulgated in terms of the BAA. This phase will be dealt with in the broader investigation of revising the South African statute book for constitutionality, redundancy and obsolescence (see par. 1.1.3).

1.5.5 **Annexure A** to this Report contains a proposed draft Bill reflecting the various stages of the proposed repeal of all the provisions of the BAA. It also contains a remnant provision of the BAA that has to be retained, as well as a provision amending the Administration of Estates Act 66 of 1965. **Annexure B** contains a table reflecting the recommended action in respect of each section of the BAA. **Annexure C** contains a list of the respondents who submitted comment to the Commission. **Annexure D** contains a list of bodies and institutions approached by the Commission for comment.

## CHAPTER 2

### SECTIONS OF THE BLACK ADMINISTRATION ACT WHICH MAY BE REPEALED IMMEDIATELY

#### 2.1 SECTION 1: POWERS OF GOVERNOR-GENERAL AS SUPREME CHIEF

##### 1. Introduction

2.1.1 Section 1 of the BAA reads as follows:

The Governor-General [President] shall be Supreme Chief of all Blacks in the Union [Republic] and shall in respect of all Blacks in any part of the Union [Republic] be vested with all such rights, immunities, powers and authorities as are or may be from time to time be vested in him in respect of Blacks in the Province of Natal.

##### 2. Background

###### *Historical perspective*

2.1.2 The policy underlying this particular section can be traced back to the 19<sup>th</sup> century. It was felt that Africans could not be governed by the common law and that it was essential that they be governed in terms of their own laws and customs.<sup>20</sup> The result of the policy was that a law was passed in Natal in 1850 enabling administrators of 'Native' law to govern Africans in accordance with their own laws and customs and providing for an appeal to the Lieutenant-Governor of Natal as Supreme Chief of the African population (thus replacing the Zulu monarch).<sup>21</sup>

2.1.3 In 1885 the State President of the Transvaal Republic was proclaimed "Paramount Chief of the Native population".<sup>22</sup> After annexation by Britain these special powers of the State President<sup>23</sup> vested in the Governor of the Colony and Governor of the Orange Free State Colony.<sup>24</sup> At the establishment of the Union, the separate administration laws in force in the different colonies were followed by the supreme chieftainship of the Governor-General-in-

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<sup>20</sup> The father of this idea was Sir Theophilus Shepstone, who was Governor of Natal from 1845-1875.

<sup>21</sup> Brookes *The History of Native Policy in South Africa from 1830 to the Present Day* (1924) 125.  
<sup>22</sup> Transvaal Law 4 of 1885.

<sup>23</sup> Article L.I of Letters Patent and Article L.11 of the Letters Patent issued in 1907.

<sup>24</sup> Rodgers *Native Administration in the Union of South Africa* (1933) 2-3.

Council.

2.1.4 Section 147 of the South Africa Act, 1909, granted the control and administration of African affairs throughout the Union to the Governor-General-in-Council.<sup>25</sup> He was empowered to exercise all special powers in regard to African administration that previously vested in the governors of the different colonies or exercised by them as supreme chiefs.<sup>26</sup>

2.1.5 Although section 1 was amended by section 2 of the Administration Amendment Act 9 of 1929, substituted by section 2 of the Black Administration Amendment Act 42 of 1956, and assigned to the premiers of certain provinces<sup>27</sup> in terms of section 235(8) of the interim Constitution,<sup>28</sup> it has remained virtually unchanged on the statute book to the present day.

***Which “rights, immunities, powers and authorities” vest in the President in terms of section 1?***

2.1.6 The President is vested with all such rights, immunities, powers and authorities as are or may from time to time be vested in him in respect of Africans in the Province of Natal. The Code of Zulu Law is the source of these rights, immunities, powers and authorities. There were four Codes of Zulu Law, namely those of 1932, 1967, 1985 and 1987. Under the 1932 Natal Code of Zulu Law and its 1967 successor,<sup>29</sup> the Governor of Natal, as supreme chief, exercised all political power over Africans in Natal and as such, he was empowered to —

- appoint and remove chiefs;
- decide questions of heirship to deceased chiefs;
- divide and amalgamate tribes;
- remove tribes or portions of tribes or individual Africans;
- call out armed men or levies;
- call upon Africans to supply labour for public works;
- punish political offenders and impose penalties for disobedience to his orders; and
- impose a fine upon an African community as a whole for suppressing evidence of crime.

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<sup>25</sup> The Governor-General-in-Council was the Governor-General acting by and with the advice of the Executive Council.

<sup>26</sup> Rodgers *Native Administration in the Union of South Africa* Second Edition (revised by Linington) (1949) p1.

<sup>27</sup> Eastern Cape, Mpumalanga, KwaZulu-Natal, Limpopo, North-West, and Free State.

<sup>28</sup> Act 200 of 1993.

<sup>29</sup> Proclamation 168 of 1932 and Proclamation 195 of 1967 respectively.

2.1.7 He was the upper guardian of African orphans and minors and his actions as supreme chief did not fall within the jurisdiction of the courts.

2.1.8 The Natal Code of Zulu Law of 1987<sup>30</sup> and the KwaZulu Act on the Code of Zulu Law of 1985,<sup>31</sup> repealed the 1967 code but did not include or refer to the rights, immunities, powers and authorities bulleted above. Although section 1 remained on the statute book, the source of these rights, immunities, powers and authorities had been repealed. It can be argued that this repeal has created a vacuum and the intention could only have been that these rights, immunities, powers and authorities had been withdrawn and can therefore no longer be exercised. Despite the fact that the supreme chief would no longer have statutory rights, immunities, powers and duties, it would appear that the supreme chief might have customary prerogative powers.

2.1.9 In ***Saliwa v Minister of Native Affairs***<sup>32</sup> it was intimated that the supreme chief did have such residual (or prerogative) powers. According to this judgment<sup>33</sup> the Governor-General as supreme chief was given all the rights and powers which were enjoyed by any supreme or paramount chief by virtue of section 2 of the 1932 Natal Native Code, but any power which was not specifically mentioned in the Code could not be invoked in court, unless it was proved in each case that such power was a power conferred by African law and custom.

2.1.10 In ***Rathibe v Reid and Another***<sup>34</sup> evidence was also led to show that in regard to the purchase of land, there was no obligation on the chief to obtain the consent of, or even to consult his people.

2.1.11 From the case law it would appear that the courts deem the supreme chief to be the holder of prerogative rights, although these would have to be proved in accordance with customary law in each particular case. Although the supreme chief may not have statutory powers in this regard, he has customary prerogative powers. As far as could be determined he has only exercised this particular power once. In the 1960s all the male taxpaying members of a community in KwaZulu-Natal were fined to suppress unrest and conflict within their ranks.

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<sup>30</sup> Proclamation 151 of 1987.

<sup>31</sup> Act 16 of 1985.

<sup>32</sup> 1956 2 SA 310 (A).

<sup>33</sup> At p317.

<sup>34</sup> 1927 AD 74.

***The supreme chief as upper guardian of African orphans and minors***

2.1.12 If it is accepted that the supreme chief has customary prerogative powers that could be invoked in a court of law, there are two powers in the code that need further investigation. These are the powers relating to the supreme chief as upper guardian of all African orphans and minors contained in the 1932 version of the code. Added to this, if there was no male heir, property that was to devolve according to customary law reverted to the supreme chief and the women of the family home as well as the family fell under the guardianship of the supreme chief. He could also appoint an African guardian.

2.1.13 As stated above these provisions were not repeated in the 1985 and 1987 codes. However, one remnant of the concept of the supreme chief as upper guardian has remained on the statute book. Regulation 7(2) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks<sup>35</sup> provides:

(2) These regulations do not limit or restrict the exercise by the Supreme Chief of his functions as the upper guardian of Black orphans and minors.

2.1.14 Generally, applicable legislation takes care of situations in respect of which there might have been legal lacunae in the past. For instance, in terms of section 1(1) of the Guardianship Act 1993,<sup>36</sup> married women have the same measure of guardianship of their minor children born out of a civil marriage as their husbands and in terms of section 6 of the Recognition of Customary Marriages Act 1998,<sup>37</sup> a wife in a customary marriage has, on the basis of equality, the same legal capacity as her husband, in addition to any rights and powers that she might have at customary law.

2.1.15 The Age of Majority Act, 1972,<sup>38</sup> furthermore did away with the former so-called minority of females. In terms of section 1 of that Act, "all persons, whether males or females, attain the age of majority when they attain the age of twenty-one years." In terms of section 9 of the Recognition of Customary Marriages Act, 1998, the age of majority of any person is determined

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<sup>35</sup> GN R200 of 1987.

<sup>36</sup> Act 192 of 1993.

<sup>37</sup> Act 120 of 1998.

<sup>38</sup> Act 57 of 1972.

in accordance with the Age of Majority Act, 1972, despite the rules of customary law.

2.1.16 If an unmarried African woman or both parents married by customary law should die, guardianship of the child or children would have to be dealt with in terms of customary law, that is, the eldest surviving male relative would generally acquire guardianship of the children. It is a moot point whether the High Court as upper guardian of all children could appoint somebody else as guardian while the supreme chief is the statutory upper guardian. It would in any event be impractical for the supreme chief to intervene if there is no male customary law guardian or if the guardian indicated by customary law is unsuitable.

2.1.17 If the estate of a single parent or a parent married by customary law should devolve according to customary law, the Master of the High Court does not have jurisdiction in respect of the property concerned because section 4(1A) of the Administration of Estates Act 1965<sup>39</sup> now provides that: “[t]he Master shall not have jurisdiction in respect of any property if the devolution of the property is governed by the principles of customary law, or the estate of a person if the devolution of all the property of the person is governed by the principles of customary law, and no documents in respect of such property or estate shall be lodged with the Master, except a will or document purporting to be a will”. This subsection was inserted by section 2(b) of the Administration of Estates Amendment Act, 2002.<sup>40</sup>

2.1.18 The magistrate administering the estate may, in terms of regulation 7(1) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (Government Notice R200 of 1987) “take all such steps as he may consider necessary to safeguard and preserve the inheritance or interest of minors and may deposit the cash inheritance of any minor in the Guardian’s fund, giving at the same time to the Master particulars as to the deceased parent, the date of birth of the minor and the name and address of the guardian.” This does not empower a magistrate to appoint a guardian, whereas in estates administered in terms of the Administration of Estates Act, 1965, the Master may appoint a curator dative to a minor whose property is not under the care of any guardian, tutor or curator. This means that a minor without a guardian is left with inadequate protection. In the circumstances consideration should be given to the amendment of regulation 7(1) of the Estate Regulations to provide for the appointment of a curator dative.<sup>41</sup>

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<sup>39</sup> Act 66 of 1965.

<sup>40</sup> Act 47 of 2002.

<sup>41</sup> However, see the recommendation in par 2.1.26 below.

***Assignment of section 1 to the provinces***

2.1.19 Section 1 of the Act has, in terms of section 235(8) of the interim Constitution,<sup>42</sup> been assigned to the Premiers of six provinces, that is, Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North-West.<sup>43</sup> The result of the assignment is that section 1 has become provincial law in those provinces to which it was assigned and only those provinces may repeal this particular section. The peculiarity of the repeal of section 1 will be that Parliament will repeal it for the provinces of Gauteng, Western Cape and Northern Cape and that the other provinces will have to repeal it individually. See paragraph 1.4 of this Report.

2.1.20 It is not clear why the Gauteng, Northern Cape and Western Cape provinces were excluded from this particular assignment. It is likely, however, that the assignment of this section to the first-mentioned provinces is linked to the fact that the former Transkei, Bophuthatswana, Venda and Ciskei and self-governing territories formed part of these provinces. The chief ministers and presidents of those states and territories fulfilled the role of supreme chief and the assignments were probably intended as a measure to ensure the continuity of the functions of the supreme chief in these states and territories by present provincial office-bearers (the premiers). The current status is that the President is supreme chief of all Africans in the Gauteng, Western Cape and Northern Cape provinces and each of the premiers of the other provinces is the supreme chief in the related province.

***Is the “supreme chief” a traditional leader within the meaning of section 211 of the Constitution?***

2.1.21 The concept of supreme chief in South African legislation comes from the English common law prerogative of the King or Queen. Wiechers<sup>44</sup> submits that “[t]he executive is empowered by virtue of prerogative to perform administrative acts. In this way rules of administrative law may be promulgated when war is declared, peace is made and territory annexed. If, for example, the President annexes a certain territory and issues certain

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<sup>42</sup> Act 200 of 1993.

<sup>43</sup> Proclamation 139 of 1994.

<sup>44</sup> *Administrative Law* 1985 35.

proclamations in which rules are laid down for the internal administration of the territory, the rules to the internal administration will certainly be rules of administrative law.” Natal was annexed by the English and the concept of “supreme chief” was created to deal with the affairs of the Africans of Natal in a uniform manner. This creation of supreme chief was a prerogative arrogated by the conquering power to issue rules of administration of an annexed territory and an indirect recognition of the indigenous law of the territory. The concept was extended to other areas as well.

2.1.22 When evaluating the concept of supreme chief against section 211 of the final Constitution, it is clear that the “supreme chief” is not a traditional leader simply because, per requirement in section 211, it is not an “institution according to customary law” nor is it a “traditional authority that observes a system of customary law”. Traditional leaders are also creatures of statute because they are recognised — in fact appointed. If the supreme chief is not a traditional leader as contemplated in section 211, do the provinces have concurrent legislative powers with regard to the supreme chief?

2.1.23 Although the concept of supreme chief has as its *raison d’être* the philosophical reasoning as discussed above, there can be no doubt that it relates to indigenous law and customary law and as such is a functional area of concurrent legislative competence as envisaged in Schedule 4 of the final Constitution. In the circumstances it may safely be assumed that the provinces also have legislative powers in regard to the supreme chieftainship.

### **3. Comments received**

2.1.24 Overwhelming support for the repeal of section 1 was received from the following persons:

- Free State Province: State Law Advisor: Adv KJC Lekoeha
- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Rhodes University: Faculty of Law: Prof AJ Kerr
- Chief Magistrate’s Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Regional Head: KZN Department of Justice and Constitutional Development
- University of Cape Town: Faculty of Law Private Law Department: Prof C Himonga
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer

- University of Transkei: Faculty of Law: Prof DS Koyana

2.1.25 With regard to the upper guardianship of the President over African orphans and minors, comments were received from –

- Justice College: Master's Training Division: Ms M Meyer and Mr T Rudolph
- Department of Justice and Constitutional Development: Directorate of Law Enforcement of the Business Unit: Legal Services: Ms T Bezuidenhout and Ms C Badenhorst
- Department of Justice and Constitutional Development: Directorate of Legislation Development of the Business Unit: Legislation and Constitutional Development: Ms T Ross
- University of Cape Town: Faculty of Law: Private Law Department: Prof C Himonga

2.1.26 A meeting was held with representatives from Justice College and the relevant Directorates of various Business Units of the Department of Justice and Constitutional Development. It was agreed that African orphans and minors should be in the same position as other minors, i.e. that the High Court should be the upper guardian. It was further agreed that the applicable legislation be amended to ensure legal certainty. The provisions identified for consideration were sections 4 and 73 of the Administration of Estates Act 66 of 1965 and regulation 7 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, 1987. The participants at the meeting resolved that section 4 of the Administration of Estates Act should be amended and that section 73 requires no amendment, as the latter applies to all minors – African and otherwise. It was further resolved that it is unnecessary to amend regulation 7(1) to provide for the appointment of a curator dative, and that regulation 7(1) and (2) of the mentioned Regulations should be repealed. This recommendation addresses Prof Himonga's concern that the amendment of regulation 7(2) would create unnecessary tensions between customary law as recognised by the Constitution and other systems of law, such as common law or legislation.

