

# **DEPARTMENT OF ARTS AND CULTURE**

## **Review of Heritage Legislation**

**Final report**

**(Volume 1)**

Prepared by:

**heritageAgencycc**



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## VOLUME 1

### Part I: Introduction

#### 1 Terms of reference

Cheadle Thompson & Haysom Inc and the heritage**Agency**cc (the consultants) were contracted by the Department of Arts and Culture (DAC) to review the heritage laws which DAC administers. The specific terms of reference of the review project were:

- 1.1 to review the heritage laws for divergence, duplication and inconsistency (within and between the laws themselves, in relation to the White Paper on Arts, Culture and Heritage, 1996, the Constitution, constitutionally mandated laws and other applicable laws);
- 1.2 to conduct a gap analysis of heritage policy and legislation;
- 1.3 to identify viable solutions and propose necessary amendments to heritage policy and legislation; and
- 1.4 to consult stakeholders identified by the Department.

#### 2 Heritage laws under review

The following heritage laws were identified for review by DAC:

- 2.1 Culture Promotion Act 35 of 1983
- 2.2 Cultural Institutions Act 119 of 1998
- 2.3 South African Geographical Names Council Act 118 of 1998
- 2.4 National Heritage Council Act 11 of 1999
- 2.5 National Heritage Resources Act 25 of 1999
- 2.6 National Library of South Africa Act 92 of 1998
- 2.7 National Council for Library and Information Services Act 6 of 2001
- 2.8 South African Library for the Blind Act 91 of 1998
- 2.9 Legal Deposit Act 54 of 1997
- 2.10 National Archives and Record Service of South Africa Act 43 of 1996

#### 2.11 Heraldry Act 18 of 1962.

### 3 Policies and other strategic documents

DAC identified a range of policies and other strategic documents to be considered for purposes of the review. We have considered all of these and have taken into account a range of additional documents, literature and legal instruments which in our view have relevance to the review. In this regard:

- 3.1 a summary record of relevant DAC policy review meetings and forums is contained in Part 2 of Volume 2 of this Report;
- 3.2 a summary of key policies, strategic documents and stakeholder submissions is contained in Part 3 of Volume 2;
- 3.3 an overview of selected African heritage policy documents and statements is contained in Part 4 of Volume 2;
- 3.4 a comparative survey and analysis of heritage structure international case studies is contained in Part 5 of Volume 2;
- 3.5 a summary description of applicable international conventions with check lists is contained in Part 6 of Volume 2; and
- 3.6 a list of the sources which we consulted in the course of this review is contained in Part 7 of Volume 2.

### 4 Stakeholder consultation

DAC identified a range of stakeholders to be consulted for purposes of the review and convened an extensive and comprehensive series of consultations attended by DAC officials and the consultants. A summary record of these consultations is contained in Part 1 of Volume 2.

### 5 Reference group

The Department established a reference group to provide strategic support and insight on the context and direction of the policy and legislative review process. The reference group comprised the following experts:

- 5.1 Professor A. Oliphant - University of South Africa (UNISA);
- 5.2 Dr M D Guma - Chairperson for the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities;
- 5.3 Ms S. Nkomo - Office on the Status of Women, Presidency;
- 5.4 Mr J Mbalula - CEO of the National Youth Commission;

- 5.5 Professor C. Rassool - University of the Western Cape;
- 5.6 Mr G Mayet - Department of Sports, Arts, Culture and Recreation (North West Province);
- 5.7 Ms H du Preez - Department of Sports and Cultural Affairs (Western Cape Province);
- 5.8 Mr A Hall - Department of Sports, Arts, Culture and Recreation (Northern Cape Province);
- 5.9 Dr E van Harte - National Archives Council;
- 5.10 Mr J K Tsebe - National Council for Library and Information Services (NCLIS);
- 5.11 Professor T Msimang - National Heraldry Advisory Council; and
- 5.12 Professor D Fourie - National Heraldry Advisory Council.

The Reference Group convened on 3 November 2006 for a preliminary briefing and consultation with DAC and the consultants. It held further meetings on 5 December 2006 and 22 February, 5 and 14 March 2007. Members of the Reference Group provided invaluable advice and insight on the review of heritage legislation.

## Part II: The constitutional framework

### 6 DAC's heritage mandate

DAC's heritage mandate falls squarely within the complex constitutional relationship between the national, provincial and local spheres of government and their respective legislative and executive powers and functions for heritage.

In order to understand the framework within which the Department exercises its powers and performs its functions and to determine how best to promote a rational and coherent heritage framework across the national, provincial and local spheres of government, it is necessary at the outset to consider the statutory relationship between them.

The Constitution provides the primary legal framework governing this relationship,<sup>1</sup> emphasising co-operation and co-ordination between the national, provincial and local spheres of government, highlighting that they are distinctive, interdependent and inter-related. The Constitution<sup>2</sup> regulates the manner in which these different spheres of government must interact.<sup>3</sup>

### 7 Co-operative government and inter-governmental relations

The Constitution distributes powers between these spheres and provides principles of co-operative government and inter-governmental relations which include the obligations of all spheres of government:

- 7.1 to respect the constitutional status, institutions, powers and functions of government in the other spheres;
- 7.2 not to assume any power or function except those conferred on them in terms of the Constitution;
- 7.3 to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- 7.4 to co-operate with one another in mutual trust and good faith by:
  - 7.4.1 fostering friendly relations;
  - 7.4.2 assisting and supporting one another;

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> See chapter 3 and section 40, Constitution.

<sup>3</sup> Chapter 3, Constitution.



- 7.4.3 informing one another of, and consulting one another on, matters of common interest;
  - 7.4.4 co-ordinating their actions and legislation with one another;
  - 7.4.5 adhering to agreed procedures; and
  - 7.4.6 avoiding legal proceedings against one another.<sup>4</sup>
- 7.5 Importantly, the Constitution refers to spheres rather than levels of government. This suggests that the different spheres of government should not be viewed as functioning in a strictly hierarchical relationship but rather as partners in government - exercising specified powers and performing specified functions.

## 8 National legislative authority

- 8.1 Parliament may pass legislation with regard to any matter - subject only to the exclusive legislative competences of provincial legislatures as set out in Schedule 5 to the Constitution, which in turn are subject to national override in certain limited circumstances.<sup>5</sup>
- 8.2 In this regard, national government is entrusted with legislative override powers regarding areas of exclusive provincial competence where necessary to maintain national security, economic unity, and essential national standards, to establish minimum standards required for the rendering of services, and to prevent unreasonable action by a province which is prejudicial to the interests of another province or to the country as a whole.

## 9 Provincial legislative authority

- 9.1 Provinces may pass legislation with regard to any matter:
- within a functional area listed in Schedule 4 (concurrent matters);
  - within a functional area listed in Schedule 5 (exclusive matters);
  - outside those functional areas if expressly assigned to the province by national legislation;
  - for which a provision of the Constitution envisages the enactment of provincial legislation.<sup>6</sup>

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<sup>4</sup> Section 41, Constitution.

<sup>5</sup> Sections 44(1) and (2), Constitution.

<sup>6</sup> Section 104(1)(b), Constitution.

9.2 Schedule 4 to the Constitution provides an extensive list of functional areas in which the national and provincial spheres of government exercise concurrent or shared legislative authority. Of particular relevance to the Department's mandate is the functional area of "cultural matters".

9.3 Schedule 5 to the Constitution provides for matters over which provinces have exclusive legislative authority.<sup>7</sup> Of particular relevance to the Department's mandate are the functional areas of:

- "archives other than national archives";
- "libraries other than national libraries";
- "museums other than national museums"; and
- "provincial cultural matters".<sup>8</sup>

## 10 Local government legislative authority

10.1 Municipalities may make and administer by-laws for the effective administration of matters which they have a right to administer. These are:

- the local government matters listed in Parts B of Schedules 4 and 5 to the Constitution; and
- any other matter assigned to local government by national or provincial legislation.<sup>9</sup>

10.2 The national and provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.<sup>10</sup> Subject to this limitation, any local government by-law that conflicts with a national or provincial law is invalid.<sup>11</sup>

## 11 Potential for conflict between national and provincial laws

11.1 Inherent to our constitutional framework is the potential for conflict to arise between provincial and national laws. The Constitutional Court has noted in this regard that-

*"The wide ambit of the functional competences concurrently accorded the national legislature by Schedule 4 creates the potential for overlap, not merely with the provinces' concurrent legislative powers in Schedule 4, but with their exclusive competences set out in Schedule 5. Examples of concurrent Schedule 4*

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<sup>7</sup> Sections 44(1), 104(1)(b)(ii) and Schedule 5, Constitution.

<sup>8</sup> Section 104(1)(b)(ii) and Schedule 5, Constitution.

<sup>9</sup> Sections 156(1) and (2), Constitution.

<sup>10</sup> Section 151(4), Constitution.

<sup>11</sup> Section 156(3), Constitution.

competences which could overlap with Schedule 5 competences include “trade” and “liquor licenses”; “environment” and “provincial planning”; “cultural matters” and “provincial cultural matters” as well as “libraries other than national libraries”, and “road traffic regulation”; and “provincial roads and traffic”.<sup>12</sup>

...

“Whereas the Constitution makes provision for conflicts between national and provincial legislation falling within a functional area in Schedule 4, and between national legislation and a provincial constitution, the sole provision made for conflicts between national legislation and provincial legislation within the exclusive provincial terrain of Schedule 5 is in section 147(2), which provides that national legislation referred to in section 44(2) prevails over Schedule 5 provincial legislation. This suggests that the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences and that conflict will ordinarily arise between Schedule 5 provincial legislation and national legislation only where the national legislature is entitled to intervene under section 44(2).”<sup>13</sup>

...

“Since ... no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation, and hence in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes. ... it seems apparent that the substance of a particular piece of legislation may not be capable of a single characterisation only, and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence.”<sup>14</sup>

11.2 The Constitution sets out the circumstances in which national legislation dealing with any matter over which the national and provincial legislatures have concurrent legislative authority (Schedule 4), will prevail over provincial legislation in the case of a conflict. These are where:

- the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually;
- the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing:

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<sup>12</sup> Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC) at para 48.

<sup>13</sup> Ibid at para 49.

<sup>14</sup> Ibid at para 63.

- norms and standards;
- frameworks; or
- national policies;
- the national legislation is necessary for:
  - the maintenance of national security;
  - the maintenance of economic unity;
  - the protection of the common market in respect of the mobility of goods, services, capital and labour;
  - the promotion of economic activities across provincial boundaries;
  - the promotion of equal opportunity or equal access to government services; or
  - the protection of the environment.<sup>15</sup>

11.3 National legislation will also prevail over such provincial legislation if the national law is aimed at preventing unreasonable action by a province that:

- is prejudicial to the economic, health or security interests of another province or the country as a whole; or
- impedes the implementation of national economic policy.<sup>16</sup>

11.4 If none of these circumstances apply, the provincial legislation will prevail over national legislation.<sup>17</sup>

11.5 Any court examining a conflict between national and provincial legislation must prefer any reasonable interpretation of the legislation or constitution that avoids a conflict, over any alternative interpretation that results in a conflict.<sup>18</sup> If a court finds that legislation prevails over other legislation, the decision does not invalidate the other legislation, but renders it inoperative for as long as the conflict between the two pieces of legislation remains. Parliament or the provincial legislature would potentially be able to amend the legislation to remove the conflict.<sup>19</sup>

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<sup>15</sup> Section 146(2), Constitution

<sup>16</sup> Section 146(3), Constitution

<sup>17</sup> Section 146(5), Constitution

<sup>18</sup> Section 150, Constitution

<sup>19</sup> Section 149, Constitution

## 12 National intervention in areas of exclusive provincial competence

12.1 The national Parliament's power of intervention in the areas of exclusive provincial competence (Schedule 5) is defined and limited by section 44(2) of the Constitution. There are a limited range of circumstances in which the national legislature may intervene and pass legislation that prevails over provincial legislation in areas in which the provinces enjoy exclusive legislative authority. These are where it is necessary:

- to maintain national security;
- to maintain economic unity;
- to maintain essential national standards;
- to establish minimum standards required for the rendering of services; or
- to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.<sup>20</sup>

Outside of these limits the exclusive provincial power remains intact and beyond the legislative competence of Parliament. The occasion and scope for intervention by the national Parliament is therefore limited.<sup>21</sup>

## 13 National and provincial executive authority

13.1 National executive authority includes:

- implementing national legislation, except where the Constitution or an Act of Parliament provide otherwise;
- developing and implementing national policy;
- preparing and initiating legislation.<sup>22</sup>

13.2 Provincial executive authority includes the following matters:

- 13.2.1 implementing provincial legislation in the province;
- 13.2.2 implementing all national legislation within the functional areas listed in Schedule 4 and 5 except where the Constitution or an Act of Parliament provides otherwise;

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<sup>20</sup> Sections 44(2) and 147(2), Constitution.

<sup>21</sup> Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744(CC) at para 257.

<sup>22</sup> Section 85, Constitution.

- 13.2.3 administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- 13.2.4 developing and implementing provincial policy;
- 13.2.5 co-ordinating the functions of the provincial administration and its departments;
- 13.2.6 preparing and initiating provincial legislation;
- 13.2.7 performing any other functions assigned to the provincial executive in terms of the Constitution or an Act of Parliament.<sup>23</sup>
- 13.2.8 Provinces have exclusive executive authority to implement their provincial legislation.<sup>24</sup>

#### 14 Impact of national policy on provincial and local government

In general, national policy does not create legal obligations that bind provinces or local government.<sup>25</sup> Policy determinations are not legislative instruments and in order to bind provinces or the public, national policies must normally be reflected in laws or regulations. As a general rule, policy determinations cannot override, amend or be in conflict with legislative instruments.<sup>26</sup> A province may of course adopt national policy as its own, in which case the policy will bind the provincial authorities.

#### 15 Provincial and local government authority

- 15.1 The relationship between the provincial and local spheres of government is also of great significance to DAC as local government exercises and performs significant powers and functions in relation to aspects of its mandate. This relationship is governed by a range of laws. We examine the key laws briefly below.

##### 15.2 The constitutional framework

- 15.2.1 The Constitution provides the primary framework regulating the relationship. Important components of this framework are:

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<sup>23</sup> Section 125(2), Constitution.

<sup>24</sup> Section 125(5), Constitution.

<sup>25</sup> In this regard, see Ex parte Speaker of the National Assembly: In re dispute concerning the constitutionality of certain provisions of the National Education Policy Bill 83 of 1995, 1996 (4) BCLR 518 (CC) at paras 31 and 38 and Minister of Education v Harris 2001 (11) BCLR 1157 (CC) at para 11.

<sup>26</sup> See Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) at 508 C E.

- municipalities have the right to govern on their own initiative, the local government affairs of their communities, subject to national and provincial legislation;<sup>27</sup>
- national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions;<sup>28</sup>
- national and provincial governments are required to support and strengthen the capacity of municipalities to manage their own affairs and to exercise their powers and perform their functions;<sup>29</sup>
- draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before its introduction to Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.<sup>30</sup>

15.2.2 A municipality has executive authority in respect of, and the right to administer:

- the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution; and
- any other matter assigned to it by national or provincial legislation.<sup>31</sup>

15.2.3 The importance of the local government sphere is emphasised by the constitutional obligation on the national and provincial governments to assign to a municipality, by agreement and subject to conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if:

- that matter would most effectively be administered locally; and
- the municipality has the capacity to administer it.<sup>32</sup>

15.2.4 As far as legislative competence is concerned, municipalities have authority to make and administer by-laws for the effective administration of the matters which they

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<sup>27</sup> Section 151(3), Constitution.

<sup>28</sup> Section 151(4), Constitution.

<sup>29</sup> Section 154(1), Constitution.

<sup>30</sup> Section 154(2), Constitution.

<sup>31</sup> Section 156(1), Constitution.

<sup>32</sup> Section 156(4), Constitution.

have the right to administer.<sup>33</sup> The Constitution stipulates that any by-law made by a municipality that conflicts with national or provincial legislation is invalid.<sup>34</sup>

15.2.5 The Constitution authorises provincial legislatures to assign any of their legislative powers to a municipal council.<sup>35</sup> The Constitution also authorises a Member of the Executive Council (MEC) to assign any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act to a municipal council. The assignment:

- must be in terms of an agreement between the MEC and the municipal council concerned;
- must be consistent with the Act in terms of which the relevant power or function is exercised or performed; and
- takes effect upon proclamation by the Premier.<sup>36</sup>

15.2.6 The Constitution does however provide for a provincial government to intervene in municipal affairs in certain circumstances. A provincial government may intervene in the operations of a municipality where the municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, in order to ensure fulfilment of that obligation.<sup>37</sup>

### 15.3 The Local Government: Municipal Systems Act 32 of 2000

The Local Government: Municipal Systems Act, 2000<sup>38</sup> deals in some detail with the assignment of functions or powers by provincial governments to municipalities.

Before assigning the function or power, a provincial MEC must follow a detailed procedure. This includes compiling and submitting a memorandum to the national Minister responsible for local government and the National Treasury containing a 3 year projection of financial implications, disclosing possible financial liabilities or risks beyond this period and indicating how additional expenditure by the municipality will be funded.<sup>39</sup> The MEC is also obliged to take appropriate steps to ensure sufficient funding and capacity building as may be needed for the performance of the assigned function or power by the municipality.<sup>40</sup> In short, should a province transfer powers and functions to municipalities, it is obliged to ensure sufficient funding is made available for municipalities to carry out functions and exercise powers properly.

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<sup>33</sup> Section 156(2), Constitution.

<sup>34</sup> Section 156(3), Constitution.

<sup>35</sup> Section 104(1)(c), Constitution.

<sup>36</sup> Section 126, Constitution.

<sup>37</sup> Section 139, Constitution.

<sup>38</sup> Act 32 of 2000.

<sup>39</sup> Section 10, Local Government: Municipal Systems Act.

<sup>40</sup> Section 10A, Local Government: Municipal Systems Act.



The Local Government: Municipal Systems Act also provides mechanisms for provincial monitoring and standard setting for local government. In this regard the MEC responsible for local government in a province:

- is obliged to establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution:
  - to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
  - to monitor the development of local government capacity in the province; and
  - to assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions;<sup>41</sup> and
- is empowered, by notice in the Provincial Gazette, to require municipalities of any category or type specified in the notice or any other kind described in the notice, to submit to a specified provincial organ of state such information as may be required in the notice either at regular intervals or within a period as may be specified.<sup>42</sup>

## 16 Mechanisms for regulating the relationship between provincial and local government

As discussed above, there are a number of mechanisms available to regulate the relationship between provincial government and municipalities in respect of heritage matters. The following are most relevant:

### 16.1 Assignment of legislative powers

The provincial legislature is empowered to assign any of its legislative powers to a municipal council in the province.<sup>43</sup>

### 16.2 Assignment of MEC's powers and functions

A provincial MEC is empowered to assign any power or function that is to be exercised or performed in terms of a provincial Act to a municipal council. The assignment must be in terms of an agreement with the municipal council and be consistent with the Act governing the power or function concerned and takes effect on proclamation by the Premier.<sup>44</sup>

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<sup>41</sup> Section 105(1), Local Government: Municipal Systems Act.

<sup>42</sup> Section 105(2), Local Government: Municipal Systems Act.

<sup>43</sup> Section 104(1)(c), Constitution.

<sup>44</sup> Section 126, Constitution.

### 16.3 Monitoring and standard setting for local government

The provincial MEC responsible for local government in the province may establish appropriate mechanisms, processes and procedures to monitor the exercise of municipalities' powers and functions in respect of matters relating to heritage.<sup>45</sup>

The same MEC may require (by notice in the Provincial Gazette) municipalities to submit specified information to the provincial department responsible for heritage at specified intervals in relation to matters under the provincial department's jurisdiction.<sup>46</sup>

### 16.4 Intervention in operations of municipality

The provincial government may intervene in the operations of a municipality relating to the Department's areas of jurisdiction where that municipality cannot or does not fulfil its executive obligations in terms of the law, in order to ensure fulfilment of those obligations.<sup>47</sup>

## 17 Intergovernmental Relations Framework Act, 2005

17.1 The Intergovernmental Relations Framework Act 13 of 2005 commenced on 15 August 2005. The Act was passed pursuant to the requirements of the Constitution which requires an Act of Parliament to establish or provide for structures and institutions to promote and facilitate intergovernmental relations and to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.<sup>48</sup> We focus on this law as it highlights a range of statutory mechanisms available to DAC to promote a rational and coherent heritage framework across spheres of government.

17.2 The stated object of the Act is to provide a framework for the national government, provincial governments and local governments and all organs of state within those spheres of government to facilitate co-ordination in the implementation of policy and legislation, including:

- coherent government;
- effective provision of services;
- monitoring implementation of policy and legislation; and
- realisation of national priorities.<sup>49</sup>

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<sup>45</sup> Section 105(1), Local Government: Municipal Systems Act.

<sup>46</sup> Section 105(2), Local Government: Municipal Systems Act.

<sup>47</sup> Section 139, Constitution.

<sup>48</sup> Section 41 (2), Constitution.

<sup>49</sup> Section 4, Intergovernmental Relations Framework Act.

17.3 Chapter 2 of the Act contemplates a range of intergovernmental structures. These are:

**17.3.1 The President's Co-ordinating Council**

Consisting of the President, Deputy President, 4 members of the national Cabinet, the Premiers of the 9 provinces and a municipal councillor designated by the national organisation representing organised local government,<sup>50</sup> the Council is a consultative forum *inter alia* on:

- the implementation of national policy and legislation in provinces and municipalities;
- the co-ordination and alignment of priorities, objectives and strategies across national, provincial and local governments; and
- other matters of strategic importance which depend on co-operation between different spheres of government.<sup>51</sup>

**17.3.2 National intergovernmental forums**

The Act empowers Cabinet members to establish national intergovernmental forums to promote and facilitate intergovernmental relations in functional areas for which they are responsible. Any existing intergovernmental body consisting of at least a national Cabinet member and members of provincial executive councils responsible for functional areas similar to that of the Cabinet member are regarded as having been established in terms of the Act, except where the structure concerned has been established by an Act of Parliament.<sup>52</sup>

A national intergovernmental forum consists of the national Cabinet member responsible and his or her deputy, members of provincial executive councils responsible for a similar functional area and to the extent appropriate to the relevant functional area, representatives of organised local government.<sup>53</sup>

National intergovernmental forums are consultative bodies *inter alia* on:

- the development of national policy and legislation relating to matters affecting the functional area;
- the implementation of national policy and legislation regarding the functional area;

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<sup>50</sup> Section 6, Intergovernmental Relations Framework Act.

<sup>51</sup> Section 7, Intergovernmental Relations Framework Act.

<sup>52</sup> Section 9, Intergovernmental Relations Framework Act.

<sup>53</sup> Section 10, Intergovernmental Relations Framework Act.

- the co-ordination and alignment within that functional area of strategic and performance plans and priorities, objectives and strategies across national, provincial and local governments; and
- other matters of strategic importance within the functional area which depend on co-operation between different spheres of government.<sup>54</sup>

### 17.3.3 Provincial intergovernmental forums

The Act establishes in each province a Premier's intergovernmental forum to promote and facilitate intergovernmental relations between the province and local governments in the province.<sup>55</sup> The forum consists of the Premier, at least the MEC responsible for local government, at least the mayors of district and metropolitan municipalities in the province and representatives of organised local government.<sup>56</sup>

The forum is a consultative forum inter alia on:

- the implementation of national and provincial policy and legislation with respect to matters affecting local government interests in the province;
- the co-ordination of provincial and municipal development plans to facilitate coherent planning of the province as a whole;
- the co-ordination and alignment of the strategic and performance plans and priorities, objectives and strategies of the provincial government and local governments in the province; and
- any other matters of strategic importance that affect the interests of local government in the province.<sup>57</sup>

The Act also empowers the Premier of a province to establish for any specific functional area a provincial intergovernmental forum to promote and facilitate effective and efficient intergovernmental relations between the province and local governments in the province with respect to that functional area. The composition of such a forum and its role is to be determined by the Premier of the relevant province.<sup>58</sup> The Premiers of two or more provinces may establish an inter-provincial forum to promote and facilitate intergovernmental relations between those provinces.<sup>59</sup>

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<sup>54</sup> Section 11, Intergovernmental Relations Framework Act.

<sup>55</sup> Section 16, Intergovernmental Relations Framework Act.

<sup>56</sup> Section 17, Intergovernmental Relations Framework Act.

<sup>57</sup> Section 18, Intergovernmental Relations Framework Act.

<sup>58</sup> Section 21, Intergovernmental Relations Framework Act.

<sup>59</sup> Section 22, Intergovernmental Relations Framework Act.

#### 17.3.4 Municipal intergovernmental forums

The Act requires the mayors of district municipalities to establish district intergovernmental forums to promote and facilitate intergovernmental relations between a district municipality and local municipalities in the district and stipulates the composition and roles of these forums.<sup>60</sup> The Act also empowers municipalities to establish inter-municipality forums to promote and facilitate intergovernmental relations between them.<sup>61</sup>

As far as the conduct of intergovernmental relations is concerned, the Act provides that any consultation required with organised local government in terms of the Act or any other Act may be conducted through the appropriate intergovernmental structure<sup>62</sup> and also provides for implementation protocols in circumstances where the implementation of a policy, the exercise of a power or function or the provision of a service depends on the participation of organs of state in different governments, in order to co-ordinate their actions as may be appropriate or required in the circumstances.<sup>63</sup> The Act stipulates the content of implementation protocols which must include:

- the respective roles and responsibilities of each organ of state;
- the priorities, aims and desired outcomes of the protocol;
- the resources to be contributed by each organ of state;
- indicators to measure effective implementation; and
- oversight of monitoring mechanisms for effective implementation of the protocol.

#### 17.4 Dispute resolution procedures and mechanisms

An implementation protocol must be consistent with applicable legislation and must be in writing and signed by the parties to the protocol.<sup>64</sup>

- 17.5 Chapter 4 of the Act provides various procedures and mechanisms for the resolution of intergovernmental disputes, including facilitation, and bars judicial proceedings in respect of intergovernmental disputes unless a dispute has formally been declared in terms of the Act and efforts to resolve the dispute have been unsuccessful.<sup>65</sup>

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<sup>60</sup> Section 24, Intergovernmental Relations Framework Act.

<sup>61</sup> Section 28, Intergovernmental Relations Framework Act.

<sup>62</sup> Section 31, Intergovernmental Relations Framework Act.

<sup>63</sup> Section 35, Intergovernmental Relations Framework Act.

<sup>64</sup> Section 35, Intergovernmental Relations Framework Act.

<sup>65</sup> Chapter 4, Intergovernmental Relations Framework Act.

## 18 Intergovernmental mechanisms available to DAC

A consideration of the above reveals a range of key intergovernmental mechanisms to be considered by DAC in order to promote a rational and coherent heritage framework across all spheres of government. Despite the complexity of intergovernmental relationships in the heritage sector, we believe that the combination of mechanisms set out below will enable DAC to implement its heritage mandate effectively:

- 18.1 preparing and implementing national legislation on heritage within the concurrent functional competence of “cultural matters”;
- 18.2 preparing and implementing national legislative interventions in functional areas of exclusive provincial competence (“archives other than national archives”, “libraries other than national libraries”, “museums other than national museums” and “provincial cultural matters”) to maintain essential national standards and to establish minimum standards required for the rendering of public services;
- 18.3 developing and implementing national policy on heritage matters that addresses directly the relationship between and responsibilities of the different spheres of government;
- 18.4 establishing appropriate intergovernmental forums under the Intergovernmental Relations Framework Act, 2005 or, where the forums provided for under that Act are not appropriate, establishing specific intergovernmental forums in terms of national legislation; and
- 18.5 preparing implementation protocols under the Intergovernmental Relations Framework Act, 2005 in order to co-ordinate the actions of different spheres of government in implementing national heritage policy and rendering public services in the heritage sphere.

### Part III: Key policy challenges

#### 19 Introduction

The White Paper on Arts, Culture, Science and Technology, 1997, the key national heritage policy document identified critical issues to be addressed and outlined key requirements for the transformation of the sector and the restructuring of key heritage institutions.

Formulated at a time when the country was in a state of euphoria, and under a government of national unity, the White Paper reflects the concerns and constraints of the period. Ten years on, the document is dated and in need of revision to reflect changing and expanding government programmes and policies, accommodate current priorities and challenges and address factors that impede delivery.

While the DAC Arts and Culture Policy Review was initiated to address the broad revision of policy, the brief of this review requires that we conduct a gap analysis of heritage policy and legislation, identify viable solutions and propose necessary amendments to heritage policy and legislation.<sup>66</sup>

#### 20 Policy and legislation

In reviewing heritage legislation it has been necessary to assess the extent to which it supports and enables the implementation of national heritage policy. This has been difficult, because in many instances policy is not articulated and although it is sometimes implicit, it is not consistent in the institutional arrangements and programmes of DAC and its institutions and agencies. But, the process has proved useful in raising questions that bring to light a number of broad issues of policy requiring clarification and in identifying specific policy gaps across the suite of laws that govern heritage. Given the links between policy, legislation and strategy (see diagram below), it is essential that DAC clarify and resolve the issues noted in this section of the report. Legislation cannot exist in a vacuum. Clear policy guidelines are required to ensure that the legislative amendments support the values, principles and vision for heritage and empower rather than impede implementation.

Not all policy issues require debate. Policy direction is informed by: the Constitution and the commitment of government to give substance to the Bill of Rights; the fundamental principles and values articulated in the White Paper; and the provisions of international conventions and agreements to which the state is party.

Careful consideration needs to be given to the development of national position statements relating to issues such as indigenous knowledge systems, human remains

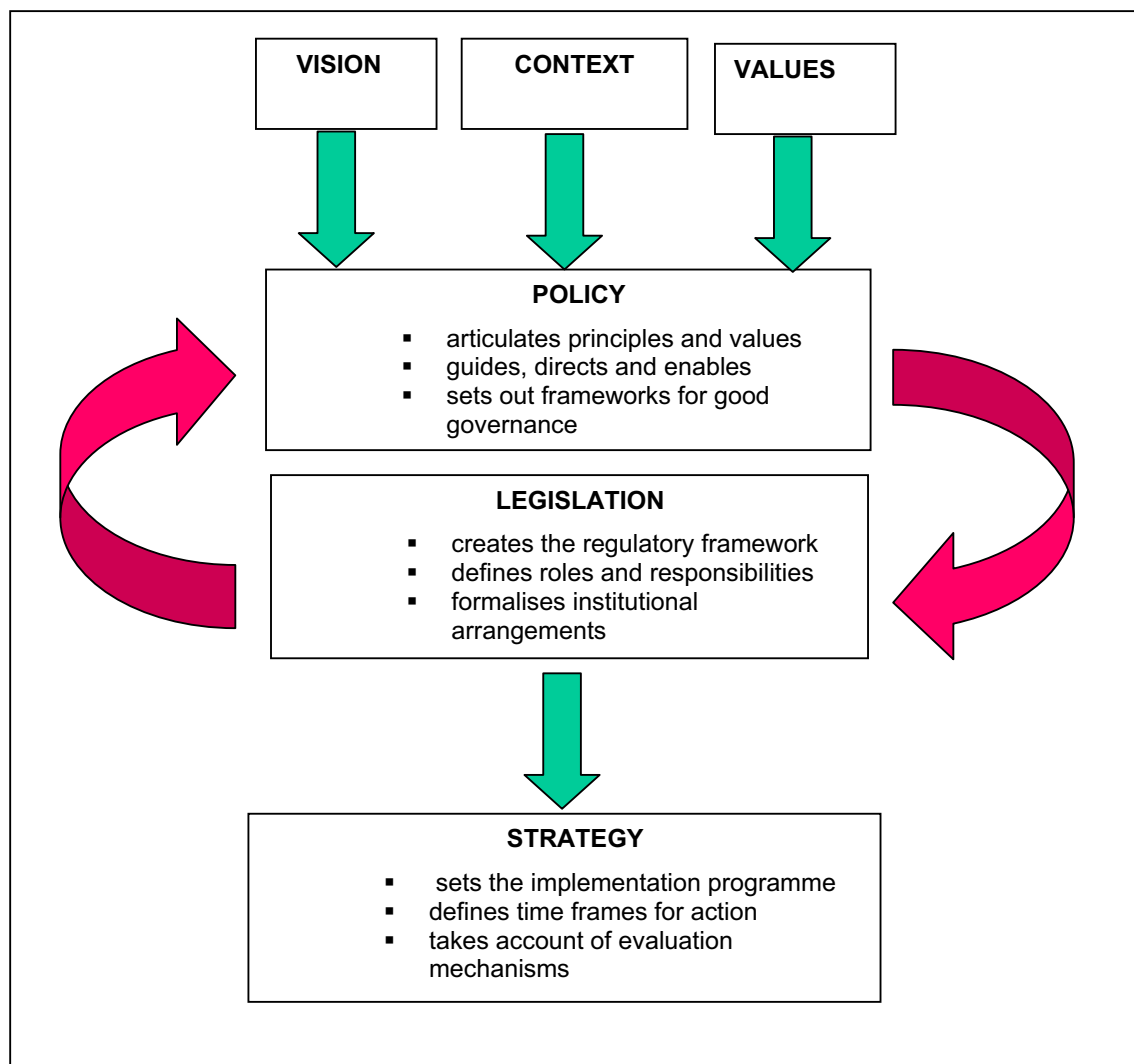
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<sup>66</sup> For further discussion of the White Paper and related policy documents please see Part 3, Volume 2 of this Report. For further information pertaining to the DAC Arts and Culture Policy Review, please see Part 2, Volume 2 of this Report.

and digitisation. In some instances these will be informed by international best practice and by the provisions of applicable international conventions and agreements.

Notwithstanding the above, the key question is: What do we want policies and legislation to do? The critical questions we have to ask of each piece of legislation, and every proposed amendment, are: Does it support the strategic mandate of DAC and its associated institutions? Does it drive transformation and advance the vision for heritage, archives and libraries? Does it speak coherently to the South African situation, within a global context?

These questions, as well as the disjuncture between policy and legislation, must be addressed in amending national heritage policy and legislation.





## 21 Roles and responsibilities: a national integrated delivery framework

The review has brought to the fore a number of questions relating to the roles and responsibilities of the Minister, the Department, its associated institutions and agencies as well as the way in which these relate to, or interact with, provincial and local government and other stakeholders. Matters to be clarified include:

- How do heritage policy, institutional frameworks and mechanisms for engagement reflect the Constitutional principles of co-operative governance? More specifically, what are the roles, responsibilities, functions and powers of the three spheres of government and how do they interact to effect delivery in the heritage sector?
- What are the specific roles and responsibilities, functions and powers of the Minister, DAC, its associated institutions and agencies?
- What institutions and agencies are required to facilitate delivery, how should funding be allocated, what degree of autonomy is appropriate and how should institutions be held accountable?
- What roles do traditional leadership, civil society, communities and the private sector play in respect of heritage, archives and libraries?
- What roles do academics, critical thinkers and public intellectuals play, and how does the sector engage with these?

In relation to the above, it has been noted that a certain degree of overlap exists between the roles and responsibilities of DAC and its associated institutions and agencies. For example, the White Paper, following the lead of the Arts and Culture Task Group (ACTAG), implies that the role of policy formulation lies with statutory bodies tasked with advising the Minister on such matters, and that the role of DAC, as the Minister's executive arm, is to implement such policies. The White Paper tasks the NHC with responsibility for liaising with the World Heritage Committee regarding World Heritage Sites, whereas this function is currently performed by the Department of Environmental Affairs (DEAT) and, to some extent, DAC. SAHRA and the NHC are tasked with responsibilities for repatriation.

Legislative amendments cannot be finalised until the issues noted above are resolved, and, the issues of duplication, overlap, and indeed of omission cannot be resolved in isolation. In the absence of a national heritage policy that clarifies roles and mandates, it has been necessary to revisit the framework of institutions and agencies and ascertain that each has a unique and complementary role to play and, that collectively they deliver on the heritage mandate, as described in current policy and legislation and supplemented by the consultative process and submissions from stakeholders.

In framing the legislative amendments proposed in this Report we have taken into account the need to ensure that the laws make provision for DAC, its institutions and

agencies to interact with each other and with other spheres of government, within the Constitutional framework of cooperative governance. In so doing, we have adapted the heritage landscape, pulling the disparate components together into a proposed integrated delivery framework.

The proposed framework comprises a number of components. The key functions of each of these are summarised below.

#### **21.1 The Minister and Department of Arts and Culture**

The Minister and the Department of Arts and Culture are responsible for:

- formulating national policy;
- monitoring and evaluating the implementation of national policy;
- establishing appropriate legal and fiscal frameworks;
- overseeing the management of national heritage resources in accordance with national policies;
- coordinating national institutions, agencies and structures;
- funding national structures and allocating resources;
- liaising with international and regional governments regarding issues of national significance;
- liaising with provincial governments to ensure equitable, efficient and effective delivery of heritage services.

#### **21.2 National heritage sector structures**

National heritage sector structures provide a formal institutional framework of key stakeholders with whom the Minister and DAC can consult or receive advice from. Four national heritage sector structures are recommended, each with a specific role.

- MinMEC, which provides a forum through which the Minister can consult with the provinces to ensure co-ordination of heritage delivery;
- The TIC, which provides a forum through which national and provincial department officials can communicate and consult in order to coordinate activities;
- The CEO's Forum, building on the foundation established by the NHC, which provides a forum through which the Minister and DAC can consult with the heads of national institutions and agencies to discuss issues of common interest and to ensure coordination of activities;

- The NHC, which will provide a forum for the Minister and DAC to obtain expert advice on heritage matters from civil society representatives. The NHC will take responsibility for promoting, funding and mentoring the development of new heritage initiatives.

### 21.3 National sub-sector structures

National heritage sub-sector structures include those bodies that represent, govern and manage the activities and operations of heritage sub-sectors-

- the SAHRA Council, which is responsible for identifying and coordinating the management of sites and objects that constitute the national estate;
- the proposed National Museums Council, which will take responsibility for promoting and coordinating the management of public collections that constitute the national estate;
- the NCLIS, which takes responsibility for libraries and other bodies involved in promoting, protecting and managing the nations literary heritage;
- the National Archives Council, which takes responsibility for promoting, protecting and managing the nation's documentary heritage.
- the Heraldry Council (or similar structure under a new cultural symbols law), which is responsible for identifying, registering and protecting heraldic symbols, national symbols and cultural heritage symbols; ant
- the SAGNC, which is responsible for registering, processing and advising the Minister on name changes.

These national sub-sector structures are primarily responsible for:

- advising the Minister on sub-sector policy;
- setting national norms and standards;
- implementing national policy; and
- coordinating sub-sector activities.

### 21.4 National heritage institutions

National heritage institutions including the declared cultural institutions, SAHRA, the SAGNS, the Heraldry Bureau, the National Library, Blind Lib and the Legal Deposit Committee are tasked with implementation of national policy

### 21.5 Intergovernmental forums

The Department of Provincial and Local Government (DPLG) has been mandated to review the work of the provinces and of local government, to develop a white paper on provincial government and to review the existing white paper on local government. This may prove useful in addressing some of the questions raised by heritage, archives and libraries in relation to the roles and responsibilities of these spheres of government and the mechanisms through which they interact with national structures.

