

SOUTH AFRICAN LAW COMMISSION: BRIEFING OF JUSTICE PORTFOLIO COMMITTEE: 22 FEBRUARY 1999

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A. REVIEW OF THE WORK OF THE LAW COMMISSION SINCE 1994: LAW REFORM

Introduction

During the past 5 years the Commission has made every effort to adhere and give effect to its objects of developing, improving, modernising and reforming all branches of our law. During this period it has produced 34 reports (including interim reports), 29 discussion papers (previously referred to as working papers) and 14 issue papers (since 1996). Discussion papers and issue papers are published for general information and comment and the former usually contain draft legislation. The Commission's recommendations bear upon many important reforms of our law.

reports submitted to the minister

* Project 24 - Investigation into the courts' powers of review of administrative acts

The Commission recommended that legislation was necessary to complement section 24 and other provisions of the Constitution, 1993. In terms of section 33 of the Constitution, 1996, everyone has the right to just administrative action and national legislation must be enacted to give effect to such rights. In the development of Justice Vision 2000 the review of administrative law was identified as one of the premier projects. On 23 January 1998 the Commission approved that an investigation into the "review of administrative law" be included in its programme. The Minister approved the inclusion in October 1998 (project 115). A discussion paper on administrative law was published for general information and comment. The closing date for comment is 31 March 1999.

* Project 41 - The division of pension benefits on divorce

The report, which addressed problems experienced in the administration of the Divorce Amendment Act 7 of 1998, was Tabled in Parliament on 12 October 1995. A former member of the Commission (Mr G G Smit) subsequently submitted a memorandum to the Minister on 7 November 1996 in which he pointed out that the whole system of the sharing of pension interests of spouses on divorce remained unsatisfactory. The Minister agreed and endorsed the inclusion of an investigation into the sharing of pension benefits (project 112) in the Commission's programme. A discussion paper containing draft legislation was published for general information and comment on 6 May 1998. A draft report is being finalised.

* Project 42 - Time limits for the institution of actions against the state

In 1985 a report to the then Minister of Justice recommended the repeal or amendment of provisions that limited the institution of actions against government agencies. Legislation was never introduced in Parliament. A supplementary report highlighting the desirability of a uniform provision for actions against all government institutions was submitted to the Minister on 13 October 1998.

* Project 47 - Unreasonable stipulations in contracts and the rectification of contracts

A report recommending reform in respect of contractual unreasonableness, unconsciounability, or oppressiveness in all contractual phases was submitted to the Minister on 6 May 1998. The report was Tabled in Parliament.

* Project 50 - Investigation into the payments system in South African Law

The report recommended the repeal of the Bills of Exchange Act and its replacement by two separate Acts. The implementation of the recommendations are under consideration by the Minister of Finance.

* Project 52 - The legal consequences of sexual realignment and related matters

A change in a person's outward sexual appearance is not recognised by law in that it does not alter the legal description of such a person as a man or a woman. The report addressed the legal problems in this regard. The implementation of the recommendations are under consideration by the Minister.

* Project 58 - Group and human rights

The extensive investigation started with the inclusion of the project in the Commission's programme on 23 April 1986. A final report was handed to the Minister on 1 December 1994. The primary purpose of the report was to assist the Constitutional Assembly in its task of drafting and enacting a final Bill of Fundamental rights. The report was made available to the Constitutional Assembly.

* Project 62 - The protection of a purchaser of shares

A supplementary report on section 138 of the Companies Act 61 of 1973 was referred to the Minister of Finance for consideration. The recommendations were not implemented.

* Project 63 - Review of the law of insolvency

From the ranks of market participants it was submitted that our financial markets were fraught with uncertainty regarding the risk exposures of market participants in the event of the insolvency of another market participant. The Commission's interim report on the protection of the financial markets in the event of insolvency contained recommendations for remedying the problems in the law of insolvency in that regard. Act 32 of 1995 was passed.

According to current planning the entire review of the law of insolvency will be concluded in the course of this year.

* Project 66 - Reform of the South African law of bail

During November 1992 the Commission submitted a report on its investigation into the reform of the law of bail to the former Minister of Justice. At the request of the present Minister the Commission undertook an investigation into the law pertaining to bail. The Commission reconsidered and adapted its report against the background of sections 25(2)(d) and 33(1) of the Constitution, 1993. The view was held that a healthy balance should be struck between the rights of arrested persons and the community's rights to safety and the combating of crime. Act 75 of 1995 was passed.