#### **4. Conclusion**

2.1.27 Section 1 of the Act grants the President and the premiers of the provinces to which the section has been assigned, supreme chieftaincy. The contents of this supreme chieftaincy can no longer be found in legislation. The courts, however, have found the supreme chief to have

customary prerogative powers. These customary prerogative powers can be related to the role of the supreme chief as upper guardian of all African orphans and minors. The current institutional structures must provide equal protection to orphans and minors and should as a result be amended.

## **5. Recommendation**

2.1.28 It is recommended that:

- section 1 be repealed by Parliament in the Gauteng, Western Cape and Northern Cape provinces;
- the remaining provinces be requested to add the repeal of section 1 to their legislative programme;
- regulation 7(1) and 7(2) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, 1987, be repealed; and
- section 4 of the Administration of Estates Act, 1965, be amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:<sup>45</sup>

“In respect of the property belonging to a minor, including property governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-“.

Clause 2 of the proposed draft Bill in **Annexure A** to this Report contains the amendment of the Administration of Estates Act, 1965.

## **2.2 SECTION 2: APPOINTMENT OF CERTAIN OFFICE-BEARERS**

### **1. Introduction**

2.2.1 Subsections (1) to (6) of section 2 of the BAA provide for the appointment of different categories of commissioners and tribal settlement superintendents. The subsections read as follows:

- (1) The Minister may, subject to the law governing the public service, appoint for any

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<sup>45</sup> Underlined parts indicate insertions in the existing enactment.

area an officer, to be styled Chief Commissioner, who shall exercise such powers and perform such duties as the Minister may from time to time prescribe, and so many officers, to be styled Assistant Chief Commissioners, as he may deem necessary to assist the Chief Commissioner in carrying out the functions assigned to him.

(2) Subject to the provisions of the law governing the public service and of subsection (3), the Minister, or the Secretary for Plural Relations and Development, may appoint for any area in which a large number of Blacks reside a Commissioner and so many additional Commissioners and Assistant Commissioners as he may deem necessary, who shall perform such duties as may be prescribed by any law or assigned to them by the Minister.

(3) No person shall be appointed under subsection (1) or (2) unless he is, at the time of his appointment, a member of the public service, in terms of section 3 of the Public Service Act, 1957 (Act 54 of 1957), and unless—

- (a) he has passed the diploma *iuris* examination or an examination determined by the Minister for the Public Service and Administration to be equivalent thereto for the purposes of this section; or
- (b) he held, at the commencement of this Act, the post of commissioner sub-commissioner; or
- (c) he was continuously employed in the Department of Plural Relations and Development or in the Department of Justice as from the thirty-first day of May, 1910, to the date of his appointment as aforesaid.

(5) Subject to the provisions of the law governing the public service, the Minister, or if delegated thereto by the Minister, the Secretary for Plural Relations and Development, or a Deputy Secretary or an Under Secretary of the Department of Plural Relations and Development may appoint for any area for which a Commissioner has been appointed, a tribal settlement superintendent to assist the commissioner to control or supervise any tribal settlement in that area, and so many persons as may be necessary to assist such a superintendent, and may prescribe the duties of any superintendent or other persons so appointed.

(6) The Minister, or if delegated thereto by the Minister, the Secretary for Plural Relations and Development, or any other officer of the Department of Plural Relations and Development, may when circumstances require appoint any person to act temporarily as Chief Commissioner or Commissioner, or tribal settlement superintendent, in the place of or in addition to the ordinary incumbent of the post, or when the post is vacant or for an area in respect of which there is ordinarily no such post, even though the person so appointed is not qualified for permanent appointment to the post in question, by reason of the provisions of subsection (3).

## **2. Background**

2.2.2 These offices were instituted to constitute the administrative arm of the separate administration of Africans.

## **3. Comments received**

2.2.3 Comments were received from:

- University of Transkei: Faculty of Law: Prof DS Koyana
- Province of the Western Cape: Office of the Premier: Premier Mr MCJ van Schalkwyk
- Rhodes University: Faculty of Law: Prof AJ Kerr
- Mpumalanga House of Traditional Leaders: Chairperson: Kgosi MF Mashile
- Regional Head: KZN Department of Justice and Constitutional Development
- Parliament: PHK Ditshetelo, MP
- Director-General: Department of the Premier: Free State Province: Khotso DE Wee
- Magistrate of Wynberg: MM Dimbaza
- Director-General: Department of Home Affairs: BP Gilder
- Limpopo Provincial Government: Office of the Premier: Legal Services
- Minister of Local Government: Western Cape: C Dowry
- Director-General: Department of Provincial and Local Government: L Msengana-Ndlala
- Office of the Premier: Mpumalanga Provincial Government: State Law Advisers

2.2.4 Meetings were also convened with representatives from the Department of Land Affairs and the Department of Provincial and Local Government who were in agreement that section 2(1) - (6) could be repealed.

2.2.5 There is also consensus amongst the respondents that this section should be repealed.

#### **4. Conclusion**

2.2.6 These offices have fallen into disuse and should be removed.

#### **5. Recommendation**

2.2.7 It is recommended that section 2(1) to (6) be repealed.

### **2.3 SECTIONS 11 AND 11A: WHAT LAW TO BE APPLIED IN COMMISSIONERS' COURTS AND LEGAL CAPACITY OF BLACK WOMEN IN RELATION TO LEASEHOLD AND OWNERSHIP**

## 1. Introduction

### 2.3.1 Section 11(3) of the BAA reads as follows:

(3) The capacity of a Black to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European: Provided that—

- (a) if the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncodified) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law.

### 2.3.2 Section 11A reads as follows:

Notwithstanding any law affecting the status or contractual capacity of any person by virtue of Black law and custom, the capacity of a Black woman to perform any juristic act with regard to the acquisition by her of a right of leasehold, sectional leasehold or ownership under any law or the disposal of any such right or the borrowing of money on security of such right or the performance of any other juristic act in connection with such right or to enforce or defend her rights in connection with such right in any court of law, shall be determined and any such rights acquired by her shall vest in her and any obligation incurred by her shall be enforceable by or against her as if she were not subject to Black law and custom.

## 2. Background

2.3.3 Section 11A was introduced into the BAA by the Laws on Co-operation and Development Second Amendment Act 90 of 1985. The insertion of this particular section was primarily due to the fact that African women could not secure loans from building societies to obtain leasehold or sectional leasehold, despite the fact that they were very often the sole breadwinners.<sup>46</sup> At the time of the insertion African women who were married by virtue of a customary union were deemed to be minors and their husbands were deemed to be their guardians. As a result, their status was that of a perpetual minor. They could therefore not enter into contracts or acquire property in their own right. Before its repeal, section 11(3)(b)<sup>47</sup> of the Act provided as follows:

A Black woman who is partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

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<sup>46</sup> Hansard, 12 June 1985, 7376.

<sup>47</sup> Section 11(3)(b) was repealed by the Recognition of Customary Marriages Act.

2.3.4 The result of this particular section was that building societies were of the opinion that it was possible for an African woman to claim that she was unmarried whilst being a party to a customary union. If the “customary union” husband claimed the property, the building society would have no rights against her. African women were being refused loans by these institutions for this reason. They were therefore excluded from the rights that White, Indian and Coloured women were entitled to in terms of the Matrimonial Property Act, 1984.<sup>48</sup>

2.3.5 In 1985 the right granted to African women was to obtain leasehold or sectional leasehold in areas governed under the Blacks (Urban Areas) Consolidation Act<sup>49</sup> and the Black Communities Development Act.<sup>50</sup> In 1987 the right contained in section 11A was extended to include full ownership rights in terms of the Constitutional Laws Amendment Act 32 of 1987.

### ***Recognition of Customary Marriages Act, 1998***

2.3.6 The purpose of including a discussion of the Recognition of Customary Marriages Act is to determine whether the Act in question protects the property rights of women married in accordance with customary law.

2.3.7 Section 6 of the Recognition of Customary Marriages Act reads as follows:

#### **Equal status and capacity of spouses**

**6.** A wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

2.3.8 When evaluating this particular section it is quite clear that the intention of the legislature is to grant a woman in a customary marriage full legal status and legal capacity, including the acquisition of assets. However, the words “in a customary marriage” would imply that if she is divorced or if her husband dies, she will no longer enjoy that capacity.

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<sup>48</sup> Act 88 of 1984.

<sup>49</sup> Act 25 of 1945.

<sup>50</sup> Act 4 of 1984.

2.3.9 Section 9 of the Recognition of Marriages Act provides that “*despite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 57 of 1972*”. This was ostensibly meant to bring all major persons within the ambit of legal capacity as contemplated in the common law. This is not as clear-cut as it seems to be, because section 11(3)(a) of the BAA has not been repealed yet.

2.3.10 As a result of section 11(3)(a) of the BAA, a single African woman has legal capacity for purposes of common law, but not in respect of customary law. She would, for instance, be entitled to accept employment or buy and sell assets, but not for customary law purposes. She may, for instance, not become a family head and she may not negotiate about lobolo for her own children. These transactions may be negligible in present social circumstances, but the point is that single women and men too for that matter, are still minors in customary law.

2.3.11 It is therefore recommended that section 11(3)(a) be repealed and that the determination of the age of majority of any person be made in accordance with the Age of Majority Act.

### ***Application of section 11A in the former TBVC states***

2.3.12 Section 11A was only introduced into the Act in 1985. By that time the TBVC states had gained ‘independence’ and as a result this particular section never found application in those territories.

## **3. Comments received**

2.3.13 Comments were received from the following persons:

- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Rhodes University: Faculty of Law: Prof AJ Kerr
- Chief Magistrate’s Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana
- Province of the Western Cape: Office of the Premier: Premier Mr MCJ van Schalkwyk

- Mpumalanga House of Traditional Leaders: Chairperson: Kgosi MF Mashile
- Parliament: PHK Ditshetelo, MP
- Director-General: Department of Home Affairs: BP Gilder
- Limpopo Provincial Government: Legal Services: Office of the Premier
- Minister of Local Government: Western Cape: C Dowry
- Director-General: Department of Provincial and Local Government: L Msengana-Ndlala
- Office of the Premier: Mpumalanga Local Government: State Law Advisers

2.3.14 There was consensus amongst the majority of respondents that this particular section, together with section 11(3)(a), may be repealed. Prof Kerr, however, recommends that a separate Act be drafted to replace section 11A. Although the reasoning for this particular section was mainly to assist wives in customary marriage, it is more extensive as it refers to “the capacity of a Black woman to perform any juristic act.” It thus benefits also major spinsters. If section 11A were to be repealed, there would be no statutory rule on their freedom to perform “juristic acts” (not only to enter into contracts).

2.3.15 After a study into the Age of Majority Act and the provisions of the Constitution, it was felt that these two suites of legislation confirm and entrench the age of majority of all persons.

#### **4. Conclusion**

2.3.16 Until its repeal, section 11(3)(b) of the Act deemed African women who were partners in customary unions to be perpetual minors, and as such, they were not capacitated to enter into any agreements. The purpose of the addition of section 11A to the Act was to provide these African women with an opportunity to obtain leasehold and ownership rights in property despite the fact that they were deemed perpetual minors. The rights of African women in customary unions enshrined in this particular section are protected by section 6 of the Recognition of Customary Marriages Act and the rights of single African women are dealt with in the Age of Majority Act.

#### **5. Recommendation**

2.3.17 It is recommended that:

- sections 11(3)(a) and 11A of the BAA be repealed; and
- the repeal should include a safety clause to protect any vested rights that African women may have acquired in terms of section 11A.

## **2.4 SECTION 21A: CONFERRING OF CIVIL AND CRIMINAL JUDICIAL POWER ON CERTAIN BLACKS**

### **1. Introduction**

2.4.1 Section 21A of the BAA provides for judicial powers to be conferred on a Black person resident in townships outside the 'homelands'. It reads as follows:

(1) The Minister may, after consultation with any community council established under section 2(1) of the Community Councils Act, 1977 (Act No. 125 of 1977), confer on a Black in respect of the area of such council or such portion of such area as the Minister may determine, the same judicial power as in terms of sections 12 and 20 of this Act may be conferred on a Black chief or headman.

(2) The appropriate provisions of the said sections 12 and 20 and any regulations made thereunder shall, subject to such exceptions and to such adaptations and modifications with reference to such regulations as the Minister may in general or in a particular case deem necessary and made known by notice in the Gazette, mutatis mutandis apply in connection with the judicial power conferred on any person in terms of subsection (1).

### **2. Background**

2.4.2 The history of this section goes back to 1961 when urban black councils were established. In terms of section 5 of the Urban Black Councils Act,<sup>51</sup> the Minister of Black Administration and Development could confer the judicial powers of a traditional leader upon an African resident of an urban area. The urban black councils were abolished by the Community Councils Act<sup>52</sup> which in turn established community councils. Their powers and duties, included administrative duties as well as the maintenance of law and order. In 1980 the BAA was amended and the Minister, in consultation with the community council, could confer upon any African urban resident the same judicial powers as those conferred upon a chief or headman in terms of the same Act. It is not certain whether such courts have indeed been instituted in terms

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<sup>51</sup> Act 79 of 1961.

<sup>52</sup> Act 125 of 1977.

of the Act. (See Schärf and Nina *The Other Law: Non-State Ordering in South Africa* (2001) 28) Even if there were such courts, which is unlikely, this section has been a dead letter for a long time.

2.4.3 At the time (in 1980) there were many informal community courts (makgotla). The idea was no doubt to regulate them officially on the basis of traditional authority courts.

### **3. Comments received**

2.4.4 Comments were received from the following persons:

- University of Transkei: Faculty of Law: Prof DS Koyana
- Province of the Western Cape: Office of the Premier: Premier Mr MCJ van Schalkwyk
- Rhodes University: Faculty of Law: Prof AJ Kerr
- Mpumalanga House of Traditional Leaders: Chairperson: Kgosi MF Mashile
- Regional Head: KZN Department of Justice and Constitutional Development
- Parliament: PHK Ditshetelo, MP
- Director-General: Department of the Premier: Free State Province: Khotso DE Wee
- Magistrate of Wynberg: MM Dimbaza
- Director-General: Department of Home Affairs: BP Gilder
- Limpopo Provincial Government: Legal Services: Office of the Premier
- Minister of Local Government: Western Cape: C Dowry
- Director-General: Department of Provincial and Local Government: L Msengana-Ndlala
- Office of the Premier: Mpumalanga Local Government: State Law Advisers

2.4.5 All the respondents supported the repeal of this section.

### **4. Conclusion**

2.4.6 There are no community councils in existence and the repeal of sections 12 and 20 of the BAA will be considered when the enactment of the draft Traditional Courts Bill, already proposed by the Commission in its Report on Traditional Courts and the Judicial Function of

Traditional Leaders (currently under consideration by the Department of Justice and Constitutional Development), is promoted.