The engagement of political principals, the Minister and MECs responsible for arts, culture and heritage is formalized and facilitated through MinMEC. Communication between national and provincial officials is facilitated through the TIC. National institutions engage with their counterparts in the provinces through a variety of mechanisms. In some sectors the interaction is more extensive than in others: national libraries and archives for example work in close co-operation; national museums do not.

While the measures described above facilitate broad engagement and consultation, the issue of provincial representation on the governing bodies of national institutions requires a policy decision. Current legislation requires that the National Heritage Council (NHC), the South African Heritage Resources Agency (SAHRA) and the South African Geographical Names Council (SAGNC) include representatives from the provinces. It is recommended that this provision be reviewed and replaced with a requirement for the establishment of an appropriate inter-governmental structure.

As noted in Part II of this Report, national policy does not create legal obligations that bind provinces or local government. National policies must be reflected in the laws and regulations that govern the sector.

National legislation has been enacted to promote the principle of cooperative governance in accordance with the provisions of the Constitution. This provides the framework through which DAC exercises its powers and performs its functions and promotes a rational and coherent heritage framework across the national, provincial and local spheres of government.

The intergovernmental forums provide the mechanism through which the activities of different spheres of government are co-ordinated and determine the manner in which they co-operate to effect delivery. It is recommended that appropriate intergovernmental forums be established between national and provincial institutions within each of the heritage sub-sectors.

### 21.6 Other institutions and organisations

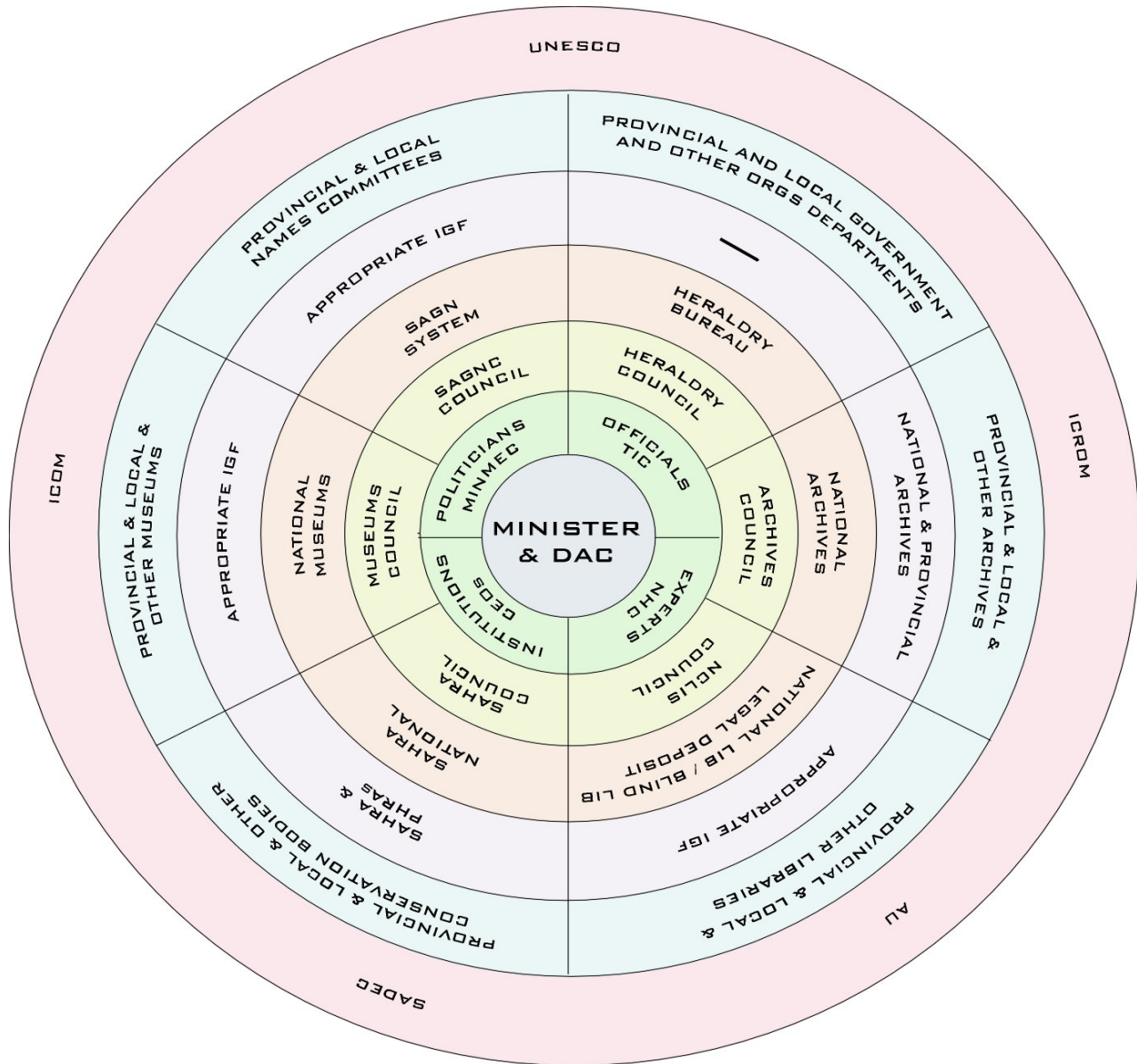
All other institutions and organisations: provincial, local, community based, academic, etc implement policy and contribute to delivery within their specific heritage sub-sectors.

### 21.7 International bodies and organisations

The policies and programmes of international bodies and organisations influence local heritage activity – and local heritage practice informs these. Opportunities for interaction with these bodies exist across all components of the sector.

See diagram below





## 22 Policy gaps

The White Paper is silent on a number of issues on which policy guidance is required. These include:

- intangible heritage;
- community based heritage initiatives;
- monuments and memorials;
- exhumations, reburials and human remains;
- identifying and commemorating victims of conflict;
- repatriation and restitution;
- the protection and promotion of indigenous knowledge;
- public interest copyright exceptions;
- research and development;
- building and sharing intellectual capital;
- access to heritage resources, institutions and collections;
- funding.

### 22.1 Intangible heritage

In South Africa, decades of heritage and conservation practice have focussed on 'tangible' heritage including "colonial monuments, statues and architecture, while intangible heritage in the form of indigenous knowledge systems, oral traditions, folklore, popular memory" has been neglected.<sup>67</sup>

Defined by UNESCO as "the practices, representations, expressions, knowledge skills – as well as the objects, artefacts and cultural spaces associated therewith – that communities, groups and in some cases individuals recognize as part of their cultural heritage,"<sup>68</sup> intangible heritage is manifest in oral traditions and expressions, the performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship. It is also generally considered to-

- be transmitted from generation to generation;
- be constantly recreated by communities and groups, in response to their environment, their interaction with nature, and their history;

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<sup>67</sup> SAHRA, Living Heritage Chapter: Policy and Guideline Principles for Management, page 9.

<sup>68</sup> UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage: Article 2.

- provide communities and groups with a sense of identity and continuity;
- promote respect for cultural diversity and human creativity;
- be compatible with international human rights instruments;
- comply with the requirements of mutual respect among communities, and of sustainable development.

Intangible cultural heritage is traditional and living at the same time. It is constantly recreated and mainly transmitted orally.<sup>69</sup>

Intangible or living heritage has been recognised as an issue to be addressed in the transformation of the South African heritage sector.

The ACTAG Report made mention of *amasiko*, which encompasses “culture with specific emphasis on living tradition, customs and oral history that carries valuable messages from the past.”<sup>70</sup> The Report noted that the majority of South Africans have been excluded from “our history books”<sup>71</sup> and recommended that a national *amasiko* commission be established to make proposals to redress this imbalance. The Report recommended that, in principle, heritage institutions should be ‘suffused’ with *amasiko*, stating that, “for example, an understanding of and respect for sacred sites should be integrated into the heritage resources legislation and practice; people should want to visit archives to research the history of their ancestors; and traditional performances such as praise poems and story-telling should draw the community to museums.”<sup>72</sup>

The White Paper on Arts, Culture and Heritage notes that, “the promotion of living heritage is one of the most vital aspects of the Ministry’s arts, culture and heritage policy”<sup>73</sup> and that “means must be found to enable song, dance, story-telling and oral history to be permanently recorded and conserved in the formal heritage structure.”<sup>74</sup> It commits the Department to: establishing “a national initiative to facilitate and empower the development of living heritage projects in provinces and local communities;”<sup>75</sup> suffusing “institutions responsible for the promotion and conservation of our cultural heritage with the full range and wealth of South African customs;”<sup>76</sup> liaising with the Department of Education and provincial departments responsible for cultural affairs to develop information for heritage education so that the youth are

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<sup>69</sup> United Nations Educational, Scientific and Cultural Organization, <http://www.unesco.org> accessed April 2007.

<sup>70</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 66.

<sup>71</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 76.

<sup>72</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 77.

<sup>73</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.

<sup>74</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:2.

<sup>75</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.

<sup>76</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.



“encouraged to take pride in their own living heritage;”<sup>77</sup> and, with the practitioners, provincial heritage services, SATOUR and the Department of Environmental Affairs, developing a code of ethics for the use of living heritage resources for cultural tourism.<sup>78</sup>

South Africa is in the process of ratifying UNESCO's *Convention for the Safeguarding of the Intangible Cultural Heritage*. This Convention requires State Parties to take the measures necessary to safeguard intangible cultural heritage by: identifying and defining elements and drawing up an inventory; adopting a policy aimed at promoting the function of intangible cultural heritage in society; designating or establishing a competent body for the safeguarding of intangible heritage; fostering research; adopting appropriate legal, technical, administrative and financial measures to foster training, transmission, access and documentation of intangible cultural heritage; and ensuring recognition of, respect for and enhancement of intangible heritage in society through educational and awareness programmes.<sup>79</sup>

A Human Sciences Research Council (HSRC) Social Cohesion and Integration Project paper, presented at the International Network on Cultural Policy meeting in Croatia in 2003, suggested that, “intangible heritage is an important concept because it allows us to expand the concept of heritage beyond buildings, places and objects and to correct an earlier bias towards Western buildings in heritage lists.”<sup>80</sup> A second publication by the same authors concludes that, “safeguarding intangible heritage will also have to become a part of the broader strategy on community development since the safeguarding of transmission mechanisms will be inseparable from national debates around development, land rights and identity policies.”<sup>81</sup>

The documents referred to above include detailed information on and analyses of various international, national and regional initiatives and instruments aimed at safeguarding intangible cultural heritage, and conclude that this may be achieved by establishing a government agency or agencies to do the following:

- maintain and administer the listing and information management process for registers of intangible heritage;
- proactively seek listings of threatened resources and ensure the implementation of management plans for them;

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<sup>77</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:31.

<sup>78</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:32.

<sup>79</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 2003, pages 5-7.

<sup>80</sup> Deacon, H, *Legal and Financial Instruments for Safeguarding our Intangible Heritage* presented at ICOMOS 14<sup>th</sup> General Assembly and Scientific Symposium, 27-31 October 2003, (pages not numbered, see *Summary*).

<sup>81</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage*, Social Cohesion and Integration Programme, HSRC, Cape Town, 2004, page 67.

- make independent decisions about the compatibility of intangible resources with human rights codes;
- assist communities to list resources and, where necessary, also to manage them after listing;
- help to document and address disputes arising over ownership and management of intangible heritage;
- help to protect community rights and to channel benefits related to intangible heritage back into communities;
- develop funding strategies for community-based management of the resource;
- engage with other government and non-governmental agencies.<sup>82</sup>

In conclusion, the document argues that one of the biggest challenges for the safeguarding of heritage, particularly its intangible elements, is not just the development of national cultural policies and legislation but also the better integration of the functions of government departments responsible for culture, heritage and social development.<sup>83</sup>

National heritage institutions have acted on the injunction of the White Paper that means must be found to incorporate living heritage into formal heritage structures.<sup>84</sup>

The National Heritage Resources Act defines living heritage as the intangible aspects of inherited culture, which may include: cultural tradition; oral history; performance; ritual; popular memory; skills and techniques; indigenous knowledge systems; and the holistic approach to nature, society and social relationships.<sup>85</sup> It mandates SAHRA to promote the identification and recording of aspects of living heritage associated with heritage resources,<sup>86</sup> and to protect places and objects to which oral traditions are attached and which are associated with living heritage.<sup>87</sup>

SAHRA, in accordance with the mandate described above, has prepared policy and guidelines for the management of living heritage.<sup>88</sup> This document notes that “the

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<sup>82</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage*, Social Cohesion and Integration Programme, HSRC, Cape Town, 2004, page 65.

<sup>83</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage*, Social Cohesion and Integration Programme, HSRC, Cape Town, 2004, page 67.

<sup>84</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 3:2.

<sup>85</sup> *National Heritage Resources Act, No 25 of 1999*, page 10.

<sup>86</sup> *National Heritage Resources Act, No 25 of 1999*, page 15.

<sup>87</sup> *National Heritage Resources Act, No 25 of 1999*, pages 7 and 52.

<sup>88</sup> South African Heritage Resources Agency, *Living Heritage Chapter: Policy and Guideline Principles for Management*, Cape Town, undated.

official recognition of living heritage is a great accomplishment in the South African heritage fraternity,” and that “integrating living heritage into the ambit of heritage resource management serves as a commitment towards making a meaningful contribution to the transformation of the heritage sector and redress to the past imbalances in heritage resources management.”<sup>89</sup> This document does not address the mechanisms, roles and responsibilities of other heritage agencies in the broader protection and promotion of intangible cultural heritage.

The Cultural Institutions Act makes no mention of living or intangible cultural heritage. Nevertheless, museums have taken cognisance of the call to address the issue of intangible heritage, particularly in relation to their collections. Iziko Museums, for example, have acknowledged the role of indigenous knowledge systems and intangible heritage in interpreting collections, the need to make use of new technologies to give tangible form to intangible aspects of heritage and the need to engage with local communities, the keepers of cultural knowledge, to research, present and preserve intangible heritage.<sup>90</sup>

While the National Archives and Record Service of South Africa Act, 1996 makes no mention of living or intangible cultural heritage, it does determine one of the primary objects of the National Archives (NARS) as the collection of “non-public records with enduring value of national significance with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past.”<sup>91</sup> NARS has identified oral history as a significant mechanism for addressing this and has initiated a National Oral History Programme and developed a National Register of Oral Sources (NAROS).

The National Heritage Council Act's definition of living heritage<sup>92</sup> is consistent with that included in the National Heritage Resources Act. The objects of the NHC, as outlined in this Act, include, *inter alia*: “to protect, preserve and promote the content and heritage which reside in orature in order to make it accessible and dynamic; to integrate living heritage with the functions and activities of the Council and all other heritage authorities and institutions at national, provincial and local level; and to promote and protect indigenous knowledge systems, including but not limited to enterprise and industry, social upliftment, institutional framework and liberatory processes’.”<sup>93</sup> It describes one of the functions, duties and powers of the Council as being to “monitor and co-ordinate the transformation of the heritage sector, with special emphasis on the development of living heritage projects.”<sup>94</sup>

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<sup>89</sup> South African Heritage Resources Agency, *Living Heritage Chapter: Policy and Guideline Principles for Management*, Cape Town, undated, page 9.

<sup>90</sup> Bredekamp, HCJ, *Transforming Representations of Intangible Heritage at Iziko Museums, SA*, paper presented at the Concurrent Session ‘Museums and Living Heritage’, ICOM General Conference, Seoul, 2-8 October 2004

<sup>91</sup> National Archives and Record Service Act of South Africa, No 43 of 1996, page 2.

<sup>92</sup> National Heritage Council Act, No 11 of 1999, page 3.

<sup>93</sup> National Heritage Council Act, No 11 of 1999, page 4.

<sup>94</sup> National Heritage Council Act, No 11 of 1999, page 6.

The NHC mission includes, amongst other objectives, to, "promote, mainstream and foreground living heritage with particular emphasis on Ubuntu as a resource for nation building."<sup>95</sup>

An internal discussion document prepared by the DAC for the purposes of this review<sup>96</sup> notes that living or intangible heritage is still at the periphery of the South African national consciousness. While a pilot programme, the National Indigenous Music and Oral History Programme (NIMOHP) is being piloted at a number of universities, the document notes that, given the debates around intellectual property rights, it is untenable that government proceeds with the research and collection of vulnerable cultural property and that public intellectuals, the custodians of living or intangible heritage, continue to be exploited by unscrupulous researchers in the absence of appropriate policy and legislative frameworks.<sup>97</sup>

It is recommended that DAC formulate a policy on intangible heritage. This policy should address *inter alia*:

- an appropriate definition of intangible heritage, and the scope of activity that falls within the scope of the policy;
- the integration of culture, heritage and development and the implications of this for intangible heritage conservation and management;
- social and economic benefits of the development, promotion and preservation of intangible heritage;
- an appropriate institutional framework for the protection of intangible heritage;
- identification of intangible heritage knowledge, skills and practices;
- the development of intangible heritage registers or databases and the criteria associated with the inclusion of intangible heritage knowledge, skills or practices in these registers;
- guidelines for the involvement of communities in all aspects of the development, promotion, preservation, management and transmission of intangible heritage knowledge, practice and skills;
- managing and custodianship of intangible heritage;

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<sup>95</sup> National Heritage Council, <http://www.nhc.org.za> accessed 22 April 2007.

<sup>96</sup> Department of Arts and Culture, *Some Reflections on Policy and Legislative Issues from the Heritage Perspective*, Internal Discussion Document, December 2006, page 10.

<sup>97</sup> Department of Arts and Culture, *Some Reflections on Policy and Legislative Issues from the Heritage Perspective*, Internal Discussion Document, December 2006, page 11.

- measures to protect the intellectual rights of communities in respect of knowledge and skills from abuse and exploitation;
- funding and economic incentives to support the development promotion and preservation of intangible heritage;
- links to the protection of related sites and objects (tangible heritage), the conservation thereof, and relevant public and private sector agencies;
- measure to address disputes relating to ownership and meaning;
- the roles and responsibilities of other agencies tasked with the protection of cultural, linguistic and linguistic rights.

## 22.2 Community based heritage initiatives

While policy-making processes such as ACTAG focussed on arts and culture in the community, with specific reference to community arts centres,<sup>98</sup> very little attention was paid to community based heritage initiatives. But, as formal established institutions have grappled with transformation, emerging initiatives have forged a new 'face' for heritage. The subsequent emergence of community based heritage initiatives: museums and site specific interpretation centres, monuments, memorials, oral history projects and other initiatives funded through diverse sources has taken place outside the formal heritage sector.

The proliferation of community based heritage initiatives can be attributed to three factors: firstly the need of communities (however they may be defined) to present and celebrate histories that were marginalised under apartheid; secondly the growth of cultural tourism and the investment by the Department of Environment and Tourism, amongst others, in facilities and infrastructure linked to urban and rural regeneration programmes designed to support this; and thirdly, the growing awareness of and pride in indigenous knowledge and value systems and the cultures from which they have emerged.

Community initiatives demonstrate a range of strategies adopted by communities to develop, sustain and preserve local culture and memory. Operating on the margins, these initiatives operate with minimal, if any support from government and with limited opportunities for engagement with the institutions mandated to preserve and promote the national heritage. As sites of engagement initiatives such as these play a role in articulating identity and in contesting the narratives framed by mainstream institutions.

It is recommended elsewhere in this Report that DAC give urgent priority to a heritage development strategy that would take initiatives such as this into account. It is further

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<sup>98</sup> See for example Chapter Four of the ACTAG Report of May 1995.

recommended that DAC formulate policy on facilitation and support for community heritage initiatives. This policy should address *inter alia*:

- the promotion of community based heritage initiatives;
- the role of national, provincial and local government, institutions, agencies and other stakeholders in facilitating, supporting and sustaining these initiatives;
- funding;
- access to material heritage (sites, artefacts, archives) in the custody of other institutions;
- protection of traditional knowledge and resources;
- governance structures;
- mentoring and monitoring;
- skills development; and
- institutional linkages.

### 22.3 Human remains, exhumations, storage and reburials

"Most South African museums contain skeletal remains of the indigenous people, particularly the Khoisan. The South African Museum in Cape Town has at least 788 specimens, the National Museum in Bloemfontein 403, the Department of Anatomy at the University of the Witwatersrand 365, the Department of Anatomy at the University of Cape Town 239, the Albany Museum, Grahamstown 168 and the McGregor Museum in Kimberley 150."<sup>99</sup> Museums in other countries hold similar collections, and the British Museum of Natural History and various other institutions include 'specimens' of Khoisan and other South African peoples in their collections.

The existence of human remains in museum collections poses a number of questions relating to the museum as an appropriate repository for human remains; the storage and 'use' of human remains while they are held by the museum; and how and by whom they might be reburied. Given the circumstances under which these remains were acquired for museum collections and the stories they tell of 'dispossession and

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<sup>99</sup> Legassick, M and Rassool, C, *Skeletons in the Cupboard: South African Museums and the Trade in Human Remains 1907–1917*, South African Museum and McGregor Museum, Cape Town and Kimberley, 2000, page 1. An endnote in this publication states that these figures are derived from Alan Morriem, *A master catalogue: Holoceine human skeletons from South Africa* (Wits University Press 1992), p 18. Morris, 'The Reflection of the Collector: San and Khoi Skeletons in Museums Collections', *South Africa Archaeological Bulletin*, 42, 1987, pp. 12-22 gives somewhat different figures: 350 for the UCT Department of Anatomy and more than 200 for the McGregor Museum, Kimberley.

marginalisation',<sup>100</sup> there is growing international pressure to accord the deceased people the dignity that is their due and to develop appropriate policies and procedures to deal with them. While there is no national policy that addresses the issue, institutions such as Iziko and the McGregor Museum have begun to develop a professional and public discourse.<sup>101</sup>

The ICOM Code of Ethics for Museums<sup>102</sup> specifies that "Collections of human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully. This must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known."<sup>103</sup> The Code of Ethics does not, however, prevent a museum "from acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens and objects from the territory over which it has lawful responsibility."<sup>104</sup>

Research on and exhibition of such remains and material, likewise, must be conducted according to such standards and must take into account the interests and beliefs of the groups from which the objects originated. Exhibitions, particularly, must be presented with great tact and respect for the feelings of human dignity held by all peoples.<sup>105</sup>

The issue of human remains held in museum collections is coming increasingly to the fore as previously marginalised indigenous communities assert their rights to preserve and interpret their own heritage. In response to this, a number of countries and/or institutions have developed policies on human remains held in museums. In general these deal with the ways in which the human remains are acquired, stored, managed, accessed, researched, displayed, de-accessioned, repatriated or re-interred.

One of the critical issues dealt with in several of these policies is the institution's obligation to play a proactive role in identifying genealogical or cultural descendants who might wish to make a claim for return or reburial, as well as verifying claims and negotiating with claimants.

In South Africa, the issue of human remains is of relevance to the policies and practices of SAHRA as well as to museums. The National Heritage Resources Act and the Human Tissue Act make some provision for human remains, but there is no integrated national policy on the removal and re-interment or storage of human remains.

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<sup>100</sup> Morris, A G, "Trophy Skulls, Museums and the San", in Skotnes, P (ed), *Miscast: Negotiating the Presence of the Bushmen*, University of Cape Town Press, Rondebosch, 1996, page 79.

<sup>101</sup> See, for example, Legassick, M and Rassool, C, *Skeletons in the Cupboard: South African Museums and the Trade in Human Remains 1907 - 1917*, South African Museum and McGregor Museum, Cape Town and Kimberley, 2000

<sup>102</sup> ICOM Code of Ethics for Museums, 2006..

<sup>103</sup> ICOM Code of Ethics for Museums, 2006, Section 2.5.

<sup>104</sup> ICOM Code of Ethics for Museums, 2006, Section 2.11.

<sup>105</sup> ICOM Code of Ethics for Museums, 2006, Section 3.7 and 4.3.



It is recommended that DAC formulate a policy on human remains, exhumation and reburials. Such a policy should address, *inter alia*:

- the discovery of human remains;
- the excavation of burial sites: human remains and grave goods;
- the African context and sensitivities to the removal and re-interment of human remains;
- the storage, conservation and management of human remains in institutional collections;
- the de-accession, return or re-interment of named and unnamed human remains in institutional collections;
- the identification and assessment of claimants;
- the process of public consultation when relocating graves; and
- the repatriation of human remains of South African origin, held in collections held elsewhere in the world.

It has been noted that human remains should not be treated in the same way as objects in museum collections. In developing a policy on human remains, it would be appropriate to consider the ethos of the Vermillion Accord on Human Remains, which bases its actions on the principle of respect for: the mortal remains; the wishes of the dead concerning disposition; the wishes of the local community, relatives or guardians and the legitimate concerns of education and science.<sup>106</sup>

## 22.4 Monuments and memorials

There is tendency to confuse monuments and memorials. For the purpose of this discussion cultural heritage monuments are, in accordance with definition included in the World Heritage Convention “architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science”.<sup>107</sup>

Memorials on the other hand are generally assumed to commemorate an individual or group who lost their lives through involvement in conflict or as result of a courageous act or who made a significant contribution to society. In post-apartheid South Africa,

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<sup>106</sup> World Archaeological Congress, The Vermillion Accord on Human Remains, adopted in 1989 at the WAC Inter-Congress, South Dakota, USA.

<sup>107</sup> UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972.



the process of memorialisation has flourished, as have debates about who, what and how we remember. This process impacts directly on much of the activity of the sector. New heritage sites have been identified and declared, memorials have been erected, interpretation facilities have been constructed, streets have been renamed and any number of institutions, programmes and events have been launched to commemorate the memory of a particular individual, group, event or action.

While it would be inappropriate to constrain such activity it is recommended that DAC launch a 'national conversation' on national memory and develop national guidelines for public memorials. Such guidelines should address, *inter alia*:

- appropriate forms of memorialisation;
- mechanisms for the assessment of the significance of the individuals or event to be commemorated;
- consultation processes;
- legal liability for memorials; and
- long term sustainability of memorials.

Memorials should closely reflect the values of the Constitution and should not conflict with the principles that underpin public heritage activity.

## 22.5 Remembering and commemorating victims of conflict

The South African landscape is dotted with the graves of victims of war, named and unnamed, marked and unmarked. These include the victims of: pre-colonial war, colonial wars, the South African War, the First World War, the Second World War and the struggle for liberation.

Towns and settlements are home to memorials to residents who participated in or gave their lives for the cause of one or other conflict. In some parts of the country, memorials commemorating the South African War abound. In other parts, gardens of remembrance have a prominent place in the townscape. Since 1994, memorials acknowledging the role of those who died in the struggle for liberation have sprung up in many townships. Each of these satisfies the need of a community to honour those who suffered or died during conflict.

But the process of memorialization goes beyond the simple act of remembering and, in serving as, "a means to examine the past and address contemporary issues. It can

either promote social recovery after violent conflict ends or crystalize a sense of victimisation, injustice, discrimination, and the desire for revenge".<sup>108</sup>

The State has, since the late 1930's made provision for the formal commemoration of victims of conflict and the protection of their graves. A Commission appointed by the Minister of Interior recommended in 1939, that a permanent committee be appointed to take responsibility for the preservation, care and maintenance of war graves and gardens of remembrance. This led to the establishment of the South African War Graves Board which exercised its duties through two committees, the Civil Graves Committee and the British Forces Committee. The Minister of Education, Arts and Science noted that in the thirty years of its existence the War Graves Board had established gardens of remembrance in honour of the women and children who had died in concentration camps during the "Anglo-Boer War" and had restored or transferred the graves of many of those who had fought in this war. The Minister, in his speech introducing the War Graves Act, 1967 proposed an amendment extending the provisions of the Bill to include only the graves of "white persons." After an extended debate, during which the contribution of the Cape Corps and others in battles against the British troops was described, it was agreed that the proposed amendment be abandoned.<sup>109</sup>

The War Graves Act, 1967 was amended in 1968, 1969, 1970 and 1977 and was repealed by the National Monuments Amendment Act, 1981 which extended the mandate of the National Monuments Council to include protecting, conserving and maintaining a register of war graves.

The Commonwealth War Graves Act, 1992 made provision for the protection of Commonwealth war graves, specifically the graves of those who had died in the course of activity during the First World War and the Second World War. This Act effectively linked activities in South Africa to those of the Commonwealth War Graves Commission, previously the Imperial War Graves Commission, established in the United Kingdom in 1917 and tasked with maintaining the graves of approximately 1.7 million Commonwealth members who died in the two world wars.

It must be noted that despite the existence of the formal protection and commemoration measures described above, the politics of the day prevailed. The black people who lost their lives in the concentration camps of the South African War, and in the First and Second World Wars were largely excluded from the memorials.

The Report of the ANC Monuments, Museums, Archives and National Symbols Commission presented at the 1993 Culture and Development Conference, stated that the ANC policy on graves of victims of conflict was to: consider establishing a Heroes Acre for the graves of those who died in the struggle; attempt to identify the graves of unknown victims of past conflicts and make appropriate arrangements for the

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<sup>108</sup> Barsalou, J., V., Baxter. January 2007, *The Urge to Remember in Stabilization and reconstruction series no.5*. United States Institute of Peace, Washington.

<sup>109</sup> War Graves Act, Second Reading Debate, 1967: 1600-1620.

restoration and care thereof; arrange for the ongoing care and maintenance of graves outside South Africa; and to re-inter remains in situations where graves are under threat from natural forces or development.

The ACTAG Report, 1996 recommended that the conservation work of the British War Graves and Burgergraftekomitee should be incorporated into a division dealing more broadly with all victims of conflict in South Africa, 'from land struggles to wars and the struggle against apartheid'.<sup>110</sup>

In accordance with the above, the White Paper on Arts, Culture and Heritage, 1996 made provision for the work of the War Graves Division to be broadened to include the maintenance of graves of victims of conflict within South Africa and abroad and stated that the National Heritage Council would determine and execute national policy for graves of victims of conflict.<sup>111</sup> It must be noted that this mandate was not incorporated into the National Heritage Council Act, 1999.

The National Heritage Resources Act, 1999, defines "victims of conflict" as:

- certain persons who died in any area now included in the Republic as a direct result of any war or conflict as specified in the regulations, but excluding victims of conflict covered by the Commonwealth War Graves Act, 1992 (Act No. 8 of 1992);
- members of the forces of Great Britain and the former British Empire who died in active service in any area now included in the Republic prior to 4 August 1914;
- persons who, during the Anglo-Boer War (1899-1902) were removed as prisoners of war from any place now included in the Republic to any place outside South Africa and who died there; and
- certain categories of persons who died in the "liberation struggle" as defined in the regulations, and in areas included in the Republic as well as outside the Republic.<sup>112</sup>

The Act makes it an offence to "destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground or part thereof which contains such graves"<sup>113</sup> and tasks SAHRA with identifying and recording the graves of victims of conflict and states that it may erect memorials associated with these graves.<sup>114</sup>

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<sup>110</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 81.

<sup>111</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:18.

<sup>112</sup> National Heritage Resources Act 25 of 1999, definitions.

<sup>113</sup> National Heritage Resources Act 25 of 1999, Section 36 (3)(a).

<sup>114</sup> National Heritage Resources Act 25 of 1999, Section 36 (2).

In addition to the above, the Act tasks SAHRA with assisting other state departments in “identifying graves in a foreign country of victims of conflict connected with the liberation struggle and, following negotiations with the next of kin, or relevant authorities, it may re-inter the remains of that person in a prominent place in the capital of the Republic.”<sup>115</sup>

The drive to remember and commemorate the lives of victims of conflict was given further impetus by the Truth and Reconciliation Commission which recommended the construction of memorials as a form of symbolic reparation.

SAHRA’s Burial Grounds and Graves Unit is in the process of identifying and listing the graves of those who died during apartheid within and beyond South Africa’s borders. This project is seen as an essential part of the country’s search for resolution and closure, especially as it relates to conservation and commemoration as a form of symbolic reparations at community level and promotes community rehabilitation and reconciliation.

The need for a national policy on the graves or memorialisation of victims of conflict has been brought into sharp focus by the debates arising from the development of Freedom Park’s *Sikhumbuto* which commemorated the memory of those who perished in past conflicts and wars, and those who made a contribution to the human renaissance, in our country, our continent and internationally.<sup>116</sup>

In framing such policies it is critical to clarify the intention and assess the impact of potential initiatives. If the intention is, as in colonial times, to glorify the victor, then the impact is likely to strengthen existing divisions. If the intention is to promote social reconstruction and reconciliation then the process is more likely to be inclusive. If the intention is to redress past imbalances the situation becomes more complex and it may be necessary to contextualise the approach: communities may, for example, be encouraged to commemorate and pay tribute to the lives of local residents and acknowledge the loss of the survivors.<sup>117</sup> National initiatives may, in the interests of promoting reconciliation and social cohesion, be more broadly framed to acknowledge and embrace all those who lost their lives in situations of conflict.

The value of the process of formulating policies on memorialisation and victims of conflict and the ‘national conversation’ that this gives rise to may be significant.

It is recommended that DAC formulate policy on the commemoration of victims of conflict within the overarching framework of monuments and memorials. Such a policy should address, *inter alia*:

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<sup>115</sup> National Heritage Resources Act 25 of 1999, Section 36 (9).

<sup>116</sup> Address on the occasion of the ceremony to hand over to the nation, IsikhumbutoFreedom Park Salvokop, Tshwane, 16 December 2006.

<sup>117</sup> See Kgalema, L, (1999) Monuments as symbols of remembrance and peace in the process of reconciliation, CSVR for a description and analysis of the impact of local memorials in a number of South African townships.

- the identification and definition of 'victims of conflict';
- the role of memorialisation in post-conflict reconstruction and development; and
- the roles and responsibilities of national, provincial and local government, communities and stakeholders in identification and commemoration of victims of conflict.

## 22.6 Repatriation and restitution

Repatriation is the process by which cultural objects are returned to a nation or a state at the request of government.

Currently both SAHRA and the NHC are mandated to deal with the repatriation of South African heritage resources. The National Heritage Council Act, 1999 mandates the Council to 'investigate ways and means of effecting the repatriation of South African heritage objects presently being held by foreign governments, public and private institutions and individuals.'<sup>118</sup> The National Heritage Resources Act, 1999 gives SAHRA responsibility for the repatriation of heritage resources which have been removed from South Africa and which SAHRA considers to be significant as part of the national estate'.<sup>119</sup>

The UNESCO convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, 1970 and the UNIDROIT convention on stolen or illegally exported cultural objects, 1995, deal with the illicit removal of cultural property and bind state parties to protecting and repatriating such material, as necessary. But, there is a wealth of material that may not necessarily be covered by these agreements.

### 22.6.1 Repatriation of human remains

Museums in Europe and the USA, for example hold human remains from Southern Africa in their collections. In the well-publicised case of Sarah Baartman, State President Nelson Mandela intervened and issued a formal request to the government of France for the return of her remains. This was no easy matter to accomplish and required the enactment of a specific law by the French National Assembly. Years of legal and political debate came to an end in 2002 with a carefully worded instrument that authorised the return. It was considered imperative in French legal circles that this text be constructed in such a way that it should not be used as a precedent for other claims on museum artefacts and property in France. The future of the remains of South Africans in institutions such as the British Museum is still a matter of conjecture. South African efforts to repatriate these remains will be subject to international conventions and protocols and the policies

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<sup>118</sup> National Heritage Council Act 11 of 1999, Section 10 (1) c).

<sup>119</sup> National Heritage Resources Act 25 of 199, Section 13 (2) (iv).

set in place by those who hold them in custody. What is required from DAC is a policy on whether and how to pursue their repatriation.

It is recommended that DAC formulate a policy to guide this process. Such a policy should address, *inter alia*-

- criteria to assess human remains to be repatriated;
- the roles of DAC and its institutions in repatriation;
- the process to be followed; and
- the custodianship or re-interment of repatriated remains.<sup>120</sup>

#### 22.6.2 Repatriation of heritage objects

Many foreign institutions and individuals hold collections of art and artefacts from South Africa. While there is an initiative to repatriate struggle artworks and heritage<sup>121</sup> other heritage objects seem fated to remain in foreign collections, out of the reach of the majority of South Africans. South African efforts to repatriate heritage objects will be subject to the policies set in place by those who hold them in custody.

Most institutions are reluctant to consider repatriating heritage objects unless there is sufficient evidence to show that they have been illegally acquired or to support a claim from the originating community and where the institution or state has a policy of returning such objects to 'indigenous' or 'first peoples'.<sup>122</sup> In most instances museum acquisition and de-accession policies preclude the alienation of collections purchased with public funds and intended to meet the institutions by mandate for preservation, education and public access.

It is recommended that DAC take a decision on whether or not to pursue the repatriation of heritage objects and, if agreed, to formulate a policy to guide this process. Such a policy should address, *inter alia*-

- criteria to assess objects to be repatriated;
- the roles of DAC and its institutions in repatriation;
- the process to be followed;
- the custodianship of repatriated objects;

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<sup>120</sup> This issues is discussed in more detail in the section dealing with Human Remains, above.

<sup>121</sup> The Ifa Lethu Foundation, a private sector initiative supported by DAC has repatriated a significant number of artworks from around the world.

<sup>122</sup> Australia and Canada, for example.

- possible options that may be negotiated including giving local institutions access to the relevant holdings in other countries, loans, exhibitions, replication, etc; and
- specific guidelines for culturally sensitive material such as sacred and funerary objects.

### 22.6.3 Restitution

Restitution is the process by which cultural objects are returned to an individual or community. Many local institutions include in their holdings objects that are of particular significance to the communities of origin. These may include sacred or funerary objects, objects associated with sensitive cultural practices or those that are considered to be iconic – the golden Rhino from Mapungubwe, for example.

While the issue has been raised by communities, institutions have not yet been legally challenged to defend their custodianship of any such objects. But, given international developments in this field it is anticipated that this will occur in future.

Countries such as the United States of America, Australia and Canada where the rights of clearly defined indigenous population groups are recognised in law, have developed policies and guidelines for the return of cultural property to originating communities. While these differ from country to country, the general principles and processes outlined are similar and provide a useful model on which local practice can be based.

It is recommended that DAC take a decision on whether or not to pursue the restitution of heritage objects and, if agreed, to formulate a policy to guide this process. Such a policy should address, *inter alia*:

- the process through which applications for restitution should be made;
- the process through which claims may be assessed;
- criteria by which the status of the claimant/s may be verified;
- the nature and scope of evidence required to validate claims of ownership or association;
- the nature, status and significance of material claimed;
- criteria against which to assess the implications of the potential alienation of material from the collections of the institution; and
- conditions which may govern the handover of material to claimants. These may include security and preservation.



Possible options including sharing custodianship and responsibility for care and interpretation, special access to holdings, loans, replication of objects, and storage and display of material in accordance with the wishes and advice of the claimants.

## 22.7 The protection and promotion of indigenous knowledge

There is growing recognition of the value and importance of indigenous knowledge. The New Partnership for Africa's Development (NEPAD), the Southern Africa Development Community (SADC), international organisations such as the United Nations and the World Bank, government and non-governmental agencies, and academic and research institutions in many parts of the world, have developed strategies and programmes to promote indigenous knowledge.

In South Africa, an Indigenous Knowledge Systems Policy has been developed by the Department of Science and Technology (DST) and adopted by Cabinet. This policy aims to facilitate the identification and protection of IKS, and to provide the framework for collaboration between national, regional, continental initiatives and international initiatives. This policy mandates DAC as one of the key government departments with which the DST will work to coordinate the national policy.