* Project 73 - The simplification of criminal procedure

Because of the extensive scope of the investigation, it is conducted in different phases. An interim report on appeal procedures is under consideration by the Minister following the report of the Hoexter Commission of Inquiry.

In the second phase of the investigation the Commission considered the reasons for delays in the finalisation of trials, abuses of the process, particular provisions of the Criminal Procedure Act which cause delays, as well as delays resulting from the administration of the process. These issues were addressed in a first interim report on the simplification of the criminal procedure. Act 86 of 1996 was passed.

* Project 74 - Debt collecting

An interim report on imprisonment for debt gave urgent consideration to the introduction of legislation to clarify the matter. The abolition of civil imprisonment for debt in the Magistrates' Courts Act was recommended. Act 81 of 1997 was passed.

The Commission's final report on debt collecting contained numerous recommendations relating to the debt collecting procedure, including extrajudicial debt collectors. Act 114 of 1998 was passed.

* Project 76 - Jewish divorces

The report on Jewish divorces addressed the rules relating to divorce under Jewish law. Act 95 of 1996 was passed.

* Project 78 - Interest on damages

Usually there is a lapse of time before claimants receive damages consequent upon an award for damages. The report addressed the need for awards of interest in those circumstances. Act 7 of 1997 was passed.

* Project 79 - Natural fathers of children born out of wedlock

The Commission came to the conclusion that the common law position in terms of which the mother of a child born out of wedlock had exclusive rights in regard to access, custody and guardianship should be reformed. Act 86 of 1997 was passed.

* Project 84 - Application of the trapping system

The report addressed the system of trapping in order to consider the reform thereof in the light of the impact of a human rights dispensation and trends in other parts of the world. Act 85 of 1996 was passed.

* Project 85 - Aspects of the law relating to AIDS

A first interim report contained recommendations on health-related aspects which appeared to be relatively uncontroversial. The Department of Health and the Department of Labour are giving attention to the implementation of the recommendations.

A second interim report on pre-employment HIV testing and a third interim report on HIV/AIDS and discrimination in schools were Tabled in Parliament on 13 August 1998. The recommendations in the second interim report were incorporated in the Employment Equity Act 55 of 1998. The Department of Education published the Commission's draft national policy on HIV/AIDS for learners in public schools (contained in the third interim report) for public comment.

* Project 86 - Euthanasia and the artificial preservation of life

The report deals with a patient's right to refuse medical treatment or to receive assistance in ending his or her suffering by the administering of a lethal substance. A report was approved by the Commission and will be submitted to the Minister in due course.

* Project 88 - The recognition of class actions and public interest actions in South African law

Class actions and public interest actions are part of the worldwide movement to make access to justice a reality by broadening standing in court in situations where a large number of persons have the same or similar claims or defences. A report was submitted to the Minister on 12 October 1998.

* Project 87 - Jurisdictional lacuna in the Supreme Court Act 59 of 1959

A jurisdictional lacuna existed in the fact that residents and persons domiciled in the Republic were unable to proceed with claims against foreigners notwithstanding the existence of assets belonging to the foreigner within the Republic. Act 122 of 1998 was passed.

* Project 89 - Declaration and detention of persons as State patients in terms of the Criminal Procedure Act, 1977, and the release of such persons in terms of the Mental Health Act, 1973, including the onus of proof regarding the mental condition of an accused or convicted person

Consequent upon a report dealing with the aforementioned issues, Act 68 of 1998 was passed.

* Project 90 - Harmonisation of the common law and the indigenous law

A report on customary marriages recommending certain changes to the customary law of marriage in order to bring the relationship between spouses in line with constitutional requirements was submitted to the Minister on 30 September 1998. Act 120 of 1998 was passed.

* Project 93 - Speculative and contingency fees

The report explored the desirability of a system of contingency fees in terms of which a prospective litigant is only liable to remunerate a legal representative in the event of successful litigation. Act 66 of 1997 was passed.

* Project 94 - Arbitration

The report contains important recommendations aimed at bringing South Africa's arbitration law in line with international norms. It proposes the alignment of South Africa's international arbitration law with that of several of its important trading partners in Africa and elsewhere. The report was submitted to the Minister on 12 October 1998.