## **5. Recommendation**

2.4.7 It is recommended that section 21A be repealed.

## **2.5 SECTION 26: LIST OF PROCLAMATIONS TO BE LAID BEFORE PARLIAMENT AND THE RELATED SECTIONS THAT ARE AFFECTED BY IT**

### **1. Introduction**

2.5.1 Section 26 of the BAA reads as follows:

(1) A list of proclamations issued by the State President under the authority of this Act shall be laid upon the Tables of both Houses of Parliament in the same manner as the list referred to in section 17 of the Interpretation Act, 1957 (Act 33 of 1957), and every such proclamation shall be in operation unless and until both Houses of Parliament have, by resolutions passed in the same session, requested the State President to repeal such proclamation or to modify its operation, in which case such proclamation shall forthwith be repealed or modified, as the case may be, by a further proclamation in the Gazette.

### **2. Background**

2.5.2 This particular section was inserted to grant Parliament an opportunity to repeal or amend any proclamation that the President made in terms of the BAA. If a proclamation was not amended or repealed it would remain in force.

2.5.3 The following sections authorise the President to issue proclamations or make reference to proclamations issued in terms of the BAA:

- Section 6: Registration of titles to land by Chief Commissioner
- Section 7: Substitution of new title to land in certain areas
- Section 24: Operation of Code of Zulu Law
- Section 32: Penalties for breach of proclamation, rule or regulation
- Section 32A: Limitation of actions (repealed by Act 40 of 2002)
- Section 34: Extending operation of Act

- Section 37: Short title and commencement

### **3. Comments received**

2.5.4 Comments were received from the following persons:

- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Regional Head: KZN Department of Justice and Constitutional Development
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana

2.5.5 All the respondents supported the repeal of this section.

### **4. Conclusion**

2.5.6 Section 26 allows for the tabling in Parliament of proclamations issued by the President under the authority of the BAA in order to afford Parliament an opportunity to amend or repeal the proclamation. The repeal of this section will not affect the validity of any of the proclamations as this section does not authorise or enable the issuing of a proclamation. It is merely a requirement as to form. The proclamations are authorised by section 6, 7, 24 and 34. Although sections 32, 32A and 37 refer to proclamations, these sections are either of an administrative nature or aimed at facilitating the execution of the Act.

2.5.7 Furthermore, although the President's Office has been unable to provide information from their database as to the frequency of use of this section, it is recommended that section 26 be repealed as the *ratio* for this section has by and large fallen away.

### **5. Recommendation**

2.5.8 It is recommended that section 26 be repealed.

### **2.6 SECTION 27: GENERAL REGULATIONS**

## 1. Introduction

### 2.6.1 Section 27 of the BAA reads as follows:

- (1) The Governor-General may make regulations with reference to all or any of the following matters:
- (a) the exhibition of pictures of an undesirable character in any tribal settlement or Black compound or in any urban tribal settlement or Black village constituted under the Blacks (Urban Areas) Act, 1923 (Act 21 of 1923);
  - (b) the carrying of assegais, knives, kerries, sticks or other weapons or instruments by Blacks;
  - (c) the prohibition, control or regulation of gatherings or assemblies of Blacks;
  - (d) the observance by Blacks of decency;
  - (d) *bis* the prohibition, restriction or regulation of-
    - (i) the sale (within areas to be defined in the regulations) of goods to Blacks employed on mines or works otherwise than on payment in case of the full purchase price of the goods;
    - (ii) the lending of money by traders (including persons licensed under subsection (2) of section one hundred and twenty-seven of the Liquor Act, 1928 (Act 30 of 1928), to sell sorghum beer) or the recovery of money lent by traders (including persons so licensed) to Blacks so employed;
    - (iii) the presence of traders (including persons so licensed) or their representatives at places within areas to be defined in the regulations where Blacks so employed receive their wages and while they are being paid their wages;
    - (iv) the giving of any assistance, whatsoever, whether direct or indirect, by owners or managers of or persons employed on mines or works to traders (including persons so licensed) in the collection of debts owing to them by Blacks so employed; and
    - (v) generally, the giving of credit by traders to Blacks so employed;
  - (d) *ter* the control or regulation of any tribal practice involving the mutilation or removal of or any operation upon any part of the body;
  - (d) *quater* the prohibition, restriction or regulation of-
    - (i) the advertising, whether by word of mouth or by any other means, of Black medicines;
    - (ii) the advertising to Blacks, whether by word of mouth or by any other means, of any substance alleged to be capable of procuring for any person wealth or success in any undertaking or occupation or of producing in any person any disposition or attribute or immunity from, resistance against or susceptibility to hostile agencies, supernatural powers, witchcraft or unnatural diseases;
  - (d) *quin* the payment of an allowance to a Black contemplated in section 21A(1), and the defraying of expenses incurred by any such Black in the exercise of any power under that section, where such expenses are not defrayed from the funds of a community council in terms of section 9(2) of the Community Councils Act, 1977 (Act 125 of 1977); and
  - (e) generally for such other purposes as he may consider necessary for the

protection, control, improvement and welfare of the Blacks, and in furtherance of peace, order and good government, the generality of the powers conferred by this paragraph not being limited by the provisions of the preceding paragraphs.  
(2) Any such regulations may be made applicable only in any particular areas or in respect only of particular classes of persons, and different regulations may be made for different areas or in respect of different classes.

## **2. Background**

2.6.2 A provision of this nature is standard to ensure that the administration of the Act to which it relates can function effectively and efficiently within a framework of legal certainty.

2.6.3 Three regulations have been promulgated in terms of this section which have not yet been repealed or assigned to the provinces. They are:

- Control of Bantu Circumcision Schools in certain areas of the Province of Transvaal;<sup>53</sup>
- Repeal of legislation administered by the Department of Bantu Administration and Development;<sup>54</sup>
- Regulations relating to the advertising of Bantu medicines and the financial protection of Bantu.<sup>55</sup>

2.6.4 The other regulations promulgated in terms of this section or sections with similar capacity, were assigned to the relevant Provinces in terms of Proclamation No. 166 of 1994. The result of the assignment is that these regulations are provincial legislation and its repeal falls within the ambit of the provinces.

2.6.5 The need to issue regulations has fallen away and the three remaining sets of regulations may be repealed as well.

## **3. Comments received**

2.6.6 Comments were received from the following persons:

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<sup>53</sup> R194(P) of 8/9/1967.

<sup>54</sup> R265(P) of 20/9/1968.

<sup>55</sup> R1673 of 20/9/1968.

- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana

2.6.7 All the mentioned respondents supported the repeal of this section.

#### **4. Conclusion**

2.6.8 The need to issue regulations in terms of the BAA has fallen away and there is no reason for the continued existence of those regulations that were issued in terms of the Act.

#### **5. Recommendation**

2.6.9 It is recommended that section 27 be repealed.

### **2.7 SECTION 31: LETTERS OF EXEMPTION**

#### **1. Introduction**

2.7.1 Section 31 of the BAA reads as follows:

(1) In any case in which he may deem fit, the President may grant to any Black a letter exempting the recipient from Black law and customs.

(2) Any such exemption may be made subject to any conditions imposed by the President and specified in such letter.

(3) Any letter of exemption issued under any law included in the schedule to this Act shall be deemed to have been granted under subsection (1).

(4) Any letter of exemption granted under subsection (1), or referred to in subsection (3), may at any time be cancelled by the President without assigning any reason.

(5) The President may make regulations prescribing the forms of application for letters of exemption, the particulars to be submitted therewith, the method of registration of such letters, the fees which may be imposed, the form and issue of documents certifying the fact of exemption, the requirements as to the production of such documents and the penalties for willfully false statements made in connection with any application for exemption.

## 2. Background

2.7.2 The purpose of providing for exemptions can be found in history. The imperial powers considered it to be part of their civilizing missions to allow fully acculturated Africans exemptions from customary law in favour of what was thought to be the more advanced systems of metropolitan law.<sup>56</sup> The total effect of the exemption was never clear. Presumably the recipients could not be held liable in terms of customary law – but to what end? They could nevertheless enjoy the privilege of being subject to the more advanced common law only.

2.7.3 The present wording was introduced by section 17 of the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952. The wording of the original subsection (1) differs from that of the 1952 wording in a significant manner. In terms of the original wording the recipient of such a letter of exemption could be exempted from “such laws, specially affecting Natives, or so much of such laws as may be specified in such letter”, whereas in terms of the 1952 version of subsection (1) the recipient could be exempted from “Black law and custom”. Before the amendment the President could not grant exemption from laws regulating the ownership or occupation of land, or imposing taxation or controlling the sale, supply or possession of intoxicating liquor. The amended version did not impose any such limitation.

2.7.4 In 1936 the Governor-General published Letters of Exemption Regulations in terms of subsection (5)<sup>57</sup> (which has not yet been repealed). One letter of exemption exempted, among others, the recipient in the province of Natal from the Natal Code of Native Law<sup>58</sup> and any amendment thereto. The other laws listed in the regulations have become obsolete for present purposes, but the exemption from the Code of Zulu Law has survived, because regulation 2(b) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks<sup>59</sup> provides as follows:

If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the Code of Zulu Law, the property shall devolve as if he had been a European.

2.7.5 The latter regulation certainly impacts on the deceased estate of a recipient but the number, if any, of such letters of exemption granted cannot be determined. Any exemption

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<sup>56</sup> Bennet *A Sourcebook of African Customary Law for South Africa* (1991) 128.

<sup>57</sup> GN No 1233 of 21 August 1936.

<sup>58</sup> Proclamation 168 of 1932.

<sup>59</sup> R200 of 1967.

granted, however, has legal consequences to this day and any rights accrued in terms thereof need to be protected.

2.7.6 With regard to identification documents, section 3(4) of the Blacks (Abolition of Passes and Co-ordination of Documents) Act, provided that the holders of a certificate of exemption had to surrender the certificate of exemption in exchange for a reference book with a colour different from that of the outside cover of reference books issued to other Africans. The colour chosen was green.

2.7.7 The Blacks (Abolition of Passes and Co-ordination of Documents) Act was repealed by section 23 of the Identification Act of 1986, which made no provisions for distinctive identity documents. All existing identity documents were to be handed in and replaced by uniform ones.

### **3. Comments received**

2.7.8 Comments were received from the following persons:

- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana

2.7.9 All the respondents supported the repeal of this section.

### **4. Conclusion**

2.7.10 In view of the foregoing it is unlikely that any person is in possession of an identity document to show that he or she had been exempted from customary laws. However, the green reference books issued in terms of the Blacks (Abolition of Passes and Co-ordination of Documents) Act were only evidence of the exemptions, not the exemptions as such. Any exemption ever issued would therefore still be valid, despite the change in identification laws. The President could have issued certificates since the repeal of the Blacks (Abolition of Passes and Co-ordination of Documents) Act in 1986, but it is unlikely.

2.7.11 From the discussion relating to the identification documents above, it appears to be unlikely that any person will be in a position to produce a letter of exemption. It is nevertheless possible that letters of exemption are in existence. The question that arises, however, is whether an exemption could serve any purpose in our current constitutional framework. It is more than likely that this provision would in present-day circumstances be unconstitutional, because it purports to benefit only certain persons.

## **5. Recommendation**

2.7.12 It is recommended that section 31 be repealed subject to the retention of existing rights by recipients.

## **2.8 SECTION 33: EXEMPTION FROM STAMP DUTY**

### **1. Introduction**

2.8.1 Section 33 of the BAA reads as follows:

Notwithstanding anything in any other law contained, no stamp duty or fee shall be payable in respect of any declaration made under the provisions of this Act.

### **2. Background**

2.8.2 The only declaration that the BAA made provision for was the requirement in section 22 that an African man must make a declaration to the effect that he was not a partner in a customary union (with a woman other than the one he intends to marry) before a marriage officer could solemnize the marriage. Section 22(1) to (5) of the BAA has, however, been repealed by the Recognition of Customary Marriages Act, 1998. There is no reference to a declaration in the remaining parts of the BAA.

### **3. Comments received**

2.8.3 Comments were received from the following persons:

- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale

- Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana

2.8.4 All the respondents supported the repeal of this section.

#### **4. Conclusion**

2.8.5 The only declarations that were required by the BAA were in terms of the already repealed provisions of section 22. The need for this section has therefore fallen away.

#### **5. Recommendation**

2.8.6 It is recommended that section 33 be repealed.

#### **2.9 SUMMARY OF THE SECTIONS WHICH MAY BE REPEALED IMMEDIATELY**

2.9.1 In this Chapter the Commission recommends that the following sections of the BAA be repealed (see **Annexure A** for an exposition of the authorities responsible for repeal):

- Section 1: Powers of Governor-General as supreme chief
- Section 2(1)-(6): Appointment of certain office-bearers
- Section 11(3)(a) and 11A: What law to be applied in Commissioners' courts and legal capacity of black women in relation to leasehold and ownership
- Section 21A: Conferring of civil and criminal judicial power on certain Blacks
- Section 26: List of proclamations to be laid before Parliament
- Section 27: General regulations
- Section 31: Letters of exemption
- Section 33: Exemption from stamp duty

2.9.2 The repeal of these sections are proposed in the draft Bill in **Annexure A** to this Report (clause 3).

## **CHAPTER 3**

### **SECTIONS OF THE BLACK ADMINISTRATION ACT WHICH CANNOT BE REPEALED IMMEDIATELY**

#### **3.1 FRAMEWORK FOR THIS CHAPTER**

There are several sections of the BAA which cannot be repealed immediately. The following are the reasons for the interim retention of these sections:

- The sections were either promulgated as supportive measures for other sections in the BAA or are standard provisions found in legislation and will remain only for as long as the principal sections remain;
- the sections have already been investigated in terms of other studies undertaken by the Commission and will be repealed once the legislation proposed in terms of those studies are promulgated;
- the sections have created a complex and intricate system of governance relating to land matters and are dealt with in terms of national legislation spearheaded by the Department of Land Affairs;
- the sections have created a complex and intricate system of governance relating to traditional leadership and are dealt with in terms of national legislation spearheaded by the Department of Provincial and Local Government;
- the Code of Zulu Law which was proclaimed under section 24 has been assigned to the province of KwaZulu-Natal and is provincial legislation;
- one section has been identified as necessary as it provides protection that has to be retained and as a result must be incorporated in other legislation.

The remaining sections of the BAA that have not been discussed in Chapter 2 of this Report are dealt with in this Chapter under each of the categories identified above.

#### **3.2 SECTIONS PROMULGATED AS SUPPORTIVE MEASURES FOR OTHER SECTIONS IN THE BAA OR ARE STANDARD PROVISIONS FOUND IN LEGISLATION**

##### **(a) Introduction**

3.2.1 There are certain sections in the BAA which have no legal implications but are either

standard provisions found in legislation or are supportive measures for other sections that have not yet been repealed. However, these sections may only be repealed when the final sections of the BAA remaining on the statute book are repealed. The sections under discussion are sections 32, 35, 36, 37 as well as the long title and the first schedule.

### 3.2.2 **Section 32: Penalties for breach of proclamation, rule or regulation**

The section reads as follows:

- (1) Any proclamation, rule or regulation made under the authority of this Act may prescribe penalties for a contravention thereof, or default in complying therewith.
- (2) In the absence of any specific penalty for any offence under this Act or any proclamation, rule or regulation made thereunder, the court convicting any person of such offence may impose upon him a fine not exceeding twenty-five pounds, or in default of payment imprisonment for a period not exceeding three months.
- (3) Different provisions may be made by proclamation, rule or regulation in respect of different localities.