Given the close relationship between heritage and indigenous knowledge, it is recommended that DAC formulate guidelines, in accordance with the national policy, to direct and inform the manner and mechanisms through which heritage contributes to the national endeavour. Such guidelines should address, *inter alia*:

- the role of heritage institutions in affirming, developing, promoting and protecting IKS;
- mechanisms for engagement with national IKS institutions and structures;
- the principles that underpin heritage practice in relation to IKS;
- the protection of IKS;
- the development of human resource capacity; and
- information and research infrastructure.

## 22.8 Public interest copyright exceptions

- 22.8.1 Our consultations with stakeholders, our consideration of a wide range of policy documents, the historical records of DAC consultative forums and written submissions received from stakeholders present a compelling argument for introducing additional public interest copyright exceptions to our law, particularly to address the needs of the visually impaired, but also in respect of the needs of public libraries and archives in the exercise of their public mandates.



- 22.8.2 Copyright law in South Africa is governed by the Copyright Act, 1978.<sup>123</sup> The Act is administered by the Minister of Trade and Industry who is responsible for making regulations under the Act and for preparing and initiating amendments to the Act.<sup>124</sup> Section 13 of the Act offers a relatively flexible and speedy mechanism for introducing further statutory exceptions to copyright protection in the public interest, allowing the Minister of Trade and Industry to prescribe by regulation exceptions in respect of the reproduction of copyrighted works, provided that the manner of reproduction is not in conflict with the normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of copyright.<sup>125</sup> The Copyright Act itself provides only a narrow set of exceptions in respect of copyright infringement and confers limited rights of reproduction and distribution of works on libraries and archive depots.<sup>126</sup> The Act provides no specific exceptions for persons who are visually impaired or print disabled.
- 22.8.3 In contrast to our law, a range of fair use copyright exceptions are recognised internationally, particularly in respect of the visually impaired, public libraries and archives. The key international instruments governing copyright are:
- the Berne Convention<sup>127</sup> which lays down the minimum standards of protection that must be granted to works under copyright in member countries;
  - the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS);<sup>128</sup> and
  - the World Intellectual Property Organisation (WIPO) internet treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).<sup>129</sup>
- 22.8.4 All of these instruments recognise a general rule for exceptions to copyright protection, based on a three-step test. In this regard, countries may provide for the reproduction of copyrighted works:
- in special cases;
  - where this does not conflict with the normal exploitation of the work; and

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<sup>123</sup> Act 98 of 1978.

<sup>124</sup> See section 1, Copyright Act and section 85(2)(d), Constitution.

<sup>125</sup> Section 13, Copyright Act.

<sup>126</sup> Sections 12 and 13, Copyright Act; regulations 2 and 3, Copyright Regulations, 1978 (GN R1211, GG 9775 of 7 June 1985).

<sup>127</sup> The Convention dates from 1886 but has been revised several times since that date. South Africa became a contracting party to the Convention on 3 October 1928, subscribed to the Brussels text of the Convention in 1959 and to the Paris text in 1975.

<sup>128</sup> South Africa became a member of the World Trade Organisation (WTO) and a signatory to the TRIPS Agreement in January 1995.

<sup>129</sup> South Africa signed these treaties on 5 January 1988.

- where this does not unreasonably prejudice the legitimate interests of the author of the work.<sup>130</sup>

In this context, there is sufficient space for national laws to ensure that copyright protection yields appropriately to the public interest, including the needs of the visually impaired and the needs of public libraries and archives in the exercise of their public mandates. National laws must however strike an appropriate balance between the legitimate interests of rights holders and the public interest. Internationally, at least 57 countries provide in their national laws for public interest copyright exceptions.<sup>131</sup>

In the South African context, striking an appropriate balance between the interests of rights holders and the public interest must take into account also the need to develop and promote the interests of South African authors and the South African publishing industry.

We understand that DAC and other interested parties in the library and information services sector are involved in ongoing liaison with the Department of Trade and Industry (DTI) regarding amending the Copyright Act, but that there is no immediate certainty regarding the content of these amendments, nor when the DTI intends to introduce them to Parliament.

Coherence and clarity in our national law would be served best by implementing new statutory exceptions to copyright protection by promulgating (or amending) regulations under the Copyright Act or amending the provisions of that Act.

However, given the urgency of introducing new public interest copyright exceptions and the lack of certainty regarding the DTI's legislative programme, we recommend that DAC should proceed to prepare and initiate a limited set of amendments to its library and information services legislation in order to introduce public interest copyright exceptions relevant to its own mandate. Depending on the progress of continued interaction with the DTI, DAC's proposed amendments could at a later stage be incorporated into amendments to the Copyright Act or its regulations. We recommend that the DAC should prepare amendments to the following library and information services legislation:

#### 22.8.5 South African Library for the Blind Act 1 of 1998

The Act should be amended to introduce a comprehensive copyright exception for the visually impaired. The exception should consist of the core elements set out below:

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<sup>130</sup> Article 9(2), Berne Convention.

<sup>131</sup> Sullivan J. Study on copyright limitations and exceptions for the visually impaired, WIPO Geneva, 2007 at p29.

- apply to people with print disabilities (defined to include persons who are blind or whose sight is severely impaired, have a physical impairment or an impairment related to comprehension);
- provide for the right to reproduce or adapt works for people with print disabilities in an alternative format which renders it accessible to them (the needs of visually impaired people vary enormously and suitable accessible formats might therefore include large print publications, audio recordings, photographic enlargements, Braille, electronic Braille, digital copies that are compatible with screen-reading software and digital talking books);<sup>132</sup>
- restrict the right to reproduce or adapt works for this purpose to people with print disabilities themselves (the so called “one-for-one” or “private use” exception), the South African Library for the Blind and institutions accredited by it for this purpose (such as Blind SA and the Institute for the Blind);<sup>133</sup>
- require that persons who reproduce or adapt works for this purpose must be in lawful possession of the works, and that the works must be lawfully available to the public;
- require that the reproduced or adapted work must acknowledge the origin of the work and contain a copyright warning (in a form appropriate to the format concerned);<sup>134</sup>
- require persons reproducing or adapting work in terms of the exceptions to take reasonable care to prevent unauthorised distribution of the work;
- provide for the distribution (including rental and lending of works in alternative formats) and for cross-border movement of alternative formats (through institutions recognised for this purpose by the Library for the Blind);
- recognise alternative format works that are produced in terms of laws permitting such production beyond the jurisdiction of South Africa, and which are distributed on a non-profit basis in South Africa;
- require copyright owners, when requested to do so by the South African Library for the Blind, to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions (where reasonably practicable) on terms to be agreed by the parties, or failing agreement, by the National Council of Library and Information Services (NCLIS);

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<sup>132</sup> Sullivan J, p36.

<sup>133</sup> Many jurisdictions preclude use of the work for commercial purposes or reproduction and adaptation of the work by persons or entities who are not non-profit organisations.

<sup>134</sup> See for instance regulation 6, Copyright Regulations, 1978.

- allow the South African Library for the Blind to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions, on terms determined by NCLIS.

#### 22.8.6 **National Council of Library and Information Services Act 6 of 2001, Legal Deposit Act 54 of 1997, National Archives and Records Act 43 of 1996**

These Acts should be amended to introduce additional copyright exceptions to enhance the performance of the mandates of public libraries, archives and places of legal deposit. The exceptions should contain the following core elements:

- public archives and places of legal deposit should be allowed to make copies (including digital copies) of works in their lawful possession for purposes of preservation, replacement or security. Copies may not be made for commercial advantage. In respect of works subject to copyright, copies must contain an appropriate copyright warning and digital copies may not be made available to the public in that format outside the premises of the library or archives;
- the exception should allow public libraries to make copies (including digital copies) of works in their lawful possession for purposes of preservation or replacement where it is not reasonably practicable for the library to obtain a copy (not including a second-hand copy) within a reasonable time at an ordinary commercial price. Public libraries should be permitted to make digital copies available online to users within their premises provided that the user is prevented from making electronic copies or communicating the work using equipment supplied by the library. Digital copies of works subject to copyright must contain an appropriate copyright notice. Public libraries should also be allowed to communicate digital copies for purposes of inter-public library loans;
- the exception should also allow public archives and public libraries to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of these exceptions, on terms determined by NCLIS.

#### 22.9 **Research and development**

Access to sound and credible research is essential for the strategic development of the sector. But, while national institutions focus on discipline specific research, very little is done to investigate the broader issues, the context in which heritage is practiced, or to gather the data that will enable planners and practitioners to plan for the future. What is required is a space for intellectual creativity, for stimulating innovative thinking that will advance the sector.

It is recommended that DAC formulate a research and development policy that addresses *inter alia*-

- an institutional framework that clarifies the roles and responsibilities of DAC, its institutions and agencies in the field of research and development;
- the mechanisms or process through which strategic research priorities will be identified;
- the nature of research required to assist decision making, inform policy and facilitate coordination and improve the effective implementation of policies and programmes;
- development of research capacity to unlock the creative potential of the research community;
- funding of research;
- monitoring, assessment and evaluation of research; and
- linkages, partnerships and networks.

#### 22.10 Building a knowledge society

Heritage institutions, including museums, archives and libraries are storehouses of knowledge and sources of expertise and scholarship and contain and generate a wealth of knowledge that could play a part in promoting social cohesion and economic development, supporting and encouraging learning and inspiring creativity.

New technologies that have been evolved since the mid-twentieth century have stimulated an unprecedented growth in the production and dissemination of information. But as the seminal UNESCO World Report, *Towards Knowledge Societies*<sup>135</sup> notes "an excess of information is not necessarily the source of additional knowledge".<sup>136</sup> and makes the point that there is still a long way to go before an information society, ie one in which the creation, distribution and manipulation of information has become a significant economic and cultural activity<sup>137</sup> moves to becoming a knowledge society, ie one which creates, shares and uses knowledge and prosperity for the well-being of its people".<sup>138</sup>

Building a knowledge society presents a number of challenges-

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<sup>135</sup> UNESCO World Report, *Towards Knowledge Societies*, UNESCO, 2005, pg 5.

<sup>136</sup> UNESCO World Report, *Towards Knowledge Societies*, UNESCO, 2005, pg 19.

<sup>137</sup> The Digital Strategy: Creating Our Digital Future, Glossary of Key Terms, [www.digitalstrategy.gov.nz](http://www.digitalstrategy.gov.nz) accessed 6 April 2007 .

<sup>138</sup> The Digital Strategy: Creating Our Digital Future, Glossary of Key Terms, [www.digitalstrategy.gov.nz](http://www.digitalstrategy.gov.nz) accessed 6 April 2007 .

- firstly, while technology creates new channels through which information can be communicated and shared one of the critical obstacles to overcome is ensuring that knowledge resources and the means to access this are available to all;
- a second challenge is to ensure that society has the capacity to use existing information creatively to develop knowledge. This has to do with “creative ways of thinking, acting and cooperating so that existing knowledge is not only preserved and stored but so that new forms of knowledge are developed and new types of action designed”.<sup>139</sup> This requires significant investment in developing the intellectual capital of individuals and institutions. It also requires a shift in values. As the report notes “to remain human and liveable, knowledge societies will have to be societies of shared knowledge”<sup>140</sup> and, ones that espouse the fundamental human rights; freedom of opinion and expression as well as freedom of information, media pluralism and academic freedom; the right to education and its corollary, free basic education; and the right to participate in the cultural life of the community, enjoy the arts and share in scientific advancement and its benefits”.<sup>141</sup>
- a third challenge relates to the threat posed by globalisation to cultural and linguistic diversity and to local and indigenous knowledge systems and the measures required to ensure that these survive and thrive.

These are some of the challenges confronting the sector in general and the national institutions in particular as they move increasingly from a focus on preserving and promoting heritage towards playing a central role as a driver of the knowledge society.

It is recommended that DAC formulate policy on the role of heritage in building a knowledge society. Such a policy should address, *inter alia*-

- the role of each sub-sector in building a knowledge society, in the provision of resources and the development of skills;
- the clarification or extension of institutional mandates;
- co-ordination of activity and interaction with other sectors;
- mechanisms to facilitate public access to institutional resources;
- measure to support diverse forms of knowledge and the expressions thereof.

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<sup>139</sup> Drotner, K. *Library innovation for the knowledge society*, Scandinavian Public Library, www.splq.info, accessed 6 April 2007.

<sup>140</sup> UNESCO World Report, *Towards Knowledge Societies*, UNESCO, 2005, pg 5.

<sup>141</sup> UNESCO World Report, *Towards Knowledge Societies*, UNESCO, 2005, pg 18.

### 22.11 Investing in and sharing intellectual capital

Museums, archives and libraries are storehouses of knowledge and sources of expertise and scholarship that utilise public funding to generate reserves of human and intellectual capital. While this is of primary use to scholars, researchers, curators and heritage practitioners, these resources could be mobilised to make a difference to people's lives. This will not be achieved unless the policies and legislation required to protect and utilize these resources for the public good are formulated.

The precedent set in the Draft Intellectual Property Rights from Publicly Financed Research Bill, 2007, formulated by the Department of Science and Technology, should be noted. This Bill defines the rights of the State in intellectual property derived from publicly financed research and provides for: the establishment of a dedicated fund to finance the securing of intellectual property rights resulting from publicly financed research; a uniform system of intellectual property management, through the establishment of a National Intellectual Property Management office; effective protection of intellectual property emanating from publicly financed research; gives preference to small micro medium enterprise and broad-based black economic empowerment entitles in granting of licences to commercialise intellectual property derived from publicly financed research; and for benefit sharing by employees, and their institutions in the economic benefits flowing from publicly financed intellectual property. While the Bill focuses on inventions and patents, the provision are, in principle, applicable to the heritage sector, and should be taken into account.

It is recommended that DAC formulate policy to unlock the intellectual capital that resides in its publicly funded institutions. This policy should address *inter alia*-

- a motivation for investment in intellectual capital;
- the mandates of heritage institutions to develop intellectual capital;
- the rights of institutions and employees to benefit from this; and
- the criteria and processes through which the right to benefit may be extended to others for social and economic gain.<sup>142</sup>

### 22.12 Access to heritage resources, institutions and collections

The White Paper identifies access to, participation in, and enjoyment of the arts, cultural expression, and the preservation of one's heritage as basic human rights.<sup>143</sup> Given this position, it is unfortunate that many South Africans are unable to access public heritage institutions because they cannot pay the required entrance fees. While it is understood that institutions are urged to maximize revenue-generating

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<sup>142</sup> See Research and development and Building a knowledge society, above.

<sup>143</sup> White Paper on Arts, Culture and Heritage, 1997, Section 1.3.



opportunities, this must be balanced with the responsibility to promote access to the resources funded through the public fiscus.

It is recommended that DAC formulate policy to make provision for South Africans to access heritage institutions. In doing this, they may draw on international precedents which utilize one or more of the following measures to facilitate access:

- reduced rates for local residents;
- free days; and
- free entrance to general displays but not all exhibitions.

It must be noted however that obstacles to access go beyond finance. The location of national institutions in urban areas disadvantages rural populations. The use of one official language, for example, disadvantages those who communicate in others and the emphasis on the cultural production of one group may dissuade others from accessing the resources. These and other issues which impede access rather than encourage it, should be addressed in policy.

#### 22.13 Funding

Heritage institutions, projects, programmes and other initiatives are funded from diverse sources. These include: national, provincial and local government, the private sector, national and international agencies, sponsors or donors.

Public funds are channelled, at national level through DAC and its agencies, the NHC and SAHRA, and at provincial level through provincial arts, culture and heritage councils or similar structures. In some, but not all areas, local government provides and funds heritage initiatives. In the absence of a national heritage funding policy it is possible for unscrupulous applicants to source financial assistance from more than one source. Conversely, it is possible that some worthy projects are overlooked because they do not fit the funding priorities of a particular body.

It is recommended that DAC formulate a funding policy. This should address, *inter alia*:

- revenue sources and funding channels;
- roles and responsibilities of public funding entities;
- the relationship between DAC and other funding entities;
- a clear definition of the nature and scope of initiatives funded by each of the structures;
- the mechanism through which funding priorities are identified – ideally, through links to a strategic development plan for the sector;



- equitable distribution of resources;
- the processes through which funding opportunities are advertised, selection panels constituted and the criteria through which the applications are evaluated;
- monitoring and evaluation mechanisms;
- support and mentorship strategies;
- regulatory and accountability measures;
- public private partnerships;
- tax benefits or incentives;
- economic, social and environmental impact; and
- linkages to other funding bodies.

#### 22.14 **Social cohesion**

South Africa is a culturally, ethnically, linguistically and racially diverse society. DAC has been tasked with promoting social cohesion. In order to give effect to this mandate it is recommended that DAC formulate policy which addresses *inter alia*:

- ways in which heritage may be used to foster unity, support diversity, minimize conflict and promote human security;
- the role that each sub-sector may play in promoting social cohesion – and identifying the legislative, policy and operational obstacles that detract from this;
- ways to foster reconciliation and achieve redress;
- promotion of social cohesion without compromising social justice;
- measures that give substance to the provisions of the Bill of Rights so that the cultural rights of minorities are not subsumed or threatened; and
- monitoring and evaluation of institutional initiatives.

#### 22.15 **Policy position statements**

In addition to the above, clear policy statements are required to clarify, acknowledge, and provide direction for the sector in relation to the fundamental principles which underpin heritage practice and the contribution that the sector could, and should make to national policies and programmes. Such issues include:

- respect for human rights;
- freedom of expression;
- promoting literacy and contributing broadly to education;
- giving substance to the Constitutional rights of all citizens, including minority groups and those with disabilities; and
- promoting the principles, philosophy and value systems of Ubuntu.

## 23 Summary of policy recommendations

Subject	Policy recommendations
<b>National integrated delivery framework</b>	<p>The institutional landscape in the heritage sector should be adapted, pulling different components together into a proposed integrated delivery framework comprising the following components-</p> <ul style="list-style-type: none"> <li>• the Minister and the Department of Arts and Culture;</li> <li>• National Heritage Sector Structures (MinMEC, TIC, CEO's Forum and NHC);</li> <li>• National Sub-sector Structures (SAHRA Council, proposed National Museums Council, NCLIS, National Archives Council, Heraldry Council and SAGNC);</li> <li>• National Heritage Institutions (declared cultural institutions, SAHRA, SAGNS, Heraldry Bureau, National Library, BlindLib and Legal Deposit Committee);</li> <li>• Intergovernmental forums;</li> <li>• other institutions and organisations; and</li> <li>• international bodies and organisations.</li> </ul>
<b>Policy gaps identified</b>	<p>The White Paper is silent on a number of issues on which policy guidance is required. These are set out below.</p>

Subject	Policy recommendations
<b>Intangible heritage</b>	<p>It is recommended that DAC formulate a policy on intangible heritage. This policy should address <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• an appropriate definition of intangible heritage, and the scope of activity that falls within the scope of the policy;</li> <li>• the integration of culture, heritage and development and the implications of this for intangible heritage conservation and management;</li> <li>• social and economic benefits of the development, promotion and preservation of intangible heritage;</li> <li>• an appropriate institutional framework for the protection of intangible heritage;</li> <li>• identification of intangible heritage knowledge, skills and practices;</li> <li>• the development of intangible heritage registers or databases and the criteria associated with the inclusion of intangible</li> <li>• heritage knowledge, skills or practices in these registers;</li> <li>• guidelines for the involvement of communities in all aspects of the development, promotion, preservation, management and transmission of intangible heritage knowledge, practice and skills;</li> <li>• managing and custodianship of intangible heritage;</li> <li>• measures to protect the intellectual rights of communities in respect of knowledge and skills from abuse and exploitation;</li> <li>• funding and economic incentives to support the development promotion and preservation of intangible heritage;</li> <li>• links to the protection of related sites and objects (tangible heritage), the conservation thereof, and relevant public and private sector agencies;</li> <li>• measure to address disputes relating to ownership and meaning;</li> <li>• the roles and responsibilities of other agencies tasked with the protection of cultural, linguistic and linguistic rights.</li> </ul>
<b>Community based heritage initiatives</b>	<p>It is recommended elsewhere in this Report that DAC give urgent priority to a heritage development strategy that would take initiatives such as this into account. It is further recommended that DAC formulate policy on facilitation and support for community heritage initiatives. This policy should address <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• the promotion of community based heritage initiatives;</li> <li>• the role of national, provincial and local government, institutions, agencies and other stakeholders in facilitating, supporting and sustaining these initiatives;</li> <li>• funding;</li> <li>• access to material heritage (sites, artefacts, archives) in the custody of other institutions;</li> </ul>

Subject	Policy recommendations
	<ul style="list-style-type: none"> <li>• protection of traditional knowledge and resources;</li> <li>• governance structures;</li> <li>• mentoring and monitoring;</li> <li>• skills development; and</li> <li>• institutional linkages.</li> </ul>
<b>Human remains, exhumations, storage and reburials</b>	<p>It is recommended that DAC formulate a policy on human remains, exhumation and reburials. Such a policy should address, <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• the discovery of human remains;</li> <li>• the excavation of burial sites: human remains and grave goods;</li> <li>• the African context and sensitivities to the removal and re-interment of human remains;</li> <li>• the storage, conservation and management of human remains in institutional collections;</li> <li>• the de-accession, return or re-interment of named and unnamed human remains in institutional collections;</li> <li>• the identification and assessment of claimants;</li> <li>• the process of public consultation when relocating graves; and</li> <li>• the repatriation of human remains of South African origin, held in collections held elsewhere in the world.</li> </ul> <p>In developing a policy on human remains, it would be appropriate to consider the ethos of the Vermillion Accord on Human Remains, which bases its actions on the principle of respect for: the mortal remains; the wishes of the dead concerning disposition; the wishes of the local community, relatives or guardians and the legitimate concerns of education and science.</p>
<b>Monuments and memorials</b>	<p>It is recommended that DAC develop national guidelines for public memorials. Such guidelines should address <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>• appropriate forms of memorialisation;</li> <li>• mechanisms for the assessment of the significance of the individuals or event to be commemorated;</li> <li>• consultation processes;</li> <li>• legal liability for memorials; and</li> <li>• long term sustainability of memorials.</li> </ul>
<b>Remembering and commemorating victims of conflict</b>	<p>It is recommended that DAC formulate policy on the commemoration of victims of conflict within the overarching framework of monuments and memorials. Such a policy should address, <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• the identification and definition of 'victims of conflict';</li> <li>• the role of memorialisation in post-conflict reconstruction and development; and</li> <li>• the roles and responsibilities of national, provincial and local</li> </ul>

Subject	Policy recommendations
	government, communities and stakeholders in identification and commemoration of victims of conflict.
<b>Repatriation and restitution</b>	<p>It is recommended that DAC formulate a policy to guide the repatriation of human remains. Such a policy should address, <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>• criteria to assess human remains to be repatriated;</li> <li>• the roles of DAC and its institutions in repatriation;</li> <li>• the process to be followed; and</li> <li>• the custodianship or re-interment of repatriated remains.</li> </ul>
	<p>It is recommended that DAC take a decision on whether or not to pursue the repatriation of heritage objects and, if agreed, to formulate a policy to guide this process. Such a policy should address, <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>• criteria to assess objects to be repatriated;</li> <li>• the roles of DAC and its institutions in repatriation;</li> <li>• the process to be followed;</li> <li>• the custodianship of repatriated objects;</li> <li>• possible options that may be negotiated including giving local institutions access to the relevant holdings in other countries, loans, exhibitions, replication, etc; and</li> <li>• specific guidelines for culturally sensitive material such as sacred and funerary objects.</li> </ul>
	<p>It is recommended that DAC take a decision on whether or not to pursue the restitution of heritage objects and, if agreed, to formulate a policy to guide this process. Such a policy should address, <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• the process through which applications for restitution should be made;</li> <li>• the process through which claims may be assessed;</li> <li>• criteria by which the status of the claimant/s may be verified;</li> <li>• the nature and scope of evidence required to validate claims of ownership or association;</li> <li>• the nature, status and significance of material claimed;</li> <li>• criteria against which to assess the implications of the potential alienation of material from the collections of the institution; and</li> <li>• conditions which may govern the handover of material to claimants. These may include security and preservation.</li> </ul>
<b>The protection and promotion of indigenous knowledge</b>	<p>Given the close relationship between heritage and indigenous knowledge, it is recommended that DAC formulate guidelines, in accordance with national policy, to direct and inform the manner and mechanisms through which heritage contributes to the national endeavour. Such guidelines should address, <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• the role of heritage institutions in affirming, developing, promoting and protecting IKS;</li> </ul>

Subject	Policy recommendations
	<ul style="list-style-type: none"> <li>mechanisms for engagement with national IKS institutions and structures;</li> <li>the principles that underpin heritage practice in relation to IKS;</li> <li>the protection of IKS;</li> <li>the development of human resource capacity; and</li> <li>Information and research infrastructure.</li> </ul>
<b>Public interest copyright exceptions</b>	<p>Given the urgency of introducing new public interest copyright exceptions and the lack of certainty regarding the DTI's legislative programme, we recommend that DAC should proceed to prepare and initiate a limited set of amendments to its library and information services legislation in order to introduce public interest copyright exceptions relevant to its own mandate.</p> <p>Depending on the progress of continued interaction with the DTI, DAC's proposed amendments could at a later stage be incorporated into amendments to the Copyright Act or its regulations. In the interim we recommend that DAC should prepare amendments to the following library and information services laws;</p> <ul style="list-style-type: none"> <li>South African Library Act for the Blind Act 1 of 1998</li> <li>National Council of Library and Information Services Act 6 of 2001;</li> <li>Legal Deposit Act 54 of 1997;</li> <li>National Archives and Records Act 43 of 1996.</li> </ul> <p>These Acts should be amended to introduce additional copyright exceptions to enhance the performance of the mandates of public libraries, archives and places of legal deposit.</p>
<b>Research and development</b>	<p>It is recommended that DAC formulate a research and development policy that addresses <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>an institutional framework that clarifies the roles and responsibilities of DAC, its institutions and agencies in the field of research and development;</li> <li>the mechanisms or process through which strategic research priorities will be identified;</li> <li>the nature of research required to assist decision making, inform policy and facilitate coordination and improve the effective implementation of policies and programmes;</li> <li>development of research capacity to unlock the creative potential of the research community;</li> <li>funding of research;</li> <li>monitoring, assessment and evaluation of research; and</li> <li>linkages, partnerships and networks.</li> </ul>
<b>Building a knowledge society</b>	<p>It is recommended that DAC formulate policy on the role of heritage in building a knowledge society. Such a policy should address, <i>inter alia</i>-</p>

Subject	Policy recommendations
	<ul style="list-style-type: none"> <li>the role of each sub-sector in building a knowledge society, in the provision of resources and the development of skills;</li> <li>the clarification or extension of institutional mandates;</li> <li>co-ordination of activity and interaction with other sectors;</li> <li>mechanisms to facilitate public access to institutional resources;</li> <li>measure to support diverse forms of knowledge and the expressions thereof.</li> </ul>
<b>Investing in and sharing intellectual capital</b>	<p>It is recommended that DAC formulate policy to unlock the intellectual capital that resides in its publicly funded institutions. This policy should address <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>a motivation for investment in intellectual capital;</li> <li>the mandates of heritage institutions to develop intellectual capital;</li> <li>the rights of institutions and employees to benefit from this; and</li> <li>the criteria and processes through which the right to benefit may be extended to others for social and economic gain</li> </ul>
<b>Access to heritage resources, institutions and collections</b>	<p>It is recommended that DAC formulate policy to make provision for South Africans to access heritage institutions. In doing this, DAC may draw on international precedents which utilize one or more of the following measures to facilitate access:</p> <ul style="list-style-type: none"> <li>reduced rates for local residents;</li> <li>free days; and</li> <li>free entrance to general displays but not all exhibitions.</li> </ul> <p>It must be noted however that obstacles to access go beyond finance. The location of national institutions in urban areas disadvantages rural populations. The use of one official language, for example, disadvantages those who communicate in others and the emphasis on the cultural production of one group may dissuade others from accessing the resources. These and other issues which impede access rather than encourage it, should be addressed in policy.</p>
<b>Funding</b>	<p>It is recommended that DAC formulate a funding policy. This should address, <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>revenue sources and funding channels;</li> <li>roles and responsibilities of public funding entities;</li> <li>the relationship between DAC and other funding entities;</li> <li>a clear definition of the nature and scope of initiatives funded by each of the structures;</li> <li>the mechanism through which funding priorities are identified ideally, through links to a strategic development plan for the sector;</li> <li>equitable distribution of resources;</li> <li>the processes through which funding opportunities are</li> </ul>

Subject	Policy recommendations
	<p>advertised, selection panels constituted and the criteria through which the applications are evaluated;</p> <ul style="list-style-type: none"> <li>• monitoring and evaluation mechanisms;</li> <li>• support and mentorship strategies;</li> <li>• regulatory and accountability measures;</li> <li>• public private partnerships;</li> <li>• tax benefits or incentives;</li> <li>• economic, social and environmental impact; and</li> <li>• linkages to other funding bodies.</li> </ul>
<b>Social cohesion</b>	<p>South Africa is a culturally, ethnically, linguistically and racially diverse society. DAC has been tasked with promoting social cohesion. In order to give effect to this mandate it is recommended that DAC formulate policy which addresses <i>inter alia</i>:</p> <ul style="list-style-type: none"> <li>• ways in which heritage may be used to foster unity, support diversity, minimize conflict and promote human security;</li> <li>• the role that each sub-sector may play in promoting social cohesion and identifying the legislative, policy and operational obstacles that detract from this;</li> <li>• ways to foster reconciliation and achieve redress;</li> <li>• promotion of social cohesion without compromising social justice;</li> <li>• measures that give substance to the provisions of the Bill of Rights so that the cultural rights of minorities are not subsumed or threatened; and</li> <li>• monitoring and evaluation of institutional initiatives.</li> </ul>
<b>Policy position statements</b>	<p>In addition to the above, clear policy statements are required to clarify, acknowledge, and provide direction for the sector in relation to the fundamental principles which underpin heritage practice and the contribution that the sector could, and should make to national policies and programmes. Such issues include:</p> <ul style="list-style-type: none"> <li>• respect for human rights;</li> <li>• freedom of expression;</li> <li>• promoting literacy and contributing broadly to education;</li> <li>• giving substance to the Constitutional rights of all citizens, including minority groups and those with disabilities; and</li> <li>• promoting the principles, philosophy and value systems of Ubuntu.</li> </ul>

## 24 Conclusion

The recommendations made in this Part arise broadly out of concerns brought to our attention during the review of heritage legislation. While our brief does not extend to policy formulation, we have offered some pointers to issues on which to engage with stakeholders. Issues of specific concern to the heritage sub-sectors are dealt with in relation to the relevant legislation.



## Part IV: Governance review of heritage institutions

### 25 Institutional arrangements

We were requested by DAC to consider and advise on the institutional arrangements established by the heritage laws under review, with particular attention to good governance and the streamlining and where appropriate harmonising of institutional processes and procedures. In reviewing these institutional arrangements, we have had regard to a number of governance principles which we consider relevant to heritage institutions operating in the public domain. These principles are set out below.

### 26 Principles of good governance

Good governance in public sector institutions should focus on achieving two key objectives:

- proper performance of the institution's specific public mandate;
- effective compliance with the legislative and policy framework applicable to the institution, including the effective control, management and safeguarding of its finances and other public resources.

The governance structures and arrangements of public institutions should contribute to the effective and efficient performance of their specific public mandate (delivery of public goods, services and programs, exercise and performance of public powers and functions) and provide for proper accountability mechanisms and relationships.

While a range of different (but generally related) governance principles have been developed both locally and internationally to promote good governance,<sup>144</sup> the application of the following combination of governance principles has in our view greatly assisted a range of South African public institutions to achieve their performance and compliance objectives -

#### 26.1 Effectiveness

Public institutions must be effective and efficient in the performance of their specified public mandates. Public powers and functions must be exercised and performed effectively and public goods, services and programs must be delivered efficiently. This requires clarity of the institution's public purpose and objectives and clearly defined roles and responsibilities both within the institution and between the institution and other public authorities.

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<sup>144</sup> See for instance *King Report on Corporate Governance, 2002*, *Protocol on Corporate Governance in the Public Sector*, Department of Public Enterprises, 2002 and *Guide to better practice for public sector governing and advisory boards*, Audit Office of New South Wales, Australia, 1998.

## 26.2 Accountability

Public institutions must be accountable for achieving their specified public mandates and must be subject to external scrutiny. This requires –

- effective accountability mechanisms to higher executive authority, to stakeholders and to the general public for the exercise and performance of their powers and functions and for the delivery of public goods, services and programs;
- proper management, control and safeguarding of public finances and other public resources of the institution;
- regular and accurate performance review and assessment; and
- regular and accurate performance reporting.

## 26.3 Integrity

Public sector institutions are the custodians of public finances and other public resources and must be characterized by integrity and honesty. This requires -

- observing and promoting high standards of ethical conduct;
- proper performance of fiduciary duties;
- independence from vested interests;
- avoiding undue influence and conflicts of interest.

## 26.4 Transparency

The activities and conduct of public institutions must be transparent and open. This requires-

- fair, transparent and accessible rules, processes and procedures;
- the consistent application of these rules, processes and procedures and the resultant predictability of outcome;
- transparent and motivated decision-making; and
- timely, accessible and accurate provision of information to higher executive authority, stakeholders and the public.

### 26.5 Participation

Public stakeholders must not only be beneficiaries of public services but participants and agents in the development and where appropriate, the implementation of public policies. This requires -

- where appropriate, the active involvement of beneficiaries, stakeholders and other affected groups in the design of public policies and programs;
- promoting public ownership of policies and programs and stakeholder commitment to their success; and
- consultation, and where appropriate representation on institutional structures.

### 26.6 Capacity

Public institutions must have the necessary capacity and resources to perform their public mandates. This includes -

- the appropriate selection of skills, knowledge and experience on the governing body of the institution;
- the formal induction and the ongoing development and skills training of the governing body;
- a balance between continuity and renewal on the governing body; and
- the availability of time and resources.

### 26.7 Guiding documents

In addition to the governance principles provided above, the following documents provide useful guidance:

- Protocol on Corporate Governance in the Public Sector (Department of Public Enterprises), 2002
- Policy Framework for the Governance and Administration of Public Sector Institutions (Department of Public Service and Administration and National Treasury), 2005
- Guide for Appointing Persons to Boards of Public Sector Institutions (Department of Public Service and Administration), 2005.

## 27 Review of institutional arrangements

Our review of heritage institutions identified a number of areas of concern which require policy and legislative attention by DAC. These are:

### 27.1 Review of institutional mandates

The statutory mandates of a number of heritage institutions require reconsideration in the light of the current policy environment and recent developments. In this regard:

- the overlapping mandates and functions of DAC, the National Heritage Council and the South African Heritage Resources Authority must be resolved. These overlaps involve:
  - the co-ordination and management of the national estate;
  - the co-ordination of heritage institutions;
  - responsibility for intangible or living heritage;
  - the formulation of national policies;
  - the repatriation of heritage objects;
  - responsibility for project funding; and
  - the promotion of heritage awareness.

We address this matter further in our consideration of the National Heritage Council Act, 1999 and the National Heritage Resources Act, 1999 -

- reconsidering the role, functions and status of the South African Geographical Names Council, arising from shortcomings identified in this review and the Supreme Court of Appeal judgment in the *Makhado* matter (not yet reported);<sup>145</sup>
- introducing an appeal function to the functions of the National Archives Advisory Council in order to harmonise the provisions of the National Archives and Records Service of South Africa Act, 1996 with those of the Promotion of Access to Information Act, 2000.

We will deal with these matters further in our consideration of the specific laws concerned.

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<sup>145</sup> *The Chairpersons' Association v Minister of Arts and Culture and Others* (2007) SCA 44 (RSA) (Not yet reported).

## 27.2 Composition of governing bodies

Having regard to their important functions, the membership of the governing bodies of heritage institutions requires an appropriate blend of knowledge, skills, objectivity, experience and commitment in addition to being representative. The governing bodies of public institutions should at all times comprise of individuals with integrity and accountability, competence, relevant and complementary skills, experience and expertise.<sup>146</sup>

The overriding principle of selection for the members of governing bodies of public institutions should be selection based on merit - broadly speaking an objective assessment of the fit between the competencies (skills, expertise, experience and knowledge) and qualifications of prospective members and the needs of the particular institution, while also ensuring that membership is representative of South Africa's people.<sup>147</sup>

In our view, it would be appropriate to introduce appropriate eligibility criteria of this nature for the appointment of governing body members, and of transparent selection processes and structures to apply the criteria. In this regard we suggest that the Minister be empowered to appoint selection committees for this purpose in terms of the Culture Promotion Act, 1983. We will deal with this recommendation in greater detail under our consideration of that Act.

We are also of the view that the current provincial representation on the National Heritage Council, the South African Heritage Resources Agency Council, the South African Geographical Names Council and the National Archives Advisory Council should be reviewed. The membership of each of these councils currently includes 9 representatives of provinces. We believe that this composition serves to confuse the governance and inter-governmental co-ordination functions of these councils.

In our view the governance functions of these bodies would be better served by removing (or at least substantially reducing) provincial representation on these structures and that the cause of inter-governmental co-ordination would be better served by establishing specific statutory structures for this purpose, either in terms of the provisions of the Inter-governmental Relations Framework Act, 2005 or under national heritage legislation.

We will deal with these matters further in our consideration of the three laws concerned.

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<sup>146</sup> Paragraph 5.1.6.1, *Protocol on Corporate Governance in the Public Sector*, Department of Public Enterprises, September 2002.

<sup>147</sup> See the *Guide for Appointing Persons to Boards of Public Sector Institutions*, Department of Public Service and Administration, September 2005 at page 5, which identifies 5 principles for appointing persons to boards - merit based appointment, transparency of appointment processes, representivity in respect of the demographics of South Africa, consistency of appointment processes and probity, in that members of boards must be committed to the values and principles governing public administration and must perform their duties with integrity.

### 27.3 Size of governing bodies

While the effectiveness of a governing body of a public institution is influenced more by the calibre and commitment of its members than by the number of its members, the size of a governing body can have a significant impact on its effectiveness. Generally speaking, as governing bodies increase in size-

- their decision-making processes become more cumbersome;
- the sense of performance accountability of individual members dilutes; and
- the effectiveness of institutional oversight recedes.

While there is no optimum size for the governing bodies of public institutions, in our view their effectiveness is generally promoted by limiting their membership to the smallest number necessary to accommodate the skills, experience and representation appropriate to the institution and its particular public mandate.

In our view, good practice requires that the size of governing bodies of public institutions should, where possible, not exceed 15 members. Generally speaking, this number is more than sufficient to accommodate the necessary mix of skills, experience and representation appropriate to the institution and its public mandate. The effective functioning of a governing body may well be enhanced by limiting its membership even further.

We have particular concerns regarding the excessive size of the National Heritage Council and the South African Geographical Names Council and recommend that their composition be reviewed by DAC with a view to reducing their size considerably. We deal with this matter further in our consideration of the two laws concerned.

### 27.4 Disqualifications

The Companies Act 61 of 1973 provides various statutory disqualifications for appointment to or retention of the office of director of a company. These disqualifications apply to a range of persons, including unrehabilitated insolvents, persons who have been removed from an office of trust on account of misconduct and persons who have been convicted and sentenced in respect of various categories of criminal offence.<sup>148</sup> There is no general statutory provision prescribing disqualifying criteria in respect of members of heritage institutions.

