

NOTICE 296 OF 2000  
SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPERS 89 AND 90: SIMPLIFICATION OF CRIMINAL PROCEDURE (THE RIGHT OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO APPEAL ON QUESTIONS OF FACT) AND THE APPLICATION OF THE BILL OF RIGHTS TO CRIMINAL PROCEDURE, CRIMINAL LAW, THE LAW OF EVIDENCE AND SENTENCING

1. The Working Committee of the Commission recently approved the publication of Discussion Papers 89 and 90 for general information and comment. Discussion Paper 89 deals with the right of the Director of Public Prosecutions to appeal in criminal cases on questions of fact and contains recommendations on the amendment of the Criminal Procedure Act. Discussion Paper 90 deals with the constitutionality of the provisions of the Criminal Procedure Act in the light of the Bill of Rights contained in the Constitution.
2. During 1998 the Minister requested the Law Commission to include an investigation into the matter in its programme as part of its investigation dealing with the simplification of criminal procedure. Such an investigation was subsequently included in the Commission's broader investigation in project 73 (Simplification of criminal procedure). Having carefully considered the numerous countervailing factors, the Commission concluded that on balance there is merit in extending the right of the State to appeal on questions of fact. The Commission therefore recommended that the Criminal Procedure Act be amended to make provision for the right of the State (Director of Prosecutions or Prosecutor) to appeal on questions of fact from both lower and superior courts.
3. During 1994 the Minister requested the Commission to give urgent attention to the problems arising from the application of the Bill of Rights to criminal law, criminal procedure and sentencing. A new investigation was consequently included in the Commission's programme (Project 101- The application of the Bill of Rights to the criminal law, criminal procedure and sentencing). The Discussion Paper focuses only on those sections which are clearly unconstitutional and which need urgent consideration. The Commission concluded that neither the Commission nor the Project Committee dealing with the investigation should usurp the function of the Constitutional Court and decide on the constitutionality of those sections of the

Criminal Procedure Act which are only arguably unconstitutional. In those instances the Constitutional Court should rather develop the case law step by step. While the Discussion Paper primarily focuses on provisions which are considered to be clearly unconstitutional, the constitutionality of some other provisions and whether or not they should be amended in the scope of the investigation, is also dealt with. In these instances the provisions and suggestions for amendment are included in the discussion paper for purposes of inviting comment.

4. The Discussion Paper deals *inter alia* with provisions of the Criminal Procedure Act which are in conflict with -

- \* the presumption of innocence, (for example, section 55 (failure of accused to appear on a summons); section 60 (failure of an accused on bail to appear); section 74 (failure of accused on warning to appear); sections 78(1 A) and (1 B) (mental defect and criminal responsibility); section 170 (failure of accused to appear after adjournment); section 174 (discharge of accused after case for the prosecution); section 212 (proof of certain facts by affidavit); section 217 (confessions); section 219A (admissions) section 37(evidence on charge of bigamy); section 240 (evidence on charge of receiving stolen property); section 243 (evidence of receipt of money or property and general deficiency on charge of theft); section 245 (evidence on charge of which false representation is an element); and section 332 (prosecution of corporation and members of association);
- \* the constitutional provisions of equality and access to courts, for example, section 7 (private prosecution on certification of *nolle prosequi*); section 29 (search to be conducted in orderly manner); section 190 (impeachment or support of credibility of witness); section 191 (payment of expenses of witness); and section 269 (sodomy);
- \* the right to a fair trial which includes the right to appeal, for example section 302 (sentences subject to review in the ordinary course and transmission of record);
- \* the right to a public trial, for example, section 153 (circumstances in which criminal proceedings shall not take place in open court); section and 154

(prohibition of publication of certain information relating to criminal proceedings);

- \* the right to adduce and challenge evidence and adequate facilities to prepare defence, for example, section 166 (cross-examination); section 179 (process for securing attendance of witnesses); **section 182 (witnesses from prison); and section 190 (impeachment or support of credibility of witness);**
- \* the right to freedom and security of person, for example, section 185 (detention of witness) and section 286 (declaration of certain persons as dangerous criminals) and section **286B (imprisonment for an indefinite period);**
- \* the right to be brought before a court after arrest, for example, section 50 (arrest);
- \* **the right to a fair trial (including the right to be informed in detail of charge), for example, section 95 (housebreaking with intent to commit an offence);**
- \* the right to a fair trial (unconstitutionally obtained evidence), **for example, section 225 (evidence of prints or bodily appearance of accused); and section 252A (authority to make use of traps and undercover operations and admissibility of evidence so obtained);** and
- \* the right to a fair trial, for example, section 213 (proof of written statement by consent); sections 105, **119**, 126 and 213 (the unrepresented accused).

5. **The Commission invites the comments of all parties who feel that they have an interest in the topic or may be affected by the measures discussed in the Discussion Papers. Individuals, organisations and institutions affected by the provisions of the Criminal Procedure Act dealt with in these two investigations or who are likely to be affected by possible amendments to the existing legislation should participate in this debate and are invited to indicate how the present law affects them, what their concerns are, what solutions they are able to propose and whether there are other issues and/or options affecting the law that must be explored.**

**Based on the outcome of these comments and discussions**, a report containing the Commission's final recommendations will be prepared and presented to the Minister of Justice.

It would **be appreciated if written comments or suggestions could reach the Commission by 31 March 2000 at the address given below.**

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**The discussion paper will be made available on the Internet at the following site:  
<http://www.law.wits.ac.za/salc/discussn/discussn.html>**