### 3.2.3 **Section 35: Interpretation of terms**

The section reads as follows:

In this Act, and any proclamation, rule or regulation made thereunder, unless inconsistent with the context –

**'Black'** shall include any person who is a member of any aboriginal race or tribe of Africa;

**'chief'**, in relation to a Black tribe, includes a paramount chief and a sub-chief;

**'Chief Commissioner'** includes an Assistant Chief Commissioner;

**'Commissioner'** includes an Additional and an Assistant Commissioner;

**'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 part to a subsisting marriage;

**'house'** means the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Black woman;

**'marriage'** means the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law and custom or any union recognized as a marriage in Black law under the provisions of section one hundred and forty-seven of the Code of Black Law contained in the Schedule to Law No. 19 of 1891 (Natal) or any amendment thereof or any other law;

**'mine'** bears the meaning assigned to the expression by section two of the Black Labour Regulation Act, 1911 (Act No. 15 of 1911), as amended by section thirty-three of the Black Laws Amendment Act, 1937 (Act No. 46 of 1937);

**'Minister'** means the Minister of Regional and Land Affairs;

**'partner'** means any spouse of a customary union;

**'tribal settlement'** means any area where persons reside according to indigenous law;

**'works'** bears the meaning assigned to the expression by section two of the Black

Labour Regulation Act, 1911 (Act No. 15 of 1911), as amended by section thirty-three of the Black Laws Amendment Act, 1937 (Act No. 46 of 1937).

#### 3.2.4 **Section 36: Repeal of laws**

The section reads as follows:

The laws mentioned in the Schedule to this Act, and so much of any other law as may be repugnant to or inconsistent with the provisions of this Act, are hereby repealed.

#### 3.2.5 **Section 37: Short title and commencement**

The section reads as follows:

This Act may be cited as the Black Administration Act, 1927, and shall commence upon a date to be fixed by the Governor-General by proclamation in the Gazette: Provided that in such proclamation the Governor-General may exclude from application any specified part or provision of this Act, which shall thereupon not apply until brought into operation by a further proclamation in the Gazette.

#### 3.2.6 **Long title**

The long title reads as follows:

To provide for the better control and management of Black affairs.

#### 3.2.7 **First Schedule**

The first schedule contains all the laws that the BAA repealed when promulgated.

#### **(b) Background**

3.2.8 Section 32 creates the sanctions for the breach by any person of a proclamation, rule or regulation issued in terms of the BAA. Section 35 contains the definitions needed to interpret certain sections of the BAA. These sections are supportive of the other sections in the BAA and since the entire Act will be removed from the statute book, the repeal of these sections will follow automatically. Sections 36, 37, the first schedule and the long title are all standard provisions to be found in any Act of Parliament. These provisions have no impact on the statutory environment created by the BAA and may be repealed. All of the sections mentioned in this paragraph may only be repealed once all the sections of the BAA are removed from the statute book.

**(c) Comments received**

3.2.9 General comments on these sections were received from the following persons:

- Parliament PHK Ditshetelo – MP;
- Mpumalanga House of Traditional Leaders: Chairperson: Kgosi MF Mashile;
- Director- General Department of the Premier Free State Province: Khotso DE Wee;
- Western Cape Province: Office of the Premier: Premier Mr MCJ van Schalkwyk;
- University of Grahamstown: Faculty of Law: Prof AJ Kerr;
- University of Transkei: Faculty of Law: Prof DS Koyana;
- Magistrate of Wynberg, Cape: MM Dimbaza;
- Department of Home Affairs: Director-General: Mr B P Gilder;
- Legal Services: Office of the Premier – Limpopo Provincial Government;
- Ministry of Local Government: Western Cape: Mr C Dowry;
- State Law Advisers: Office of the Premier Mpumalanga Provincial Government; and
- Regional Head: KZN Department of Justice and Constitutional Development.

3.2.10 Although the comments received from the respondents were general, there is overwhelming support for the repeal of these sections subject to the condition that they only be repealed once the principal sections of the BAA are repealed.

**(d) Conclusion**

3.2.11 Sections 32 and 35 are of a supportive nature and sections 36 and 37, as well as the long title and the first schedule, are standard provisions found in legislation. These provisions will serve no purpose should it remain on the statute book.

**(e) Recommendation**

3.2.12 It is recommended that sections 32, 35, 36 and 37, as well as the long title and Schedule 1, be repealed in the same Act of Parliament that repeals the remaining principal provisions of the BAA (see clause 3 of the proposed draft Bill in **Annexure A**).

### **3.3 SECTIONS WHICH HAVE ALREADY BEEN EARMARKED FOR REPEAL IN OTHER STUDIES UNDERTAKEN BY THE COMMISSION**

#### **(a) Introduction**

3.3.1 The Commission has undertaken two studies which contain recommendations relating to the repeal of certain sections of the BAA. These studies focused on traditional authority courts and the customary law of succession. Both the Traditional Courts Bill proposed in the Commission's Report on Traditional Courts and the Judicial Function of Traditional Leaders, and the Report on the Customary Law of Succession, contain proposed interventions relating to the BAA. The provisions earmarked by the Commission for repeal are sections 12 and 20 and the third schedule which relate to traditional authority courts, and sections 22 and 23 which relate to succession.

##### **(i) *Traditional authority courts***

#### **3.3.2 Section 12: Settlement of civil disputes by Black chiefs, headmen and chiefs' deputies**

The section reads as follows:

(1) The Minister may-

(a) authorize any Black chief or headman recognized or appointed under subsection (7) or (8) of section two to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), authorize a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within such chief's area of jurisdiction:

Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage.

(2) The Minister may at any time revoke the authority granted to a chief, headman or chief's deputy under subsection (1).

(3) A judgment given by such chief, headman or chief's deputy shall be executed in accordance with the procedure prescribed by regulation under subsection (6).

(4) Any party to a suit in which a Black chief, headman or chief's deputy has given judgment may appeal therefrom to any magistrate's court which would have had

jurisdiction had the proceedings in the first instance been instituted in a magistrate's court, and if the appellant has noted his appeal in the manner and within the period prescribed by regulation under subsection (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed: Provided that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than R10, unless the court to which the appellant proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law.

(5) .....

(6) The Minister may make the regulations mentioned in sub-sections (3) and (4), and generally regulations prescribing the procedure which shall be followed in any action taken under this section.

### **3.3.3 Section 20: Powers of chiefs, headmen and chiefs' deputies to try certain offences**

The section reads as follows:

(1) The Minister may-

(a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned-

- (i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and
- (ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister:

Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.

(2) The procedure at any trial by a chief, headman or chief's deputy under this section, the punishment, the manner of execution of any sentence imposed and subject to the provisions of paragraph (b) of subsection (1) of section nine of the Black Authorities Act, 1951 (Act 68 of 1951), the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9), be in accordance with Black law and custom: Provided that in the exercise of the jurisdiction conferred upon him or her under subsection (1) a chief, headman or chief's deputy may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment.

(3) Any jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before the date of commencement of the Black Administration Amendment Act, 1955, and which at that date has not been revoked under any such

provision, shall be deemed to have been conferred under and subject to the provisions of this section.

(4) The Minister may at any time revoke the jurisdiction conferred upon a chief, headman or chief's deputy under any provision of this Act before or after the commencement of the Black Administration Amendment Act, 1955.

(4) .....

(5) (a) If a Black chief, headman or chief's deputy fails to recover from a person any fine imposed upon him in terms of subsection (2), or any portion of such fine, he may arrest such person or cause him to be arrested by his messengers, and shall within 48 hours after his arrest bring or cause him to be brought before the magistrate's court which has jurisdiction in the district in which the trial took place.

(b) A magistrate before whom any person is brought under paragraph (a) may, upon being satisfied that the fine was duly and lawfully imposed and is still unpaid either wholly or in part, order such person to pay the fine or the unpaid portion thereof forthwith and, if such person fails to comply forthwith with such order, sentence him to imprisonment for a period not exceeding three months.

(c) The magistrate shall issue in respect of any person sentenced to imprisonment in terms of this subsection a warrant for his detention in a prison.

(6) Any person who has been convicted by a Black chief, headman or chief's deputy under this section may in the manner and within the period prescribed by regulation made under subsection (9), appeal against his conviction and against any sentence which may have been imposed upon him, to the magistrate's court which has jurisdiction in the district in which the trial in question took place.

(7) and (8) .....

(9) The Minister may make regulations-

(a) in regard to all matters which by this section are required or permitted to be prescribed by regulation;

(b) prescribing the manner in which and the period within which an appeal under subsection (6) shall be brought;

(c) prescribing the procedure to be followed in any action taken under this section.

### 3.3.4 Third Schedule

Offences which may not be tried by a chief, headman or chief's deputy under subsection (1) of section twenty:

Treason.

Crimen laesae majestatis.

Public violence.

Sedition.

Murder.

Culpable homicide.

Rape.

Robbery.

Assault with intent to do grievous bodily harm.

Assault with intent to commit murder, rape or robbery.

Indecent assault.

Arson.  
Bigamy.  
Crimen injuria.  
Abortion.  
Abduction.  
Offences under any law relating to stock theft.  
Sodomy.  
Bestiality.  
Bribery.  
Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute.  
Receiving any stolen property knowing that it has been stolen.  
Fraud.  
Forgery or uttering a forged document knowing it to be forged.  
Any offence under any law relating to illicit possession of or dealing in any precious metals or precious stones.  
Any offence under any law relating to conveyance, possession or supply of habit-forming drugs or intoxicating liquor.  
Any offence relating to the coinage.  
Perjury.  
Pretended witchcraft.  
Faction fighting.  
Man stealing.  
Incest.  
Extortion.  
Defeating or obstructing the course of justice.  
Any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

**(ii) Customary law of succession**

**3.3.5 Section 22: Marriage of Blacks: Property rights**

The section reads as follows:

- (1) .....
- (2) .....
- (3) .....
- (4) .....
- (5) .....
- (6) .....
- (7) No marriage contracted after the commencement of this Act but before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and the issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.
- (8) Nothing in this section or in section twenty-three shall affect any legal right which has accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Act.

### 3.3.6 Section 23: Succession

The section reads as follows:

- (1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.
- (2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).
- (3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.
- (4) .....
- (5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.
- (6) In connection with any such claim or dispute, the heir, or in case of minority his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.
- (7) Letters of administration from the Master of the Supreme court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of-
  - (a) .....
  - (b) any portion of the estate of a deceased Black which falls under subsection (1) or (2).
- (8) A Master of the Supreme court may revoke letters of administration issued by him in respect of any Black estate.
- (9) Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act 24 of 1913).
- (10) The Governor-General may make regulations not inconsistent with this Act-
  - (a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed;
  - (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks;
  - (c) dealing with the disherison of Blacks;
  - (d) .....
  - (e) prescribing tables of succession in regard to Blacks; and
  - (f) generally for the better carrying out of the provisions of this section.
- (11) Any Black estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported.

### (b) Background

3.3.7 The above-mentioned sections were quoted to assist the reader in developing an understanding of the requirements of the BAA in this regard. However, it does not require any further discussion as the two studies undertaken by the Commission (referred to in para 3.3.1) deal with the subject matter in detail and recommend the creation of a new statutory environment where these sections do not feature.

**(c) Comments received**

3.3.8 Comments were elicited under the above-mentioned studies of the Commission and the reader is referred to the documentation referred to in para 3.3.1 should further information be required.

**(d) Conclusion**

3.3.9 The sections identified in this category are dealt with in detail by the studies referred to paragraph 3.3.1. It can be accepted that these sections will be dealt with by the legislation proposes in terms of those studies.

**(e) Recommendation**

3.3.10 It is recommended that-

- with regard to succession, section 22(7) and (8) and section 23 be dealt with as proposed in the Commission's Report on the Customary Law of Succession; and
- with regard to traditional authority courts, sections 12, 20 and Schedule 3 be repealed by the Traditional Courts Bill as proposed in the Report on Traditional Courts and the Judicial Function of Traditional Leaders.

**3.4 SECTIONS WHICH HAVE CREATED A COMPLEX AND INTRICATE SYSTEM OF GOVERNANCE RELATING TO LAND MATTERS AND ARE DEALT WITH IN TERMS OF NATIONAL LEGISLATION SPEARHEADED BY THE DEPARTMENT OF LAND AFFAIRS**

**(a) Introduction**

3.4.1 There are certain sections of the BAA which fall within the administrative jurisdiction of the Department of Land Affairs. This particular Department undertook an investigation into land matters under its jurisdiction and drafted the Communal Land Rights Bill. The Bill proposes the repeal of sections 6 and 7 of the BAA. Although it does not fall within the jurisdiction of the Department of Land Affairs, section 34 is a supporting provision of the land affairs governance system and is discussed here.

#### 3.4.2 **Section 6: Registration of titles to land by chief commissioner**

This section reads as follows:

(1) All the powers and duties hitherto vested in or imposed upon registrars of deeds under the law relating to the registration of deeds, in so far as may relate to immovable property owned by Blacks and situate within any such area included in the Schedule to the Black Land Act, 1913 (Act 27 of 1913) or any amendment thereof, or within any such area in any tribal settlement, as may be defined by the Governor-General by proclamation in the Gazette shall, upon the issue of such proclamation, devolve upon the Chief Commissioner of the area within which such immovable property is situate and all documents relating to any such immovable property shall thereupon be transferred from any existing deeds registry to the custody of the Chief Commissioner concerned: Provided that any registrar of deeds may instead of so transferring any document filed in his registry furnish the Chief Commissioner concerned with a copy thereof certified under his hand, which copy shall thereafter be as valid for all purposes as the original document.

(2) The Governor-General may make all such regulations as he may deem expedient for giving effect to the provisions of subsection (1), and may in such regulations prescribe the fees to be charged by the Chief Commissioners in the exercise of any function under that subsection.

#### 3.4.3 **Section 7: Substitution of new title to land in certain areas**

This section reads as follows:

(1) The Governor-General may revoke any grant of land in a tribal settlement made on individual tenure to a Black upon quitrent conditions, and issue a substituted deed of grant in favour of the holder or of such person as may be adjudged to be entitled to be registered as the holder in conformity with the procedure prescribed in section eight: Provided that in the case of the areas comprising the Fingo and Hottentot Village situate within the urban area of Grahamstown in the Province of the Cape of Good Hope, this subsection shall be construed as if the words 'upon quitrent conditions' were omitted therefrom.

(2) Such substituted grant shall be registered in the appropriate registry, and shall be in such form and subject to such conditions as the Governor-General may by proclamation prescribe: Provided that the conditions of any such substituted grant as may be issued in

respect of land in the areas comprising the said Fingo and Hottentot Village shall be as set forth in the Second Schedule to this Act.

### **3.4.4 Section 34: Extending operation of Act**

This section reads as follows:

The Governor-General may, by proclamation in the *Gazette*, apply mutatis mutandis the provisions of Chapter III of this Act or of any portion thereof to any area or piece of land in the district of Namaqualand in the Province of the Cape of Good Hope, which has been granted, set apart, reserved or made available for occupation by persons commonly described as Hottentots or Bastards or to the areas comprising the Fingo and the Hottentot village situate within the urban area of Grahamstown in the province of the Cape of Good Hope.