In our view there is merit in providing disqualifying criteria for members of governing bodies based on legal disability, insolvency, misconduct requiring or justifying removal from an office of trust or criminal convictions in respect of offences involving theft, fraud, forgery or other offences involving an element of dishonesty.

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<sup>148</sup> Section 218, Companies Act.

### 27.5 Terms of office

Good practice suggests that the terms of office of board members of public institutions should be limited to a maximum period of 3 years, which period may be renewed.<sup>149</sup> Generally speaking, board members should serve a maximum of 2 consecutive terms of appointment.<sup>150</sup> In the main, heritage institutions comply with these requirements.

However, none of the heritage laws under review provide for the application of principles of continuity and renewal in appointing the members of governing bodies. The application of these principles is important to ensure an appropriate balance between-

- the need for new perspectives;
- the need for continuity; and
- the need to avoid excessively long-serving governing bodies in public institutions.

Good practice requires general succession planning in the appointment of the governing bodies. In our view there is value in providing expressly for the principle of continuity and renewal (including staggered appointments) in the appointment of the governing bodies of heritage institutions.

### 27.6 Governing body remuneration

There can be little justification for providing for remuneration or allowances for the members of some heritage institution governing bodies and not for others. Remuneration and allowances for governing body members should be transparent, fair and reasonable and should adhere to guidelines determined by the Department of Public Enterprises and the National Treasury.

We therefore recommend that a standard framework for the payment of allowances to governing body members (excluding those in the full-time employment of the State) and for the reimbursement of expenditure incurred in the performance of their duties as members should be formulated and applied across heritage institutions.

### 27.7 Induction and continued training of governing body members

None of the heritage laws under review provide for the induction and continued training of members of governing bodies of heritage institutions. This is a crucial aspect of good governance.

In principle, every newly appointed governing body member should complete an orientation program to ensure that incoming members are familiar with the purpose,

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<sup>149</sup> *Protocol on Corporate Governance in the Public Sector*, page 12.

<sup>150</sup> *Guide for Appointing Persons to Boards of Public Sector Institutions*, page 26.

mandate, management structures and processes, operations and governance practices of the heritage institution. In addition, every newly appointed member should undertake appropriate learning regarding the role and responsibilities of the governing body, their role and responsibilities as individual members and how to discharge their duties. Governing body members should also receive additional development and education on an ongoing basis, to enhance or update their understanding of the operations of their heritage institutions, and other matters relevant to their oversight roles.

We therefore recommend an express requirement that governing body members undergo induction and continued training in relation to their roles and responsibilities.

#### 27.8 **Codes of ethical conduct**

In our view, there can be little justification for applying different standards of ethical conduct and associated procedures for governing body members across heritage institutions. The governance environment for heritage institutions would be enhanced significantly by adopting a standard code of conduct. This could be further assisted by making provision for registers of members' interests and for rules governing public access to these registers.

We therefore recommend that-

- the Minister be authorised to determine, after consultation with affected governing bodies, a standard code of conduct for the governing bodies of heritage institutions; and
- provision should be made for registration of members' interests and for public access to these registers.

#### 27.9 **Institutional decision-making**

Several heritage institutions exercise public powers and perform public functions that must be exercised and performed in a lawful manner. These institutions-

- may exercise only those powers and perform those functions conferred on them by law;
- must be properly appointed or constituted; and
- must exercise any delegated power and perform any delegated duty only in accordance with a lawful delegation.

Institutional decisions must comply with the formalities and procedures stipulated in their governing legislation. As a general rule, statutory powers exercised or functions performed will be invalid if exercised or performed-



- by an improperly constituted authority;
- in terms of an unlawful delegation; or
- in conflict with stipulated formalities and procedures.<sup>151</sup>

We therefore recommend that each heritage law be reviewed to ensure the clear formulation of-

- the powers and functions of heritage institutions; and
- the formalities and procedures that have to be adhered to in exercising and performing such powers and functions.

#### 27.10 Certainty of decision-making

To ensure the lawfulness of decisions of heritage institutions, it is imperative that there should be no uncertainty regarding the formalities and procedures applicable to decisions. This requires certainty by stipulating the necessary quorum for meetings, the manner of voting and the voting thresholds required for different categories of decision. Again, there is no justification for such differentiation across heritage institutions and we suggest that standard quorum and voting thresholds should apply across heritage institutions.

We therefore recommend that provisions governing the quorum, the manner of voting and voting thresholds be incorporated in each relevant heritage law.

#### 27.11 Lawful delegation

Delegated powers and functions can be performed only in accordance with a lawful delegation. The power to delegate does not automatically exist and must be provided for, either expressly or impliedly.<sup>152</sup> In this regard, heritage legislation should provide for the delegation of powers and duties subject to certain limitations. In this regard-

- powers and duties should be delegated only to committees or employees of heritage institutions;
- heritage institutions should be empowered to impose conditions on delegations; should not be divested of any powers or duties by virtue of delegations and should be empowered to vary or set aside decisions made under delegations.

We therefore recommend that unambiguous and express powers of delegation by heritage institutions be incorporated in relevant heritage laws.

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<sup>151</sup> Baxter, *Administrative Law*, page 444.

<sup>152</sup> Baxter, *Administrative Law*, page 432.

## 27.12 Clarity of roles and responsibilities

A clearly defined separation of responsibilities within and between public institutions is essential for the effective performance of their powers and functions.

### 27.12.1 Role of governing bodies

Generally speaking, the role of the governing body of a public institution is—

- to provide effective leadership, advice and independence in decision-making to the institution;
- to set strategic direction for the institution;
- to liaise with stakeholders;
- to ensure compliance with statutory requirements;
- to manage institutional risk; and
- to monitor the performance of the institution.

Good practice requires that every governing body should have a formal charter or terms of reference that clearly set out in writing the roles and responsibilities of the governing body and its individual members, including any delegations to executive management. This requires governing bodies to define their purpose, roles and responsibilities and to ensure that their members have a common understanding of their duties and responsibilities. Charters or terms of reference also serve an important basis for evaluating the performance of governing bodies and their members.<sup>153</sup>

None of the heritage laws under review provide for formal governing body charters or terms of reference nor do they require governing bodies to formulate them. In our view, the formulation of governing body charters would enhance the understanding by governing bodies and their members of their roles and responsibilities and would provide guidance to them on the crucial distinction between the governance and management of heritage institutions.

Furthermore, none of the heritage laws provide for terms of reference or appointment letters for individual members. The introduction of appointment letters setting out the duties and responsibilities of individual members could enhance the sense of accountability of the individual members of governing bodies.

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<sup>153</sup> *Code of Corporate Governance for Public Entities*, National Treasury and Department of Public Service and Administration, October 2005, page 3.

We therefore recommend that governing bodies be required to formulate charters or terms of reference and that formal letters of appointment, setting out their duties and responsibilities, be provided to individual members of governing bodies.

#### 27.12.2 Role of executive management

Generally speaking, the role of executive management in public institutions includes supporting the governing body in its governance role, providing leadership to the institution, managing its day to day operations and creating an ethical working environment. In addition, executive management may have specific statutory roles and responsibilities assigned by the legislation governing the institution concerned. The duties and responsibilities of executive management, in addition to those assigned by statute, should be determined by the governing body of the institution in writing. Similarly all formal delegations of powers and functions by the governing body to executive management should be recorded in writing.

We therefore recommend that governing bodies must record in writing the roles and responsibilities (in addition to statutory roles and responsibilities) of, and the delegation of powers and functions to, executive management.

### 28 Harmonisation of institutional processes and procedures

A wide range of different public institutions have been established or provided for under the heritage laws under review. Some of these institutions exercise and perform regulatory powers and functions (such as SAHRA), others are advisory (the National Archives Advisory Council) while others perform executive functions (the Board of the National Library and the councils of declared institutions). Some are juristic persons and are listed as public entities by the Minister of Finance under the Public Finance Management Act, 1999 while others are essentially departmental entities with no independent legal status.

Our governance review of the various heritage institutions reveals little consistency in institutional arrangements. While this is not necessarily a problem, it is in our view appropriate to streamline and where appropriate to harmonise institutional processes and procedures. We recommend that such harmonisation should focus on the following matters:

- the appointment of members, terms of office and provision for continuity and renewal of membership;
- the eligibility criteria for, and disqualifications from membership of governing bodies;
- the removal of members of governing bodies, vacancies and the filling of vacancies;

- the remuneration of members of governing bodies and reimbursement of expenses;
- induction and continued training of governing body members;
- the reporting, performance review and accountability mechanisms (including service level or performance agreements between institutions and the Minister and between institutions and their executive management);
- the management, control and safeguarding of public assets under the control of heritage institutions (including alignment with the requirements of the Public Finance Management Act, 1999);
- the appointment of executive management and other members of staff where applicable and the determination of their terms and conditions of employment;
- a common code of conduct to encourage high standards of ethical conduct;
- decision-making formalities and procedures;
- the delegation of powers and functions by governing bodies; and
- the dissolution of heritage institutions.

## 29 Summary of recommendations on governance matters

Subject	Recommendation
Review of institutional mandates	<p>The overlapping mandates and functions of DAC, the National Heritage Council (NHC) and the South African Heritages Resources Authority (SAHRA) must be resolved. Particular attention to be given to the following overlaps-</p> <ul style="list-style-type: none"> <li>• the co-ordination and management of the national estate;</li> <li>• the co-ordination of heritage institutions;</li> <li>• responsibility for intangible or living heritage;</li> <li>• the formulation of national policy;</li> <li>• the repatriation of heritage objects;</li> <li>• responsibility for project funding; and</li> <li>• the promotion of heritage awareness.</li> </ul> <p>The role, functions and legal status of the South African Geographical Names Council (SAGNC) must be reviewed.</p> <p>The National Archives Advisory Council must be authorised to perform an appeal function for purposes of access to archival records.</p>
Composition of governing bodies	<p>Appropriate eligibility criteria are required for the appointment of governing body members.</p> <p>Transparent election processes and structures must be established to apply</p>

Subject	Recommendation
	<p>these criteria.</p> <p>The Minister should be authorised to appoint selection committees for this purpose under the Culture Promotion Act, 1983.</p> <p>Provincial representation on the National Heritage Council (NHC), the South African Heritage Resources Agency Council (SAHRA) and the South African Geographical Names Council (SAGNC) should be reviewed and replaced by appropriate inter-governmental co-ordination structures, in terms of the Inter-Governmental Relations Framework Act, 2005 or under national heritage laws.</p>
Size of governing bodies	<p>Where possible the size of governing bodies should not exceed 15 members (this number is more than sufficient to accommodate the necessary mix of skills, experience and representation appropriate to an institution and its public mandate.</p> <p>The size of the NHC and the SAGNC is excessive and their composition should be reviewed.</p>
Disqualifications	<p>Disqualifying criteria for members of governing bodies should be determined, based on legal disability, insolvency, misconduct requiring or justifying removal from an office of trust or criminal convictions in respect of offences involving theft, fraud, forgery or other offences involving an element of dishonesty.</p>
Terms of office	<p>Terms of office of board members should be limited to a maximum period of 3 years, subject to renewal for a maximum of 2 consecutive terms of appointment.</p> <p>Provision should be made for the application of the principle of continuity and renewal (including staggered appointments) in the appointment of governing bodies.</p>
Governing body remuneration	<p>A standard framework for the payment of allowances to governing body members (excluding those in the full-time employment of the State) and for the reimbursement of expenditure incurred in the performance of their duties as members, should be formulated and applied across heritage institutions.</p>
Training	<p>It should be expressly required that governing body members undergo induction and continued training in relation to their roles and responsibilities.</p>
Codes of ethical conduct	<p>The Minister should be authorised to determine, after consultation with affected governing bodies, a standard code of conduct for the governing bodies of heritage institutions.</p> <p>Provision should be made for registers of members' interests and for public access to these registers.</p>
Certainty of decision-making	<p>Standard provisions governing quorums, the manner of voting and voting thresholds should be incorporated in each relevant heritage law.</p>
Lawful delegation	<p>Unambiguous and express powers of delegation by heritage institutions should be incorporated in each relevant heritage law.</p>
Clarity of roles and responsibilities	<p>Governing bodies should be required to formulate charters or terms of reference.</p> <p>Formal letters of appointment setting out the duties and responsibilities of members should be provided to individual members of governing bodies.</p>

Subject	Recommendation
	<p>Governing bodies should record in writing the roles and responsibilities of and the delegation of powers and functions to the executive management of heritage institutions.</p>
<p>Harmonisation of processes and procedures</p>	<p>The following institutional processes and procedures should be streamlined and where appropriate harmonised across heritage institutions-</p> <ul style="list-style-type: none"> <li>• the appointment of members, terms of office and provision for continuity and renewal of membership;</li> <li>• the eligibility criteria for, and disqualifications from membership of governing bodies;</li> <li>• the removal of members of governing bodies, vacancies and the filling of vacancies;</li> <li>• the remuneration of members of governing bodies and reimbursement of expenses;</li> <li>• induction and continued training of governing body members;</li> <li>• the reporting, performance review and accountability mechanisms (including service level or performance agreements between institutions and the Minister and between institutions and their executive management);</li> <li>• the management, control and safeguarding of public assets under the control of heritage institutions (including alignment with the requirements of the Public Finance Management Act, 1999);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of their terms and conditions of employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct;</li> <li>• decision-making formalities and procedures;</li> <li>• the delegation of powers and functions by governing bodies; and</li> <li>• the dissolution of heritage institutions.</li> </ul>

## Part V: Review of heritage laws

### 30 Introduction

In this part, we consider the background to the various heritage laws under review, highlight key submissions made during the review consultation process and set out our recommendations in respect of each law.

### 31 Culture Promotion Act 35 of 1983

*"Since the hon. Minister says he wants to promote culture in South Africa, the question occurs to one – and this is the crux of politics in South Africa today – as to how he sees the diversity of cultures in Southern Africa and how he seeks to make provision for that diversity in the politics of the day in the constitutional sphere." <sup>154</sup>*

#### 31.1 Introduction

The Culture Promotion Act 35 of 1983 confers a range of powers on the Minister of Arts and Culture in order to develop and promote arts and culture in South Africa and to develop and promote cultural relations with other countries. It also provides for the establishment of regional councils for cultural affairs.

The administration of the provisions of the law dealing with regional councils was assigned to the provinces in 1995<sup>155</sup> and the portions of the law dealing with the Minister's powers underwent substantial amendment in 1998.<sup>156</sup>

#### 31.2 Historical background to the law

Of all the laws under review, the Culture Promotion Act, its precursor, the National Culture Promotion Act, 1969, and its offshoot, the Cultural Affairs Act, 1989, best embody the apartheid government's stance on the promotion of culture over time and the enforcement of racial divisions, and emphasise the vast challenge facing democratic government as it seeks to reconcile and heal a fractured society.

##### 31.2.1 National Culture Promotion Act 27 of 1969

The Culture Promotion Act was preceded by the National Culture Promotion Act, 1969 provided for the preserving, developing, fostering and extending of the

<sup>154</sup> H.D.K van der Merwe in South Africa, Debates of House of Assembly, col. 4100 (29 March 1983).

<sup>155</sup> See Proclamation R36, GG 16363 of 13 April 1995.

<sup>156</sup> Culture Promotion Amendment Act 59 of 1998.

culture of the white population of the Republic by the planning, organisation, coordination and provision of facilities for the utilisation of leisure and informal out-of-school-education, the fostering of educational and cultural relations with foreign countries and the establishment of a National Cultural Council. The Act conferred powers on the Minister to achieve these objects.<sup>157</sup>

In motivating for the law, the Minister at the time stressed that the time had come for a more *“purposeful and systematic endeavour”* to disseminate culture, explaining that *“what we are concerned with here is to give everyone as much access as possible to beauty and truth. The object is to bring the entire national community at all levels into contact with the products of culture.”*<sup>158</sup> While noting the need for a *“nation-wide cultural campaign”* and admitting that there were a host of voluntary organisations who played a role in promoting culture, the Minister stressed the need for *“an instrument from the country’s highest authority for regulating such a campaign”*.<sup>159</sup>

Parliamentary debate on the law noted that the culture of the white population was not homogenous, as the law implied, but encompassed an *“Afrikaans culture”* and the culture of most, but not all, English-speaking South Africans. It was also noted that the concept of *‘nation’* alluded to in the law was that defined by the National Party, who were seeking to *“preserve, develop and foster and extend that way of life which has become a power on this continent.”*<sup>160</sup>

The National Culture Promotion Act was a significant milestone in national legislation, representing government’s first attempt to regulate and formalise *‘cultural matters’* previously considered to be the domain of civil society, *albeit* through a National Cultural Council. It is also noteworthy because it granted the Minister wide powers to utilise public funding to promote culture outside the institutional cultural framework and in foreign countries by:

- acquiring moveable and immoveable property;
- awarding grants and bursaries;
- funding cultural exchange programmes, arranging for exhibitions from and in foreign countries;
- subsidising a chair at a university, an association, programme or project in another country; and
- donating books.

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<sup>157</sup> See Preamble, National Culture Promotion Act.

<sup>158</sup> South Africa, House of Assembly Debates col. 1614 (28 February 1969).

<sup>159</sup> South Africa, Debates of the House of Assembly, col. 1615 (28 February 1969).

<sup>160</sup> South Africa, Debates of the House of Assembly, col.1619-1622 (28 February 1969).



The Act was amended in 1977 by the National Culture Promotion Amendment Act<sup>161</sup> which added two further members to the National Cultural Council to allow for representation from the functional areas of the provinces and local authorities respectively.<sup>162</sup>

The Act was amended further in 1981 to provide for the Minister to delegate powers to the Head of Department or any other officer of the Department administered by the Minister.<sup>163</sup> During parliamentary debate on this Act it was noted that the cultural affairs of both the Afrikaans and English-speaking sectors were showing “*danger signs*” which would have to be “*put right*”. A participant in the debate stated that-

“I am not alleging that it is the calling of the State as such to create culture. After all, it is the task and function of the general public and the people of culture as a group to develop the culture of a country or a group of people. What is in fact the duty of the State, is to do everything in its power to eliminate stumbling-blocks that may exist in the way of the development of cultural life.”<sup>164</sup>

### 31.2.2 Culture Promotion Act 35 of 1983

The Culture Promotion Act was enacted in 1983, repealing the National Cultural Promotion Act. The new Act came about partly in response to growing resistance to apartheid at the time.

In 1981, the United Nations and the Organisation of African Unity endorsed the Paris Declaration of Sanctions against South Africa, calling for comprehensive mandatory sanctions.<sup>165</sup> By 1983, sanctions had intensified and political resistance to apartheid was mushrooming. It was the year in which white South Africans approved government’s constitutional plans to establish the tri-cameral parliament. It was the year in which political coalitions were formed to advance the struggle for liberation: the United Democratic Front, which drew together over 600 civic and student organisations, subscribing to the Freedom Charter and allied to the African National Congress, and the National Forum, which was launched by AZAPO and drew together adherents of black consciousness.

In motivating for the Bill, the Minister at the time expressed the view that a new Act was required to address three critical deficits in the 1969 Act:

- Firstly, the old Act addressed the promotion of culture of the white population exclusively and did not make legislative provision for other groups. This deficit was addressed by providing for the assignment of its provisions to

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<sup>161</sup> Act 17 of 1977.

<sup>162</sup> South Africa, Debates of the House of Assembly, col. 1462-1463 (15 February 1977).

<sup>163</sup> Culture and Education Laws Amendment Act 11 of 1981.

<sup>164</sup> South Africa, Debates of the House of Assembly, col. 713-714 (4 February 1981).

<sup>165</sup> IDAF, Apartheid: The Facts, 1991.

different Ministers, for different purposes and in the interests of different population groups, in accordance with the new constitutional dispensation, which made the promotion of culture a '*group-responsibility*' to be handled by the various chambers of the tri-cameral parliament.

- Secondly, it limited the envisaged '*fostering of culture*' solely to the white population, therefore hampering the freedom of autonomous cultural bodies to "*occasionally*" involve members of other population groups in their efforts. The Minister believed that "*the western culture*" of the white population had found favour across a broad spectrum of other population groups, and that the Bill provided for the involvement of other population groups in activities such as "*art exhibitions, literary competitions and musical performances.*"
- Thirdly, the National Cultural Council was considered to be an unnecessarily "*comprehensive and expensive structure,*" which the new Act proposed to replace with a series of regional councils for cultural affairs. It was noted that the majority of organisations involved in cultural promotion were local or regional in character and status, and that the establishment of regional councils would "*enable representatives of the community to determine cultural needs and identify activities for support,*" shifting the initiative for cultural promotion from national government to local communities.<sup>166</sup>

Debate on the Bill raged on through eight sittings of parliament, covering a broad range of issues, including the definitions of '*nation*' and '*culture*', the notion of '*group culture*' and whether this was distinct and homogenous, the value, or lack thereof of cross-cultural contact, the dangers of cultural integration, cultural rights, the role of culture in non-formal education, and the role of government in promoting culture abroad.

In its final form, the Culture Promotion Act provided for the preservation, development, fostering and extension of culture in the Republic; the fostering of educational and cultural relations with other countries; the establishment of regional councils for cultural affairs and conferred powers to enable the Minister to achieve these objects.<sup>167</sup>

### 31.2.3 Cultural Affairs Act 65 of 1989

Under the tri-cameral constitutional framework introduced after the promulgation of the Culture Promotion Act, culture was deemed to be an '*own affair*' and the provisions of the Act were assigned by the State President to the Minister of Education and Culture (House of Assembly) with effect from September 1984.<sup>168</sup> The provisions of the Cultural Affairs Act, 1989 basically mirror those of the

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<sup>166</sup> South Africa, Debates of the National Assembly, col. 2264-2267 (3 March 1983).

<sup>167</sup> See Preamble, Culture Promotion Act, 35 of 1983.

<sup>168</sup> South Africa, Debates of the House of Assembly, col. 9580 (17 May 1989).

Culture Promotion Act and were simply adapted to meet the new 'own affairs' requirements, but the basic principle remained that-

"the State is not responsible for culture but promotes it by encouraging community organizations in the private sector and expert and financial assistance continues to be rendered."<sup>169</sup>

The Cultural Affairs Act granted extended powers to regional councils in respect of moveable and immoveable assets. Parliamentary debate on this Bill focused on the multiplicity of cultural expression in South Africa, the problems of compartmentalising culture in racial terms and the definition of a 'national' culture.

#### 31.2.4 Proclamation R 36 of 1995

Proclamation R 36 of 1995 assigned key provisions of the Culture Promotion Act to the provinces (particularly those provisions dealing with regional councils) under the interim constitutional dispensation.

#### 31.2.5 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage states that- "*it is the role of government to facilitate the optimum conditions in which (cultural) rights may be enjoyed and practiced.*"<sup>170</sup> In defining a more specific role for government, the White Paper states that-

"the prime role of the national and provincial governments is to develop policy which ensures the survival and development of all art forms and genres, cultural diversity with mutual respect and tolerance, heritage recognition and advancement, education in arts and culture, universal access to funding, equitable human resource development policies, the promotion of literature and cultural industries. These are our minimum standards."<sup>171</sup>

It also notes that national government has a role to play in funding, both of the provinces and of activities initiated by the national Department within the provinces. It also has a role to play in monitoring and evaluating progress towards achieving these goals.

In considering mechanisms through which it might give effect to this role, the White Paper defines a system of statutory bodies with which it will interact and notes that-

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<sup>169</sup> South Africa, Debates of the House of Assembly, col. 9580 (17 May 1989).

<sup>170</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 1:13.

<sup>171</sup> White Paper on Arts Culture and Heritage, 1996, Chapter 3:3.

“by establishing such statutory bodies, mandated to secure free expression and redress, government will maintain an “arms length” relationship with the practitioner community. As is the case with other existing statutory bodies, the Ministry will be involved in the budgetary process and allocation to these statutory bodies. It will not pass judgment on artistic expression.”<sup>172</sup>

In respect of international liaison, the White Paper states-

“The NAC will liaise with international arts and culture institutions for the purposes of promotion and development,” and, “the NHC will liaise with international heritage organisations regarding cultural sites for the World Heritage list, and other matters regarding heritage conservation”.<sup>173</sup>

#### 31.2.6 **Culture Promotion Amendment Act 59 of 1998**

The Culture Promotion Amendment Act, 1998 amended the Culture Promotion Act-

- further regulating the powers of the Minister;
- providing for the development of pilot projects that might further the work of the Department;
- establishing, launching or funding any organisation or project whose objects are likely to have an impact throughout the country;
- assisting non-formal or community-based arts education projects; and providing, subsidising or funding the provision of services by any such person where these are deemed necessary or expedient.

The powers of the Minister were now applied to promoting the diverse cultures that constitute the nation, rather than the minority of its citizens.

### 31.3 **Key issues**

The key issues identified below have been drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

#### 31.3.1 **National heritage policy**

A number of critical policy questions sit at the heart of the laws considered above, and are as relevant today as when the legislation was first enacted: what rights do South African citizens have with respect to culture; what is the role and

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<sup>172</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 3:15.

<sup>173</sup> White Paper on Arts, Culture and Heritage 1996, Chapter 6: 4 and 5.

responsibility of the national minister in respect of arts, culture and heritage; what is government's role vis-à-vis the promotion of culture / diverse cultures; what structures and mechanisms are best suited to enable it to deliver on its prescribed role; what funding mechanisms, processes and criteria are appropriate; what role does civil society play in this process; and how does government build cohesion in a culturally diverse society? These are questions that must be addressed in national heritage policy.

It is recommended that a national heritage policy, *inter alia*-

- describe a vision for the sector and the role it plays in the life of the nation;
- detail the principles that underpin heritage management, delivery and practice;
- outline the primary roles and responsibilities of government, its institutions and agencies, the private sector, communities and individuals; and
- set in place the institutional framework and strategic programmes through which the vision may be achieved.

### 31.3.2 **Funding of heritage promotion**

Heritage activity is funded through diverse public and private sector sources. Funding initiatives are not coordinated or tailored to meet the specific needs of the sector. While it would not be feasible or desirable to create a single funding source, it is recommended that a national heritage funding policy be formulated.

While the Act provides an unusual funding mechanism, given the nature of activity within the sector this is not considered inappropriate. But, it does raise a number of questions about the funding of heritage activity: what are the revenue sources available to the sector; what role should national, provincial and local government play in funding heritage; how should revenue be disbursed; how are decisions about funding allocation taken; what is the relationship of the various funding entities to the initiatives they support?

In our view, a national heritage funding policy is required to spell out the role of each of the public sector funding entities; provide criteria by which funding is allocated and expenditure monitored.

It is essential that funding mechanisms be open and transparent; that those who allocate funds account for the manner in which these are disbursed; and that those who receive funds account for the way in which these are utilised.

### 31.3.3 Powers of the Minister

During consultations on the review, a number of stakeholders expressed concern regarding a perceived lack of transparency in respect of the exercise of the Minister's expenditure powers under the Act.

These concerns are substantially addressed by the Constitution. In this regard the Minister's powers under section 2 of the Act are subject to constitutional requirements governing the public administration. Of particular relevance are the values and principles promoting the efficient, economic and effective use of resources and the principles of transparency and accountability set out in section 195(1) of the Constitution and the requirements of section 217 which provide for a system of contracting for goods and services that is fair, equitable, transparent, competitive and cost-effective.

DAC may nevertheless wish to address stakeholder concerns by amending section 2 in order to make express reference to the requirements of sections 195(1) and 217 of the Constitution.

### 31.3.4 Governance review of heritage institutions

The broad scope of the Culture Promotion Act, 1983 makes it an appropriate law for the implementation of a number of general recommendations arising from our governance review of heritage institutions which may also be relevant to arts and culture institutions.

## 31.4 Legislative recommendations

### 31.4.1 Location of the Minister's powers

Concerns were raised during the consultation process regarding the correct location of the Minister's powers under the Act. In this regard it was suggested that the Minister's powers could more appropriately be located within an overarching heritage law. The DAC expressed its opinion that the powers were correctly located and extended beyond the heritage sector to arts and culture in general. Taking into consideration the overarching nature of the Minister's powers, we recommend that they remain located under the Culture Promotion Act, 1983.

### 31.4.2 Section 1 - Definitions

Part (b) of the definition of "*Minister*" is redundant. The definition should be replaced by "*Minister responsible for Arts and Culture*".

### 31.4.3 Section 2 - Powers of Minister

The Minister's powers under section 2 of the Act are subject to the constitutional requirements governing the public administration. Of particular relevance are the

values and principles promoting the efficient, economic and effective use of resources and the principles of transparency and accountability set out in section 195(1) and the requirements of section 217 of the Constitution which provide for a system of contracting for goods and services that is fair, equitable, transparent, competitive and cost-effective.

Nevertheless, stakeholder concerns can be met by DAC by amending section 2 in order to make express reference to the requirements of sections 195(1) and 217 of the Constitution.

#### 31.4.4 **Section 3 - Establishment and functions of regional councils for cultural affairs**

The administration of this section of the Act was assigned to provinces in terms of Proclamation R36, GG 16363 of 13 April 1995 and no amendment of the section should therefore be considered.

#### 31.4.5 **General - Governance review of heritage institutions**

The broad scope of the Culture Promotion Act, 1983 makes it an appropriate law for the implementation of a number of general recommendations arising from our governance review of heritage institutions. We therefore recommend that-

- the Minister should be empowered to appoint selection committees to advise and oversee the selection and appointment of appropriate persons to serve as members of the governing bodies of heritage institutions;
- the Minister should be empowered, after consulting the relevant heritage institutions, to determine codes of ethics governing the conduct of the members of their governing bodies;
- the Minister should be empowered to make regulations regarding accountability, performance and reporting mechanisms for heritage institutions.

### 31.5 **Summary of recommendations on the Culture Promotion Act 35 of 1983**

Policy recommendations	
National heritage policy	<p>It is recommended that DAC adopt a national heritage policy <i>inter alia</i>-</p> <ul style="list-style-type: none"> <li>• describe a vision for the sector and the role it plays in the life of the nation;</li> <li>• detail the principles that underpin heritage management, delivery and practice;</li> <li>• outline the primary roles and responsibilities of government, its institutions and agencies, the private</li> </ul>

		<p>sector, communities and individuals; and</p> <ul style="list-style-type: none"> <li>• set in place the institutional framework and strategic programmes through which the vision may be achieved.</li> </ul>
<b>Funding of heritage promotion</b>		A national heritage funding policy is required to spell out the role of each of the public sector funding entities; providing criteria by which funding is allocated and expenditure monitored.
<b>Governance matters</b>		The broad scope of the Culture Promotion Act, 1983 makes it an appropriate law for the implementation of a number of general recommendations arising from our governance review of heritage institutions which may also be relevant to arts and culture institutions
<b>Legislative recommendations</b>		
<b>Section 1</b>	<b>Definitions</b>	Redundant part (b) of the definition of “Minister” to be substituted by “Minister responsible for Arts and Culture”.
<b>Section 2</b>	<b>Powers of Minister</b>	<p>No amendment required.</p> <ul style="list-style-type: none"> <li>▪ Current location of Minister’s powers to be retained.</li> <li>▪ DAC may consider express reference to sections 195(1) and 217 of the Constitution.</li> </ul>
<b>Section 3</b>	<b>Regional Councils</b>	No amendment.
<b>General</b>	<b>Governance matters</b>	<p>Amendments recommended to authorise the Minister-</p> <ul style="list-style-type: none"> <li>▪ to appoint selection committees to advise and oversee the selection and appointment of appropriate persons to serve as members of the governing bodies of heritage institutions;</li> <li>▪ to determine codes of conduct for the members of governing bodies;</li> <li>▪ to make regulations regarding accountability, performance and reporting mechanisms for heritage institutions.</li> </ul>



## 32 Cultural Institutions Act 119 of 1998

*"Having excluded and marginalised our people, is it surprising that our museums and national monuments are often seen as alien spaces?"<sup>174</sup>*

### 32.1 Introduction

32.2 The Cultural Institutions Act, 1998 provides for the establishment of certain institutions as declared cultural institutions under the control of councils and for the establishment of flagship institutions and a National Museums Division. While this Act primarily deals with the governance of the so-called '*national museums*' it also applies to the nationally funded '*playhouses*' that, to some extent, replaced the old-order performing arts councils.

### 32.3 Historical background to the law

South African national museums have historically been central to the state policy of protecting and promoting cultural heritage and of educating the public. A brief examination of the origins of the '*national museums*' and the context in which they were established reveals that, at key moments in our history, those in political power established '*national*' museums to fulfil '*national*' agendas and to serve '*the nation*'; accepted bequests for, and on behalf of, '*the nation*'; and took control of museums deemed '*national*' by their predecessors. As political power shifted, national museums passed into the hands of new rulers who made little attempt to change them, choosing instead to create new institutions that reflected new power relations and, most importantly, a new identity for the nation. The result is an uneven collection of national museums, each with a collection, ethos and established way of being that relates to a different definition of '*the nation*'.

Amongst the institutions which DAC inherited in 1994 were the eighteen so-called '*national museums*'. Five in Cape Town,<sup>175</sup> four in Pretoria,<sup>176</sup> two each in Pietermaritzburg,<sup>177</sup> Bloemfontein<sup>178</sup> and Grahamstown<sup>179</sup> and one each in Kimberley,<sup>180</sup> Paarl<sup>181</sup> and Johannesburg.<sup>182</sup> Of these museums: four are devoted

<sup>174</sup> From the Address by President Nelson Mandela on Robben Island, Heritage Day, 24 September, 1997.

<sup>175</sup> The South African Museum, the South African National Gallery, the South African Cultural History Museum, the William Fehr Collection and the Michaelis Collection.

<sup>176</sup> The Transvaal Museum, the National Cultural History Museum, the Foundation for Education, Science and Technology, and Engelenberg House.

<sup>177</sup> The Natal Museum and the Voortrekker Museum.

<sup>178</sup> The National Museum and the War Museum of the Boer Republics.

<sup>179</sup> The JLB Smith Institute of Ichthyology and the National English Language Museum.

<sup>180</sup> The William Humphries Art Gallery.

<sup>181</sup> The Afrikaans Taal Museum.

<sup>182</sup> The South African National Museum of Military History.

specifically to art; three to natural science; two to cultural history in general; two to military history; two to the history of language; two to the cultural history of specific groups; two to natural and cultural history; and one to science and technology. This collection of institutions had little in common except their source of funding, the legislation under which they were governed, and the fact that they were accountable to central government and administered by the national Department.

These '*national museums*' or '*declared cultural institutions*' in terms of the Act under review, are still governed by a framework that reflects largely the values and the practices of the era during which they were established. Museum legislation in South Africa, based on the British model, has not changed significantly since the 19<sup>th</sup> century.

The diverse laws through which museums have been governed historically include an Act to Incorporate the South African Museum Act 17 of 1857, the South African Art Gallery Act 20 of 1895, an Act to Incorporate the Natal Museum Act 11 of 1903, the Financial Relations Act 10 of 1913, the State-aided Institutions Act 23 of 1931 and the Cultural Institutions Act 29 of 1969. The Cultural Institutions Act 66 of 1989 made provision for the national museums to be controlled by councils with responsibility for their management and operation and accountability to the relevant Minister.<sup>183</sup> In theory, these laws provided for a system of governance which aimed to loosen the ties between the State and national museums. In practice the appointment of council members has always been a political act, allowing the State to maintain influence over the museums.

The laws referred to above were superseded by the Cultural Institutions Act, 1998 which provided for the restructuring of national institutions, but did not make fundamental changes to underlying museum policy.

### 32.3.1 Museums in the colonies and the Boer republics

The first museum in South Africa, the South African Museum (precursor of the present South African Museum, South African National Gallery and South African Cultural History Museum) was established by the British colonial government of the Cape in 1825 to acquaint colonists with the general resources of the colony.<sup>184</sup> The Natal Museum was established by the Natal Society in 1851 and was actively supported, and later administered, by the colonial government in that region.

In the latter half of the 19<sup>th</sup> century, the Boer republics established a number of museums including the Staatsmuseum (precursor of the Transvaal Museum and the

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<sup>183</sup> While the details of this system and levels of responsibility assigned to the Minister, government and councils have changed over the years, it has been in operation since the mid-19<sup>th</sup> century.

<sup>184</sup> Summers, RFH, A History of the South African Museum 1825 – 1975, AA Balkema, Cape Town, 1975, page 5.

National Cultural History Museum) and the National Museum (Bloemfontein) to promote Afrikaner nationalism.<sup>185</sup>

### 32.3.2 Museums in the Union of South Africa

When the Union of South Africa was established in 1910, central government accepted responsibility for the administration and financing of the national museums in the Cape and Natal as well as those institutions considered to be of '*national*' importance to the Boer Republics.<sup>186</sup>

### 32.3.3 Museums of the apartheid Republic

While there has never been a cohesive, coherent or clearly articulated policy for '*national museums*', a number of commissions of enquiry have been constituted over time to examine particular issues pertaining to museums.

The *Report of the Commission of Enquiry regarding Certain State-aided Institutions, 1950*, the *Report of the Commission of Enquiry into the Needs of State-aided Institutions, 1961/2*, the *Report of the Commission of Enquiry into the Needs of State-aided Institutions, 1968* and the *Report of the Commission of Inquiry into the Co-ordination of Museums at a National Level* dealt largely with issues of museum governance, funding, staffing and organisation. They offered some insight into the purpose of the national institutions, although seldom addressed the matter directly.<sup>187</sup>

The growing power of Afrikanerdom, strengthened by National Party rule after 1948, reinforced the position of museums as instruments of '*nationalism*'. After the declaration of the Republic of South Africa, the South African Cultural History Museum and the National Cultural History Museum were established as separate institutions in 1964 and 1966 respectively.<sup>188</sup>

The tri-cameral constitution in 1984 led to the division of the '*national*' museums into '*own*' and '*general*' affairs institutions. '*Own affairs museums*', administered by the Departments of Education and Culture in the three houses of the tri-cameral parliament, included the S.A. Cultural History Museum and the National Cultural History Museum, which were intended to deal with issues applicable to specific race groups. '*General affairs museums*', administered by the Department of National Education (House of Assembly), included the South African National Gallery and the Transvaal Museum, which were intended to deal with issues applicable to all

<sup>185</sup> Grobler, E. "The Origin of the Anthropology Collection of the National Cultural History Museum, Pretoria (1892-1921)" in *Research by the National Cultural History Museum*, Vol 5, Pretoria, 1996, page 1.

<sup>186</sup> Oberholzer H, *Skeletons by the Roadside: The Sad Saga of Bodies of Enquiry and Advice about Museum Matters in South Africa*, January 1993, page 7.

<sup>187</sup> See Oberholzer H, *Skeletons by the Roadside: The Sad Saga of Bodies of Enquiry and Advice about Museum Matters in South Africa*, January 1993, for a full account of the doings and findings of these commissions.

<sup>188</sup> Until the 1960s, the operations of the South African Cultural History Museum fell under the South African Museum, and those of the National Cultural History Museum fell under the Transvaal Museum.

groups. This complex system of administration was dismantled in 1989, when control of the '*national museums*' was once again centralised under the Department of Education.

In the absence of clearly defined policies, museums had to define their own priorities, activities and modes of operation. Those in authority in the national museums, with a few notable exceptions, generally chose to promote the State's agenda rather than to oppose it, either in theory or practice.