### **3.4.5 Second Schedule**

(Conditions of substituted deeds of grant issued under section seven in respect of land in the areas comprising the Fingo and Hottentot Village situate within the urban area of Grahamstown in the Province of the Cape of Good Hope)

1. That the land hereby granted shall not be alienated or transferred to any person unless the consent of the Governor-General shall have been first had and obtained.
2. ....
3. That the land hereby granted shall be further subject to all such duties and regulations are either already, or shall in future be, established with regard to such lands.

### **(b) Background**

3.4.6 The above-mentioned provisions were quoted to assist the reader in developing an understanding of the intricate system of governance of land affairs created by the BAA. However, no further discussion is required as the Department of Land Affairs commissioned a detailed study of the relevant statutory environment which resulted in the Communal Land Rights Bill.

### **(c) Comments received**

3.4.7 Apart from general comments received supporting the recommendations made with regard to these sections (see para 2.2.9), specific comments on sections 6 and 7 and the second schedule were received from the following:

- University of Grahamstown: Faculty of Law: Prof AJ Kerr
- Department of Land Affairs

3.4.8 Professor Kerr's comment related to the power of a body dealing with communal land rights to register quitrent land. He is of the opinion that such titles should be registered in the Deeds Office where title to freehold land is registered and not by an authority in charge of communal land. As stated above, these sections are administered by the Department of Land Affairs and the Communal Land Rights Bill, an initiative of that Department, proposes a new system of land tenure to replace the existing one. It covers commonage and residential and arable land.

3.4.9 With regard to section 34, Professor Kerr pointed out that this section should not be placed under the jurisdiction of the Department of Land Affairs. Land in the Fingo Village within the urban area of Grahamstown is held and has always been held on freehold title registered in the Cape Town Deeds Registry in the same manner as other freehold land in Grahamstown. If land in Namaqualand is not surveyed, there should be a recommendation that rights held be reduced to writing and registered in some form or another by the relevant Government Department.

3.4.10 A meeting was held with representatives of the Department of Land Affairs and it was confirmed that sections 6 and 7 will be repealed by the Communal Land Rights Bill. The repeal of section 34 was also discussed and although this particular section granted the President certain powers relating to the Fingo Village and Namaqualand, it is submitted that the retention of this section is not necessary as there should be no areas left in South Africa where land is held under racial title. It was further agreed that section 34 should be investigated further to determine whether it may be necessary to provide protection for vested rights, if any, when it is repealed.

**(d) Conclusion**

3.4.11 The repeal of sections 6 and 7 is envisaged by the Communal Land Rights Bill, which creates a new system of land tenure that will replace the existing one. The premature repeal of these sections as a result of this review could create a *lacuna* and the supporting systems provided by the Communal Land Rights Bill need to be in place before a repeal could be considered. The Department of Land Affairs, when engaging in the project to develop the infrastructure for the proposed system of communal land rights, needs to determine whether the President exercised his discretion in terms of section 34.

**(e) Recommendation**

3.4.12 It is recommended that-

- sections 6 and 7 not be repealed immediately but that it be repealed by the Department of Land Affairs as part of the repeal of laws that have an impact on the Communal Land Rights Bill, which creates a new system of land tenure; and
- the Department of Land Affairs, when engaging in the project to develop the infrastructure for the proposed system of communal land rights, should promote the repeal of section 34, as well as Schedule 2 of the BAA (which is linked to section 34).

**3.5 SECTIONS WHICH HAVE CREATED A COMPLEX AND INTRICATE SYSTEM OF GOVERNANCE RELATING TO TRADITIONAL LEADERSHIP AND ARE DEALT WITH IN TERMS OF NATIONAL LEGISLATION SPEARHEADED BY THE DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT**

**(a) Introduction**

3.5.1 There are certain sections of the BAA which fall within the administrative jurisdiction of the Department of Provincial and Local Government. This particular Department undertook an investigation into traditional leadership which culminated in the Traditional Leadership and Governance Framework Act 41 of 2003. Although section 2(7)-(9) does not strictly speaking fall within the jurisdiction of the Department of Provincial and Local Government, it supports the system of governance of traditional leadership as it makes provision for the appointment of chiefs and headmen and other arrangements regarding these appointments. Section 5 of the BAA is also discussed here.

**3.5.2 Section 2(7)-(9): Appointment of certain office-bearers**

The relevant subsections read as follows:

(7) The Governor-General may recognize or appoint any person as a chief of a Black tribe and may make regulations prescribing the duties, powers, privileges and conditions of service of chiefs so recognized or appointed, and of headmen, acting chiefs and acting headmen appointed under subsection (8). The Governor-General may depose any chief so recognized or appointed.

(7)*bis* When recognizing or appointing a person as chief of a Black tribe or at any time thereafter or when any person is or has been recognized or appointed as the chief of a Black tribe, the Governor-General may, notwithstanding anything in this Act or in any other law contained, after a public enquiry by such persons having a knowledge of the language, customs and laws of the Black tribe concerned, as he may appoint for the purpose, make an order awarding to, or imposing upon, the person so recognized or appointed as chief such of the property, rights or obligations of the previous chief, whether deceased or deposed, as in his opinion were acquired or incurred by the previous chief by virtue of his office and as he may deem just.

(7)*ter* Any person affected by an order made in terms of subsection (7)*bis* may, within one year from the date thereof, petition the Governor-General for the amplification, variation or interpretation of the provisions of the order, and the Governor-General may make such order thereon as he may deem fit.

(8) The Minister or, if delegated thereto by the Minister, the Secretary for Plural Relations and Development, the Under Secretary for Plural Relations and Development or the Chief Commissioner for the area concerned, may appoint any person as headman over a tribal settlement or as headman of the Blacks in any area and may appoint any person to act temporarily as a chief or headman in the place of or in addition to the ordinary incumbent of the post, or when the post is vacant or there is ordinarily no such post in respect of the tribe, tribal settlement or Blacks in question, and may depose any headman or acting chief or acting headman so appointed.

(8)*bis* and (8)*ter* .....

(9) Any person obstructing any officer, chief or headman in this section mentioned in the lawful execution of his duty or disobeying any lawful order of or wilfully insulting such officer, chief or headman while acting in the course of his duty or wilfully obstructing the proceedings of any meeting lawfully convened by such officer, chief or headman in connection with his duty shall be guilty of an offence; and in addition, any person, who wilfully insults any such officer, chief or headman while presiding over a meeting convened by him in connection with his duty or wilfully obstructs the proceedings of such meeting may be removed therefrom and, if necessary, detained in custody by order of such officer, chief or headman, until the conclusion of such meeting.

### 3.5.3 Section 5: Constitution or adjustment of Black tribes and removal of Blacks

The section reads as follows:

(1) The Governor-General may-

(a) define the boundaries of the area of any tribe or of a tribal settlement and may from time to time alter the same and may divide any existing tribe into two or more parts or amalgamate tribes or parts of tribes into one tribe or constitute a new tribe, as necessity or the good government of the Blacks may in his opinion require.

(b) .....

(1)*bis* .....

(1)*ter* .....

(2) to (5) inclusive .....

#### (b) Background

3.5.4 Since 1927 tribal government has almost exclusively been governed by the BAA. The point of departure was that a tribe was established for a tribal area. This provision was necessary to underpin the statutory definition of these tribal areas.

3.5.5 Section 2(7), (7)*bis*, (7)*ter* and (8) of the BAA has, in terms of section 235(8) of the 1993 Constitution<sup>60</sup> been assigned to the Premiers of six provinces, that is, Eastern Cape, Free State, KwaZulu-Natal, Limpopo, Mpumalanga and North-West.<sup>61</sup> The result of the assignment is that section 2(7), (7)*bis*, (7)*ter* and (8) has become provincial law in those provinces to which it was assigned and only those provinces may repeal this particular section. The peculiarity of the repeal of section 2(7), (7)*bis*, (7)*ter* and (8) will be that Parliament will repeal it for the provinces of Gauteng, Western Cape and Northern Cape and that the other provinces will have to repeal it individually. See paragraph 1.4 of this Report.

**(c) Comments received**

3.5.6 Apart from general comments received supporting the recommendations made with regard to these sections (see para 2.2.9), specific comments on section 2(7) – (9) and section 5 were received from the Department of Provincial and Local Government.

3.5.7 That Department referred to the Traditional Leadership and Governance Framework Bill (as it then was). With regard to section 2(7) - (9), the Bill makes provision for the appointment, recognition, and deposition of traditional leaders. As section 2(7), (7)*bis*, (7)*ter* and (8) had been assigned to certain Provinces, the Department of Provincial and Local Government is not in a position to attend to the repeal of the subsections. It is recommended by the latter Department that the applicable provinces attend to the repeal of these subsections in line with the clauses relating to the appointment, recognition, and deposition of traditional leaders in the applicable Bill.

3.5.8 With regard to section 5, the Department of Provincial and Local Government confirmed that the Traditional Leadership and Governance Framework Bill (as it then was) makes provision for the establishment of a Commission to deal with disputes resulting from the determination of boundaries and the merger of tribes.

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<sup>60</sup> Act 200 of 1993.

<sup>61</sup> Proclamation 139 of 1994.

3.5.9 During a meeting with representatives of the Department of Provincial and Local Government, it was agreed that section 5 can be repealed by the National Legislature by proclamation in the *Government Gazette* on a date to be determined. The repeal of section 2(7), (7)*bis*, (7)*ter* and (8) was also discussed and it was agreed that it should be repealed. However, authority to repeal lies with the provinces to whom it was assigned, save for the provinces of Gauteng, Western Cape and Northern Cape (to whom these provisions have not been assigned).

**(d) Conclusion**

3.5.10 The premature repeal of sections 2(9) and (5) in terms of this review could create a *lacuna* and the supporting systems need to be in place before a repeal could be considered. With regard to section 2(7), (7)*bis*, (7)*ter* and (8), these subsections were assigned and have become provincial legislation in six provinces.

**(e) Recommendation**

3.5.11 It is recommended that-

- sections 2(9) and 5 of the BAA not be repealed immediately but that the repeal be effected by the Department of Provincial and Local Government once supporting structures are in place;
- the provinces to whom section 2(7), (7)*bis*, (7)*ter* and (8) has been assigned be requested to repeal these subsections in line with the sections of the Traditional Leadership and Governance Framework Act 41 of 2003 dealing with the appointment, registration and deposition of traditional leaders; and
- as far as national legislation is concerned, section 2(7), (7)*bis*, (7)*ter* and (8) be repealed in so far as it has not been assigned to provinces (see **Annexure A**).

**3.6 THE KWAZULU ACT ON THE CODE OF ZULU LAW 16 OF 1985 AND THE NATAL CODE OF ZULU LAW, PROCLAMATION R151 OF 1987, ASSIGNED TO THE PROVINCE OF KWAZULU-NATAL**

**(a) Introduction**

3.6.1 Section 24 of the BAA reads as follows:

Notwithstanding the repeal of Natal Law 19 of 1891 by section 1 of the Black Laws Amendment Act, 1976, the Schedule to that Act, as substituted by Proclamation R.195 of 1967, shall, subject to the provisions of section 7 (a) of the Alteration of Provincial Boundaries Act, 1978 (Act 36 of 1978), remain of full force as law for Blacks in Natal, and the State President may from time to time by proclamation in the Gazette amend, repeal or substitute the provisions of the said Schedule, which shall be known as the Code of Zulu Law: Provided that no such proclamation shall have any force or effect until one month has elapsed from the date of its promulgation in the Gazette.

**(b) Background**

3.6.2 In the province of KwaZulu-Natal there are two Codes of Zulu Law on the statute book, i.e. the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law, Proclamation R151 of 1987. Five codes preceded the current two:

- The Natal Code of 1878 (GN 194 of 1878) which was made applicable to Zululand by Proclamation 2 of 1887.
- The Natal Code of 1891, Law 19 of 1891, replacing the 1878 code in Natal but not in Zululand. The 1878 code therefore remained in force in Zululand, but it was never applied.
- The Natal Code of Zulu Law, Proclamation 168 of 1932, which replaced the 1891 Code. This new code applied to Zululand as well. Thus only one code was in force in both Zululand and the rest of Natal.
- The Natal Code of Zulu Law, Proclamation R195 of 1967.
- The KwaZulu Act on the Code of Zulu Law 6 of 1981.

3.6.3 The 1981 code was revised and re-enacted in 1985 by the KwaZulu Act on the Code of Zulu Law 16 of 1985. In terms of the National States Constitution Act 21 of 1971, the KwaZulu Legislative Assembly had powers to pass legislation on the matters contained in the code. This 1985 code applied in the territory of the KwaZulu 'homeland', because the KwaZulu legislature could make laws in respect of its own area only. To harmonise the law in the rest of Natal with the KwaZulu code, the Natal Code of Zulu Law, Proclamation R151 of 1987, was made under

section 24 of the BAA. It is identical, with a few exceptions, to the KwaZulu code, but obviously applied in Natal outside the then KwaZulu 'homeland'. This Proclamation was assigned to KwaZulu-Natal in terms of section 235(8) of the interim Constitution.

3.6.4 The codes, including the present ones, have all along been applied territorially, although there was no specific provision to that effect in the codes themselves. Thus where Sotho people had settled in Natal, they were deemed to be subject to the provisions of the codes.<sup>62</sup>

3.6.5 A converse problem arises when people from Natal move to other parts of South Africa. There are decisions stating that the Natal Code does not apply outside the borders of the province, but there is no definite decision indicating whether persons bound to the Code within KwaZulu-Natal are bound by it when they move to other parts of South Africa. It is also uncertain as to whether the Code applies to all persons residing in KwaZulu-Natal or only to members of the Zulu tribal community.<sup>63</sup>

3.6.6 The codes, according to the chapter headings, cover the following topics:

- Tribal boundaries
- Traditional authorities
- Personal status
- Family heads
- Guardianship
- Civil and customary marriages and cognate unions
- Lobolo
- Family system
- Inheritance and succession
- Medicine men, herbalists and midwives
- Actionable wrongs
- Civil procedure and miscellaneous provisions
- Offences and general penalties

3.6.7 It is suggested that the consideration of the future of the codes should revolve around the

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<sup>62</sup> Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991).

<sup>63</sup> *Ibid* p134.

following issues:

- The codes as a purported restatement of Zulu law and custom.
- The codes as official customary law.
- The provisions of the codes vis-à-vis current national legislation and law reform.
- The constitutionality of the codes.

These topics are discussed below.

**(i) *The codes as a purported restatement of Zulu law and custom***

3.6.8 The contents of the codes have been a bone of contention from the outset. Even Theophilus Shepstone, who was Secretary for Native Affairs when the first code was proposed, had serious misgivings about drafting a code at all. Welsh reported that “[h]e genuinely believed that codification would be undesirable because it would impart a rigidity to customary law which, in its traditional setting, it did not have”.<sup>64</sup>

3.6.9 The drafting nevertheless went ahead on the insistence of the colonial government and culminated in what Welsh described as “... a curious document, divided into sixty-eight sections. It was an amalgam of traditional law and such modifications as had been introduced in the past by the Natal Government ... In so far as the code embodied customary law, it was an exceptionally poor statement of that law ...”.

3.6.10 Even magistrates, for whose benefit it was made, complained that it was inaccurate and incomplete. One commentator said that although it is headed a code of Zulu law “... [it] is not Native Law. It is simply a Code of Regulations under which it is proposed to govern the Natives.”

3.6.11 Drafters of the subsequent codes brought about only cosmetic changes, taking the existing provisions as their cue. There is no evidence of any research done to make the codes a restatement (albeit incomplete) of the customary law it was supposed to reflect.

3.6.12 The KwaZulu ‘homeland’ government versions of 1981 and 1985 were at least an effort to ‘upgrade’ the status of women subject to customary law.<sup>65</sup>

3.6.13 The 1985 and 1987 versions were understandably meant to harmonise Zulu law (in so

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<sup>64</sup> *The Roots of Segregation: Native Policy in Colonial Natal, 1845–1910* (1971) p164.

<sup>65</sup> See Bekker and Coertze “The KwaZulu Act on the Code of Zulu Law” (1981) *THRHR* 285 ff.

far as it is contained in the two codes) because the 1981 version was out of sync with the 1967 version which still applied outside KwaZulu.<sup>66</sup>

3.6.14 Present-day commentators are still skeptical about the contents of the codes and about the wisdom of enacting customary law at all. Kerr<sup>67</sup> expressed the following reservations:

One of the main arguments against codification is that it places an undue emphasis on one type of law only, neglecting the others, and that the type chosen is not in the circumstances the most suitable .... On the other hand, if the code is too detailed it tends to introduce too great rigidity into what is otherwise a flexible system.... The position with regard to errors and omissions further illustrates the disadvantages of codification in the circumstances outlined above .... Equally serious are omissions.

3.6.15 Bennett<sup>68</sup> expressed his reservation as follows:

The Natal code demonstrates an important difference between customary and common-law: the code embodies the ideas and rules of the period in which it was drafted, with the result that it always lags behind contemporary attitudes and practice. No sooner has a code been promulgated than it needs revision.

**(ii) *The codes as official customary law***

3.6.16 The codes were thus never true nor complete accounts of Zulu law and custom. They were law, nevertheless, and were applied by the courts. They acquired an outstanding legal status, having become a source of customary law. Stated otherwise, they became 'Native Law'. Stafford noted that "[t]he mutual influence exerted by the Court and the codes on each other has resulted in a comprehensive system of written law".<sup>69</sup> In a foreword to the book Lugg affirmed this remark by saying:

I think I am safe in stating that Native law as recognized in the Union is to be found in its most advanced form in this Province, and although the book is only intended to serve as 'a handy reference to Native Law as practiced in Natal' it should also prove of use beyond our borders.

3.6.17 It did have an influence beyond the borders. Stafford was joined by Franklin and in 1950 they published an extended and updated version called *Principles of Native Law and the Natal*

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<sup>66</sup> See Bekker "The two new codes of Zulu law" (1990) *THRHR* 180-189.

<sup>67</sup> The reception and codification of systems of law in Southern Africa (1985) *Journal of African Law* p96-97.

<sup>68</sup> *A Source book of African Customary Law for Southern Africa* (1991) p139.

<sup>69</sup> *Native Law as Practiced in Natal* (1935).

*Code*. The introduction stated:

Although the book does undoubtedly embrace the whole of the law, 'as practiced in Natal,' the general principles, as well as many of the enactments and decisions are of general application throughout the Union.

3.6.18 This was no idle remark. A host of authors on customary law accepted the code and its interpretations by the courts and by Stafford and Franklin as part and parcel of customary law. They did distinguish the Zulu law of the codes from customary law as practiced by other communities, but the codes constituted a most prominent source, a peculiar point of reference, if only because they were written law.

3.6.19 There is no better evidence of this than the introduction to the third edition of Seymour's *Bantu Law in South Africa* (1970) in which the author<sup>70</sup> explained that the code is specifically and extensively referred to in the text. He added that the ... "Natal [customary] law is fitted unobtrusively but nevertheless comprehensively into the main body of the work, and a comparison between Natal [customary] law obtaining in the other three provinces is easily made." Seymour's *Customary Law* has been a standard work of reference since the first edition appeared in 1953.

3.6.20 Olivier *Die Suid-Afrikaanse Bantoereg* (1968) was written in similar vein. Both this work and its 1987 edition are also standard textbooks.

3.6.21 It is necessary to mention the immense impact that the Codes had on Zulu law, because it shows that despite the initial misgivings and the subsequent justifiable criticism, they have acquired a profound status in the field of South African customary law. It may moreover be stated that the codes, at least in some important respects, came to be followed by the people themselves, if only because they are law. There is evidence that customary marriages are in fact performed in the presence of official witnesses as prescribed by the codes and are registered. At least some of them are dissolved by court orders.<sup>71</sup>

3.6.22 Ideally more should be known about the extent of the application of the provisions, because a blind repeal or amendment of certain provisions may leave a gap. Just as much as social changes have occurred, the administrative and judicial systems have undergone changes. Commissioners' courts were transferred to the Department of Justice in 1984 (Proclamation R31

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<sup>70</sup> At p xvii.

<sup>71</sup> See Bekker "Grounds for divorce in African customary marriages in Natal" *CILSA* (1976) p 346.

of 10 August 1984) and finally abolished in 1986 (section 1 of the Special Courts Abolition Act 34 of 1986). The Appeal Courts for Commissioners' Courts were simultaneously abolished. This brought reported judgments to an abrupt end. It is not clear what the reasons were, but the point is that since 1984 there has been no judicial development of the codes. Some provisions may even have fallen into disuse to a large extent.

3.6.23 The codes contain some 20 functions that were to be performed by commissioners. They were, for example, required to keep a register of chiefs' deputies (section 6(2) of the 1987 code) and could on application by an inmate of a family home ostensibly remove the family inmates from the control of the family head (section 103 of both codes). With the abolition of the posts of commissioners substitutes had to be found to perform these functions. The problem was solved by creating an office of district officer, being an official in the public service designated by the Director-General of the Department of Development Planning (definitions of 'district officer' and 'Director-General' in section 1 of Proclamation R151 of 1987). In districts where there are representatives of the Department of Home Affairs, they have been designated as district officers. In other districts magistrates were so designated.

3.6.24 At the time of writing it is not known whether such district officers still exist and whether and to what extent they perform functions in terms of the codes.

***(iii) The provisions of the codes vis-à-vis current national legislation and law reform***

3.6.25 The codes are replete with provisions that are redundant, in conflict with national legislation and common law and incompatible with present law reform projects. A review and rationalisation of the codes would require an analysis and evaluation of each section. For present purposes, only some illustrative discrepancies are highlighted. The remarks are not meant to be an evaluation of all the provisions of the codes. They are merely meant to demonstrate the incompatibility of the codes with current legislation and law reform initiatives.

3.6.26 Legislation which is in conflict with customary law does not automatically repeal customary law on the same topic. In terms of section 211(3) of the Constitution, "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law".

3.6.27 For instance, as the Recognition of Customary Marriages Act 120 of 1998 specifically

deals with customary law, one might infer that it repeals the provisions of the codes dealing with customary marriages. It is not as straightforward as it appears. Maithufi and Bekker<sup>72</sup> state the following:

The Natal and KwaZulu Codes of Zulu law also provide grounds for the dissolution of customary marriages. Here, even before the implementation of the Recognition of Customary Marriages Act of 1998, the dissolution of a customary marriage could only be effected by a court order.

These provisions have not been repealed by the Recognition of Customary Marriages Act of 1998. It is not clear why this has not been done, unless it was assumed that the provisions concerned have been repealed by implication. In terms of item 24(3) of Schedule 6 to the Constitution, all laws remain in force until repealed or declared unconstitutional.

It cannot without more ado be assumed that the provisions of the Act supersede those of the Code. The Code contained in Proclamation R151 of 1987 for the former province of Natal, that is, excluding the former KwaZulu 'homeland', was enacted by the State President by virtue of the powers vested in [him] under section 24 of the Black Administration Act. In *R v Alexander* it was held that as Parliament had delegated its powers of amendment to the Governor-General (now State President), the validity of a proclamation made under this section could not be attacked on the ground that it was *ultra vires*.

In *Bhengu v Bhengu*, the court discussed the effect of conflicting provisions in the Black Administration Act and the then Natal Code. The question whether in the case of conflict the Code or the Act should prevail, is indeed a matter of some difficulty. Broome in the *Bhengu* case summarised the position as follows:

'But before the provisions of section 24(1) of Act 38 of 1927 which, in effect, re-enact the Code and place it on the same footing as the other provisions of the Act, I should have been inclined to regard the matter as one of implied repeal seeing that [the Act] is quite general in character and intended to apply to all Natives. But the fact that the Code in its present form is subsequent to the Act creates another difficulty.'

One may infer from Broome's remarks that if a subsequent Act of Parliament is in conflict with the Code, the Act should prevail. The conclusion is that the two legislative bodies have concurrent legislative powers. In the result, the essentials of a customary marriage as contained in the Natal Code are still applicable, except in so far as they are incompatible with the provisions of the Recognition of Customary Marriages Act of 1998. It is submitted that in regard to dissolution of customary marriages, the Code is incompatible with the Act. All dissolutions would therefore be governed by the Act.

#### **(iv) Citizenship**

3.6.28 In section 1 of the KwaZulu Act the concept of "citizen" is defined. This was necessary because several provisions of the code apply to citizens only, eg section 14, determining the age

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<sup>72</sup> "The Recognition of Customary Marriages Act of 1998 and its impact on family law in South Africa" *CILSA* (2002) 182-197 at p 192.

of majority of citizens, and section 35, providing that civil marriages between citizens produce the consequences of a marriage out of community of property. The reason for this was that the Legislative Assembly of KwaZulu could, in terms of section 30 of the National States Constitution Act 21 of 1971, pass legislation on the matters listed in the Schedule to the Act. The Schedule did not contain an item mentioning the code, but item 23 specified “[t]he administration of deceased estates, the execution of wills and matters relating to status, guardianship, inheritance and succession in respect of citizens” as matters on which a legislative assembly could pass laws. Item 26 listed “births, deaths, marriages and customary unions in respect of citizens.” The provisions of the KwaZulu code on these topics therefore had to be confined to citizens.

3.6.29 In terms of section 3 of the National States Citizenship Act 26 of 1970 all Africans were made citizens of one or other of the ‘homelands’. In terms of section 1 of the Constitution South Africa constitutes a single sovereign state and section 3(1) provides for a common South African citizenship. There is no way in which the notion of a ‘homeland’ citizenship can be retained. It was rejected in *Rehman and others v Minister of Home Affairs and others*.<sup>73</sup> In *Larbi-Odam v MEC for Education (North-West Province)*<sup>74</sup> the court made the following scathing remarks about ‘homeland’ citizenship:

[The] general lack of control over one’s citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Many became statutory foreigners in their own country under the Bantustan policy, and the legislature even managed to create remarkable beings called ‘foreign natives’.

3.6.30 The result is that the codes are partly personal and partly territorial in their effect. The question arises whether they accompany a person as he/she moves in and out of KwaZulu-Natal. When there was only one code, it was held that it does not apply outside Natal.<sup>75</sup> That may not be the final answer. In *S v Khumbisa*<sup>76</sup> in an *obiter dictum* the judge remarked:

It is by no means apparent to me what is meant by ‘Black in Natal’. Does it mean that the code applies to a Black so long as he is physically present in Natal, or does it only apply to Blacks who are resident or perhaps domiciled in Natal?

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<sup>73</sup> 1996 (2) BCLR 281.

<sup>74</sup> 1997 (12) BCLR 1655 (CC) at paragraph 19.

<sup>75</sup> *Sibasa v Ratsialingwa* 1947 4 SA 369 (T); *Mashapo v Sisane* 1945 NAC (N & T) 57).

<sup>76</sup> 1984 2 SA 670 (N) 687.

3.6.31 Also in *Mtshali v Gwala*,<sup>77</sup> Holmes AJA said:

In the light of sec 2 of Law 14 of 1888 it would seem that the code applies to all natives while and so long as they sojourn or are resident in Natal. But having regard to the varied nature of the provisions of the code, it may be that the foregoing applicability arises only in the absence of considerations to the contrary.

**(v) Tribal boundaries: Chapter 2**

3.6.32 This Chapter (sections 2, 3 and 4) of the KwaZulu Act on the Code of Zulu Law 16 of 1985 has been repealed by the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990, but its counterpart in the Proclamation is still intact. At the time of writing it is not known whether tribal boundaries outside the former KwaZulu 'homeland' have been defined in terms of section 2. The question is actually whether Chapter 2 serves a purpose at all.

**(vi) Chiefs: Chapter 3**

3.6.33 Sections 5 and 6 have been repealed by the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990. The whole chapter will no doubt come under scrutiny in view of the Department of Provincial and Local Government's White Paper on Traditional Leadership and Governance (October 2002) and the subsequent Traditional Leadership and Governance Framework Act 41 of 2003. In paragraph 5.4 the policy in regard to legislation on traditional leadership is expressed as follows:

In order to lay the basis for a coordinated approach to address the current fragmentation of legislation related to traditional leadership, it is proposed that national framework legislation be enacted as a matter of urgency, which national legislation is to be complemented by concomitant provincial legislation. It stands to reason that the envisaged national framework legislation must comply with section 146 of the Constitution if it is to prevail over existing provincial legislation.

**(vii) Personal status: Chapter 4**

3.6.34 Section 13 of the Proclamation provides that "[a]ny Black may acquire movable or immovable property". Saying that a person may acquire movable property is neither here nor there, because any person may in any case acquire movable property anywhere. Allowing Blacks to acquire immovable property was merely a resonance of section 12 of the South

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<sup>77</sup> 1960 1 SA 597 (A) at 599-600.

African Development Trust and Land Act 18 of 1936 in terms of which whites were prohibited from owning property in the then KwaZulu.

3.6.35 Section 14 on the age of majority has become an anachronism because section 9 of the Recognition of Customary Marriages Act 120 of 1998 now provides that “[d]espite the rules of customary law, the age of majority of any person is determined in accordance with the Age of Majority Act, 1972 (Act No 57 of 1972).”

***(viii) Family heads: Chapter 5***

3.6.36 The following provisions appear to be outdated:

- Section 19 — entitling a family head to a reasonable share of the earnings of the minor members of his family.
- Section 24 — entitling a family head to arrest any person within the precincts of his family home defying his orders or disturbing the peace or committing or reasonably suspected of committing or attempting to commit any offence against person or property.

***(ix) Guardianship: Chapter 6***

3.6.37 The provisions of this chapter must be viewed against the background of section 6 of the Recognition of Customary Marriages Act, 1998, in terms of which a wife in a customary marriage is in all respects equal to her husband and of section 2 of that Act which recognises customary marriages as valid marriages for all purposes. A married woman is therefore simply a guardian on the same footing as her husband, irrespective of whether they were married by common law or customary law. A single mother, again, whether never married, divorced or being a widow, is guardian of her child. It will be impossible to maintain ‘codified customary law’ rules on guardianship under these circumstances. It follows that it is not necessary to make elaborate provisions about suspending guardianship (section 30); requiring guardians to furnish security (section 31); obliging them to obtain permission to institute legal proceedings (section 32); and allowing them to claim reasonable remuneration (section 33); or to have special arrangements about claiming custody of children (section 34). These provisions are probably not applied in any event. It will be well-nigh impossible to design a version of Zulu law that is compatible with the national legislation referred to.