#### 32.3.4 Museums for a democratic South Africa

The ANC Department of Arts and Culture set up the Museums, Monuments, Archives and National Symbols Commission shortly after its unbanning to address issues of reconstruction and transformation of the sector, to engage the State, to develop future policy and to push for the transformation and democratisation of the country's cultural institutions.<sup>189</sup> The ANC's policy position regarding museums, and other heritage institutions was articulated at the landmark *Culture and Development Conference* held in 1993.

In the same period, the Department of National Education,<sup>190</sup> at the suggestion of the Southern African Museums Association, initiated a process to develop a national process for South African Museums. The findings of this process are contained in *Museums for South Africa: Intersectoral Investigation for National Policy*, (commonly known as the MUSA report) tabled in 1994 shortly before the end of National Party rule, which outlines a broader national policy for museums.

This report was extensively critiqued by the ANC Commission for the Reconstruction and Transformation of the Arts and Culture in South Africa, in a Draft Report<sup>191</sup> which: stressed the need for a broad-based national policy making exercise; recommended the restructuring of national museums into flagship institutions; proposed the establishment of a National Council for Museums and Monuments; described framework autonomy as a "*totally discredited system*" for governing museums;<sup>192</sup> and identified, as a major fault, the MUSA Report's failure to mention,

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<sup>189</sup> See ANC Department of Arts and Culture, *Looking Backwards Looking Forwards: Culture and Development Conference*, Johannesburg, April–May 1993, Mayibuye Books, Bellville, 1995.

<sup>190</sup> The Department of National Education (House of Assembly) administered 'general affairs' museums.

<sup>191</sup> ANC Commission for the Reconstruction and Transformation of the Arts and Culture in South Africa, Working Document: Comment on 'MUSA Intersectoral Investigation for National Policy' (Draft Report, January 1994), African National Congress, Johannesburg, April 1994.

<sup>192</sup> ANC Commission for the Reconstruction and Transformation of the Arts and Culture in South Africa, Working Document: Comment on 'MUSA Intersectoral Investigation for National Policy' (Draft Report, January 1994), African National Congress, Johannesburg, April 1994, page 9.

*“the role that museums can and must play in the reconstruction and future development of South Africa”.*<sup>193</sup>

In 1994, the Minister of Arts, Culture, Science and Technology established the Arts and Culture Task Group, ACTAG, to make recommendations for a future arts, culture and heritage policy. The ACTAG Report of 1995 and the report produced by its Heritage Sub-Committee, *A New Policy for the Transformation of South African Museums and Museum Services*, informed the *White Paper on Arts, Culture and Heritage*, 1996, which laid the foundation for the transformation of the sector and called for a review of the 'national museums'.

### 32.3.5 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage, 1996 acknowledged the role that the declared cultural institutions played in the development of arts, culture, heritage and science and the opportunities they provided for life-long learning, tourism and other entrepreneurial activities.

The White Paper confirmed that many of the declared cultural institutions were national in name only rather than in status, in the sense that neither their collections nor the services that they rendered could be described as truly national in character. It stated that these institutions would be reviewed and “*evaluated according to agreed upon criteria of what constitutes ‘national’.*”<sup>194</sup>

The White Paper stated that while there were many publicly funded municipal, provincial and national museums, there was no national museums policy, the provision of museum services was not coordinated, planning was fragmented and uncoordinated; many communities did not have access to museums; cultural collections were often biased; and funds were needed to support new museums and those that fell outside of the national network. It called for transformation through a systematic process of restructuring and rationalisation.

A review of the declared cultural institutions was identified as an immediate priority to enable the Ministry to reconceptualise national museums as a nationally coherent structure that would fulfil the objectives set out in the White Paper. In the future, funding would be subject to performance measures.

The grading system envisaged in the White Paper on Arts, Culture and Heritage was not developed.

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<sup>193</sup> ANC Commission for the Reconstruction and Transformation of the Arts and Culture in South Africa, Working Document: Comment on 'MUSA Intersectoral Investigation for National Policy' (Draft Report, January 1994), African National Congress, Johannesburg, April 1994, page 12.

<sup>194</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:6.

### 32.3.6 National flagship institutions

In 1996, the Department established a Review Committee to assess recommendations relating to the future of the national museums and to propose a way forward. The report of the Review Committee, *Towards a New National Museums Service: A Vision for the Restructuring of Declared Cultural Institutions*, noted that national museums must “reflect in every way the collective heritage, the new identity, and the ethos of a multi-cultural democratic South Africa”<sup>195</sup> and that these ‘national’ museums should be “institutions that can significantly contribute to the delivery of an equitable and efficient national museums service across the length and breadth of South Africa”.<sup>196</sup>

Recommendations made by the Review Committee led to the establishment of Working Groups in Gauteng and the Western Cape. The reports of these working groups, *Restructuring the Declared Cultural Institutions: Final Report of the Gauteng Working Group* and *Restructuring the Declared Cultural Institutions: Final Report of the Western Cape Working Group*, contained detailed recommendations for the restructuring of the national institutions. These proposals were assessed and refined by Simeka Management Consulting, whose report, Framework for Implementation Plan Tender No KKWT 28/97: Assessment of the Management and Cost Implications of the Proposals to Establish a National Museum Service for South Africa, Department of Arts, Culture, Science and Technology, concluded that the national museums could, given sufficient resources and organisational capacity, be restructured to meet the Department’s objectives.

### 32.3.7 Implementing the Cultural institutions Act 119 of 1998

The Cultural Institutions Act, 1998 made provision for the establishment and amalgamation of institutions under the control of councils, the establishment of ‘flagship institutions’ and for a National Museums Division.

Two flagship institutions were established through the consolidation of various declared cultural institutions in Gauteng and in the Western Cape: Iziko Museums of Cape Town, which included the Michaelis Collection, the South African Cultural History Museum, the South African Museum, South African National Gallery and the William Fehr Collection; and the Northern Flagship Institution, Pretoria, which included the Transvaal Museum, the National Cultural History Museum and its associated site museums, and the South African National Museum of Military History. It must be noted that this was not an easy process and that there was strong resistance to change.

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<sup>195</sup> Department of Arts, Culture, Science and Technology, The Review Committee, *Towards a New National Museums Service: A Vision for the Restructuring of Declared Cultural Institutions*, October 1996, page 4.

<sup>196</sup> Department of Arts, Culture, Science and Technology, The Review Committee, *Towards a New National Museums Service: A Vision for the Restructuring of Declared Cultural Institutions*, October 1996, page 4.



In addition a committee was established to evaluate and assess the National Museum, Bloemfontein and the Natal Museum, Pietermaritzburg. In its report, *Evaluation and Assessment of the National Museum, Bloemfontein, and the Natal Museum, Pietermaritzburg*, this committee concluded that these museums should be reconceptualised as 'keystone institutions,' i.e. museums different from but not inferior to Flagship Institutions, which would "operate on a regional, transprovincial basis in zones of South Africa that are not covered by Flagship museums."<sup>197</sup>

Two further feasibility studies were commissioned in 2001 to investigate the possibility of creating KwaZulu Natal and Bloemfontein/Kimberley Flagships. The report recommended two possible routes for amalgamation: the autonomous and core function models. The autonomous model suggested that the three institutions retain their original identities and only merge through the appointment of a CEO who would oversee the management of the three entities as a single institution. The core function model provided for the establishment of a single institution with the centralized management of functions. The latter was strongly recommended. The report was not well received by council members and managers of institutions and coincided with a time when the newly established flagships (Northern and Southern Flagships) were grappling with a variety of teething problems. The proposals were not implemented.<sup>198</sup>

The National Museums Division, provided for in the Act, has not been established.

### 32.3.8 Legacy projects

After 1994, the President's Office was inundated with requests to consider the commemoration of historic events and leaders marginalised by the previous dispensation. Since then, a number of new museums have been established and accorded 'national status' as declared cultural institutions. These include the Robben Island Museum, established in 1997 as the "first major new heritage institution of democratic South Africa" to be developed as "a cultural and conservation showcase for South Africa's democracy",<sup>199</sup> the Nelson Mandela Museum, established in 2000, and the Luthuli Museum established in 2004. All three of these were initiated as Legacy Projects.<sup>200</sup>

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<sup>197</sup> Department of Arts, Culture, Science and Technology, Evaluation and Assessment of the National Museum, Bloemfontein, and the Natal Museum, Pietermaritzburg: Report to the Department of Arts, Culture, Science and Technology, November 1997, page 39.

<sup>198</sup> Information pertaining to this feasibility study was sourced from the Heritage Briefing by the Department of Arts and Culture to the Education and Recreation Select Committee, National Council of Provinces, 27 October 2004.

<sup>199</sup> Address by President Mandela on Heritage Day, Robben Island, 24 September 1997.

### 32.4 Key issues

The key issues identified below are drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

#### 32.4.1 Museums of and for the nation

The nature of the national museums as social institutions and their role in defining, shaping and presenting the nation, promoting social cohesion or entrenching social divisions has not been sufficiently explored in South Africa.

South African museums are conventionally '*classified*' as '*national*', '*provincial*', '*departmental*', '*local*' or '*municipal*', or '*private*' according to the source of their funding.<sup>201</sup> In South Africa, the term '*national museum*' is commonly understood to describe museums that are funded and administered by the national Department in accordance with national legislation. Although institutions classified as national have been quick to claim a superior status to others, their claims to either represent or serve the nation have been increasingly called into question. "*They are not all of 'national' status in terms of their collections or the services they provide. Indeed, several provincial and municipal museums are more 'national' in this respect than some of the nationally funded institutions*".<sup>202</sup>

From our consideration of international practice, it seems that this is a world-wide phenomenon. The designation "*national*" tends to refer to an institution that: is established by a statute of parliament; represents the nation; holds in trust a collection bequeathed to or acquired on behalf of the nation; or delivers a service to the citizens of the nation, rather than simply those in a particular location or community of interest.

What is evident is that national museums do, or should, enter into a compact or contract with the State that funds them, fulfilling a set of functions in return for continued funding. What is unclear, though, is: what services the museum should deliver, to whom and to what end; who should define these services – and to what extent the museum may have the autonomy to do this or be required to work in accordance with government's pre-defined priorities and programmes; and how national museums could or should work in partnership with other museums and the suite of institutions that constitute the heritage landscape. These are some of the primary issues that must be addressed in developing a national policy for museums.

A broad review of international museum policy indicates that, generally speaking, legislation and policy governing national museums focuses on the conventional museum activities of collection, documentation, research, presentation and promotion. Little attempt is made to address the relationship between the institutions

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<sup>201</sup> See, for example, *Museums for South Africa: Intersectoral Investigation for National Policy*, 1994.

<sup>202</sup> White Paper on Arts, Culture and Heritage, 1996, page 31.



and the citizens of the nation; to indicate an aspiration to reflect the values of the nation or to utilise the resources – intellectual and other - of the institution in the service of society.

The degree of autonomy accorded museums established and funded by national governments varies from country to country and is usually spelt out in the relevant founding statute, together with appropriate monitoring and evaluation mechanisms. The relationship between government departments or agencies that sponsor other museums is spelt out in a range of agreements or memoranda that link funding to strategic programmes and performance.

While national museums conform to the International Council of Museums (ICOM) definition of a museum as a *“non-profit making permanent institution in the service of society and of its development, open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, the tangible and intangible evidence of people and their environment”*<sup>203</sup> they have been criticised for failing to transform and for being of little relevance to the South African public. It is true to say that, in many instances, they have failed to realise their potential. While this can be, and is, ascribed to the prevalence of outdated attitudes and collection, display and communication practices, it also indicates a policy vacuum and an inadequate institutional and legal framework.

Museums are national resources: repositories of significant material and intellectual assets that need to be integrated more fully into the heritage landscape and the life of the communities that make up our diverse nation.

#### 32.4.2 A national sub-sector structure for museums

As noted in the background to this law, a number of structures have been established, or proposed to facilitate co-ordination of the museum sector, but none of these exist today.

It is recommended that a National Council of Museums be established in accordance with international best practice and following the model adopted by the library and information services sector.

In accordance with the model proposed elsewhere in this report, the functions of the Council, as a national statutory sub sector structure would include:

- advising the Minister on policy, strategy, legal and fiscal frameworks;
- formulating national norms and setting standards, grading and assessment criteria;

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<sup>203</sup> ICOM Code of Ethics for Museums, 2006.

- facilitating coordination and communication in the sector. This may involve or build upon the existing professional association.

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- advising the Minister on policy, strategy, legal and fiscal frameworks;
- formulating national norms and setting standards, grading and assessment criteria;
- facilitating coordination and communication for the sector, in accordance with the proposals outlined elsewhere in this Report. This may involve or build upon the existing professional association.

#### 32.4.4 An integrated museum policy and delivery framework

There is no coherent policy framework for museums. The museum sector is fragmented, and the issue of '*national museums*' has long bedevilled it. It will continue to do so until these institutions can be seen not in isolation but as elements within the broader heritage landscape and until critical policy issues relating to this have been negotiated and resolved.

In terms of the Constitution, museums other than national museums are functional areas of exclusive provincial legislative competence. Museum and other sites of interpretation have been established by a range of national, provincial and local government structures as well as by community based, private, academic and other organisations. An integrated national museums policy is required to provide an enabling environment within which the mechanisms for engagement are articulated and all concerned have a clearly defined role and functions. The policy should include the following elements:

- **The role of declared cultural institutions as national institutions**

Declared cultural institutions are an integral component of the museum sector. It would be premature to recommend significant changes to these without firstly taking into account the broader context and secondly without a comprehensive assessment of the effect that the creation of two flagships has had on delivery.

The role of national museums, including flagship institutions, should be reassessed and articulated within the policy described above before further decisions about restructuring are considered, so that this can happen, if and when necessary, within the context of an integrated policy.

- **Public, private sector and community-based museums**

Issues pertaining to private sector heritage institutions, community-based heritage projects and heritage practitioners are not adequately accommodated in existing heritage policy. The inclusion of these will lead to greater integration of the sector and to the development of appropriate standards.

There is general concern that historically advantaged cultural institutions are still funded with no requirement for them to transform, while new initiatives are in urgent need of support funding. Museums are generally not self-sustaining; a national strategy and policy for funding and governance of local museums would be welcomed by the sector.

Whatever system is developed to regulate museums and like institutions should apply to community-based and private sector initiatives as well as to those initiated by government. All public, private sector and community-based institutions should be incorporated in an integrated museum policy.

- **Sites of interpretation**

While the White Paper makes reference to museums, it does not provide for other heritage initiatives. Definitions and terminology need to be broadened to include other initiatives – such as the many interpretation or exhibition centres being developed at heritage sites, in national parks and by communities across the country - that interpret and present information about heritage to the public.

These initiatives should be incorporated within an integrated museum policy framework.

- **Natural history collections**

The definition of 'heritage' should be extended to include 'natural heritage' because a number of national museums incorporate significant natural heritage components.

While natural history museums are accountable to the Department some natural history museums have expressed an interest in developing a closer alignment with the South African Biodiversity Institute, especially in relation to research and funding.

It is recommended that the Department of Science and Technology be represented on the councils of relevant institutions and that an agreement or memorandum of understanding be formulated between the two departments regarding these institutions.

- **Establishing an appropriate intergovernmental forum**

It has been noted that the museum sector is fragmented. An appropriate intergovernmental forum is required to ensure that publicly-funded museums are more closely aligned. The composition of such a forum should be decided upon in accordance with the provisions of an integrated museum policy and delivery framework.

- **Museum grading and accreditation**

There are many questions about what constitutes a national museum: whether the institutions are in fact national in character and, if not, why their administration should not be devolved to the provinces; why some institutions currently funded by provincial and local government and considered to be 'national' in character are excluded from the Act; and how national, provincial, local, academic, corporate and private museums interact. None of these questions are adequately addressed, if at all, in either the White Paper or in existing legislation.

Criteria are required to guide the ways in which museums in general are declared, graded, classified, assessed and accredited. This has been recommended in and through a range of processes and reports including ACTAG, the White Paper on Arts, Culture and Heritage and the development of the flagship museums, but has not been implemented.

A museum classification, grading and accreditation system should be established and implemented (The work of the Southern African Museums Association in this area should be noted).

- **Living heritage**

Living or intangible cultural heritage has historically been marginalised and, while programmes such as the National Indigenous Music and Oral History Programme (NIMOHP) have been established, these operate in a policy vacuum.

A policy for living heritage is required. This should take into account the role that all institutions and agencies in the sector play and clarify their respective responsibilities.

- **Museums and transformation**

Museums have had to confront and deal with a number of challenges in relation to accessibility, the development of new audiences, policies, programmes and the human resource capacity to deliver these as well as to devise ways of integrating living heritage and indigenous knowledge systems into their everyday practice.

While there have been initiatives aimed at facilitating the transformation process, it is noted that these have been hampered by the fragmentation that characterises the sector. The finalisation of a transformation charter, to which all museums subscribe, is recommended.

- **Human remains**

The existence of human remains in museum collections is problematic and must be addressed through national policy that provides guidelines for acquisition, access and reburial of these in accordance with international best practice. This issue is addressed in more detail in Part III of this Report.

- **Heritage objects**

Museums hold heritage objects in custody for the nation but SAHRA, as the primary custodian of the sites and objects that constitute the national estate is ultimately responsible for the norms and standards that should be applied to protect these and for monitoring the implementation of these.

- **Public access to heritage institutions**

It has been noted that many South Africans do not have the economic means to access heritage institutions, Access to these institutions is critical to transformation. This issue should be addressed through a policy that applies to heritage institutions and sites in accordance with international precedents which allow local residents privileged access. This issue is addressed in more detail in Part III of this Report.

- **Intellectual capital**

Museums utilise public funding to generate, acquire and hold enormous reserves of intellectual capital. These resources should be protected and utilised for the public good in accordance with policy principles and guidelines.

### 32.5 **Legislative recommendations**

We recommend the following amendments to the Cultural Institutions Act, 1998:

**32.5.1 Section 1 - Definitions**

- The definition of “institution” should be amended to include reference to performing arts councils in accordance with the Minister’s declaration of performing arts councils as declared institutions under GN 455, GG 24612 of 1 April 2003.
- The definition of “Minister” should be amended to refer to the “Minister responsible for Arts and Culture”.

**32.5.2 Section 3 - Amalgamation of declared institutions**

The provisions providing for the amalgamation of institutions do not satisfy the constitutional requirement of administrative fairness. The Act should be amended to provide for notice, adequate consultation and consideration of representations before amalgamating institutions.

**32.5.3 Section 4 - Declared institution to be corporate body**

The redundant reference to the “*National Monuments Act, 1969*” in section 4(5) should be substituted by reference to the “*National Heritage Resources Act 25 of 1999*”.

**32.5.4 Section 5 - Establishment and constitution of councils**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of councils;
- remuneration of members of councils and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by councils;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between institutions and the Minister and between councils and their executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;

- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;
- council charters and appointment letters setting out the individual duties and responsibilities of members of councils.
- Subsection (9A) providing for the dissolution of a council, does not satisfy the constitutional requirement of administrative fairness. The provision should be amended to provide for notice, adequate consultation and consideration of representations before dissolving a council.

#### 32.5.5 Section 8 - Functions of councils

- The policy formulation function of a council of a declared institution as contemplated in section 8(1)(a), should be expressly limited to institutional policy and for purposes of coherence and consistency, should be subject to national policy.
- The councils of a number of declared institutions are listed as Schedule 3 Public Entities in terms of the Public Finance Management Act, 1999. However, relevant sections of the Cultural Institutions Act, 1998 are not consistent with the provisions of the Public Finance Management Act. In this regard, the following amendments should be made to provide for consistency-
  - a budget of estimated revenue and expenditure should be submitted by a council for approval at least 6 months before the start of a financial year;
  - financial statements for each financial year must be submitted to the auditors of the institution, within 2 months of the end of that financial year;
  - an annual report of activities during the year, audited financial statements for that year and a report from the auditors on those statements, must be submitted within 3 months of the end of a financial year.
  - Subsection (5) should be amended to make reference to subsection (1)(g).

#### 32.5.6 Sections 12 and 13 - National museums division

The national museums division should be abolished and replaced by a National Council of Museums as a museums sub-sector statutory body to advise the Minister on the formulation of national policy on museums.

Appropriate provisions should be incorporated dealing with composition, administrative support and appropriate institutional processes and procedures identified in our governance review of heritage institutions.

### 32.5.7 Section 14 - Abolition of declared institutions

The provisions providing for the abolition of declared institutions do not comply with the constitutional requirement of administrative fairness. The Act should be amended to provide for notice, adequate consultation and consideration of representations before abolishing an institution.

### 32.5.8 Section 15 - Delegation of powers

The provisions dealing with delegation of powers by the Minister should be amended in accordance with the recommendations arising from our review of heritage institutions and broadened to include delegation of powers by the councils of declared institutions.

### 32.5.9 Appropriate intergovernmental forum

The Act should be amended to provide for an appropriate intergovernmental forum to co-ordinate activities at national, provincial and local government levels.

## 32.6 Summary of recommendations on the Cultural Institutions Act 119 of 1998

Policy recommendations	
<b>National Council of Museums</b>	<p>The functions of the Council, as a national statutory sub sector structure should include:</p> <ul style="list-style-type: none"> <li>• advising the Minister on policy, strategy, legal and fiscal frameworks;</li> <li>• formulating national norms and setting standards, grading and assessment criteria;</li> <li>• facilitating coordination and communication in the sector. This may involve or build upon the existing professional association.</li> </ul>
<b>Integrated museum framework and delivery framework</b>	<p>An integrated national museum policy is required to provide an enabling environment within which the mechanisms for engagement are articulated and all concerned have a clearly defined role and function. The policy should include the following elements-</p> <ul style="list-style-type: none"> <li>• the role of declared cultural institutions as national institutions;</li> <li>• public, private sector and community-based museums;</li> <li>• sites of interpretation;</li> <li>• natural history collections;</li> <li>• establishment of an appropriate inter-governmental forum;</li> <li>• museum grading and accreditation;</li> <li>• living heritage;</li> </ul>



		<ul style="list-style-type: none"> <li>• human remains;</li> <li>• heritage objects;</li> <li>• public access to heritage institutions; and</li> <li>• intellectual capital.</li> </ul>
<b>Legislative recommendations</b>		
<b>Section 1</b>	<b>Definitions</b>	<p>Definition of "institution" should be amended to include reference to performing arts councils</p> <p>Definition of "Minister" should be amended to refer to the "Minister responsible for Arts and Culture"</p>
<b>Section 3</b>	<b>Amalgamation of declared institutions</b>	Amendment recommended to provide for notice, adequate consultation and consideration of representations before amalgamating institutions
<b>Section 4</b>	<b>Declared institution to be corporate body</b>	Redundant reference to the "National Monuments Act 1969: in section 4(5) should be substituted by a reference to the "National Heritage Resources Act 25 of 1999"
<b>Section 5</b>	<b>Establishment and constitution of councils</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• Qualifications for and disqualifications from membership;</li> <li>• Removal of members, vacancies and filling of vacancies and the dissolution of councils;</li> <li>• Remuneration of members of councils and the reimbursement of their expenses;</li> <li>• Quorums for meetings, manner of decision making and voting thresholds;</li> <li>• Delegation of powers and functions by councils;</li> <li>• Reporting, performance review and accountability mechanisms (including service level or performance agreements between councils and the Minister and between councils and their executive management);</li> <li>• The appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• A common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;</li> <li>• Council charters and appointment letters setting out the individual duties and responsibilities of members of councils.</li> </ul> <p>Subsection (9A) should be amended to provide for notice, adequate consultation and consideration of representations before dissolving a council</p>
<b>Section 8</b>	<b>Functions of</b>	<ul style="list-style-type: none"> <li>• The policy formulation function of a council as contemplated in section 8(1)(a) should be expressly limited to institutional policy</li> </ul>

	<b>council</b>	<p>and should be subject to national policy</p> <ul style="list-style-type: none"> <li>• Recommend that the following amendments be made to ensure consistency with the PFMA- <ul style="list-style-type: none"> <li>• the policy formulation function of a council of a declared institution as contemplated in section 8(1)(a), should be expressly limited to the institutional</li> <li>• policy and for purposes of coherence and consistency, should be subject to national policy.</li> </ul> </li> <li>• The councils of a number of declared institutions are listed as Schedule 3 public entities in terms of the Public Finance Management Act, 1999. However, relevant sections of the Cultural Institutions Act, 1998 are not consistent with the provisions of the Public Finance. In this regard, the following amendments should be made to provide for consistency- <ul style="list-style-type: none"> <li>• a budget of estimated revenue and expenditure should be submitted by a council for approval at least 6 months before the start of a financial year;</li> <li>• financial statements for each financial year must be submitted to the auditors of the institution, within 2 months of the end of that financial year;</li> <li>• an annual report of activities during the year, audited financial statements for that year and a report from the auditors on those statements, must be submitted within 3 months of the end of a financial year.</li> </ul> </li> <li>• Subsection (5) should be amended to make reference to subsection (1)(g).</li> </ul>
<b>Sections 12, 13</b>	<b>National museums division</b>	<p>The national museums division should be abolished and replaced by a National Council of Museums as a museum-sector statutory body to advise the Minister on the formulation of national policy on museums</p> <p>Appropriate provision should be incorporated to deal with composition, administrative support and appropriate institutional processes and procedures identified in our governance review on heritage institutions</p>
<b>Section 14</b>	<b>Abolition of declared institutions</b>	<p>The provision should be amended to provide for notice, adequate consultation and consideration of representations before abolishing an institution</p>
<b>Section 15</b>	<b>Delegation of powers</b>	<p>The provisions dealing with the delegation of powers by the Minister should be amended in accordance with the recommendations arising from our review of heritage institutions and broadened to include delegation of powers by the councils of declared institutions</p>
	<b>Appropriate inter-governmental forum</b>	<p>The Act should be amended to make provision for an appropriate intergovernmental forum to co-ordinate activities at national, provincial and local levels.</p>

### 33 South African Geographical Names Council Act 118 of 1998

*"I would call on places that have names that are strange to me as an African, such as Port Elizabeth, Grahamstown, King Williamstown, Berlin, Stutterheim, Fort Hare, Fort Beaufort and East London, and try to understand who Graham was, such that a town must be named after him, and why we have a small town in the Eastern Cape that shares the same name as the great city of Berlin. I am certain that as I walk around these places with strange names, I will learn much about the great dramas of times past, when British men and women and soldiers, and German men and women descended on the Eastern Cape and constructed towns and forts that they named after their heroes and heroines, and sovereigns and places of origin. In the process I will learn something about what happened, then. Who fought whom, and who lost and won! Who owned this land, and who took it by force!"<sup>204</sup>*

#### 33.1 Introduction

The South African Geographical Names Council Act provides for the establishment of the SAGNC, a body to advise the Minister of Arts and Culture on the transformation and standardisation of geographical names.

The SAGNC deals with geographical names of national concern including, but not limited to: towns, suburbs and any form of human settlement, post offices, railway stations, highways and government dams, natural landforms such as mountains, hills, rivers, streams, bays, headlands and points, islands, passes, 'poorts' and 'neks'.

Geographical names which fall outside the jurisdiction of the SAGNC include: juristic names such as the name of the country, the provinces and local authorities; features under the control of local authorities, such as streets, municipal buildings, squares, parks, cemeteries; privately owned buildings and farms and cadastral names.

#### 33.2 Historical background to the law

##### 33.2.1 Place names, power and identity

Place names constitute an essential part of the cultural history of a nation. Names arise from political and social history, geographical features and phenomena, fauna and flora. South African geographical place names reflect the diverse histories and languages of those who have shared this land, willingly or unwillingly, over thousands of years. The oldest names are those used by the Khoi and the San and other indigenous African peoples. In many instances, these were replaced from the late 15<sup>th</sup> century onwards by Portuguese, Dutch,

<sup>204</sup> From the Address by President Thabo Mbeki at the Opening of the Tourism Indaba, 4 May 2003.

English, French, German and other names given by those who colonised or settled in various parts of the country. The evolution of Afrikaans in the 19<sup>th</sup> century further enriched the nomenclature, and the discovery of gold and diamonds and urban and industrial development added Latin, Greek, Hebrew, Italian and Indian names to the mix.

In earlier times, names were relatively fluid. Older names were altered, adapted, translated and supplanted; names passed down through oral traditions were misheard and then mis-spelt by those who recorded them in writing; hybrid names combining different languages came into being; many names were spelt differently by different people at different times; some places carried more than one name bestowed by different language groups. This variety of forms and spellings created a fair degree of confusion and problems with communication.

### 33.2.2 The National Place Names Committee

In 1936, realising that a measure of standardisation of place names in South Africa was necessary, the then Minister of the Interior appointed a committee to investigate the situation. At the recommendation of this Committee, a Place Names Committee, later to become the National Place Names Committee (NPNC) was appointed in 1939 to advise the then Minister of National Education and, after 1994, the Minister of Arts, Culture, Science and Technology, on proposed new names or applications for name changes. The NPNC's mandate was restricted to the naming of post offices, railways, towns, and stopping places for railway buses, and excluded cadastral names.

The work of this Committee led to the publication of Official Place Names in the Union and South West Africa (1951), Official Place Names in the Republic and South West Africa (1978), Official Place Names in the Republic of South Africa Approved 1978-1988 (1991) and a Concise Gazetteer of South Africa (1994).

The Committee was criticised for being unrepresentative and for erasing original African names and imposing names of European origin.

### 33.2.3 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts Culture and Heritage, in locating the position and function of the Names Committee within the reconfigured heritage landscape, proposed that, *"As part of the process of transformation towards democratic decision-making, the National Place Names Committee will be renamed as the National Geographical Names Division and fall under the National Heritage Council. Its remit will be broadened through appropriate legislation. The National Geographical Names Division, in consultation with provincial authorities, will be responsible for identifying existing place names in need of revision, co-ordinating requests for advice on new geographical names, communicating decisions effectively to the relevant Ministries,*

*the public and liaising with international organisations concerned with geographical names”.*<sup>205</sup>

### 33.2.4 The South African Geographical Names Council Act 118 of 1998

In 1996, in accordance with the recommendations of the White Paper on Arts, Culture and Heritage, a Working Forum on Geographical Names was established to advise the then Minister of Arts, Culture, Science and Technology on the reconstitution of the NPNC. The Forum recommended that the NPNC be reconstituted to represent all stakeholders and that it should be given a wider mandate. It also recommended that legislation be drafted to regulate its activities. The Forum prepared a report as well as a *Draft South African Names Commission Bill*, taking into account the relevant United Nations resolutions and recommendations on the standardisation of geographical names, the principles and procedures of the NPNC, international practices and the provisions of the White Paper.

In his speech at the Second Reading proposal of the Bill, the then Minister of Arts, Culture, Science and Technology commented on the need to address the issue of standardisation of names but added that the establishment of the SAGNC as a body separate from the National Heritage Council<sup>206</sup> was to “*deliver an important legislative instrument to address the needs of the marginalised communities and to remove the insults to which, over the years, these people have been subjected.*”<sup>207</sup>

The South African Geographical Names Council (SAGNC) was inaugurated in December 1999. DAC’s Living Heritage sub-directorate administers the South African Geographic Names System, which is governed by the SAGNC. Provincial Names Committees have been established, but there are problems with the status and functioning of these (see inputs from the consultative process, below).

### 33.3 Key issues

The policy issues, gaps and challenges identified below are drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

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<sup>205</sup> Department of Arts, Culture, Science and Technology, White Paper on Arts, Culture and Heritage, 1996 Chapter 5:22.

<sup>206</sup> The White Paper states that “As part of the process of transformation towards democratic decision-making, the National Place Names Committee will be renamed as the National Geographical Names Division and fall under the National Heritage Council. Its remit will be broadened through appropriate legislation. The National Geographical Names Division, in consultation with provincial authorities, will be responsible for identifying existing place names in need of revision, co-ordinating requests for advice on new geographical names, communicating decisions effectively to the relevant Ministries, the public and liaising with international organisations concerned with geographical names”.

<sup>207</sup> South Africa, Parliament, House of Assembly, *Debates*, 5 November 1998, 7812.

### 33.3.1 Renaming and transformation

In a 2002 survey, the United Nations Group of Experts on Geographical Names found that 48 of 93 states included in the survey had national naming bodies. In general, it seems that the countries where such bodies are found have a colonial past, a historically-marginalised indigenous population, strong minority language groups and have undergone dramatic political changes from one regime to another.

While international organisations such as the Group of Experts focus on technical issues, the inherently political nature of naming and renaming and the role of this process in South African transformation is eloquently captured in the following, “Imperialism with its concomitant colonial subjugation wrought havoc, in terms, not only, of military conquest, but also of intellectual conquest. Colonialism ‘conquered’ and ‘subjugated’ knowledge systems that informed the history of indigenous communities. One of the ways in which these knowledge systems were subjugated was through the marginalisation of pre-colonial geographical names in favour of new colonial names that were institutionalised and formed part of the dominant political discourse that defined and characterised South Africa's social, political and heritage landscapes. Such colonial reconfiguring impacted, and still impacts, on the human psyche. It perpetuated and confirmed colonial stereotypes that propagated that there was no creative thinking prior to Westernisation in Africa in general and South Africa in particular. Hence, the urgent need to transform the national heritage landscape through renaming. South Africa's geographical features that were stripped of their original identities have to reclaim such identities. The process of re-naming is an exciting and a challenging one and forms an integral part of the African Renaissance project.”<sup>208</sup>

The forward of the report to the Eighth United Nations Conference on the Standardization of Geographical Names, by Prof L.F. Mathenjwa, Chairperson of the SAGNC, emphasises the role of the public in this process as follows - *“Liberation has been achieved, it is now time for the people of South Africa to play their role in changing our country to be what we fought for. For the first time in our history and that of our country, people have been afforded an opportunity to have a say in the naming of their geographical places.”*<sup>209</sup>

### 33.3.2 National policy

While a set of guidelines exists, there is no clear policy on name changes. We believe that DAC has initiated a process to develop this but recommend that, in the light of current developments and the attention that this topic is generating in the public domain, the process be accelerated.

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<sup>208</sup> Themba Wakashe, 2001.

<sup>209</sup> Eight United Nations Conference on the Standardisation of Geographical Names, Report of South Africa, 24 June 2002.

This policy should address, *inter alia*, the issues of offensive names, naming of key sites and the role of name changing in transformation. While the Act makes provision for the Council to act proactively in respect of changing names, it has not made full use of this power, largely because there is a feeling that civil society, rather than government, should be seen to be initiating name changes. It is recommended that policy make provision for government to facilitate and create an enabling environment rather than continue to allow a situation in which name changes are occurring within a policy vacuum, with the potential to further social divisions rather than engender cohesion.

The issues identified below should be addressed through the formulation of a cohesive national policy.

### 33.3.3 The role of the Minister of Arts and Culture in decision-making

The Minister should be given greater regulatory mandate over geographical names outside the national competence in order to ensure consistency in terms of standardisation processes and guidelines.

The Minister of Arts and Culture should retain authority for approving or rejecting applications for name changes.

### 33.3.4 The role of the South African Geographical Names Council (SAGNC) as a sub-sector structure

The SAGNC should be regarded as a national sub-sector structure as proposed in Part III of this Report, to advise the Minister on national policy and with powers to formulate national norms, standards and guidelines to regulate activity in relation to naming and re-naming and to recommend name changes to the Minister.

### 33.3.5 The South African Geographical Names System as a national institution

It is recommended that the SAGNS continue to operate as a unit within DAC, under the direction of the Council with sufficient administrative support to enable it to function effectively and efficiently.

### 33.3.6 The role of provincial government

While local and national government have a clearly defined role in relation to name changes, provincial government appears to have been sidestepped, lacking any real power or authority in this process. The Act does not prescribe the role of provincial government but makes provision for the provinces to “facilitate” the establishment of the PGNCs.

Several provinces have established PGNCs, following the lead of the national department and provide human, financial, administrative and operational capacity by seconding staff to provide operational and administrative support, appointing



dedicated staff and providing financial support for salaries and administration or doing this via a budget from another provincial structure such as in the case of the Western Cape, the Cultural Commission.

Notwithstanding the above, the role and responsibilities of provincial MECs and the Provincial Geographical Names Committees requires clarification within an overall national policy.

It is recommended that:

- The role, responsibilities and powers of MECs in respect of name change be addressed in the Act and that MECs be empowered to establish PGNCs.
- PGNCs be established by the MEC, to advise the MEC, consider and verify applications and support relevant local structures.
- Guidelines for a regulatory framework that addresses the appointment, composition, size, competencies, term of office and remuneration of PGNC members be formulated.

#### 33.3.7 Names outside the national competence

The Act is silent on names outside the national competence. Guidelines for these should be included in a national policy.

#### 33.3.8 Intergovernmental forum

It is recommended the Minister establish an appropriate intergovernmental forum to ensure intergovernmental cooperation and coordination.

### 33.4 Recommendations for legislative amendment

#### 33.4.1 Section 3 - Composition of Council

In our view the current provincial representation on the SAGNC should be reviewed. The membership of the Council currently includes 9 members nominated by the provinces and we believe that this composition serves to confuse the governance and inter-governmental coordination functions of the Council. In our view the governance functions of the Council will be better served by substantially reducing provincial representation on the structure and that the cause of inter-governmental coordination will be better served by establishing a specific statutory structure for this purpose. Furthermore, the size of the SAGNC is excessive and we recommend that the number of members be reduced.

#### 33.4.2 Section 4 - Termination of membership and dissolution of Council

Section 4(7) and (8) govern the termination of a person's membership of the Council and the dissolution of the Council by the Minister. These provisions do not provide



for administrative fairness and we recommend an amendment to provide for a fair procedure to be followed in the event of terminating a person's membership or dissolving the Council.

#### 33.4.3 **Sections 2 and 9 - Provincial geographic names committees**

A key object of the Council is to facilitate the establishment of PGNCs and one of its powers is to set guidelines for the operation of such committees. The Act is however silent on the legal basis on which provincial committees are established and funded. The effect of this is that these committees need to be established through provincial legislation.

An amendment is required to provide for the establishment of provincial geographical names committees by provincial MECs either under the Act or in terms of provincial legislation.

#### 33.4.4 **Section 10 - Approval and revision of geographical names**

The Act is silent on the procedure to be followed for the consideration of applications for the approval and revision of geographical names, either by the Council in formulating its recommendations on geographical names falling within the national competence to the Minister for approval or by the Minister in approving or rejecting a geographical name recommended by the Council.

This renders decisions to approve or revise geographical names vulnerable to legal challenge on the grounds that they do not comply with the requirements of administrative fairness. The Minister's decision was set aside in the SCA Makhado matter on grounds of lack of consultation at local government level.

Furthermore, the Act provides for complaints to be lodged with the Minister only after the Minister's approval of a geographical name, for the Minister to refer the complaint to the Council for advice and for the Minister thereafter to make a decision on the complaint, providing reasons for the decision. This procedure is also vulnerable to legal challenge on grounds that it does not satisfy the requirements of administrative fairness.

In our view there are two important amendments required to deal with procedural matters in respect of the approval and revision of geographical names:

- the Act should be amended to provide for a transparent procedure for the consideration, approval and revision of geographical names, including the requirements for consultation;
- the existing complaint procedure provided in section 10 of the Act should be replaced with a requirement that the Minister, before deciding whether or not to approve or reject a geographical name recommended by the Council, be required to follow a notice and comment procedure.

#### 33.4.5 Intergovernmental forum

The Act should be amended to provide for an appropriate intergovernmental forum responsible for implementing national policy on name changes:

- to coordinate activities at national, provincial and local government levels; and
- to promote uniform standards for name changes.