3.6.38 It is foreseen that customary law will adapt itself to the new legal order.

**(x) Civil and customary marriages and cognate unions: Chapter 7**

3.6.39 Here too there is no more to be done about Zulu law than what is dictated by national legislation. If two marriage regimes are to be retained, it will create insoluble legal conundrums. It should be noted that this chapter is one of those applicable to citizens only. It is suggested that matters such as the essentials of a customary marriage, *ukungena* unions and lobolo be left to be governed by unwritten customary law (Zulu customary law) where appropriate. The relevance of such typical customary practices must be considered within the ambit of national legislation.

**(xi) Lobolo: Chapter 8 and The Family System: Chapter 9**

3.6.40 These two chapters are from a lawyer's point of view the two most useful ones in the codes. They do establish a certainty unknown in other spheres of customary law. But again social change might have reduced them to mere paper law. Research will be necessary to ascertain to what extent these rules are current social practices. They are largely based on the fact that customary marriages are potentially polygamous. The question is whether there are in fact so many polygamous marriages that a written law is necessary to regulate them.

**(xii) Inheritance and succession: Chapter 10**

3.6.41 The future of this chapter will depend on the outcome of the Commission's project on the Customary Law of Succession. The question arises whether KwaZulu-Natal should have a separate set of statutory rules on succession in some form or another.

**(xiii) Medicine men, herbalists and midwives: Chapter 11**

3.6.42 It is suggested that this chapter be referred to the Department of Health for investigation and report. If it is necessary to regulate these practices — and it seems so — it should be done by way of national health laws.

**(xiv) Actionable wrongs: Chapter 12**

3.6.43 Many of the matters dealt with in this chapter are covered by the common law of delict. It

would appear that with the passage of time these provisions have lost their usefulness. Defamation, seduction and adultery need not be embodied in a written law — either for customary law claims or for claims in terms of common law.

***(xv) Civil procedure and miscellaneous provisions: Chapter 13***

3.6.44 Some of these provisions merely state the obvious, such as that stolen property may be vindicated (section 109). Section 105(3) is unnecessary because section 1 of the Law of Evidence Amendment Act 45 of 1988 and the Constitution regulate the recognition of customary law. Some provisions, such as section 113 providing that insolvency laws are not applicable to a person unless he is a trader, are unlikely to be upheld by the court.

***(xvi) Offences and general penalty: Chapter 14***

3.6.45 This Chapter must be evaluated in the light of the foregoing. It is hardly necessary to single out some offences to show that they are almost ludicrous. A few examples chosen at random will suffice:

- In terms of section 115(1)(a) any person who spreads any false report of a nature calculated to cause disquiet or anxiety commits an offence.
- In terms of section 115(1)(e), any person who seduces an unmarried girl commits an offence.
- The miscellaneous offences listed in section 117 will not withstand judicial scrutiny. They are vague and the acts aimed at unpredictable.

***(xvii) The constitutionality of the codes***

3.6.46 In view of the constitutional recognition of customary law, the rules of customary law embodied in the Codes should not without more ado be declared unconstitutional. Moreover, there should be no objection to the Natal province enacting a code of Zulu customary law as this is a matter in respect of which provincial legislatures have concurrent legislative powers with Parliament (Part A of Schedule 4 to the Constitution).

3.6.47 There are, however, some provisions in the current Codes that are obviously open to

attack. A few examples should suffice to show what is at stake. There is no point in 'proving' for purposes of this Report that some of the provisions are unconstitutional. The objective is to show that government will render itself vulnerable if it chooses to retain the codes in their present form.

#### Applicability of the codes

3.6.48 The first and foremost example is the applicability of the codes. The concept of citizenship can of course be done away with, which will still beg the question as to which persons are subject to the code. Is it a Zulu, an African domiciled in Natal, or a member of a tribe? There is no certainty. Under the Constitution the issue has taken on new dimensions. In terms of section 104(1)(b) of the Constitution a provincial legislature may pass legislation for its province. The Natal province could therefore not make a law applicable outside the province. Ideally, systems of customary law should be personal to litigants wherever they happen to be. In theory the national Parliament could cause a code of Zulu law to have personal application, but that is highly unlikely.

#### Discrimination

3.6.49 It is unlikely that the application of the code to 'blacks' would render it unconstitutional on the ground of discrimination. Customary law is recognised as a system of law.<sup>78</sup>

3.6.50 Customary law is of course not recognised in a vacuum. Blacks are the obvious people subject to that system. But a law codifying customary law need not even mention a 'black'. The word 'black', for instance, does not appear anywhere in the Recognition of Customary Marriages Act, 1998.

3.6.51 In addition to recognising customary law as a system of law, the Constitution in section 31 recognises a right to culture. Bennett<sup>79</sup> explains:

By introducing a right to culture s31 does not necessarily nullify or change the previous freedom. Rather, practice of a culture must now be considered both a right and freedom in a way that is analogous to the ownership of property. The owner is both free to use

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<sup>78</sup> See Bekker "How compatible is African customary law with human rights? Some preliminary observations" *THRHR* 1994 440-447.

<sup>79</sup> *Human Rights and African Customary Law* (1995) 50.

property and to vindicate it. Thus Africans may be free to pursue their culturally defined legal regime within an area delimited by the rights of others, but at the same time they have a right to insist that the courts apply customary law to appropriate legal proceedings. The freedom comprehends the generality of social life, the right requires a specific act of recognition/application.

3.6.52 Thus customary law and by implication any enactment or codification is not *per se* unconstitutional. In other words, differentiation on the basis of customary law is not *ipso facto* discriminatory.

3.6.53 There are, however, some provisions in the codes, in fact in customary law in general, that constitute unfair discrimination as contemplated by section 9(3), (4) and (5) of the Constitution. Thus section 27(3) of both Codes, providing that a woman is under the marital power of her husband, is patently unfair. The government is fully aware of this situation. It has therefore, among others, enacted section 6 of the Recognition of Customary Marriages Act, 1998, to place all married women on an equal footing with their husbands. That provision and similar ones in the Codes are, it is submitted, patently unconstitutional.

3.6.54 There are a number of other provisions that are possibly in conflict with constitutional tenets. A few examples chosen at random will suffice to explain:

- In terms of section 7(1) a chief or headman has authority to require people under his jurisdiction to comply with their duties under Zulu law and may give orders for that purpose. It is followed by what must be a panoply of acts that may be prohibited — among others the gathering of persons in groups. These acts are so vaguely worded and wide-ranging that they may be said to infringe the individual's right to legal certainty.
- In terms of section 7(2) a chief or headman may impose a fine of R50 on a person who defies or disregards his order. It is not clear whether the person must be formally accused in a chief's court or whether summary punishment is envisaged. This adds to uncertainty in the administration of justice.
- In terms of section 113 insolvency laws are not applicable to a person unless he is a trader. This is downright discriminatory.
- In terms of section 24 a family head may summarily arrest offenders found within the precincts of the family home. If challenged, this provision will probably be struck down for violating section 35 of the Constitution, which protects the rights of arrested, detained and accused persons. The circumstances under which private persons may summarily

effect arrests is moreover circumscribed in section 42 of the Criminal Procedure Act 51 of 1977.

**(c) Comments received**

3.6.55 In phase 1 of the investigation into the rationalisation of the BAA (see para 1.5), comment was requested on certain proposals. The Codes of Zulu Law were dealt with under sections 1 and 26 during that phase. Although general comment was received on these recommendations, none of them dealt with the Codes of Zulu Law in the detail contained in this Chapter.

3.6.56 As the jurisdiction for both the Codes falls with KwaZulu-Natal, the Commission approached the province with a view to determine its point of view with regard to the retention or repeal of these Codes. This process has initiated the constitution of a working group to investigate the Codes and make recommendations to the Provincial legislature via the Department of Traditional and Local Government in KwaZulu-Natal. During a two-day workshop on 22 and 23 October 2003, the working group resolved that a mechanism should be devised in terms of which the *lacunae* left by the proposed repeal of the Codes could be addressed. This would involve the restatement of Zulu law in a document that would not have the status of Parliamentary legislation, but which would serve as a source of the application of the law formerly contained in the Codes. The compilation of such document is under consideration.

**(d) Conclusion**

3.6.57 In conclusion it is obvious that retention of the codes in their present form is in the balance. There has been no judicial development of the codes since 1984. Certain provisions have to a large extent fallen into disuse and others are in conflict with national legislation and proposed law reform measures. This makes the contents of the Codes questionable. Enacting one code to replace the current two will not cure the defects. The likely unconstitutionality of some provisions and the incompatibility of others with national legislation are the overriding considerations.

**(e) Recommendation**

3.6.58 It is recommended that the continued existence of section 24 be evaluated once the

document on the restatement of Zulu law has been compiled and submitted to the KwaZulu-Natal provincial legislature for consideration.

### **3.7 SECTION 3 OF THE BAA WHICH HAS BEEN IDENTIFIED AS NECESSARY AS IT PROVIDES PROTECTION THAT HAS TO BE RETAINED**

#### **(a) Introduction**

3.7.1 Section 3 of the BAA reads as follows:

##### **When tribe bound for contract or obligation of chief**

(1) Subject to the provisions of this section, a Black people or tribe shall not be responsible for the personal obligations of its chief, nor shall a tribe or the ground occupied by a tribe be bound in any way whatsoever by any contract entered into or any liability incurred by a chief unless it has been approved by the Minister after having been adopted by a majority of the adult male members of the tribe present at a public meeting convened for the purpose of considering such contract or liability.

(2) The written certificate of a Commissioner that the contract or liability referred to therein has been adopted in terms of subsection (1) shall be conclusive evidence of that Act.

#### **(b) Background**

3.7.2 This provision was necessary because a traditional leader had no private law capacity, could bind his tribe to their detriment and could not be sued for damages resulting from his actions. It has been stated by Myburgh and Prinsloo<sup>80</sup> that -

The chief's means are these of the realm and he has no share in an estate, although he may allocate public contributions to the estates of his wives and children. He therefore cannot be prosecuted or sued.

3.7.3 Myburgh elsewhere explains in more detail that in principle the head of state has no non-

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<sup>80</sup> Myburgh and Prinsloo *Indigenous Public Law in KwaNdebele* (1985) 9.

official private law or private capacity nor a share in any estate. He has an official public law capacity only. He is only an organ of state. His competence to dispose of property is a public law competence and it relates to state property only. The state is furthermore not a legal person and can therefore not act in terms of private law. The king who is exclusively a state organ and who moreover owns no property that may be attached, cannot be held civilly liable. He is excluded from private law and may neither resort to civil action nor is he subject to it.<sup>81</sup>

3.7.4 Subject to what has been said above, if a tribe is a legal person the tribe can be held liable in terms of the private law. In ***Rathibe v Reid and Another***<sup>82</sup> evidence was led to show that in the event of purchase of land there is no obligation on the chief to obtain the consent of, or even to consult his people. The result of this decision was therefore that the chief could bind the tribe to a contract without obtaining consent and that the tribe, as a legal person, would be bound to its provisions — hence the inclusion of section 3 in the Act.

3.7.5 Since the above-mentioned decision there have been only two further judgements relating to the legal personality of tribes, namely ***Zulu v Hermansburg Mission Society***<sup>83</sup> and ***S v Ntuli***.<sup>84</sup> Both left the question whether a tribe is a legal person open, but both clearly intimated that it was possible for a tribe as legal person to acquire land by way of prescription despite the provision in the South African Development Trust and Land Act<sup>85</sup> that land acquired by a tribe had to be registered in the name of the Minister in trust for the tribe. Janse van Rensburg confirms that some explicit references to a tribe as a common law legal person indicate that the courts accepted as a point of departure that a tribe is a legal entity which could incur rights and liabilities separate from the members constituting it.<sup>86</sup>

3.7.6 Since 1991 several laws were promulgated that provide for the acquisition of land by tribes. In terms of sections 1 and 3 of the Upgrading of Land Tenure Rights Act,<sup>87</sup> read with Schedules 1 and 2, any leasehold, deed of grant, quitrent or any other right to the occupation of tribal land under the indigenous law or custom of a tribe is upgraded to full ownership, provided that certain formalities are complied with.

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<sup>81</sup> Myburgh *Die Inheemse Staat in Suider-Afrika* (1986) 71-73.

<sup>82</sup> 1927 AD 74.

<sup>83</sup> 1952 3 SA 159 (N) 160.

<sup>84</sup> 1963 4 SA 177 (N) 801.

<sup>85</sup> Act 18 of 1936.

<sup>86</sup> Janse van Rensburg "Die regsraad van stamme in Suid - Africa: Universitas of verenigings van gemeenskaplike eiendom" *Obiter* (2000) 67 – 80.

<sup>87</sup> Act 112 of 1991.

3.7.7 The Less Formal Township Establishment Act<sup>88</sup> also makes provision for the registration of ownership of tribal land in the name of the tribe as entity.

3.7.8 The Interim Protection of Informal Land Rights Act<sup>89</sup> describes informal rights to land, *inter alia*, as “the use of, occupation of, or access to land in terms of ... any tribal, customary or indigenous law or practice of a tribe”.

3.7.9 In terms of sections 19 and 20 of the Upgrading of Land Tenure Rights Act, tribal land may only be alienated with the consent of the court.<sup>90</sup> The court will consent to such alienation if the requirements prescribed by that Act are met, which includes a resolution by the tribe consenting to such alienation.<sup>91</sup> The protection granted by section 19, however, is only for a period of ten years calculated from the commencement of the Act. The ten-year period has expired and this protection is not applicable anymore. The Less Formal Township Establishment Act also requires the consent of the tribe, but this consent is limited to the establishment of a township and not the alienation of property.<sup>92</sup> It would appear that there are no other suites of legislation that contain similar protective provisions.

**(c) Comments received**

3.7.10 Comments were received from:

- Free State Province: State Law Advisor: Adv KJC Lekoeha
- Northern Cape: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
- Rhodes University: Faculty of Law: Prof AJ Kerr
- Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
- Regional Head: KZN Department of Justice and Constitutional Development
- University of Cape Town: Faculty of Law Private Law Department: Prof C Himonga
- Province of the Western Cape: Office of the Premier: Acting Premier Mr P Meyer
- University of Transkei: Faculty of Law: Prof DS Koyana
- Mpumalanga Provincial Government: Office of the Premier: Mr JK Sikhosana

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<sup>88</sup> Sections 25 and 26 of Act 113 of 1991.

<sup>89</sup> Act 31 of 1996.

<sup>90</sup> Section 19(2).

<sup>91</sup> Section 19(3).

<sup>92</sup> Section 25.

3.7.11 The majority of the persons who submitted comment supports the opinion that the protection granted by section 3 should be retained. Professor Kerr is of the opinion that a new Act should be established to make provision for the recognition of tribes as corporate bodies with the protection that would accompany it.

3.7.12 Comment from Mr TC Mabaso and Mr SS Luthuli indicated that they felt that there was an element of paternalism in this particular section and that a written certificate issued by the Member of the Executive Council in charge of Traditional Affairs in the province that the approval of the tribal authority was obtained should be conclusive proof of the evidence of that fact. This comment is agreed with and it is recommended that the re-enactment should take cognizance thereof.

**(d) Conclusion**

3.7.13 It is trite law that a tribal chief has no private law capacity and cannot be held civilly liable and that a tribe is a legal entity which could incur rights and liabilities separate from the members constituting it. As a result, if a tribe is not protected by a provision such as section 3 of the BAA, a tribal chief may bind a tribe to detrimental agreements without having to obtain the consent of the tribe. An investigation into related legislation has shown that there are no other suites of legislation that provide the type of protection needed.