#### 33.4.6 Governance matters

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the council;
- remuneration of members of the council and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and their executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

### 33.5 Summary of recommendations on the South African Geographical Names Council Act 118 of 1998

Policy recommendations		
<b>National policy on name changes</b>		<p>We recommend that DAC formulate national policy on name changes which should address the following matters-</p> <ul style="list-style-type: none"> <li>• the role of the Minister of Arts and Culture in decision-making;</li> <li>• the role of the SAGNC as a sub-sector structure;</li> <li>• the South African Geographical Name System as a national institution;</li> <li>• the role of provincial government;</li> <li>• names outside the national competence;</li> <li>• an appropriate inter-governmental forum to ensure inter-governmental co-operation and co-ordination.</li> </ul>
Legislative recommendations		
<b>Section 3</b>	<b>Composition of Council</b>	<p>In our view the current provincial representation on the SAGNC should be reviewed. The membership of the Council currently includes 9 members nominated by the provinces and we believe that this composition serves to confuse the governance and inter-governmental coordination functions of the Council. In our view the governance functions of the Council will be better served by substantially reducing provincial representation on the structure and that the cause of inter-governmental coordination will be better served by establishing a specific statutory structure for this purpose. Furthermore, the size of the SAGNC is excessive and we recommend that the number of members be reduced.</p>
<b>Section 4</b>	<b>Termination of membership and dissolution of Council</b>	<p>Section 4(7) and (8) govern the termination of a person's membership of the Council and the dissolution of the Council by the Minister. These provisions do not provide for administrative fairness and we recommend an amendment to provide for a fair procedure to be followed in the event of terminating a person's membership or dissolving the Council.</p>
<b>Sections 2 and 9</b>	<b>Provincial geographic names committees</b>	<p>A key object of the Council is to facilitate the establishment of PGNCs and one of its powers is to set guidelines for the operation of such committees. The Act is however silent on the legal basis on which provincial committees are established and funded. The effect of this is that these committees need to be established through provincial legislation.</p> <p>An amendment is required to provide for the establishment of provincial geographical names committees by provincial MECs either under the Act or in terms of provincial legislation.</p>
<b>Section 10</b>	<b>Approval and revision of geographical names</b>	<p>The Act is silent on the procedure to be followed for the consideration of applications for the approval and revision of geographical names, either by the Council in formulating its recommendations on geographical names falling within the national competence to the Minister for approval or by the Minister in approving or rejecting a geographical name recommended by the Council.</p>

		<p>This renders decisions to approve or revise geographical names vulnerable to legal challenge on the grounds that they do not comply with the requirements of administrative fairness. The Minister's decision was set aside in the SCA Makhado matter on grounds of lack of consultation at local government level.</p> <p>Furthermore, the Act provides for complaints to be lodged with the Minister only after the Minister's approval of a geographical name, for the Minister to refer the complaint to the Council for advice and for the Minister thereafter to make a decision on the complaint, providing reasons for the decision. This procedure is also vulnerable to legal challenge on grounds that it does not satisfy the requirements of administrative fairness.</p> <p>In our view there are two important amendments required to deal with procedural matters in respect of the approval and revision of geographical names:</p> <ul style="list-style-type: none"> <li>the Act should be amended to provide for a transparent procedure for the consideration, approval and revision of geographical names, including the requirements for consultation;</li> <li>the existing complaint procedure provided in section 10 of the Act should be replaced with a requirement that the Minister, before deciding whether or not to approve or reject a geographical name recommended by the Council, be required to follow a notice and comment procedure</li> </ul>
	<b>Inter-governmental forum</b>	<p>The Act should be amended to provide for an appropriate intergovernmental forum responsible for implementing national policy on name changes:</p> <ul style="list-style-type: none"> <li>to coordinate activities at national, provincial and local government levels; and</li> <li>to promote uniform standards for name changes.</li> </ul>
	<b>Governance matters</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>qualifications for and disqualifications from membership;</li> <li>removal of members, vacancies and filling of vacancies and the dissolution of the council;</li> <li>remuneration of members of the council and the reimbursement of their expenses;</li> <li>quorums for meetings, manner of decision making and voting thresholds;</li> <li>delegation of powers and functions by the council;</li> <li>reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li> <li>the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> </ul>

		<ul style="list-style-type: none"><li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;</li><li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li></ul>
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## 34 National Heritage Council Act 11 of 1999

*"Heritage is, first and foremost, about living people. The Bill moves away from the notion that something has to be dead and obsolete before it can be described as part of our heritage. The Bill therefore moves away from an object-centred approach to a people-centred one."*<sup>210</sup>

### 34.1 Introduction

The policy-making processes that informed the White Paper on Arts, Culture and Heritage, 1996, based their recommendations on the assumption that it would be desirable for heritage to be coordinated and managed by an autonomous, arm's-length public entity, and that direct government involvement in the sector should be limited.

This strategy stemmed from the imagined fear that a democratic government would emulate the totalitarian models of cultural and heritage policies of the past. This did not happen, and the political focus on national reconciliation, nation building and social cohesion is firmly entrenched in the national consciousness.<sup>211</sup>

In this context, and given the divergences from the institutional structure outlined in the White Paper, the development of the Department of Arts and Culture into a stronger and more proactive arm of government than envisaged and the role and function of the National Heritage Council and its 'sister' institutions and agencies have been called into question.

### 34.2 Historical background to the law

#### 34.2.1 Report of the ANC Monuments, Museums, Archives and National Symbols Commission, 1993

The Report of the ANC Monuments, Museums, Archives and National Symbols Commission to the Culture and Development Conference held in Johannesburg in 1993, recognised that *"the current statutes legislating heritage are overtly racist, narrow and incapable of upholding democratic principles and values"*<sup>212</sup> and proposed a system for the administration of heritage institutions by a National Heritage Council, regional councils and the establishment of a National Heritage

<sup>210</sup> Hansard, *Second Reading Debate, National Heritage Council Bill*, 23 February 1999, House of Assembly, South Africa.

<sup>211</sup> Department of Arts and Culture, *Some Reflections on Policy and Legislative Issues from the Heritage Perspective*, Internal Discussion Document, December 2006, page 10.

<sup>212</sup> ANC Department of Arts and Culture, *Looking Backwards Looking Forwards: Culture and Development Conference*, Johannesburg, April May 1993, Mayibuye Books, Bellville, 1995, page 55.

Trust Fund to enable the implementation of national policy by “*providing funds for approved projects*”.

The NHC, as conceived in the Report, would be responsible for “*co-ordinating and determining broad national policy and advising the government regarding legislation pertaining to material culture*.” The NHC would consist of standing committees with statutory powers, to manage a number of divisions including museums, monuments, memorials, war graves, national archives, heraldry and national symbols.

#### 34.2.2 Report of the Arts and Culture Task Group ( ACTAG), 1995

The report of the Arts and Culture Task Group (ACTAG), 1995, proposed the establishment of interlinked local, provincial and national heritage councils, a National Heritage Development Unit and a National Heritage Trust.<sup>213</sup>

The National Heritage Council, in this Report, was envisaged as being comprised of the National Archives Commission, the National Amasiko Commission, the National Museums Commission, and the National Heritage Sites Commission, each appointed by the Minister and having with its own staff and council with executive powers, funded by the Department under a system of framework autonomy. Each of the commissions would be responsible for, amongst other issues, advising on national policy, legislation, and establishing national norms and standards and would report to the National Heritage Council.

The National Heritage Trust was envisaged as a body that would raise and disburse funds for transformation projects, special projects, training programmes and for redressing past imbalances.<sup>214</sup> This Trust was envisaged as “*sitting alongside the NHC*”<sup>215</sup> but being guided and directed by it.

A National Heritage Development Unit, appointed by and reporting to the Minister, but advised and assessed by the NHC, was proposed as a short-term intervention to facilitate local, provincial and national reconstruction and development projects.<sup>216</sup>

The ACTAG Report recommended that the structure outlined above should be operated according to the principles of arm's-length control (framework autonomy)<sup>217</sup>.

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<sup>213</sup> See Organogram, Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 128.

<sup>214</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 97.

<sup>215</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 97.

<sup>216</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, pages 95-109.

<sup>217</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 104.

It must be noted that this structure was aligned with the ACTAG proposals for a National Arts and Culture Council, which was intended to entrench the right of every person to *“practice their culture, language, beliefs and customs as well as enjoy freedom of expression and creativity from interference.”* In accordance with this, it was accepted that it was the responsibility of the State to provide resources and create the conditions under which this right could be exercised. It was also understood that the State had no right to *“interfere in these matters or prescribe to its citizens on matters concerning the arts and culture,”* and that the principle of arm’s-length funding of autonomous statutory bodies was the best way to achieve this.<sup>218</sup>

Putting this recommendation in context, the ACTAG Report noted that funds were used by the previous regime as a *“political instrument to ensure that the arts and culture in State-subsidised institutions generally conformed to the political and ideological interests and the aesthetic tastes of the ruling party.”*<sup>219</sup> The principles applied by ACTAG to the funding and administration of the arts sector have been applied to the heritage sector with little consideration as to whether these are appropriate or not, or whether the State should have the same approach to both sectors. It is relevant to note that services in sectors such as education, health and housing are not delivered or implemented by arm’s-length agencies.

#### 34.2.3 White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage noted the range of tasks required to transform support for heritage and proposed the establishment of the National Heritage Council as a statutory body to bring equity to heritage promotion and conservation. It defined the role of the NHC as advising on policies for research, collections management, curation, exhibits and education and playing a coordinating and consultative role in advising on national cultural symbols.

The NHC was also tasked with responsibility for:

- advising the Ministry on the funding of ongoing operations and new projects, and stipulating the criteria against which funding applications would be assessed, including national relevance;
- initiating, facilitating and empowering the development of living heritage projects in provinces and local communities, with the aim of suffusing the institutions responsible for the promotion and conservation of our cultural heritage with the full range and wealth of South African customs and; recording living heritage practices. This would be done through creating an enabling environment for and identifying resources for communities to

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<sup>218</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 23.

<sup>219</sup> Arts and Culture Task Group, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, May 1995, page 23.



develop an inventory of living heritage resources encourage awareness programmes amongst communities whose heritage has been neglected and marginalised and encourage museums to conserve living heritage through audiovisual media;

- liaising with international heritage organisations regarding cultural sites for the World Heritage List, and other matters regarding heritage conservation;
- consulting with practitioners and provincial heritage services to develop a strategy and code of ethics for using living heritage resources for cultural tourism. This would be done in collaboration with SATOUR and the Department of Environmental Affairs and Tourism. The strategy would empower communities, particularly in rural areas, to promote traditional customs and performances and have a ripple effect on creating jobs in the tourism industry by making marketable living heritage products available for sale.

The NHC was envisaged as having a total of 23 members, 9 with expertise in museums, galleries, archives, living heritage, heritage resources, architecture, education and natural sciences, finance and law; five members of civil society, and one member nominated by the MEC responsible for the cultural affairs of each province.

The White Paper on Arts, Culture and Heritage, 1996 outlined an institutional structure very similar to that proposed in the ACTAG Report, i.e. the NHC as an overarching, coordinating structure with a number of divisions incorporating the then-existing heritage bodies: the National Monuments Council; the War Graves Division and; the National Place Names Committee. The White Paper stated that:

- the National Monuments Council, together with the War Graves Division, would be reconstituted as a division within the NHC, and new legislation maximising coordination across all the fields of national heritage conservation would be enacted. The NHC would act on recommendations for new sites to be declared national monuments or for objects to be declared national cultural treasures;
- the work of the War Graves Division would be broadened to include the maintenance of graves of victims of conflict within South Africa and conducted abroad by South Africa. The NHC would determine and execute national policy for graves of victims of conflict.

The National Place Names Committee would be renamed as the National Geographical Names Division and would fall under the National Heritage Council. Its remit would be broadened through appropriate legislation and it would be responsible for identifying existing place names in need of revision, coordinating requests for advice on new geographical names, communicating decisions

effectively to the relevant Ministries and the public and liaising with international organisations concerned with geographical names.

In the light of subsequent developments and current debates, it must be noted that the White Paper proposed that *"the National Heritage Council will comprise the assets, posts and resources of the National Monuments Council head office in Cape Town and the War Graves Division in Pretoria."*<sup>220</sup>

#### 34.2.4 The Draft Heritage Bill, 1998

In accordance with the White Paper, the Draft Heritage Bill (B 138-98) aimed to present *"an integrated holistic and interactive heritage structure,"*<sup>221</sup> defining national heritage as *"including the national estate and living heritage, which coexist in a dynamic relationship."*<sup>222</sup> The Bill made provision for the establishment of a National Heritage Council to "coordinate the management of the national heritage and affairs common to it and the divisions and agencies associated with it,"<sup>223</sup> a South African Geographical Names Division to standardise geographical names, a National Heritage Resources Division and a South African Heritage Agency to coordinate and promote the management of heritage resources.

#### 34.2.5 The National Heritage Council Act, 1999

The Draft Heritage Bill was introduced in the National Assembly on 15 October 1998. On 8 February 1999, the Portfolio Committee on Arts, Culture and Language, Science and Technology was given leave to split the Bill and to present two separate Bills to the House: the National Heritage Council Bill, and the National Heritage Resources Bill.

The National Heritage Council Bill was presented a fortnight later and welcomed by all parties as a significant step towards implementing the vision articulated in the White Paper on Arts, Culture and Heritage<sup>224</sup> in the endeavour to transform heritage institutions<sup>225</sup> and build unity.

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<sup>220</sup> White Paper on Arts, Culture and Heritage, 4 June 1996, Republic of South Africa, Chapter 5:15.

<sup>221</sup> Department of Arts, Culture, Science and Technology, Draft National Heritage Bill, South Africa, 7 January 1997, page 1.

<sup>222</sup> Department of Arts, Culture, Science and Technology, Draft National Heritage Bill, South Africa, 7 January 1997, page 7.

<sup>223</sup> Department of Arts, Culture, Science and Technology, Draft National Heritage Bill, South Africa, 7 January 1997, page 11.

<sup>224</sup> Hansard, Second Reading Debate, National Heritage Council Bill, 23 February 1999, House of Assembly, South Africa: 616.

<sup>225</sup> Hansard, Second Reading Debate, National Heritage Council Bill, 23 February 1999, House of Assembly, South Africa: 614, 622, 628.

#### 34.2.6 Deviations from the White Paper

The institutional structure envisaged in the White Paper has not been implemented in practice, or carried through in legislation. This has created anomalies which have led to a degree of conflict, confusion and tension within the sector. The National Heritage Council, the South African Heritage Resources Agency, and the South African Geographical Names Council have all been established as stand-alone institutions rather than as components of a single, cohesive structure.

- Clause 16 of the White Paper stated that the National Monuments Council would be reconstituted as a division of the broader National Heritage Council (NHC). In reality, SAHRA is a stand-alone institution with its own legislation and mandate.
- Clause 18, acting on the assumption detailed above, stated that the NHC would determine and execute national policy for the graves of victims of conflict. This function is currently performed by SAHRA.
- Clause 22 stated that the National Geographical Names Division would fall under the NHC. It currently functions, under a separate Act, as a unit operating within the DAC.
- Clause 23, dealing with the NHC's funding mandate, was ambiguous. It should have been clear that the NHC funds institutions and projects outside of government, not the Declared Cultural Institutions.

It has been said that the White Paper on Arts, Culture and Heritage was developed at a time when *the "fever and mood of transformation was higher than it is today,"* but its provisions were not implemented fully because of political trade-offs.

The National Heritage Council was conceptualised at a time when it was believed that heritage should be managed by an autonomous public entity rather than by a government department, and in response to a fear that the 'new' government was going to emulate the totalitarian models of the past. The sector has now to confront the consequences of its own short-sightedness.

The National Heritage Council was intended to be a body that facilitated structural coherence by coordinating all the national entities responsible for heritage delivery and to serve as a vehicle for civil society participation, in accordance with the model established for the arts through the establishment of the National Arts Council and the National Film and Video Foundation.

There was also strong support, at the time, for the notion that the transformation agenda would best be driven by a new institution.

The heritage landscape as envisaged by the authors of the White Paper has changed considerably: DAC has been established as a functioning and well

capacitated department; institutions that were to have been components of an overarching heritage structure have been established as independent entities and; fears of excessive government intervention in the sectors have been allayed. The key policy question to be addressed in this review then is, what role can the National Heritage Council play in taking the sector forward.

### 34.3 Key issues

#### 34.3.1 The NHC and its mandate

The NHC's mandate, as defined in the Act, encompasses coordination of the heritage sector, policy advice to the Minister, promotion of public education and awareness, funding and transformation.

In delivering on its mandate, the NHC is challenged by:

- Tensions created by the mandate to both coordinate and fund;
- The lack of coordinating mechanisms - national institutions and agencies have no obligation to cooperate;
- Funding issues: DAC, SAHRA and the NHC fund a various of heritage projects;
- Coordination is compromised by the lack of policy, legislation and structural alignment. For example, the SAGNC and Freedom Park Trust fall outside the coordinative scope of the NHC;
- The overlap between its mandates and functions and that of the NHC and DAC relate to: coordination and management of the national estate; funding; repatriation; international liaison and World Heritage Sites;
- The overlap its mandates and functions of the NHC and SAHRA in relation to: coordination and management of the national estate; the public institutions and agencies involved; intangible or living heritage; formulation of national policies; repatriation of heritage objects; funding of projects initiated elsewhere; coordination of public institutions; and heritage awareness.

It is critical that the overlaps between the mandates of the Department of Arts and Culture, the National Heritage Council and the South African Heritage Resources Agency be resolved.

#### 34.3.2 A revised composition and mandate for the NHC

In considering the objectives outlined in the White Paper on Arts, Culture and Heritage, 1996, and raised in subsequent forums and processes, particularly in relation to: transformation of the sector; redress; access to resources; capacity

building; developing intellectual capital and a powerful knowledge base to advance the sector and facilitating the contribution that it makes to national priorities. And, taking into account the current role of the NHC and the functions of other heritage institutions within the heritage landscape it is recommended that:

- DAC assume responsibility for coordinating the sector in accordance with the proposals outlined elsewhere in this Report and that it assume primary responsibility for liaising with international organisations and dealing with repatriation, i.e. those functions which require government-to-government intervention; require government intervention or commit government to action;
- SAHRA assume responsibility for management of the national estate, as defined in the National Heritage Resources Act 25 of 1999;
- A National Heritage Council, comprising a representative elected by each of the five national sub-sector structures and 8 members appointed by the Minister through a public nomination process be mandated-
  - to advise the Minister on policies and programmes relating to the development of the sector;
  - to prepare, in consultation with DAC and after consulting stakeholders, an integrated heritage development strategy;
  - to commission and fund research that builds a knowledge base to advance and sustain heritage development in accordance with the strategy described above and to undertake any focused heritage research programme or consultation process at the request of the Minister;
  - to promote, fund, mentor and monitor heritage projects that will redress past imbalances in the provision of and access to resources in order to address marginalised heritage, with a particular emphasis on living heritage, intangible heritage and indigenous knowledge systems. This will require that the NHC identify suitable partners, advisers and service providers with the specialist knowledge and expertise to assist them;
  - to take primary responsibility for promoting the integration of intangible or living heritage into the activity of all heritage institutions and authorities in accordance with relevant national policies and the provisions of the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*, and to assist institutions as and where necessary to build the bridges with civil society required to do this;
- All national sub-sector structures including the NHC, be mandated to advise the Minister on heritage policy, to set national norms and standards and;

address issues of education, training and professional development within their areas of jurisdiction;

- The nature and scope of ‘development’ and ‘promotion’ and the relationship of these to ‘funding’ should be clarified in respect of the activities of each of the affected organisations as follows-
  - *Promotion* refers to advancing heritage practice through support for research and development;
  - *Development* means the identification and support of community based initiatives aimed at researching, documenting, preserving heritage or of projects initiated by formal institutions in support of this;
  - *Research* is focused on developmental projects, as described above, and on initiatives aimed broadly at extending knowledge and understanding of the nature of the sector and its needs;
  - *Advice to the Minister* is limited to advising on issues pertaining directly to the organisation’s mandate;
  - *Funding* of heritage projects is limited to funding of projects relating to the organisation’s revised mandate, and located within the context of the national heritage funding policy recommended elsewhere in this document.

#### 34.4 Recommendations for legislative amendment

##### 34.4.1 Section 4 - Objects of Council

The objects of the Council should be amended in order to eliminate the overlapping functions between the NHC, SAHRA and DAC. See proposal above.

##### 34.4.2 Section 5 - Composition of Council

The current composition of the Council is open-ended with a minimum of 20 members as contemplated by the Act. The membership of the NHC currently includes 9 representatives of provinces appointed by their respective MECs. As stated above, we believe that this composition serves to confuse the governance and intergovernmental coordination functions of the NHC. In our view, the governance function of the NHC will be better served by substantially reducing provincial representation on the NHC and by establishing an appropriate intergovernmental forum to promote intergovernmental coordination. See recommendation below.

##### 34.4.3 Section 6 - Termination of membership and dissolution of Council

Section 6(5) provides for the Minister to terminate a person’s membership of the Council and section (5A) provides for the Minister to dissolve the Council on any

reasonable grounds. These provisions do not provide for administrative fairness. We therefore recommend an amendment to incorporate fair administrative procedures in respect of any termination of a person's membership of the Council or dissolution of the Council by the Minister.

#### **34.4.4 Section 10 - Functions, powers and duties of Council**

There is a duplication of functions, powers and duties of the Council, SAHRA and DAC. Key areas of duplication involve the repatriation of heritage resources, the funding of heritage activities, coordination of heritage activities and institutions and promoting public awareness.

The Act should be amended to eliminate this duplication of powers, functions and duties in accordance with the proposal in Part III of this Report.

#### **34.4.5 Sections 12 and 13 - Financing, audit, annual and financial report of Council**

The NHC is listed as a Schedule 3 public entity in terms of the Public Finance Management Act 1 of 1999. Sections 12 and 13 are not consistent with the provisions of that Act and should be amended to comply with the PFMA. In this regard, the PFMA requires-

- submitting for approval at least 6 months before the start of the financial year, a budget of estimated revenue and expenditure (section 53(1));
- submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (section 55(1)(c));
- submitting within 5 months of the end of the financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (section 55(1)(d)).

Amendment required to provide consistency with the PFMA.

#### **34.4.6 Appropriate intergovernmental forum**

The Act should provide for the establishment of an appropriate intergovernmental forum between the NHC and appropriate structures at provincial and local government level.

#### **34.4.7 Governance review of heritage institutions**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;

- removal of members, vacancies and filling of vacancies and the dissolution of the council;
- remuneration of members of the council and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

#### 34.5 Summary of recommendations on the National Heritage Council Act 11 of 1999

Policy recommendations	
<b>Revised composition and mandate for the NHC</b>	<p>It is critical that the overlaps between the mandates of DAC, the NHC and SAHRA be resolved. In this regard it is recommended that-</p> <p>DAC assume responsibility for coordinating the sector in accordance with the proposals outlined elsewhere in this Report and that it assume primary responsibility for liaising with international organisations and dealing with repatriation, i.e. those functions which require government-to-government intervention; require government intervention or commit government to action;</p> <p>SAHRA assume responsibility for management of the national estate, as defined in the National Heritage Resources Act 25 of 1999;</p> <p>A National Heritage Council, comprising a representative elected by each of the five national sub-sector structures and 8 members appointed by the Minister through a public nomination process be mandated-</p> <ul style="list-style-type: none"> <li>• to advise the Minister on policies and programmes relating to the development of the sector;</li> <li>• to prepare, in consultation with DAC and after consulting stakeholders, an integrated heritage development strategy;</li> <li>• to commission and fund research that builds a knowledge</li> </ul>



		<p>base to advance and sustain heritage development in accordance with the strategy described above and to undertake any focused heritage research programme or consultation process at the request of the Minister;</p> <ul style="list-style-type: none"> <li>to promote, fund, mentor and monitor heritage projects that will redress past imbalances in the provision of and access to resources in order to address marginalised heritage, with a particular emphasis on living heritage, intangible heritage and indigenous knowledge systems. This will require that the NHC identify suitable partners, advisers and service providers with the specialist knowledge and expertise to assist them;</li> <li>to take primary responsibility for promoting the integration of intangible or living heritage into the activity of all heritage institutions and authorities in accordance with relevant national policies and the provisions of the UNESCO <i>Convention for the Safeguarding of the Intangible Cultural Heritage</i>, and to assist institutions as and where necessary to build the bridges with civil society required to do this.</li> </ul> <p>All national sub-sector structures including the NHC, be mandated to advise the Minister on heritage policy, to set national norms and standards and; address issues of education, training and professional development within their areas of jurisdiction.</p>
<b>Legislative recommendations</b>		
<b>Section 4</b>	<b>Objects of Council</b>	The objects of the Council should be amended in order to eliminate the overlapping functions between the NHC, SAHRA and DAC. See proposal above.
<b>Section 5</b>	<b>Composition of Council</b>	The current composition of the Council is open-ended with a minimum of 20 members as contemplated by the Act. The membership of the NHC currently includes 9 representatives of provinces appointed by their respective MECs. As stated above, we believe that this composition serves to confuse the governance and intergovernmental coordination functions of the NHC. In our view, the governance function of the NHC will be better served by substantially reducing provincial representation on the NHC and by establishing an appropriate intergovernmental forum to promote intergovernmental coordination. See recommendation below.
<b>Section 6</b>	<b>Termination of membership and dissolution of Council</b>	Section 6(5) provides for the Minister to terminate a person's membership of the Council and section (5A) provides for the Minister to dissolve the Council on any reasonable grounds. These provisions do not provide for administrative forums. We therefore recommend an amendment to incorporate fair administrative procedures in respect of any termination of a person's membership of the Council or dissolution of the Council by the Minister.
<b>Section 10</b>	<b>Functions, powers and duties of Council</b>	<p>There is a duplication of functions, powers and duties of the Council, SAHRA and DAC. Key areas of duplication involve the repatriation of heritage resources, the funding of heritage activities, coordination of heritage activities and institutions and promoting public awareness.</p> <p>The Act should be amended to eliminate this duplication of powers, functions and duties in accordance with the</p>

		proposal in Part III of this Report.
<b>Sections 12 and 13</b>	<b>Financing, audit, annual and financial report of Council</b>	<p>The NHC is listed as a Schedule 3 public entity in terms of the Public Finance Management Act 1 of 1999. Sections 12 and 13 are not consistent with the provisions of that Act and should be amended to comply with the PFMA. In this regard, the PFMA requires-</p> <ul style="list-style-type: none"> <li>• submitting for approval at least 6 months before the start of the financial year, a budget of estimated revenue and expenditure (section 53(1));</li> <li>• submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (section 55(1)(c));</li> <li>• submitting within 5 months of the end of the financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (section 55(1)(d)).</li> </ul> <p>Amendment required to provide consistency with the PFMA.</p>
	<b>Appropriate inter-governmental forum</b>	The Act should provide for the establishment of an appropriate intergovernmental forum between the NHC and appropriate structures at provincial and local government level.
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• qualifications for and disqualifications from membership;</li> <li>• removal of members, vacancies and filling of vacancies and the dissolution of the council;</li> <li>• remuneration of members of the council and the reimbursement of their expenses;</li> <li>• quorums for meetings, manner of decision making and voting thresholds;</li> <li>• delegation of powers and functions by the council;</li> <li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li> </ul>

## 35 National Heritage Resources Act 25 of 1999

*"Our history, the history of all South Africans stretching through time and space, encapsulated in bone, sand, ceramic, cloth, words and blood, a history that lives in our hearts and minds – our memory."*<sup>226</sup>

### 35.1 Introduction

The National Heritage Resources Act introduced an integrated and interactive system for the management of national heritage resources and provided general principles for governing heritage resources management throughout the country. The Act established the South African Heritage Resources Agency together with its council to co-ordinate and promote the management of heritage resources at national level. The Act set norms and maintains essential national standards for the management of heritage resources and to protect heritage resources of national significance, controls the export of nationally significant heritage objects and the import into the country of cultural property illegally exported from foreign countries. The Act also provided for provinces to establish heritage authorities with powers to protect and manage certain categories of heritage resources. The Act furthermore provided for the protection and management of conservation-worthy places and areas by local authorities.

### 35.2 Historical background to the law

#### 35.2.1 The origins of modern national heritage conservation legislation

The origins of modern heritage conservation legislation can be traced back to post-revolutionary France at the end of the eighteenth century.

While societies have, throughout the ages, identified, preserved and conserved elements of the material past that are considered to be of significance to them, the roots of modern conservation practice, theory, policies and legislation are generally considered to have originated in post-revolutionary France. In the aftermath of the revolution, citizens were intent on destroying or vandalising property associated with and confiscated from the king, noble families or the church. The National Assembly, recognising that this property now belonged to the nation, established structures<sup>227</sup> to prepare inventories of all moveable objects and monuments and to "constitute guardians for them."<sup>228</sup>

<sup>226</sup> Deputy Minister of Arts, Culture, Science and Technology, Brigitte Mabandla, National Heritage Resources Bill, Second Reading Debate, 13 February 1999.

<sup>227</sup> The nature and constitution of these differed over time, but, for the purposes of this report, it is sufficient to illustrate the point that the principle of identifying objects and structures of significance, and listing and conserving these, was firmly entrenched during this period.

<sup>228</sup> Jokilehto, J. 1999, *A History of Architectural Conservation*, Butterworth Heinemann, Oxford, Auckland, page 115.

Notwithstanding this, it was also decreed that “*the sacred principles of liberty and equality no longer permit the monuments raised to pride, prejudice and tyranny to be left before the people’s eye.*”<sup>229</sup> The resultant large-scale destruction of cultural property led to further decrees detailing penalties for those who damaged national property and to the decree of 1793, which forbade anyone to “remove, destroy, mutilate or alter in any way,”<sup>230</sup> objects of interest to “*the arts, history and education.*” The proclamation of decrees and the formalisation of penalties did not put an end to the widespread destruction of cultural property<sup>231</sup> and in 1833, the National Assembly established an inspectorate to enforce and administer the laws.<sup>232</sup>

These measures set in place the framework for systematic listing and conservation of heritage objects and properties of state organisations in the public or national interest that became entrenched in European legislation and subsequent years territories governed by European nations.

### 35.2.2 The origins of heritage conservation in South Africa

The current framework for the management of South African heritage resources carries traces of its origins within civil society structures, both locally and abroad. One can only assume that individuals in the Colonies concerned with conservation at the turn of the 20<sup>th</sup> century were aware of, and influenced by, related developments in England.<sup>233</sup> The establishment in England of the National Trust for Places of Historic Interest or Natural Beauty (National Trust) in 1895 by three Victorian philanthropists to act as a guardian for the nation by acquiring and protecting coastline, countryside and buildings threatened by uncontrolled development and industrialisation, certainly appears to have influenced South African thinking.<sup>234</sup> Both the general purpose of the Trust, i.e. “*promoting the permanent preservation for the benefit of the nation of lands and tenements (including buildings) of beauty and historic interest and as regards lands for the preservation of their natural aspect, features and animal and plant life,*” and its constitution as a membership-based body are reflected in the founding document of the South African National Society (SANS).<sup>235</sup>

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<sup>229</sup> Jokilehto, J. 1999, *A History of Architectural Conservation*, Butterworth Heinemann, Oxford, Auckland, page 115.

<sup>230</sup> Jokilehto, J. 1999, *A History of Architectural Conservation*, Butterworth Heinemann, Oxford, Auckland, page 116.

<sup>231</sup> A similar pattern, of a statement of intent to conserve, a period of activity in which iconic properties are ‘saved’, followed by the establishment of a formal agency empowered to monitor and enforce compliance, has been followed in many other countries. The activities of the South African National Society, a civil society membership-based organisation, and the subsequent establishment of statutory bodies such as the National Monuments Council with essentially the same objects, can be seen in South Africa.

<sup>232</sup> Choay, 2001, page 99.

<sup>233</sup> At the turn of the 20<sup>th</sup> century, both the Cape and Natal were British colonies. The legislation and administrative regimes of these colonies were closely aligned to those of the colonising power.

<sup>234</sup> National Trust, [www.nationaltrust.org.uk](http://www.nationaltrust.org.uk) accessed 9 January 2007.

<sup>235</sup> The South African National Society Year Book, 1931 pages 3–6.

This society, established in 1904 by a small group of prominent citizens concerned at the destruction of and unsympathetic alterations to historic buildings, was the first organisation dedicated to conservation in South Africa. With branches in Durban, Pietermaritzburg and Grahamstown, the SANS defined a role for itself as guardian of the country's heritage at a time when there were no legal protections in place to facilitate this.

The objects of the society were described in its rules as being *"to endeavour to inculcate respect and affection for the natural beauties of the country, to preserve as far as possible, from destruction, all ancient monuments and specimens of old Colonial architecture still remaining in South Africa, and to keep systematic records in such cases where they cannot be saved; to compile a record of old furniture, and other objects of interest still in South Africa and to take all possible methods to discourage their removal from this country; to promote love and care for the trees and save unnecessary destruction; to endeavour to regulate the gathering of wild flowers so as to avoid the danger of extinction to any species; to collect records and endeavour to acquire archives of historic interest; to make known by means of lectures and printed matter, circulated throughout the country, the objects of the Society, and to endeavour to promote in every legitimate manner reverence for the natural beauties of the country, and a conservative spirit towards the remains and traditions of old Colonial life."*<sup>236</sup>

The organisation, funded by subscriptions from members, was empowered to *"accept grants or donations to assist with its objects or become trustees for the same" and to "receive gifts of books, furniture, objects of Art, etc., and to hold these in perpetuity for the benefit of the Community."*<sup>237</sup>

### 35.2.3 The Bushman Relics Protection Act 22 of 1911

The *Bushman Relics Protection Act 22 of 1911* introduced measures for the protection of paintings, anthropological sites and artefacts of *'Bushmen or other aboriginals,'* forbade the unauthorised removal or export of artefacts and introduced penalties for damaging or destroying sites.

This Act, while significant as the first attempt by the new Union Parliament to preserve sites and objects of cultural importance, did not create the mechanisms necessary for administering its provisions, and it was left to organisations such as the South African Society and others to monitor, record and protect sites.

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<sup>236</sup> The South African National Society Year Book, 1908, page 3-4.

<sup>237</sup> The South African National Society Year Book, 1908, page 7. In an address celebrating the 25<sup>th</sup> Anniversary of the Society in 1931,<sup>237</sup> the Honorary Secretary was happy to detail the progress that the Society had made in achieving its objects, noting the role that it had played in: lobbying for effective legislation;<sup>237</sup> establishing the National Botanic Gardens at Kirstenbosch; co-operating with other bodies to create National Parks in the Western Cape; keeping a vigilant eye on *'disfiguring'* outdoor advertising; saving the Castle and other structures from destruction; *'taking vigorous steps'* to record and preserve a range of colonial buildings around the country; initiating a programme of lectures and exhibitions; and supporting the publication of books that *"give the people a knowledge of their history and monuments."*

It is interesting to note that in the 1911 Second Reading Debate on the Bill, it was said that it created the impression that paintings would be safeguarded but, *“the only way to preserve the paintings would be to cut them off and place them in museums.”* This sentiment prevailed for most of the 20<sup>th</sup> century and our museums hold large collections of paintings which have been removed from the context in which they were created and used.

#### 35.2.4 The Natural and Historical Monuments Act 6 of 1923

Lobbying by the SANS, and others for a body similar to the Historical Monuments Board in England<sup>238</sup> resulted in the promulgation of the *Natural and Historical Monuments Act 6 of 1923*, which made provision for the *“preservation of natural and historical monuments of the Union and of objects of aesthetic, historical or scientific significance,”* provided a broadly inclusive definition of ‘monuments’ and laid the foundation for the legislative and institutional protection of South African heritage.

The Act, which significantly defined monuments holistically as *“areas of land having distinctive or beautiful scenery, areas with a distinctive, beautiful or interesting content of flora or fauna, and objects (whether natural or constructed by human agency) of aesthetic, historical or scientific value, or interest, and also specifically includes in any event and without limiting the generality of the previous portion of this definition, waterfalls, caves, Bushman paintings, avenues of trees, old trees and buildings.”*

Importantly, the Act made provision for the establishment of the Commission for the Preservation of Natural and Historical Monuments of the Union, commonly known as the Historical Monuments Commission or HMC and referred to in legislation as *‘the commission’*. This was the first official body charged with responsibility for South Africa’s heritage. The HMC, appointed by the Governor-General, was tasked with creating a register of monuments which, in its opinion, *“ought to be preserved,”* taking steps to *“preserve and prevent the impairment”* of such monuments by purchasing such properties, if it had sufficient funding or acting as a trustee, if requested by the owner to do so, and by accepting monuments given as a gift or bequest to the Union. The commission was empowered to make by-laws regulating public access and entry fees to monuments which it owned, controlled or held in trust as well as to safeguard them from disfigurement, damage or destruction. The Act detailed maximum penalties for the contravention of these provisions.

Notwithstanding the above, the HMC had limited powers because the Act did not make provision for the proclamation of properties or sites as monuments. This meant that they were not legally protected; preservation was contingent on the HMC’s success in negotiating voluntary agreements with those who owned or controlled the identified properties.

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<sup>238</sup> Stated in Hall and Lillie, 1992.

### 35.2.5 The Natural and Historical Monuments, Relics and Antiques Act 4 of 1934

The Natural and Historical Monuments, Relics and Antiques Act 4 of 1934 repealed both the *Bushman Relics Protection Act 22 of 1911* and the *Natural and Historical Monuments Act 6 of 1923*. It re-enacted and amended their provisions in amplified form and provided for the control of the export of certain antique objects.

This Act broadens the scope of the commission to include natural and historical sites and objects ('*monuments*' as defined in Act 6 of 1923), palaeontological, archaeological and anthropological material ('*relics*' as defined in Act 22 of 1911) and '*antiques*' - moveable objects made or housed for over a hundred years in the Union.

Significantly, the Act made provision for the proclamation by the Minister of the Interior, at the recommendation of the commission, of monuments, relics and antiques, and made it illegal for any person to "*destroy or damage any monument or relic or make any alteration thereto or remove it from its original site or export it from the Union*", or to destroy or export antiques without the written consent of the commission. The Act provided penalties for the contravention of its provisions.

The commission was empowered to make by-laws to regulate access to monuments, fix entry fees and safeguard monuments, relics and antiques from disfigurement, destruction, alteration or export. It strengthened the commission's capacity to fulfil its broader mandate by giving it the powers to raise funds, accept grants, employ staff, restore monuments under its control and be granted reasonable access to any other proclaimed monuments.

The Natural Monuments Amendment Act 9 of 1937 made provision for rescinding monument status and determining the boundaries of monuments. It also granted the commission the power to confiscate monuments owned, but not maintained, by local authorities.

The Monuments Amendment Act 13 of 1967 regulated certain procedures of the commission extended its powers, recommended the granting of subsidies for the purchase or restoration of monuments and gave additional powers to the Minister.

### 35.2.6 The National Monuments Council Act 28 of 1969

The National Monuments Council Act 28 of 1969 repealed the earlier legislation, consolidated provisions for the preservation of certain immovable or moveable property as national monuments and established the National Monuments Council as a statutory body under the Minister of National Education. The Act also made provision for the provisional declaration of national monuments for a maximum of five years to enable the NMC to protect immovable property while it investigated the desirability of a permanent declaration.