3.7.14 From the above it would appear that this provision still serves a purpose to protect the tribe against the liabilities incurred by a wayward chief and it is necessary that the protection be retained in a statutory form. According to some of the respondents, section 3 furthermore contains an element of paternalism and when it is re-enacted, it should be borne in mind that a written certificate issued by the Member of the Executive Council in charge of Traditional Affairs in the province that the approval of the tribal authority was obtained should be conclusive evidence of that approval.

**(e) Recommendation**

3.7.15 It is recommended that-

- the protection granted to a tribe in terms of section 3 should be retained; and

- when re-enacting the provision, a written certificate issued by the Member of the Executive Council in charge of Traditional Affairs in the province that the approval of the tribal authority was obtained should be considered conclusive evidence of that approval.

3.7.16 The proposed draft Bill in **Annexure A** to this Report contains a reformulated provision in this regard (see clause 1).

**GENERAL EXPLANATORY NOTE:**

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

\_\_\_\_\_        Words underlined with a solid line indicate insertions in existing enactments

**CUSTOMARY LAW MATTERS AMENDMENT BILL**

**To regulate the liability of a tribe in respect of its chief's personal or contractual obligations; to amend the Administration of Estates Act, 1965, so as to treat all orphans and minors equally; to repeal the provisions of the Black Administration Act, 1927, incrementally; and to provide for related matters.**

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**INTRODUCED BY THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

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

**When tribe liable for obligation of traditional leader**

1.        (1)        Subject to the provisions of this section, no tribe subject to customary law shall be liable for any personal obligation of its traditional leader.

          (2)        A tribe or the ground occupied by a tribe shall not be bound in any way by any contract entered into or any liability incurred by a traditional leader unless it has been approved by the Cabinet member responsible for provincial and local government after having been adopted by a majority of the members of the tribe present at a public meeting convened for the purpose of considering such contract or liability.

          (3)        The written certificate of the Member of the Executive Council in charge of traditional affairs in the relevant province that the contract or liability referred to therein has been adopted in terms of subsection (2), shall be evidence of that act.

(4) For purposes of subsections (1) and (2), “traditional leader” means a traditional leader as contemplated in the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003), and “tribe” means a tribe that was established or recognised under legislation in force before the commencement of this Act.

**Amendment of section 4 of Act 66 of 1965, as amended by section 1 of Act 86 of 1983, section 26(1) of Act 57 of 1988, section 4 of Act 20 of 2001 and section 2 of Act 47 of 2002**

2. Section 4 of the Administration of Estates Act, 1965, is amended by the substitution for subsection (2) of the following subsection:

“(2) In respect of the property belonging to a minor, including property governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie-

- (a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and
- (b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person:

Provided that-

- (i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and
- (ii) in the case of any mentally ill person who under the Mental Health Act, 1973 (Act 18 of 1973), has been received or is detained in any place, jurisdiction shall lie with the Master who, immediately prior to such reception or detention, had jurisdiction in respect of his or her property under paragraph (a) or (b).”.

**Incremental repeal of Act 38 of 1927**

3. (1) Sections 2(1) to (6), 3, 11(3)(a), 11A, 21A, 26, 27, 31 and 33 of the Black Administration Act, 1927, are repealed.

(2) Section 1 and section 2(7), (7)bis, (7)ter and (8) of the Black

Administration Act, 1927, are repealed insofar as those sections have not been assigned to any provincial legislature in terms of item 14(5) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

(3) The repeal of sections 11A and 31 of the Black Administration Act, 1927, should not be construed as derogating from any right acquired in terms of those sections.

(4) Sections 32, 35, 36, 37, the long title and Schedule 1 of the Black Administration Act, 1927, are repealed subject to the repeal of –

- (a) sections 2(9), 5, 6, 7, 12, 20, 22, 23, 24, 34 and Schedules 2 and 3 of that Act; and
- (b) section 1 and section 2(7), (7)*bis*, (7)*ter* and (8) of that Act by the provincial legislatures to whom those provisions have been assigned in terms of item 14(5) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

#### **Short title and commencement**

4. (1) (a) This Act is called the Customary Law Matters Amendment Act, 2004, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(b) Different dates may be so determined in respect of different provisions of this Act.

(2) Section 3(4) of this Act only comes into operation on a date after -

- (a) sections 2(9), 5, 6, 7, 12, 20, 22, 23, 24, 34 and Schedules 2 and 3 of the Black Administration Act, 1927, have been repealed; and
- (b) section 1 and section 2(7), (7)*bis*, (7)*ter* and (8) of that Act have been repealed by the provincial legislatures to whom those provisions have been assigned in terms of item 14(5) of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

TABLE REFLECTING RECOMMENDED ACTION IN RESPECT OF EACH SECTION OF BAA

Section no	Black Administration Act section heading	Recommended action
1	Powers of Governor-General as Supreme Chief	* National legislature (Justice) to repeal in so far as it has not been assigned to provinces (see Customary Law Matters Amendment Bill) * Provincial legislatures to repeal for certain provinces * National legislature (Justice) to repeal regulation 7(1) and (2) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, 1987, as proposed in the Commission's Report on the Customary Law of Succession
2	Appointment of certain office bearers	* National legislature (DPLG) to repeal section 2(1) – (6) (see Customary Law Matters Amendment Bill) * DPLG to promote repeal of section 2(9) once structures are in place * National legislature to repeal section 2(7), (7)bis, (7)ter and (8) in so far as it has not been assigned to provinces (see Customary Law Matters Amendment Bill) * Provincial legislatures to repeal section 2(7), (7)bis, (7)ter and (8) for certain provinces
3	When tribe bound for contract or obligation of chief	To be re-enacted in the proposed Customary Law Matters Amendment Bill
4	Repealed	None
5	Constitution or adjustment of Black tribes and removal of Blacks	DPLG to promote repeal once structures are in place
6	Registration of titles to land by Chief Commissioner	DLA to promote repeal in light of Communal Land Rights Bill
7	Substitution of new title to land in certain cases	DLA to promote repeal in light of Communal Land Rights Bill
8	Repealed	None
9	Repealed	None
10	Repealed	None
10bis	Repealed	None
11	What law to be applied in Commissioner's Courts (Section 11(3)(a) remains on statute book)	National legislature (Justice) to repeal (see Customary Law Matters Amendment Bill)

<b>Section no</b>	<b>Black Administration Act section heading</b>	<b>Recommended action</b>
11A	Legal capacity of Black women in relation to leasehold and ownership	National legislature (Justice) to repeal (see Customary Law Matters Amendment Bill)
12	Settlement of civil disputes by Black chiefs, headmen and chiefs' deputies	National legislature (Justice) to repeal as proposed in Traditional Courts draft Bill
13	Repealed	None
14	Repealed	None
15	Repealed	None
16	Repealed	None
17	Repealed	None
18	Repealed	None
19	Repealed	None
20	Powers of chiefs, headmen and chiefs' deputies to try certain offences	National legislature (Justice) to repeal as proposed in Traditional Courts draft Bill
21	Repealed	None
21A	Conferring of civil and criminal judicial power on certain Blacks	National legislature (Justice) to repeal (see Customary Law Matters Amendment Bill)
22	Marriages of Blacks: Property rights	National legislature (Justice) to repeal as proposed in Customary Law of Succession draft Bill
22bis	Repealed	None
22ter	Repealed	None
23	Succession	National legislature (Justice) to repeal as proposed in Customary Law of Succession draft Bill
24	Operation of Code of Zulu Law	KwaZulu-Natal Provincial Government to repeal after consideration of restatement of Zulu law
25	Repealed	None
26	List of proclamations to be laid before Parliament	National legislature to repeal (see Customary Law Matters Amendment Bill)
27	General regulations	National legislature to repeal (see Customary Law Matters Amendment Bill)
28	Repealed	None
29	Repealed	None
30	Repealed	None
30A	Repealed	None
31	Letters of exemption	National legislature to repeal (see Customary Law Matters Amendment Bill)
32	Penalties for breach of proclamation, rule or regulation	National legislature to repeal once all other provisions have been repealed (see Customary Law Matters Amendment Bill)

<b>Section no</b>	<b>Black Administration Act section heading</b>	<b>Recommended action</b>
32A	Repealed	None
33	Exemption from stamp duty	National legislature to repeal (see Customary Law Matters Amendment Bill)
34	Extending operation of Act	DLA to promote repeal
35	Interpretation of terms	National legislature to repeal once all other provisions have been repealed (see Customary Law Matters Amendment Bill)
36	Repeal of laws	National legislature to repeal once all other provisions have been repealed (see Customary Law Matters Amendment Bill)
37	Short title and commencement	National legislature to repeal once all other provisions have been repealed (see Customary Law Matters Amendment Bill)
	Schedule 1	National legislature to repeal once all other provisions have been repealed (see Customary Law Matters Amendment Bill)
	Schedule 2	DLA to promote repeal
	Schedule 3	National legislature to repeal as proposed in Traditional Courts draft Bill (see Customary Law Matters Amendment Bill)

**ANNEXURE C**

**List of respondents who commented on the Commission's two research documents on those sections of the BAA which could be repealed immediately and those sections which are redundant or superfluous**

1. Free State Province: State Law Advisor: Adv KJC Lekoeneha
2. Northern Cape Province: Office of the Premier: Chief State Law Advisor: Adv TI Rakgoale
3. Western Cape Province: Office of the Premier: Acting Premier Mr P Meyer
4. Western Cape Province: Office of the Premier: Premier Mr MCJ van Schalkwyk
5. Gauteng Provincial Government: Development Planning and Local Government: Ms N Nazo
6. Mpumalanga House of Traditional Leaders: Chairperson: Kgosi MF Mashile
7. Ministry of Local Government: Western Cape: Mr C Dowry
8. Regional Head: KZN Department of Justice and Constitutional Development
9. Department of Land Affairs: Deputy Director Legal Services: Mr J H Havenga
10. Department of Home Affairs: Director-General: Mr B P Gilder
11. University of Cape Town: Faculty of Law Private Law Department: Prof C Himonga
12. University of Transkei: Faculty of Law: Prof DS Koyana
13. University of Grahamstown: Faculty of Law: Prof AJ Kerr
14. Chief Magistrate's Office: Durban Mr TC Mabaso and Mr SS Luthuli
15. Financial Services Board: Deputy Registrar of Pension Funds: Mr D P Tshidi
16. Parliament PHK Ditshetelo – MP
17. Director- General Department of the Premier Free State Province: Khotso DE Wee
18. Magistrate of Wynberg, Cape: MM Dimbaza
19. Legal Services: Office of the Premier – Limpopo Provincial Government
20. Director-General: Department of Provincial and Local Government: L Msengana-Ndlala
21. State Law Advisers: Office of the Premier Mpumalanga Provincial Government

**ANNEXURE D**

**List of respondents approached by the Commission to submit comment on those sections of the BAA which could be repealed immediately and those sections which are redundant or superfluous**

1. Director-General (Department of Justice and Constitutional Development)
2. Director-General (Department of Provincial and Local Government)
3. Director-General (Department of Land Affairs)
4. Director-General (Department of Home Affairs)
5. Director-General (Department in the Presidency)
6. Department of Justice: Regional (Gauteng)
7. Department of Justice: Regional (Free State)
8. Department of Justice: Regional (Eastern Cape)
9. Department of Justice: Regional (KwaZulu-Natal)
10. Department of Justice: Regional (Mpumalanga)
11. Department of Justice: Regional (Western Cape)
12. Department of Justice: Regional (Northern Cape)
13. Department of Justice: Regional (North West)
14. Director: Legal Services (Department of Land Affairs)
15. Director: Legal Services (Department of Provincial and Local Government)
16. The Ministry in the Presidency
17. MEC for Housing, Local Government and Traditional Affairs (Eastern Cape Provincial Government)
18. MEC for Developmental Local Government and Housing (North West Provincial Government)
19. MEC for Local Government (Western Cape Provincial Government)
20. MEC for Local Government and Housing (Limpopo Provincial Government)
21. MEC For Housing and Land Administration (Mpumalanga Provincial Government)
22. MEC for Housing and Local Government (Northern Cape Provincial Government)
23. MEC for Local Government and Housing (Free State Provincial Government)
24. MEC for Developmental Planning and Local Government (Gauteng Provincial Government)
25. MEC for Traditional Affairs, Local Government and Safety and Security (KwaZulu-Natal Provincial Government)

26. National House of Traditional Leaders
27. Eastern Cape House of Traditional Leaders
28. North West House of Traditional Leaders
29. Free State House of Traditional Leaders
30. Mpumalanga House of Traditional Leaders
31. KwaZulu-Natal House of Traditional Leaders
32. Limpopo House of Traditional Leaders
33. Faculty of Law (University of Fort Hare)
34. Faculty of Law (University of the Western Cape)
35. Faculty of Law (University of North West)
36. Faculty of Law (Vista University)
37. Faculty of Law (Rand Afrikaans University)
38. Faculty of Law (University of Cape Town)
39. Faculty of Law (University of Stellenbosch)
40. Faculty of Law (University of Natal)
41. Faculty of Law (University of the Witwatersrand)
42. Faculty of Law (University of the Free State)
43. Faculty of Law (University of Transkei)
44. Faculty of Law (Rhodes University)
45. Faculty of Law (University of Durban-Westville)
46. Faculty of Law (University of Port Elizabeth)
47. Faculty of Law (University of Potchefstroom)
48. Faculty of Law (University of South Africa)
49. Faculty of Law (University of Zululand)
50. Faculty of Law (University of the North)
51. The Premier (Northwest Provincial Government)
52. The Premier (Eastern Cape Provincial Government)
53. The Premier (Free State Provincial Government)
54. The Premier (Gauteng Provincial Government)
55. The Premier (KwaZulu-Natal Provincial Government)
56. The Premier (Limpopo Provincial Government)
57. The Premier (Western Cape Provincial Government)
58. The Premier (Mpumalanga Provincial Government)
59. The Premier (Northern Cape Provincial Government)
60. Chief Magistrate: Durban

61. Chief Magistrate: Pietermaritzburg
62. Chief Magistrate: Port Elizabeth
63. Chief Magistrate: Bloemfontein
64. Chief Magistrate: Umtata
65. Chief Magistrate: Kimberley
66. Magistrate: Wynberg
67. Magistrate: Mitchell's Plain
68. Magistrate: Goodwood
69. Women's Legal Centre (Cape Town)
70. Commission on Gender Equality (Cape Town)
71. Office on the Status of Women (Cape Town)
72. Gender, Law and Development Project (University of Cape Town)
73. ANC Women's League (Athlone)
74. Joint Monitoring Committee on the Improvement of Quality and Life of the Status of Women
75. Black Sash
76. Law Society of the Cape of Good Hope
77. Legal Resources Centre (Cape Town)
78. Lawyers for Human Rights
79. NADEL, Western Cape
80. Community Law Centre, University of the Western Cape
81. Centre for Legal Rural Studies (Cape Town)
82. Road Accident Fund
83. UDM, Western Cape
84. United Christian Democratic Party
85. Citabatwa
86. Contralesa
87. Ms C C September, MP
88. Prof G J van Niekerk (Pretoria)
89. Prof C Himonga
90. Prof J Hund (Pretoria)
91. Mr D J Tilton
92. Adv S Kholong (Department of Provincial and Local Government)
93. Mr J Meiring (Department of Provincial and Local Government)
94. Ms Z Zola (Khayelitsha)