Interestingly, the Act did not provide a definition of the term '*monument*.' Section 10 made provision for the Minister, to declare "any immovable or moveable property of aesthetic, historical, archaeological, palaeontological or scientific value" as a monument, subject to certain conditions.

The National Monuments Council Act was amended several times to expand the powers of the NMC to conserve cultural heritage-

- The National Monuments Amendment Act 22 of 1970 provided for the expropriation of land declared or about to be declared as a national monument.
- The National Monuments Amendment Act 35 of 1979 defined the objects of the NMC as "to preserve and protect the historical and cultural heritage, to encourage and promote the preservation and protection of that heritage, and to co-ordinate all activities in connection with monuments in order that monuments will be retained as tokens of the past and may serve as an inspiration for the future." This Act extended the NMC's mandate to include the declaration of certain shipwrecks as monuments.
- The National Monuments Amendment Act 13 of 1981 repealed the War Graves Act 34 of 1967 and made provision for the establishment of a Burgergraftekomitee and a British War Graves Committee, regulated the declaration of certain burial grounds and graves as national monuments, made new provisions in respect of National Gardens of Remembrance, and further regulated the workings of the Council.
- The War Graves and National Monuments Amendment Act 11 of 1986 defined the NMC's mandate to safeguard shipwrecks and further regulated its activities to allow for the compilation of registers and the declaration of conservation areas and cultural treasures as well as making provision for the council and local authorities to make certain by-laws.
- The National Monuments Amendment Act 25 of 1991 granted the Council greater autonomy with regard to its operations.

By 1991, the mandate of the National Monuments Council had been extended to cover the built environment, aspects of archaeology and palaeontology, historical shipwrecks, cultural treasures and military graves. However, while its remit on paper appeared to be inclusive, the ACTAG Report noted that the bias of the NMC towards the conservation of "*buildings and sites associated with European colonists has been criticised and needs redressing through the evaluation of existing national monuments and the identification of sites deserving of national monument status,*" and that the work undertaken by the two War Graves Committees should be



broadened to include the graves of “*all victims of conflict in South Africa, from land struggles to wars and the struggle against apartheid.*”<sup>239</sup>

### 35.2.7 The Report of the ANC Monuments, Museums, Archives and National Symbols Commission, 1993

The Report of the ANC Monuments, Museums, Archives and National Symbols Commission tabled at the Culture and Development Conference, 1993, noted the need for a holistic strategy for the conservation of heritage resources and the need for conservation mechanisms to reflect the concerns of urban and rural communities and stated that the state should take ultimate responsibility for conserving the country’s natural and cultural heritage to ensure, amongst other concerns, that-

- monumentalism is integrated into overall conservation policies;
- social planning policies are integrated with environmental and conservation programmes;
- local communities are involved in monumentalisation and conservation programmes;
- monumentalism redresses historical imbalances.<sup>240</sup>

With respect to graves of victims of conflict, the Commission noted that:

- Consideration would be given to the establishment of a Heroes Acre for the graves of those who died in the struggle;
- Appropriate arrangements would be made to identify, restore and care for the graves of unknown victims of past conflicts;
- Graves of those who died outside of South Africa would be cared for as a symbolic gesture of solidarity with those nations with whom South Africa had in the past been allied, and who had supported South Africans during the liberation struggle
- Where graves were under threat, remains would be re-interred.<sup>241</sup>

With respect to memorials the Commission noted that:

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<sup>239</sup> Arts and Culture Task Group, *Second Draft Report*, May, 1995 page 80-81.

<sup>240</sup> ANC Department of Arts and Culture, *Looking Backwards Looking Forwards: Culture and Development Conference*, Johannesburg, April May 1993, Mayibuye Books, Bellville, 1995, page 53.

<sup>241</sup> ANC Department of Arts and Culture, *Looking Backwards Looking Forwards: Culture and Development Conference*, Johannesburg, April May 1993, Mayibuye Books, Bellville, 1995, page 54.

- Many memorials celebrate the history of colonial conquest and apartheid division. These will be reassessed to ensure that they foster reconstruction and reconciliation.
- Consideration should be given to the erection of memorials commemorating personalities or events suppressed during the apartheid era, and appropriate resources should be allocated to this end.
- A national memorial to the liberation struggle should be erected.

### 35.2.8 The Report of the Arts and Culture Task Group (ACTAG), 1995

The Report of the Arts and Culture Task Group (ACTAG), 1995 noted that heritage resources which include, “*places of natural beauty, buildings, streetscapes, topographical features that create a sense of place, places and objects of historical importance, geological, palaeontological and archaeological sites and objects, rock art, graves of victims of conflict as well as historically significant people, and shipwrecks*”.<sup>242</sup> The Report makes the point that while these ‘monuments’ were administered by the National Monuments Council and various ‘homeland’ authorities, changes were required once provinces assumed responsibility for these and, that while some regional offices exist, new offices would need to be established for some provinces and work undertaken on an agency basis, where necessary.

It also noted that new legislation would be required to replace the then National Monuments Council Act because this ‘*antiquated colonial-style legislation*’<sup>243</sup> was unable to handle the pressures of development, accommodate programmes such as the RDP or deal with the property rights enshrined in the new constitution. Other problems identified in this Report included sites such as shipwrecks and rock art which were considered to be particularly vulnerable to development and vandalism, and non-renewable resources, i.e. those where the communities that created them were no longer present.<sup>244</sup>

It was recommended that a new national institution replace the existing National Monuments Council and take responsibility for making and monitoring conservation policy rather than for proclamation and site management. The principle that underpinned this recommendation was that of encouraging communities and local authorities.

The Report noted the past bias of conservation authorities to buildings and sites associated with European colonists and recommended that this be redressed through the evaluation of existing national monuments; the identification of sites deserving of national monument status and by empowering communities to participate meaningfully in this process.

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<sup>242</sup> Arts and Culture Task Group, *Second Draft Report*, May 1995, page 69.

<sup>243</sup> Arts and Culture Task Group, *Second Draft Report*, May 1995, page 80.

<sup>244</sup> Arts and Culture Task Group, *Second Draft Report*, May 1995, page 80.

The ACTAG Report recommended the establishment of a National Heritage Council with four commissions, each with its own council with executive powers, reporting to the NHC and receiving funding directly from the Department under a system of framework autonomy.<sup>245</sup> It recommended that: the National Monuments Council, including the War Graves Division be restructured and redefined as the National Heritage Resources Commission; existing monuments, regional offices and functions be devolved to the Provincial Heritage Resource Services; new provincial structures be created, where necessary; and, that provision be made for the identification and declaration of heritage resources that have a broader base than the existing declared national monuments.<sup>246</sup>

### 35.2.9 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage, 1996 noted that the term *monuments* is too narrow, introduced the concept of *heritage resources*, which included places of natural beauty, buildings, street landscapes, objects of historical importance, geological, palaeontological and archaeological sites and objects, rock art, shipwrecks, and graves of historical figures and of victims of conflict,<sup>247</sup> and proposed that communities be encouraged to “*locate and mark the heritage sites important to their identity*”<sup>248</sup>, with the support of the Ministry and its provincial counterparts.

The White Paper stated that the National Monuments Council, together with the War Graves Commission, would be reconstituted as a division within the broader National Heritage Council and that new legislation would be developed to maximise coordination across all fields of heritage conservation.

It further noted that “*the protection and conservation of heritage resources is acknowledged by the Ministry as an important function of both environmental planning, urban and rural development planning*”,<sup>249</sup> that the work of the War Graves Division would be broadened to include the maintenance of graves of victims of conflict within South Africa and would be conducted abroad by South Africa, and that the NHC would determine and execute national policy for graves of victims of conflict.<sup>250</sup>

### 35.2.10 The Draft Heritage Bill, 1998

In accordance with the White Paper, the Draft Heritage Bill (B 138-98) aimed to present “*an integrated holistic and interactive heritage structure*,”<sup>251</sup> defining national

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<sup>245</sup> Arts and Culture Task Group, *Second Draft Report*, May 1995, page 99-100.

<sup>246</sup> Arts and Culture Task Group, *Second Draft Report*, May 1995, page 108.

<sup>247</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:14.

<sup>248</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:15.

<sup>249</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:17.

<sup>250</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:18

<sup>251</sup> Department of Arts, Culture, Science and Technology, *Draft National Heritage Bill*, South Africa, 7 January 1997, page 1.

heritage as "including the national estate and living heritage, which coexist in a dynamic relationship,"<sup>252</sup> and making provision for the establishment of a National Heritage Council to "coordinate the management of the national heritage and affairs common to it and the divisions and agencies associated with it,"<sup>253</sup> a South African Geographical Names Division to standardise geographical names, a National Heritage Resources Division and a South African Heritage Agency to coordinate and promote the management of heritage resources.

The Draft Heritage Bill was introduced in the National Assembly on 15 October 1998. On 8 February 1999, the Portfolio Committee on Arts, Culture and Language, Science and Technology was given leave to split the Bill and to present two separate Bills to the House: the National Heritage Council Bill, and the National Heritage Resources Bill.

#### 35.2.11 The National Heritage Resources Act, 1999

When the National Heritage Resources Bill was introduced to the House of Assembly, the Deputy Minister of Arts, Culture, Science and Technology noted that it provided the *'means and mechanisms to protect our unique valuable heritage resources so that these can be made accessible to all the people of this land and so that benefits may accrue from their use and be spread in an equitable way'*.<sup>254</sup> The Deputy Minister also noted that *'for its successful implementation however, those tasked with the responsibility will have to take account of our unique and complex history. What is required is nothing less than a total reconceptualisation of what we have come to understand and define as our national heritage'*.<sup>255</sup>

The National Heritage Resources Act 25 of 1999 defined the various components of the *'national estate'*. It provided a three-tier national system for the identification and management of these resources that gives the State and its agencies the authority to protect these resources.

#### 35.3 Key issues

The NHRA is a relatively new and rather complex law. Practitioners have raised concerns about many aspects of it and made detailed submissions concerning the nature and scope of the amendments required. Many of these are technical in nature and do not require policy decisions. But, some do, and the decisions to be taken will impact significantly on heritage practice. We have raised critical policy issues below. It

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<sup>252</sup> Department of Arts, Culture, Science and Technology, *Draft National Heritage Bill*, South Africa, 7 January 1997, page 7.

<sup>253</sup> Department of Arts, Culture, Science and Technology, *Draft National Heritage Bill*, South Africa, 7 January 1997, page 11.

<sup>254</sup> Republic of South Africa, 1999, Debates of the National Assembly, *Second Reading, National Heritage Resources Bill*, 23 February 1999: 631.

<sup>255</sup> Republic of South Africa, 1999, Debates of the National Assembly, *Second Reading, National Heritage Resources Bill*, 23 February 1999 :632.

is recommended that key policy issues be addressed before detailed technical amendments are contemplated.

The key issues identified below are drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

#### 35.3.1 Duplication of mandates

A key issue to resolve is the overlap between the mandates and functions of SAHRA, the NHC and DAC in respect of: the coordination and management of the national estate, the public institutions and the agencies involved; intangible or living heritage; formulation of national policies; repatriation; funding of projects initiated elsewhere; coordination of public institutions; and heritage awareness.

The resolution of this issue lies not in an amendment to this, or any other single Act, but to the careful realignment of all DAC's institutions and agencies within an integrated policy framework that defines a unique role for each, articulates the nature of the relationships between them and established the mechanisms through which they interact.

#### 35.3.2 The role of SAHRA

In addressing the issue raised above it is important to clarify what SAHRA's role is, or should be. While the objects of SAHRA are defined as '*to co-ordinate the identification and management of the national estate*,' SAHRA is also responsible for '*the identification and management of Grade I heritage resources*'. While it may be feasible for SAHRA to fulfill both functions it is not desirable. To some extent the dual role can be seen as a legacy from the days when SAHRA managed rather than coordinated the management of heritage resources. It is important in determining SAHRA's core function to take into account, and give substance to, the principle and provisions of co-operative governance established in the Constitution.

It is recommended that SAHRA's role as the national authority tasked with identification and coordination of the national estate must be reinforced. It must advise the Minister on the formulation of national heritage resource management policy, give strategic direction to, and set national standards for, all other bodies involved in the identification and management of heritage sites and objects, oversee the national estate and monitor implementation of this policy.

#### 35.3.3 SAHRA and the PHRAs

The Act makes provision for the establishment of Provincial Heritage Authorities (PHRAs) but the implementation of this has proved problematic. In some instances, PHRAs exist in name, but are dysfunctional in practice. Several reasons for this have been cited including a lack of resources and capacity and uncertainty around the mandate to fund the PHRAs.

The issue is further compounded by the status of SAHRA and the PHRAs as independent bodies and the existence of SAHRA regional offices in each province. This situation confuses and complicates the management of heritage resources.

It is recommended that the Act must be amended to make provision for a closer working relationship between SAHRA and the PHRAs.

PHRAs must be held accountable to SAHRA for the effective implementation of national policy and the Act amended to provide for circumstances under which SAHRA be permitted to intervene in the activities of PHRAs.

Conversely, SAHRA must take responsibility for guiding and supporting the fledgling PHRAs through allocation of resources and expertise, as required.

The primary role of PHRAs should be to identify and manage all heritage sites within the relevant province in accordance with the Act.

#### **35.3.4 The role of local authorities in conservation**

While the provisions of the NHRA are underpinned by the assumption that heritage is best managed, and protected, by the level of government closest to the people, the roles, powers and responsibilities of local government in relation to conservation are unclear and linkages to SAHRA and the PHRAs are tenuous.

It is recommended that PHRA's should, in consultation with SAHRA be empowered to delegate management of any site, to a local authority if that authority is deemed competent.

#### **35.3.5 Grading of heritage sites**

The grading system, which assigns the identification and management of Grade I sites to SAHRA, Grade II sites to PHRAs and Grade III sites to local authorities, exacerbates the already confused and contested terrain. Essentially, this system is problematic because it allows for the assignment of responsibility on the basis of significance rather than on the protection measures appropriate to a particular site.

It has been noted that internationally the trend is for conservation authorities to move away from the system of permitting as a primary protection measure, to one based on identification of heritage areas, registers and impact assessment systems which are considered to be more appropriate.

It is recommended that the grading system be reconsidered. Sites should be graded in terms of the protection measure required, rather than in terms of significance.

#### **35.3.6 World Heritage Sites**

The Department of Environment and Tourism is currently responsible for the identification and management of World Heritage Sites in accordance with the

provisions of the UNESCO *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 1972 and the World Heritage Convention Act 49 of 1999. While discussions are underway to transfer responsibility to DAC, this has not yet been effected.

It is recommended that SAHRA as the national institution responsible for the identification and management of heritage resources must play a greater role in the management and monitoring of South African World Heritage Sites. WHS management authorities, established in terms of the World Heritage Convention Act 49 of 1999 must report primarily to SAHRA and then to the relevant portfolio committee and to UNESCO.

#### 35.3.7 Living and intangible heritage

The Act does not and should not be interpreted to cover the conservation of living heritage. The laws that protect intangible practices have to do with issues like freedom of expression, intellectual rights, etc and not conservation. The role of an institution like SAHRA in respect of living heritage has to be to protect and conserve sites that have a connection to living heritage in order to ensure that those that wish to, can continue their activities. SAHRA, in accordance with the mandate described above, has prepared policy and guidelines principles for the management of living heritage,<sup>256</sup> but this needs to be located within a broader national policy that is aligned to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.

#### 35.3.8 Heritage objects

SAHRA as primary custodian of the national estate must establish policies for the protection of heritage objects. Institutions that hold these objects in their collections must do so in accordance with national policy, SAHRA as the national agency must take responsibility for monitoring implementation of this policy.

#### 35.3.9 Victims of conflict

The Act provides for the protection of graves of '*victims of conflict*' but does not provide a clear definition of the term. This is a highly contentious and politically charged debate that should be initiated and driven at national level and in accordance with a national policy or guidelines on the role of heritage in post-conflict reconstruction.

#### 35.3.10 Repatriation

DAC, SAHRA and the NHC have responsibilities in relation to repatriation. It is essential to delineate roles and responsibilities clearly, not only for the sake of

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<sup>256</sup> South African Heritage Resources Agency, Living Heritage Chapter: Policy and Guideline Principles for Management, Cape Town, undated.



easing tension and facilitating efficient delivery, but also so that agencies are seen to be meeting their obligations. Because, in many instances repatriation involves government to government liaison it is recommended that DAC assume primary responsibility for this, and be empowered to delegate this under particular conditions.

### 35.3.11 Human remains

There is increasing sensitivity to the issue of human remains housed in museum and other institutional collections and to the need to treat these with dignity and respect. A national policy on the removal and re-interment or storage of human remains is required to bring local responses to this issue into alignment with international best practice.

## 35.4 SAHRA proposed amendments

SAHRA submitted a set of proposed amendments to the National Heritage Resources Act<sup>257</sup> which we summarise and comment on below.

Section	Subject	SAHRA proposal	Recommendation
1	Definitions	Amend the definition of “alter” by omitting the word “painting”	<p>The proposal is aimed primarily at removing the requirement for applications for the painting of buildings with no cultural significance older than 60 years.</p> <p>The defined term “alter” however has application throughout the Act in circumstances beyond those which SAHRA seeks to address.</p> <p>SAHRA’s objective would be better achieved by introducing an appropriate amendment to section 34</p>
		Amend the definition of “archaeological” by-	
		<ul style="list-style-type: none"> <li>• in subparagraph (a), replacing the 100 year cut-off date with the year 1947</li> <li>• in subparagraph (b), replacing the 100 year cut-off date with the year 1957</li> <li>• acknowledging “rock art”,</li> </ul>	<p>Requires policy decision by DAC</p> <p>Requires policy decision by DAC</p> <p>The proposal is not motivated but</p>

<sup>257</sup> Undated letter from SAHRA CEO to DAC with annexed proposed amendments.



Section	Subject	SAHRA proposal	Recommendation
		"wrecks" and "resources" currently falling under subparagraph (d), as separate classes of heritage resources, managed in terms of their own protective regimes	suggests a fundamental amendment of the term "archaeological" and the establishment of specific protective regimes for these resources.  In the absence of a clear motivation, no amendment is recommended
		Review the definition of "victims of conflict"	Subparagraph (d) of the definition of "victims of conflict" is unsatisfactory but at least provides for further definition in regulations.  Regulations defining this category of victims of conflict have not yet been made by the Minister but, should an appropriate definition have been determined, DAC may wish to include it in the Act itself rather than in regulations to the Act
		Amend "heritage resource" to include living heritage	The allocation of responsibility to SAHRA for living heritage requires a policy decision by DAC
		Extend the definition of "grave"	Amend the NHRA accordingly
6	<b>SAHRA principles and national policy</b>	The requirement to consult the Minister before prescribing additional principles or national policy should be removed	The section confers significant powers on SAHRA to prescribe additional principles for heritage resource management and to determine national policy on heritage resources management.  In our view it is appropriate that these powers be exercised in consultation with the Minister. This requirement should not be removed.
7(1)	<b>Grading of places and objects</b>	SAHRA proposes omitting the reference to "objects" from the grading system	Requires policy decision by DAC
		SAHRA proposes deleting the words "although forming part of the national estate" in subparagraph (b)	Amend the NHRA accordingly
7(2)	<b>Powers of PHRAS</b>	Powers of PHRAS to prescribe more detailed criteria should be subject to the criteria prescribed under section 7(1)	Amend the NHRA accordingly
8(1), (6)(b)	<b>Assumption by SAHRA of functions of PHRAS and local</b>	The proposal seeks to clarify SAHRA's powers where PHRAS do not exist or PHRAS and local	Amend the NHRA accordingly

Section	Subject	SAHRA proposal	Recommendation
	<b>authorities in certain circumstances</b>	authorities do not have the capacity or competence to perform their functions under the Act	
<b>8(2) to (4)</b>	<b>Management responsibilities of heritage authorities</b>	After identifying places which meet the criteria for grades I, II or III, the relevant authority should pursue their declaration as national or provincial heritage sites or their listing in on a heritage register. Furthermore, SAHRA, PHRAs and local authorities should be required to ensure sites and resources in their jurisdiction are properly managed	Proposal is not entirely consistent with the provisions of section 27 which requires authorities to <u>investigate</u> the desirability of declaring places national or provincial heritage sites.  In our view, these matters would be better dealt with in regulations under section 59 or policy under section 6(1). No amendment is recommended
<b>9(3)(d)</b>	<b>Power to require the preparation of management plans</b>	This power should be conferred on SAHRA and not the Minister	Requires policy decision by DAC
<b>9(10) (c) to (f)</b>	<b>Heritage resources authorities to furnish documents and information to the Surveyor-General and the Registrar of Deeds</b>	SAHRA believes that these sections are burdensome and should be omitted	It is not clear why these provisions are more burdensome than those contained in subsections (a), (b) and (g) nor why they are so burdensome as to be omitted, given the benefit of ensuring that significant decisions under the NHRA are recorded properly on title deeds and survey records. No amendment is recommended
<b>New 9(14) &amp; (15)</b>	<b>SAHRA jurisdiction in respect of heritage resources controlled by organs of state in the national sphere of government</b>	SAHRA should have jurisdiction over heritage resources controlled by organs of state in the national sphere of government regardless of status	It is not clear on what basis SAHRA's experience of the preference of organs of state in the national sphere would justify such a substantial departure from the grading system provided under the NHRA. No amendment is recommended

Section	Subject	SAHRA proposal	Recommendation
10(2)(b)	<b>Administrative justice</b>	The proviso should be omitted as it may conflict with PAJA	Both subparagraphs (b) and (c) exceed the requirements of PAJA and may hamper the administrative functions of heritage authorities.  As far as the proviso is concerned, there is no difficulty with in-camera proceedings in justifiable circumstances but the only basis upon which public access to the minutes of public bodies can be denied is on the grounds set out in PAIA.  Amendment recommended
11	<b>SAHRA Council</b>	SAHRA and its Council are not separate bodies	See comments above. Amendment recommended
13(2)(a)	<b>SAHRA Council</b>	SAHRA and its Council are not separate bodies	See comments above. Amendment recommended
14(1)(a)	<b>Provincial representation on SAHRA</b>	Review provincial representation on SAHRA	See comments above. Amendment recommended
16(b)	<b>Council's powers</b>	Council should be responsible for the adoption of policy rather than for the implementation of the functions, powers and duties of SAHRA	The Council is the governing body of SAHRA and is accountable for the implementation of the functions, powers and duties of SAHRA. Section 16(b) should not be amended.  However section 16(c) should be deleted as it serves to confuse the relationship between SAHRA and its Council
19	<b>Honoraria</b>	Provision should be made for the payment of honoraria	See our comment above. Amendment recommended to provide for allowances and remuneration in respect of Council members and members of committees
20(1)	<b>Employees of SAHRA</b>	Staff are employed by SAHRA and not the Council	This is a further example of confusion between the status of SAHRA and its Council.  Amendment recommended
20(4)	<b>SAHRA CEO</b>	The CEO need not be appointed from the ranks of senior SAHRA staff.  The CEO should appoint his or her temporary replacement	It is correct that the CEO need not be appointed from amongst SAHRA senior staff and the provision should be amended accordingly.  However, the Council and not the CEO should be responsible for appointing any acting CEO. This provision should not be amended

Section	Subject	SAHRA proposal	Recommendation
22(3)	<b>SAHRA annual report</b>	The requirement that the Minister table SAHRA's annual report in Parliament should be omitted	SAHRA is a public body which receives its funding from Parliament. It is good practice that annual reports of bodies such as SAHRA be tabled in Parliament as soon as possible following their submission to the Minister.  No amendment is recommended, but DAC may wish to consider replacing the period of 14 days within which the Minister must table the report in Parliament with the phrase "as soon as reasonably practicable"
23	<b>PHRAs</b>	The proposal is that PHRAs must be established in each province without exception	Amend the NHRA accordingly
26(2)	<b>Delegation of powers by heritage resources authorities</b>	Section 26(2) may render appeals unfair.	Subsection (2) appears to serve no legal purpose.  Amendment recommended
27(19)	<b>Regulations regarding heritage sites</b>	Regulations should be made after consulting the owner of the heritage site rather than with the consent of the owner	Amend the NHRA accordingly
28(1), (2)	<b>Designation of protected areas</b>	An area should be designated after consultation with the owner of the area rather than with their consent	Amend the NHRA accordingly
29	<b>Provisional protection</b>	The section does not comply with the requirements of administrative justice	See our comments above. Amendment recommended to require administrative justice
30	<b>Heritage registers</b>	Heritage registers should be referred to as provincial heritage registers	Section 30 header should be amended accordingly
New 30(13)	<b>PHRA authority over local authorities</b>	PHRAs should be responsible for the protection and management of local government heritage resources listed in a provincial heritage register until such time as they have been protected under local government by-laws or town planning schemes	Requires policy decision by DAC

Section	Subject	SAHRA proposal	Recommendation
32(4)	<b>Ministerial approval for declaration of heritage objects</b>	Efficiency will be promoted by omitting the requirement that SAHRA must obtain the approval of the Minister before issuing a notice declaring an object to be a heritage object	The requirement of ministerial approval in this section is not consistent with the provisions of the Act dealing with the designation of heritage sites, protected areas, heritage areas and the provisional protection of protected areas.  Amend the NHRA accordingly
34(2) & new (3)	<b>PHRA permits to alter or demolish structures older than 60 years</b>	If structure not designated within 1 year, the subsection (1) prohibition ceases to apply	It is not clear to us why a delay on the part of a PHRA should result in no protection at all. Subsections (3) and (4) already provide for an exemption procedure.  No amendment recommended  DAC may however consider excluding "painting" from the application of this section in order to address SAHRA's concerns regarding the definition of "alter"
35(1) & new (2)	<b>SAHRA should assume responsibility for the protection of palaeontological sites and material, as well as meteorites and meteorite impact sites</b>	The proposal involves a shift of responsibility for these sites and material from the PHRAS to SAHRA	Requires policy decision by DAC
35(7) (a)	<b>Condonation of late filing of archaeological or palaeontological material</b>	Responsible heritage resources authorities should be empowered to condone the late lodging of lists required within a period of 2 years from the commencement of the Act	Amend the NHRA accordingly
36	<b>Burial grounds and graves</b>	SAHRA should assume responsibility for the conservation and care of burial grounds and graves	The proposal involves a shift of responsibility from PHRAS to SAHRA. Requires policy decision by DAC
38(8)	<b>Exclusion of developments under NEMA</b>	Environmental impact assessments must be subject to the requirements and conditions of relevant heritage resources authorities	Amend the NHRA accordingly
49	<b>Appeals</b>	Appeals against decisions of PHRAS should be to the SAHRA Council and not to the provincial MEC	The proposal substitutes the current appeal function of the provincial MEC with that of SAHRA.

Section	Subject	SAHRA proposal	Recommendation
			Requires policy decision by DAC
51	<b>Offences and penalties</b>	Provision should be made for larger fines and longer terms of imprisonment in order to increase the deterrent value of the law	Amend the NHRA accordingly  DAC may also wish to consider the introduction of a system of administrative penalties.

### 35.5 Recommendations for legislative amendment

#### 35.5.1 Section 1 - Definitions

The definition of “grave” should be extended as per the SAHRA recommendation.

Subparagraph (d) of the definition of “victims of conflict” is unsatisfactory but at least provides for further definition in regulations. Regulations defining this category of victims of conflict have not yet been made by the Minister but, should an appropriate definition have been determined, DAC may wish to include it in the Act itself rather than in regulations to the Act.

#### 35.5.2 Section 7(1) - Gradings of places and objects

The words “although forming part of the national estate” in subparagraph (b) should be deleted as proposed by SAHRA.

#### 35.5.3 Section 7(2) - Powers of PHRAs

The powers of PHRAs to describe more detailed criteria should be subject to the criteria prescribed under section 7(1).

#### 35.5.4 Section 8 - Disputes regarding competence of provincial heritage resources authorities or local authorities

The provision requires disputes regarding competence to perform functions under the Act to be submitted to arbitration, but is silent on the arbitrator’s appointment, terms of reference, the applicable procedures to be followed in any arbitration and the legal status of arbitration decisions.

Amendment required providing adequate arbitration framework.

SAHRA’s powers where PHRAs do not exist or PHRAs of local authorities do not have the capacity or competence to perform their functions under the Act, should be clarified. Amendment recommended.

**35.5.5 Section 10 - Administrative justice**

Subsections (2)(b) and (c) exceed the requirements of the Promotion of Administrative Justice Act and may hamper the administrative functions of heritage authorities. The proviso creates no difficulty as far as in-camera proceedings in justified circumstances are concerned. However, the only basis on which public access to the minutes of public bodies can be denied is on one of the grounds set out in the Promotion of Access to Information Act. An amendment is recommended to ensure that the provisions comply with the requirements of administrative justice.

**35.5.6 Section 12 - Object of SAHRA**

SAHRA's object is to co-ordinate the identification and management of the national heritage estate. This duplicates the objects of the National Heritage Council under the National Heritage Council Act, 1999.

Policy decision required on appropriate institutional framework and division of statutory institutional objects.

Amendment required eliminating the duplication of institutional objects.

**35.5.7 Section 13 - Functions, powers and duties of SAHRA**

Duplication of functions, powers and duties of SAHRA and the National Heritage Council under the National Heritage Council Act, 1999. Key areas of duplication are:

- repatriation of heritage resources;
- funding of heritage activities;
- co-ordination of heritage activities and institutions;
- promoting public awareness on heritage matters.

Policy decision required on appropriate institutional framework and division of statutory institutional powers, functions and duties.

Amendment required eliminating the duplication of institutional powers, functions and duties.

**35.5.8 Sections 11, 12, 13, 14, 16 and 18 - SAHRA and its governing Council**

The respective roles and responsibilities of SAHRA and its Council require clarification. In this regard:

- s11 establishes SAHRA as a body corporate governed by the Council; s14 provides that the affairs of SAHRA are under the control and management of the

Council; and s16 requires that the Council is responsible and accountable for implementing the functions, powers and duties of SAHRA; yet

- s13(2)(a)) requires SAHRA to advise the Council on a wide range of matters; and s16(c) requires the Council to advise and assist SAHRA in the performance of its functions, powers and duties.

Amendment required to clarify and distinguish between the respective roles and responsibilities of SAHRA and its Council.

#### 35.5.9 **Section 14 - Composition and appointment of Council**

We are of the view that the current provincial representation on the Council should be reviewed. Membership of the Council currently includes 9 members who represent the provinces. We believe that this composition serves to confuse the governance and intergovernmental coordination functions of the Council. In our view the governance functions would be better served by reducing provincial representation on the Council and that the cause of intergovernmental coordination will be better served by establishing an appropriate intergovernmental forum. See recommendation below.

S14(4), governing the removal of members of Council, does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.

#### 35.5.10 **Section 19 - Reimbursement of expenses**

There is no provision for remunerating the members of the Council or its committees.

Amendment required providing for the remuneration for members of Council and its committees.

#### 35.5.11 **Section 20 - Employees of SAHRA**

Section 20(1) provides for staff to be employed by the SAHRA Council. This is a further example of confusion between the status of SAHRA and its Council. Amendment recommended.

Section 20(4) suggests that the CEO be appointed from the ranks of senior SAHRA staff. The CEO need not be appointed from amongst SAHRA senior staff and the provision should be amended accordingly.

#### 35.5.12 **Sections 21 and 22 - SAHRA financing and reporting**

SAHRA is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss21 and 22 are not consistent with its provisions. In this regard, the PFMA requires:



- submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));
- submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c));
- submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).

Amendment required providing consistency with the PFMA.

**35.5.13 Section 23 - PHRAs**

SAHRA proposes that PHRAs must be established in each province without exception. Amendment recommended.

**35.5.14 Section 26 - Delegation of powers by heritage resource authorities**

Section 26(2) appears to serve no legal purpose and should be omitted.

**35.5.15 Section 27 - Declaration of national and provincial heritage sites**

The procedure for declaring a heritage site is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.

SAHRA recommends that regulations should be made after consulting the owner of the heritage site rather than with the consent of the owner. Amendment recommended.

**35.5.16 Section 28 - Designation of protected areas**

SAHRA recommends that an area should be designated after consultation with the owner of the area rather than with their consent. Amendment recommended.

**35.5.17 Section 29 - Provisional protection of protected areas and heritage resources**

The procedure for the provisional protection of protected areas and heritage resources is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.

**35.5.18 Section 30 - Heritage registers**

SAHRA recommends that heritage registers should be referred to as provincial heritage registers in order to avoid any confusion. The header to section 30 should be amended accordingly.

**35.5.19 Section 31 - Designation of heritage areas**

The procedure for the designation of heritage areas by provincial heritage resources authorities or local authorities is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.

**35.5.20 Section 32 - Declaration of heritage objects**

The procedure for the declaration of heritage objects is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.

SAHRA proposes that efficiency will be promoted by omitting the requirement that it must obtain the approval of the Minister before issuing a notice declaring an object to be a heritage object. The requirement of ministerial approval in this section is not consistent with the provisions of the Act dealing with the designation of heritage sites, protected areas, heritage areas and the provision of protection of protected areas. We recommend an amendment.

**35.5.21 Section 34 - PHRA permits to alter or demolish structures older than 60 years**

SAHRA proposes that if a structure is not designated within one year of a refusal by SAHRA, the subsection (1) should cease to apply. It is not clear to us why delay on the part of a PHRA should result in no protection at all particularly since subsections (3) and (4) already provide for an exemption procedure.

DAC may however consider excluding "painting" from the application of this section in order to address SAHRA's concerns regarding the definition of "alter".

**35.5.22 Section 35(7) - Condonation of late filing of material**

SAHRA recommends that the responsible heritage resources authorities should be empowered to condone the late lodging of lists required within a period of 2 years from the commencement of the Act. We recommend that the Act be amended accordingly.

**35.5.23 Section 38 - Exclusion of developments under NEMA**

SAHRA suggests that environmental impact assessments must be subject to the requirements and conditions of relevant heritage resources authorities. The Act should be amended accordingly.

**35.5.24 Section 50 - Powers of heritage inspectors**

The provision is capable of authorising warrantless entry into private homes and the search of intimate possessions, rendering it vulnerable to legal challenge on the grounds of breaching the constitutional right to personal privacy.

Amendment required providing that a warrant from a judicial or other officer should be required for the search of private homes and domestic premises.

#### 35.5.25 **Section 51 - Offences and penalties**

SAHRA suggests that provision should be made for larger fines and longer terms of imprisonment in order to increase the deterrent value of the law. The Act should be amended accordingly. DAC may also wish to consider the introduction of a system of administrative penalties.

#### 35.5.26 **Intergovernmental forum**

The Act should be amended to provide for the establishment of an appropriate intergovernmental forum involving SAHRA, the PHRAs and appropriate structures at local government level.

#### 35.5.27 **Governance matters**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the council;
- remuneration of members of the council and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

### 35.6 Summary of recommendations on the National Heritage Resources Act 25 of 1999

Policy recommendations	
<b>Role of SAHRA</b>	It is recommended that SAHRA's role as the national authority tasked with identification and coordination of the national estate must be reinforced. It must advise the Minister on the formulation of national heritage resource management policy, give strategic direction to, and set national standards for, all other bodies involved in the identification and management of heritage sites and objects, oversee the national estate and monitor implementation of this policy.
<b>SAHRA and the PHRAs</b>	<p>It is recommended that the Act must be amended to make provision for a closer working relationship between SAHRA and the PHRAs.</p> <p>PHRAs must be held accountable to SAHRA for the effective implementation of national policy and the Act amended to provide for circumstances under which SAHRA be permitted to intervene in the activities of PHRAs.</p> <p>Conversely, SAHRA must take responsibility for guiding and supporting the fledgling PHRAs through allocation of resources and expertise, as required.</p> <p>The primary role of PHRAs should be to identify and manage all heritage sites within the relevant province in accordance with the Act.</p>
<b>Role of local authorities</b>	It is recommended that PHRA's should, in consultation with SAHRA be empowered to delegate management of any site, to a local authority if that authority is deemed competent.
<b>Grading of heritage sites</b>	It is recommended that the grading system be reconsidered. Sites should be graded in terms of the protection measure required, rather than in terms of significance.
<b>World heritage sites</b>	It is recommended that SAHRA as the national institution responsible for the identification and management of heritage resources must play a greater role in the management and monitoring of South African World Heritage Sites. WHS management authorities, established in terms of the World Heritage Convention Act 49 of 1999 must report primarily to SAHRA and then to the relevant portfolio committee and to UNESCO.
<b>Living and intangible heritage</b>	The Act does not and should not be interpreted to cover the conservation of living heritage. The laws that protect intangible practices have to do with issues like freedom of expression, intellectual rights, etc and not conservation. The role of an institution like SAHRA in respect of living heritage has to be to protect and conserve sites that have a connection to living heritage in order to ensure that those that wish to, can continue their activities. SAHRA, in accordance with the mandate described above, has prepared policy and guidelines principles for the management of living heritage, <sup>258</sup> but this needs to be located within a broader national policy that is aligned to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.
<b>Heritage objects</b>	The Act does not and should not be interpreted to cover the conservation of living heritage. The laws that protect intangible practices have to do with issues like freedom of expression, intellectual rights, etc and not conservation. The role of an institution like SAHRA in respect of living heritage has to be to protect and conserve sites that have a connection to living heritage in order to ensure that

<sup>258</sup> South African Heritage Resources Agency, Living Heritage Chapter: Policy and Guideline Principles for Management, Cape Town, undated.

		those that wish to, can continue their activities. SAHRA, in accordance with the mandate described above, has prepared policy and guidelines principles for the management of living heritage, but this needs to be located within a broader national policy that is aligned to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.
<b>Victims of conflict</b>		The Act provides for the protection of graves of ' <i>victims of conflict</i> ' but does not provide a clear definition of the term. This is a highly contentious and politically charged debate that should be initiated and driven at national level and in accordance with a national policy or guidelines on the role of heritage in post-conflict reconstruction.
<b>Repatriation</b>		DAC, SAHRA and the NHC have responsibilities in relation to repatriation. It is essential to delineate roles and responsibilities clearly, not only for the sake of easing tension and facilitating efficient delivery, but also so that agencies are seen to be meeting their obligations. Because, in many instances repatriation involves government to government liaison it is recommended that DAC assume primary responsibility for this, and be empowered to delegate this under particular conditions.
<b>Human remains</b>		There is increasing sensitivity to the issue of human remains housed in museum and other institutional collections and to the need to treat these with dignity and respect. A national policy on the removal and re-interment or storage of human remains is required to bring local responses to this issue into alignment with international best practice.
<b>Legislative recommendations</b>		
<b>Section 1</b>	<b>Definitions</b>	<p>The definition of "grave" should be extended as per the SAHRA recommendation.</p> <p>Subparagraph (d) of the definition of "victims of conflict" is unsatisfactory but at least provides for further definition in regulations. Regulations defining this category of victims of conflict have not yet been made by the Minister but, should an appropriate definition have been determined, DAC may wish to include it in the Act itself rather than in regulations to the Act.</p>
<b>Section 7(1)</b>	<b>Gradings of places and objects</b>	The words "although forming part of the national estate" in subparagraph (b) should be deleted as proposed by SAHRA.
<b>Section 7(2)</b>	<b>Powers of PHRAs</b>	The powers of PHRAs to describe more detailed criteria should be subject to the criteria prescribed under section 7(1).
<b>Section 8</b>	<b>Disputes regarding competence of provincial heritage resources authorities or local authorities</b>	<p>The provision requires disputes regarding competence to perform functions under the Act to be submitted to arbitration, but is silent on the arbitrator's appointment, terms of reference, the applicable procedures to be followed in any arbitration and the legal status of arbitration decisions.</p> <p>Amendment required providing adequate arbitration framework.</p> <p>SAHRA's powers where PHRAs do not exist or PHRAs of local authorities do not have the capacity or competence to perform their functions under the Act, should be clarified. Amendment recommended.</p>
<b>Section 10</b>	<b>Administrative justice</b>	Subsections (2)(b) and (c) exceed the requirements of the Promotion of Administrative Justice Act and may hamper the administrative functions of heritage authorities. The proviso creates no difficulty as far as in-camera proceedings in justified

		<p>circumstances are concerned. However, the only basis on which public access to the minutes of public bodies can be denied is on one of the grounds set out in the Promotion of Access to Information Act. An amendment is recommended to ensure that the provisions comply with the requirements of administrative justice.</p>
<b>Section 12</b>	<b>Object of SAHRA</b>	<p>SAHRA's object is to co-ordinate the identification and management of the national heritage estate. This duplicates the objects of the National Heritage Council under the National Heritage Council Act, 1999.</p> <p>Policy decision required on appropriate institutional framework and division of statutory institutional objects.</p> <p>Amendment required eliminating the duplication of institutional objects.</p>
<b>Section 13</b>	<b>Functions, powers and duties of SAHRA</b>	<p>Duplication of functions, powers and duties of SAHRA and the National Heritage Council under the National Heritage Council Act, 1999. Key areas of duplication are:</p> <ul style="list-style-type: none"> <li>• repatriation of heritage resources;</li> <li>• funding of heritage activities;</li> <li>• co-ordination of heritage activities and institutions;</li> <li>• promoting public awareness on heritage matters.</li> </ul> <p>Policy decision required on appropriate institutional framework and division of statutory institutional powers, functions and duties.</p> <p>Amendment required eliminating the duplication of institutional powers, functions and duties.</p>
<b>Sections 11, 12, 13, 14, 16 and 18</b>	<b>SAHRA and its governing Council</b>	<p>The respective roles and responsibilities of SAHRA and its Council require clarification. In this regard:</p> <ul style="list-style-type: none"> <li>• s11 establishes SAHRA as a body corporate governed by the Council; s14 provides that the affairs of SAHRA are under the control and management of the Council; and s16 requires that the Council is responsible and accountable for implementing the functions, powers and duties of SAHRA; yet</li> <li>• s13(2)(a) requires SAHRA to advise the Council on a wide range of matters; and s16(c) requires the Council to advise and assist SAHRA in the performance of its functions, powers and duties.</li> </ul> <p>Amendment required to clarify and distinguish between the respective roles and responsibilities of SAHRA and its Council.</p>
<b>Section 14</b>	<b>Composition and appointment of Council</b>	<p>We are of the view that the current provincial representation on the Council should be reviewed. Membership of the Council currently includes 9 members who represent the provinces. We believe that this composition serves to confuse the governance and intergovernmental coordination functions of the Council. In our view the governance functions would be better served by reducing provincial representation on the Council and that the cause of intergovernmental coordination will be better served by establishing an appropriate intergovernmental forum. See recommendation below.</p> <p>S14(4), governing the removal of members of Council, does not</p>

		satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.
<b>Section 19</b>	<b>Reimbursement of expenses</b>	There is no provision for remunerating the members of the Council or its committees.  Amendment required providing for the remuneration for members of Council and its committees.
<b>Section 20</b>	<b>Employees of SAHRA</b>	Section 20(1) provides for staff to be employed by the SAHRA Council. This is a further example of confusion between the status of SAHRA and its Council. Amendment recommended.  Section 20(4) suggests that the CEO be appointed from the ranks of senior SAHRA staff. The CEO need not be appointed from amongst SAHRA senior staff and the provision should be amended accordingly.
<b>Sections 21 and 22</b>	<b>SAHRA financing and reporting</b>	SAHRA is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss21 and 22 are not consistent with its provisions. In this regard, the PFMA requires: <ul style="list-style-type: none"> <li>• submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));</li> <li>• submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c));</li> <li>• submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).</li> </ul> Amendment required providing consistency with the PFMA
<b>Section 23</b>	<b>PHRAs</b>	SAHRA proposes that PHRAs must be established in each province without exception. Amendment recommended.
<b>Section 26</b>	<b>Delegation of powers by heritage resource authorities</b>	Section 26(2) appears to serve no legal purpose and should be omitted.
<b>Section 27</b>	<b>Declaration of national and provincial heritage sites</b>	The procedure for declaring a heritage site is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.  SAHRA recommends that regulations should be made after consulting the owner of the heritage site rather than with the consent of the owner. Amendment recommended.
<b>Section 28</b>	<b>Designation of protected areas</b>	SAHRA recommends that an area should be designated after consultation with the owner of the area rather than with their consent. Amendment recommended.
<b>Section 29</b>	<b>Provisional protection of protected areas</b>	The procedure for the provisional protection of protected areas and heritage resources is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.



	<b>and heritage resources</b>	Amendment required providing for administrative fairness.
<b>Section 30</b>	<b>Heritage registers</b>	SAHRA recommends that heritage registers should be referred to as provincial heritage registers in order to avoid any confusion. The header to section 30 should be amended accordingly.
<b>Section 31</b>	<b>Designation of heritage areas</b>	The procedure for the designation of heritage areas by provincial heritage resources authorities or local authorities is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.
<b>Section 32</b>	<b>Declaration of heritage objects</b>	<p>The procedure for the declaration of heritage objects is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment required providing for administrative fairness.</p> <p>SAHRA proposes that efficiency will be promoted by omitting the requirement that it must obtain the approval of the Minister before issuing a notice declaring an object to be a heritage object. The requirement of ministerial approval in this section is not consistent with the provisions of the Act dealing with the designation of heritage sites, protected areas, heritage areas and the provision of protection of protected areas. We recommend an amendment.</p>
<b>Section 34</b>	<b>PHRA permits to alter or demolish structures older than 60 years</b>	<p>SAHRA proposes that if a structure is not designated within one year of a refusal by SAHRA, the subsection (1) should cease to apply. It is not clear to us why delay on the part of a PHRA should result in no protection at all particularly since subsections (3) and (4) already provide for an exemption procedure.</p> <p>DAC may however consider excluding "painting" from the application of this section in order to address SAHRA's concerns regarding the definition of "alter".</p>
<b>Section 35(7)</b>	<b>Condonation of late filing of material</b>	SAHRA recommends that the responsible heritage resources authorities should be empowered to condone the late lodging of lists required within a period of 2 years from the commencement of the Act. We recommend that the Act be amended accordingly.
<b>Section 38</b>	<b>Exclusion of developments under NEMA</b>	SAHRA suggests that environmental impact assessments must be subject to the requirements and conditions of relevant heritage resources authorities. The Act should be amended accordingly.
<b>Section 50</b>	<b>Powers of heritage inspectors</b>	<p>The provision is capable of authorising warrantless entry into private homes and the search of intimate possessions, rendering it vulnerable to legal challenge on the grounds of breaching the constitutional right to personal privacy.</p> <p>Amendment required providing that a warrant from a judicial or other officer should be required for the search of private homes and domestic premises.</p>
<b>Section 51</b>	<b>Offences and penalties</b>	SAHRA suggests that provision should be made for larger fines and longer terms of imprisonment in order to increase the deterrent value of the law. The Act should be amended accordingly. DAC may also wish to consider the introduction of a system of administrative penalties.
	<b>Intergovernmental forum</b>	The Act should be amended to provide for the establishment of an appropriate intergovernmental forum involving SAHRA, the PHRAs



		and appropriate structures at local government level.
	<b>Governance matters</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• qualifications for and disqualifications from membership;</li> <li>• removal of members, vacancies and filling of vacancies and the dissolution of the council;</li> <li>• remuneration of members of the council and the reimbursement of their expenses;</li> <li>• quorums for meetings, manner of decision making and voting thresholds;</li> <li>• delegation of powers and functions by the council;</li> <li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li> </ul>

## 36 National Council of Library and Information Services Act 6 of 2001

*"The establishment of NACLIS (sic) in South Africa is a major achievement, a beacon of hope for librarians and libraries. Through NACLIS we hope to lobby the government to regard and fund libraries as a vital link to democracy and a vehicle for development."<sup>259</sup>*

### 36.1 Introduction

The establishment of the National Council for Library and Information Services was the outcome of a decades-long process to establish a central policy and decision-making body to advise the Minister and represent, co-ordinate and play an advocacy role for the sector at large.

### 36.2 Historical background to the law

#### 36.2.1 Towards a central coordinating body for library and information services

The notion of a central body to co-ordinate library services in South Africa dates back to at least 1928, when the Carnegie Corporation of New York, at the invitation of the Germiston Librarian, sent two librarians of international standing to undertake a survey and recommend action to improve the state of public libraries in South Africa. Once this task had been completed, the results were tabled at the South African Library Conference in Bloemfontein. The decisions of this conference laid the foundations for library development in South Africa.<sup>260</sup> Amongst other recommendations made by the conference was the formation of a library association, based on the British model. The South African Library Association (SALA), a professional body for librarians, was duly established.<sup>261</sup>

It was not until 1967 that the first National Library Advisory Council (NLAC) was established by the Minister of Education, Arts and Science to address the implementation of the Programme for Future Library Development, an outcome of the 1962 National Conference of Library Authorities.

By the early 1980s, the effects of information science and technology were such that the NLAC was dissolved and the National Advisory Council for Librarianship and Information Science (NACLI), comprising 23 expert members, was appointed by the Minister to, amongst other tasks, advise on the formulation and implementation of national policy and to consult with interested and knowledgeable institutions. NACLI

<sup>259</sup> Rachel More, *Librarians as Agents of Democracy*, 2004.

<sup>260</sup> The Conference also recommended the establishment of separate library services for the blind, for European school children, "black African children" and "Non Europeans".

<sup>261</sup> Walker, C W, *Library Development in South Africa*, 1995, page 20.

was disbanded in 1987, at the end of its first term of office, because, in the view of FW de Klerk, the Minister at the time, *"information plays a role in all decision making and communication, and a national policy would... result in his encroaching on the spheres of authority of others."*<sup>262</sup>

As the ACTAG Report notes, *"the previous government left the development of LIS to 'market forces', neglecting its responsibility,"*<sup>263</sup> and the late addition of Library and Information Services to the ACTAG process came about as a result of pressure exerted from the Library and Information Workers Organisation.<sup>264</sup>

The National Education Crisis Committee (later renamed the National Education Coordinating Committee), while not specifically recommending a structure for a national council or board, noted in its 1992 report, the National Education Policy Investigation (NEPI), the need to identify and consult with a broad range of stakeholders to formulate policy. It suggested two options for responsibility for the formulation of policy and decision-making in the sector. One of these options included the establishment of a statutory body, which could advise the Minister on legislation and act as a monitoring and communication channel. It was suggested that members of this body would represent *"professional interests, agencies active in the field, and elected representatives from user communities"*.<sup>265</sup>

TRANSLIS (Transforming our Libraries and Information Services), the coalition that emerged from the NEPI LIS project, brought representatives of a range of LIS bodies and individuals to *"develop a national library and information service policy and programme which directs the process of participatory change and reconstruction of South Africa's libraries and information services, both regionally and nationally."* In 1993, TRANSLIS recommended that LIS be a subsystem of the Ministry of Education and that, *"a national LIS council with decision-making powers, comprising the user community, stakeholders and ex-officio LIS civil servants"*<sup>266</sup> be established. These recommendations were to a large extent echoed in the ANC draft discussion document on a policy framework for education and training distributed early in 1994. While the TRANSLIS coalition began enthusiastically, the formation of a LIS Task Team by the Centre for Education Policy Development (CEPD) in 1994, *"brought about a bitter split in the LIS sector that affected participation in LIS policy development for many years"*.<sup>267</sup>

The CEPD LIS Task Team recommended the establishment of a National Council for Library and Information Services (NCLIS) as the main policy-making and co-ordinating body for community libraries, resource centres, information centres and archives operated by all sectors (state, parastatal, civil society and commercial

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<sup>262</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 3.

<sup>263</sup> Arts and Culture Task Group (ACTAG) Report, 1995.

<sup>264</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 3.

<sup>265</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 4.

<sup>266</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 6.

<sup>267</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 4.

sectors). This body would include representatives of the nine provinces, the full range of LIS sector organisations, the publishing and bookselling industry, a representative of the proposed Education and Training Coordination Council and civil society.<sup>268</sup>

These recommendations accord to some extent with a submission to the CEPD LIS Task Team by the Transvaal Public Library Strategy Group, that community library information services (COLIS) be located within the Department of Education and that a national representative council be established.<sup>269</sup> The CEPD LIS Task Team proposals were criticised on the grounds that there had not been sufficient consultation. In a further blow to the sector, the Reconstruction and Development Programme (RDP) made only two passing references to libraries, in the context of arts and culture.

By 1995, the sector was in disarray - confusion, communication problems and mutual suspicion brought about major divisions. ALSA and SAILIS initiated a conference, Library and Information Services in Developing South Africa, which resolved to create a single-voice LIS organisation, leading to the launch of the Library and Information Association of South Africa (LIASA) in 1997.

### 36.2.2 The Arts and Culture Task Group (ACTAG)

At the same conference, it was announced that an ACTAG Sub-Committee had been appointed to develop LIS policy for a new Ministry. The ACTAG Report, published in 1995, confirmed that LIS would be transferred from the Ministry of Education to the Ministry of Arts, Culture, Science and Technology and outlined three possible models for a national body. The first of these comprised a large, broad-based national forum and a smaller council. The second, a forum comprising elected representatives and persons appointed by the Minister. The third option was a national Council and sub-sector specific panels.<sup>270</sup>

One of the debates not touched on to any great extent in the section above is that of the alignment of library and information services with arts and culture rather than with education. The ACTAG Report noted that many involved in LIS were concerned about the location of LIS within the Department of Arts, Culture, Science and Technology even though this department had responsibility for the two national libraries, a number of museums and other institutions with significant library holdings. The Report noted that LIS has a particularly close relationship to education and that current developments provide opportunities to build links between public libraries and those of schools and other academic institutions but cautions that LIS may be marginalised in a Department *"preoccupied with getting the country's schools running."*<sup>271</sup> The Report concludes that there is, however, agreement within

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<sup>268</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 7.

<sup>269</sup> Walker, C W, From NEPI to NCLIS: A "Do-Decade" of Democratisation, 1992-2004, Page 8.

<sup>270</sup> Arts and Culture Task Group (ACTAG) Report, 1995, pages 226-232.

<sup>271</sup> Arts and Culture Task Group (ACTAG) Report, 1995, page 219.

the sector that there should be a single national focal point for decision-making and co-ordination, and that this should be associated with a national government department.

### 36.2.3 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage, 1996 notes that-

*“there is presently no structure for promotion and coordination of LIS at national level. An inter-ministerial working group has been established to advise on the matters relating to LIS.”<sup>272</sup>*

It recommends that-

*“a national advisory council be established to assist in the formulation of LIS policy, to provide co-ordinating networks and mechanisms and set priorities for extending national LIS. It will provide a vehicle for co-ordination at national level and may advise provinces on linkages between the national and provincial governments.”*

### 36.2.4 The Report of the Interministerial Working Group on Libraries and Information Services

The Report of this Working Group pointed out that the impetus for this initiative could be traced back to earlier efforts to establish a national coordinating structure and on the initiatives of the early 1990s and indicated a need for a council to coordinate a sector that was both fragmented and marginalised. The Report noted that access to information was key to strengthening ‘our newly democratised society.’<sup>273</sup>

### 36.2.5 The National Council for Library and Information Services Act 6 of 2001

In his speech introducing this Act to the National Assembly, the Minister noted that Library and Information Services were at the centre of the information revolution and faced tremendous challenges including low levels of literacy and information literacy; promoting a culture of reading and life-long learning; stimulating the publishing industry to publish material in African languages and transforming services and collections to meet the needs of all communities.<sup>274</sup>

The Minister noted too that NCLIS was to be established to advise government on the transformation of the library and information services sector and to ensure that

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<sup>271</sup> Arts and Culture Task Group (ACTAG) Report, 1995, page 219.

<sup>272</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 4:49.

<sup>273</sup> Hansard, Second Reading, National Council for Library and Information Services Bill, 27 February 2001, House of Assembly, South Africa: 585.

<sup>274</sup> Hansard, Second Reading, National Council for Library and Information Services Bill, 27 February 2001, House of Assembly, South Africa: 584.

the needs of all communities were addressed in a co-ordinated manner<sup>275</sup>. The functions, outlined in the Act were focused on two significant aspects: advising the Minister and; coordinating the response of the sector to problems and liaising with other relevant stakeholders and role-players.

### 36.2.6 Implementation of the Act

The National Council for Library and Information Services was launched in March 2004, albeit in a form very different from the earlier vision, and represented a victory for those who believed that government had a role to play in delivering library and information services to the nation.

While NCLIS reports back to the Minister of Arts and Council and the Minister of Education, debates regarding the alignment of LIS have moved on since ACTAG. The context in which LIS operates is somewhat different and there is a deeper appreciation for the role that LIS plays as a partner in preserving the nation's documentary heritage, building a knowledge society, promoting lifelong learning and nurturing social cohesion. There is also an understanding that boundaries between disciplines, institutions and structures are permeable, and that the priorities defined in government's programme of action are more likely to be achieved if relevant agencies work in partnership: with and within different spheres of government and in co-operation with other public, private, community-based and civil society organisations.

Nassimbeni notes that there are a number of lessons to be learnt from an examination of the formalised policy initiatives in the LIS sector: the low visibility of the sector and lack of understanding or acknowledgement of the critical role that it could play in a developing society; the fractiousness and resistance of some stakeholders arising from ideological tensions and contradictions which create unnecessary divisions in the sector and hamper progress; the perceptions of poor communication and consultation processes which stymie even the most considered proposals and; the ambitious formulation of complicated and expensive structures which are simply not sustainable.<sup>276</sup>

### 36.3 Key issues

The key issues identified below have been drawn from our consultations and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

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<sup>275</sup> Hansard, Second Reading, National Council for Library and Information Services Bill, 27 February 2001, House of Assembly, South Africa: 584.

<sup>276</sup> Nassimbeni, M C, Library and information policy in South Africa in the nineties and beyond: process, product and practice, in Stilwell, C, Leach, A and Burton, S (eds) Knowledge, information and development: an African perspective, Pietermaritzburg: School of Human and Social Studies, University of Natal. 25-39, 2001.

### 36.3.1 An integrated policy and delivery framework

In terms of the Constitution, libraries other than national libraries are functional areas of exclusive provincial legislative competence. Library and information services are delivered by a range of national, provincial and local government structures as well as by community based, private, academic and other organisations. Given the complexity of interactions between these bodies and the dire need to extend services to all it is clear that an integrated national library policy is required to provide an enabling environment within which all concerned have clearly defined roles and functions.

It is recommended that an integrated national policy for the delivery of library and information services be formulated. This should articulate the critical role of libraries and information services in: building a knowledge society; affirming and supporting national language policy and encouraging the publication of materials in African languages; promoting lifelong learning, literacy and information literacy and a culture of reading; and conservation of the country's published documentary heritage.

The policy should address *inter alia*, the matters set out below.

### 36.3.2 NCLIS as a national sub-sector structure

NCLIS should be recognised as the national co-ordinating and advisory structure for the library and information services sector. If NCLIS is to fulfil this role effectively it will be necessary to clarify its role in relation to:

- The formulation of national norms and standards;
- Monitoring and evaluation;
- Promoting awareness.

### 36.3.3 Status and composition of the Council

NCLIS has a broad mandate to advise the Department and the Departments of Science and Technology and Education on policy, but its membership is drawn solely from the library sector. The Legal Deposit Committee, on the other hand, has a much narrower mandate but much broader representation from the sector. It is recommended that the composition of NCLIS be extended to include representatives from the science and technology sector, the Legal Deposit Committee, Blindlib and one person with expertise in law and/or accounting. This will enable the NCLIS to fulfil the functions of a national sub-sector structure.



**36.3.4 Intergovernmental forum**

An appropriate intergovernmental forum is required to ensure that publicly funded libraries and information centres are more closely aligned. The composition of such a forum should be decided upon in accordance with the provisions of an integrated library information services policy and delivery framework, as noted above.

**36.3.5 Building a knowledge society**

The role of the sector as a central driver in the creation of a knowledge society should be articulated in policy.

**36.3.6 Multilingualism**

There is a need to address the role of libraries and information services in promoting and preserving African languages; affirming and supporting national and provincial language policies; and encouraging the publication of books in African languages. The sector's commitment to ensuring that South African libraries should reflect a South African identity and respond to the needs of all communities should be central to a national policy framework.

**36.3.7 Promoting a culture of reading**

NCLIS is charged with advising the Minister on the promotion of literacy, information literacy and a culture of reading. The sectors commitment to meeting this mandate, and the strategies by which they hope to achieve this should be clarified in a national policy framework.

**36.3.8 Lifelong learning**

The critical role of libraries in lifelong learning must be promoted and acknowledged. A policy statement that outlines the libraries commitment to and interaction with the sector should be developed.

**36.3.9 Conservation**

Libraries are custodians of the country's published documentary heritage. As such they interact with other custodians of the national estate: the South African Heritage Resources Agency, the Declared Cultural Institutions and the National Archives and Records Service of South Africa to preserve and promote heritage. It is critical that these institutions act with common purpose to fulfil an agreed upon vision for heritage. This will only happen when a coherent and integrated national heritage policy has been formulated.



### 36.3.10 Copyright

Issues pertaining to Copyright have been detailed in Part III of this Report. It is essential that the solutions to the dilemma meet the need to balance the rights of authors to have their intellectual property protected and the requirement of national institutions to facilitate access while ensuring that the national documentary heritage – text, images and in any format – is preserved and protected from commercial exploitation for future generations. It is recommended that policy include provision for public interest copyright exceptions to enable NCLIS and associated institutions to meet their mandated responsibilities.

In accordance with the policy proposed in Part III of this Report, NCLIS should be vested with a further function, ie to determine the terms on which public libraries should be allowed to circumvent places of legal deposit and the South African Library for the Blind should be allowed to circumvent digital rights and management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of these exceptions.

### 36.3.11 Electronic publications

One of the key challenges facing the sector is the collection and preservation of electronic publications, because of the complexity of legal, organisational, technical and operational aspects associated with the acquisition, storage and use of these.<sup>277</sup> This complex issue affects intellectual property, copyright, legal deposit, archival and other national concerns. It is recommended that a national strategy, drawing on international best practice be formulated to address this issue. This should define the nature and scope of material to be deposited and archived, address the practical implications of this and provide guidelines for the use of electronic material located in public collections.

### 36.3.12 The provision of material in alternative formats

The right to information is recognised internationally in the International Covenant of Civil and Political Rights, the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities and in the Bill of Rights in The Constitution of the Republic of South Africa. Giving effect to these rights requires that information aimed at the general public be made available in alternative formats for visually impaired or print disabled readers.

### 36.3.13 Digitisation

A national policy and strategy for digitisation is required. See Part III of this Report for a more detailed discussion of this issue.

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<sup>277</sup> [www.ifla.org](http://www.ifla.org), accessed on 21 February 2007.

### 36.3.14 Alignment of library and information services

One of the debates not touched on to any great extent in the section above is the alignment of the library and information services with arts and culture rather than with education. The ACTAG Report noted that many involved in LIS were concerned about the location of LIS within the Department of Arts and Culture, Science and Technology even though DACS has responsibility for the two national libraries, a number of museums and other institutions with significant library holdings. The Report noted that LIS has a particularly close relationship to education and that current developments provide opportunities to build links between public libraries and those of schools and other academic institutions but cautions that LIS may be marginalised in a Department ‘pre-occupied with getting the country’s schools running.’ The Report concludes that there is however agreement within the sector that there should be a single national focal point for decision-making and coordination, and that this should be associated with a national government department.

Debates have moved on since ACTAG; and the context in which LIS operates is somewhat different and there is a deeper appreciation for the role that LIS plays as a partner in preserving the nation’s documentary heritage, building a knowledge society, promoting lifelong learning and nurturing social cohesion.

There is also an understanding that boundaries between disciplines and institutions and structures are permeable and that the priorities defined in governments’ programme of action are more likely to be achieved if relevant agencies work in partnership: with and within different spheres of government and in cooperation with other public, private, community based and civil society organisations. It is recommended that the mechanisms for engagement with other entities be formalised.

## 36.4 Recommendations for legislative amendment

### 36.4.1 Section 1 - Definitions

The definitions of “department”, “Director-General” and “Minister” are outdated.

Amendment required to align definitions to the Department responsible for arts and culture and the Minister responsible for arts and culture

### 36.4.2 Section 3 - Object of Council

The objects of NCLIS should be extended to incorporate reference to building a knowledge society, the importance of multi-linguism, promoting a culture of reading, life long learning and conservation.

**36.4.3 Section 4**

An additional function should be conferred on NCLIS - to determine the terms on which public libraries, the South African Library for the Blind, public archives and places of legal deposit should be allowed to circumvent digital rights and management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of public interest copyright exceptions.

**36.4.4 Section 5 - Composition of Council**

The composition of NCLIS should be extended to include representatives from the science and technology sector, the legal deposit committee and the South African Library for the Blind. This will enable NCLIS to better fulfil the functions of a national sub-sector structure.

**36.4.5 Section 9 - Tenure and vacation of office of members of council**

The provisions governing the removal of a member of the council and for dissolution of the council are vulnerable to legal challenge on the grounds that they do not satisfy the requirements of administrative fairness.

Amendment required providing for administrative fairness.

**36.4.6 Section 10 - Meetings of council**

S10(6) provides that no remuneration is payable to any member of the council except for reasonable travel, accommodation and subsistence costs.

Amendment required providing for the remuneration of members of the council and its committees or working groups.

**36.4.7 Intergovernmental forum**

An appropriate intergovernmental forum should be established under the Act involving NCLIS the National Library, the South African Library for the Blind and appropriate libraries or library structures at provincial and local government level.

**36.4.8 Governance review of heritage institutions**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the council;

- remuneration of members of the council and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

### 36.5 Summary of recommendations on the National Council of Library and Information Services Act 6 of 2001

Policy recommendations	
<b>Integrated policy and delivery framework</b>	<p>It is recommended that an integrated national policy for the delivery of library and information services be formulated. This should articulate the critical role of libraries and information services in: building a knowledge society; affirming and supporting national language policy and encouraging the publication of materials in African languages; promoting lifelong learning, literacy and information literacy and a culture of reading; and conservation of the country's published documentary heritage.</p> <p>The policy should address <i>inter alia</i>, the matters set out below:</p> <ul style="list-style-type: none"> <li>• NCLIS as a national sub-sector structure;</li> <li>• the status and composition of NCLIS;</li> <li>• an appropriate inter-governmental forum;</li> <li>• building a knowledge society;</li> <li>• multi-linguism;</li> <li>• promoting a culture of reading;</li> <li>• life long learning;</li> <li>• conservation;</li> <li>• copyright;</li> <li>• electronic publications;</li> </ul>

		<ul style="list-style-type: none"> <li>the provision of material in alternative formats;</li> <li>digitisation; and</li> <li>the alignment of library and information services</li> </ul>
<b>Legislative recommendations</b>		
<b>Section 1</b>	<b>Definitions</b>	<p>The definitions of "department", "Director-General" and "Minister" are outdated.</p> <p>Amendment required to align definitions to the Department responsible for arts and culture and the Minister responsible for arts and culture</p>
<b>Section 3</b>	<b>Object of Council</b>	The objects of NCLIS should be extended to incorporate reference to building a knowledge society, the importance of multi-linguism, promoting a culture of reading, life long learning and conservation.
<b>Section 4</b>		An additional function should be conferred on NCLIS - to determine the terms on which public libraries, the South African Library for the Blind, public archives and places of legal deposit should be allowed to circumvent digital rights and management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of public interest copyright exceptions.
<b>Section 5</b>	<b>Composition of Council</b>	The composition of NCLIS should be extended to include representatives from the science and technology sector, the legal deposit committee and the South African Library for the Blind. This will enable NCLIS to better fulfil the functions of a national sub-sector structure.
<b>Section 9</b>	<b>Tenure and vacation of office of members of council</b>	<p>The provisions governing the removal of a member of the council and for dissolution of the council are vulnerable to legal challenge on the grounds that they do not satisfy the requirements of administrative fairness.</p> <p>Amendment required providing for administrative fairness.</p>
<b>Section 10</b>	<b>Meetings of council</b>	<p>S10(6) provides that no remuneration is payable to any member of the council except for reasonable travel, accommodation and subsistence costs.</p> <p>Amendment required providing for the remuneration of members of the council and its committees or working groups.</p>
	<b>Inter-governmental forum</b>	An appropriate intergovernmental forum should be established under the Act involving NCLIS the National Library, the South African Library for the Blind and appropriate libraries or library structures at provincial and local government level.

	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"><li>• qualifications for and disqualifications from membership;</li><li>• removal of members, vacancies and filling of vacancies and the dissolution of the council;</li><li>• remuneration of members of the council and the reimbursement of their expenses;</li><li>• quorums for meetings, manner of decision making and voting thresholds;</li><li>• delegation of powers and functions by the council;</li><li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li><li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li><li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li><li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li></ul>
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## 37 National Library of South Africa Act 92 of 1998

*"Knowledge societies are about capabilities to identify, produce, transform, disseminate and use information to build and apply knowledge for human development. They require an empowering social vision that encompasses plurality, inclusion, solidarity and participation."<sup>278</sup>*

### 37.1 Introduction

The National Library of South Africa, as a custodian of the country's documentary heritage, is a significant provider of the nation's knowledge resources and a key component of the complex network of provincial, local and community-based libraries and resource and information centres that provide information services to the South African public.

### 37.2 Historical background to the law

#### 37.2.1 The early history of the South African Library

The South African Library came into being in 1818 by Proclamation of the then Governor, Lord Charles Somerset, as the beneficiary of a tax imposed on the wine trade to, *"place the means of knowledge within the reach of the youth of this remote corner of the globe."*<sup>279</sup> In accordance with the proclamation, control of the Library was vested in a Committee appointed by the Governor. In 1820, the fledgling library acquired the collection of Joachim Nicolaus von Dessin, which had been bequeathed to the Dutch Reformed Church in 1761, *"to serve as the foundation of a public library for the advantage of the community."*<sup>280</sup> The library opened to the public in 1822 and all citizens over the age of 18, army and navy officers, civil servants and other fixed residents were admitted free of charge.

In 1828, the Wine tax benefit was removed and the library, facing closure, was placed under the control of three trustees appointed by the Governor. These trustees proposed that the financial woes of the institution be resolved through the adoption of a subscription system.<sup>281</sup> This was formalised in the Ordinance of His Excellency the Governor in Council for Abolishing the Office of Trustees of the Public Library in Cape Town and for Vesting the Management therefore in a Committee of Subscribers to that Institution, No 71 of 1830. The Ordinance for the Better and more Effectual Management of the Public Library in Cape Town, No 8 of

<sup>278</sup> Towards Knowledge Societies, UNESCO World Report, 2005.

<sup>279</sup> National Library of South Africa website, accessed 12 June 2006.

<sup>280</sup> Joyce, P. The South African Family Encyclopaedia, Struik, 1989, page 208.

<sup>281</sup> Esdaile A, National Libraries of the World, pg 32.

1836 spelled out an improved management system and vested control of the library in a committee of nine subscribers.

The South African Public Library became a legal deposit library for the Cape Colony in accordance with the Ordinance to Protect and Regulate the Rights of Authors in respect of their Works, No 2 of 1873, the Cape's first copyright law, which entitled it and the Grahamstown Public Library to receive, free of charge, copies of all books published in the Colony.

In 1888, the subscribers and the government of the day agreed that steps be taken to make the Library a statutory body. The Ordinance to Provide for the Management of the South African Public Library, No 33 of 1893 placed control of the institution in the hands of a Board of Trustees, which included four government nominees, four subscribers' representatives, the Vice-Chancellor of the University of the Cape of Good Hope and the Mayor of Cape Town, *ex officio*.

### 37.2.2 The early history of the State Library

The first public library in Pretoria opened in 1878 but because of financial problems closed down in 1890. The "Staats-Bibliotheek der Zuid-Afrikaansche Republiek" (State Library of the South African Republic) came into being in 1883 as the result of a donation of books from the Maatschappij der Nederlandsche Letterkunde to the government of the Transvaal Republic, and its constitution was approved in 1887.

In 1893, the resources of these two institutions were combined under the Staats-Bibliotheek, with the bookstock of the former public library. From then until 1964, the State Library performed a dual role as public library and national library.

The first national librarian, the Afrikaans poet Jan Celliers, saw exchange agreements as a means of enriching the State Library's collections. The first exchange agreement was entered into in 1898 with the Smithsonian Institution of Washington in the United States. In terms of the agreement, the State Library would receive all American official publications in exchange for two copies of each official publication of the South African Republic.<sup>282</sup>

### 37.2.3 The National Library of South Africa

In 1910, with the advent of Union, the two libraries, together with certain other institutions, came under the protection of the new Department of the Interior, although the Trustees still enjoyed a considerable measure of autonomy.

The *Copyright Act 141 of 1916* conferred the privilege of legal deposit of all books published in the Union of South Africa on five libraries, those of the colonial power and its colonies as well as those of the two independent Boer republics, i.e. the British Museum, the South African Public Library (Cape Town), the Natal Society's

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<sup>282</sup> Information from the website of the National Library of South Africa and Esdaile; A, *National Libraries of the World*.



Public Library (Pietermaritzburg), the State Library (Pretoria), and the Public Library (Bloemfontein), all of which still function as places of legal deposit.

The *State-Aided Institutions Act 23 of 1931* specifically excluded the South African Public Library from its provisions because it was considered to have its own Act. The State Library was, however, brought within the scope of the *State-Aided Institutions Act* in 1933 and its original governing committee replaced with a Board of Trustees responsible to the Minister of the Interior.

In 1948, state-aided institutions were placed under the control of the Department of Education, Arts and Sciences. Representations made by the Board of the South African Public Library to the Department for additional funding were met with a response that, while the library continued to serve as a lending library to the citizens of Cape Town, a responsibility which the Department felt should be fulfilled by the City, subsidy from the central government would be limited.<sup>283</sup> Negotiations were entered into, resulting in the City taking over the lending library. The *State-Aided Institutions Act* was amended in 1954 to include the Library, and the Board was reconstituted in the following year, replacing subscribers' representatives with government nominees.

In 1964, the State Library similarly handed over its public library services to the City of Pretoria to concentrate on national and international library coordination and in 1967 the South African Public Library was renamed the South African Library.

In 1969, institutions previously subject to the provisions of the *State-Aided Institutions Act 23 of 1931* were deemed to be declared cultural institutions in terms of the *Cultural Institutions Act 29 of 1969*.

#### 37.2.4 The National Libraries Act 56 of 1985

The National Libraries Act 56 of 1985 made special provision for libraries which were considered, by the politicians of the day, not to "fit in with the present Cultural Institutions Act." The National Libraries Act set out the objects and functions of a National Library, detailed the powers and duties of the Board and made provision for the establishment of an Advisory Committee to coordinate and promote the functions of the National Libraries.

During the 1990s, the Department of Arts, Culture, Science and Technology appointed a Working Group to advise on the future of the two national libraries. The Working Group recommended that the South African Library and the State Library be amalgamated to create the National Library of South Africa, operating on campuses in Cape Town and Pretoria.

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<sup>283</sup> *Quarterly Bulletin of the South African Library*, Volume 13, page 38.

### 37.2.5 The White Paper on Arts, Culture and Heritage, 1996

The White Paper on Arts, Culture and Heritage, notes that-

*“Policy is needed to address the shortcomings of the past and the challenges of the future. In particular, with transformation taking place at both the metropolitan and local levels, a national policy which sets the norms and standards is required. A robust library and information services (LIS) is an essential factor in reconstruction and development.”*

The White Paper does not detail or describe a role for national libraries in the delivery of an integrated library service, although it does indicate that a national structure for the promotion and coordination of library and information services is required.

### 37.2.6 The National Library of South Africa Act 92 of 1998

The *National Library of South Africa Act 92 of 1998* provides for the establishment of a National Library for collecting, preserving, making available and promoting awareness of the national documentary heritage.

In motivating for this, the Minister stated that, *“the new institution will serve the needs of the nation’s documentary heritage in all its richness. The new national library will respond to the needs of a diverse, multicultural and multilingual society. The new library’s response to the challenges of diversity, multiculturalism and multilingualism will enhance its status as a nation’s heritage institution.”*

## 37.3 Key issues

The key issues identified below are drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

Overarching policy issues affecting the libraries and information services sector have been discussed in Part III this Report and aspects of these specific to the National Library of South African have been noted below.

### 37.3.1 An integrated library and information services policy and delivery framework

The role of the National Library and the mechanisms through which it interacts with other institutions and agencies in the sector should be spelt out in an integrated policy and delivery framework for the sector. This should address *inter alia* the issues set out below.

### 37.3.2 The role and function of the National Library

A critical question is the definition and role of the National Library. “Libraries may be national in the sense that they contain the literary production of the nation; or in the

sense that they are the nation's main book museums, containing a high concentration of the nation's treasures; or in the sense that they are leaders, perhaps coordinators of the nation's libraries; or in the sense that they offer a national service (to the nation's libraries or population)".<sup>284</sup>

The objects and functions of the National Library as outlined in the Act encompass many aspects of that definition. In terms of the Act, the objects of the National Library are to "contribute to socio-economic, cultural, educational, scientific and innovative development by collecting, recording, preserving, and making available the national documentary heritage and promoting an awareness and appreciation thereof by fostering information literacy, and by facilitating access to the world's information resources."<sup>285</sup>

The Act outlines the functions of the National Library in relation to the above and tasks the library with: providing national bibliographic, reference, information and conservation services; providing leadership, advice and guidance to South African libraries and information services; undertaking planning and coordination in cooperation with other library and information services; presenting training in cooperation with appropriate educational institutions and professional bodies; research and development; and liaising with libraries and other institutions in and outside South Africa.

However, the Act does not outline the mechanisms through which the National Library delivers on its national mandate. In terms of Schedule 5 of the Constitution, libraries, except national libraries, are classified as areas of exclusive provincial legislative competence, and the Act falls short because it does not address the relationship of the National Library to the myriad of provincial, municipal, academic and other institutions that collectively deliver library and information services to South Africans.

While this issue may be addressed in the Act under review, it would be more appropriate for it to be addressed through the development of a national policy on information that could underpin the planning of all library and information services.

It is recommended that this issue be addressed through the development of a national policy on information that could underpin the planning of all library and information services.

### 37.3.3 The role of the National Library as a national institution

If the National Library is to play the role of a national institution in accordance with the structure proposed in Part III this Report to will be necessary to clarify its role and mandate in relation to:

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<sup>284</sup> Lor, P J, Guidelines for Legislation for National Library Services, International Federation of Library Associations and Institutions (IFLA), 1997.

<sup>285</sup> The South African Library Act, No 92 of 1998, section 3.

- Preserving and promoting documentary heritage
- Providing leadership, guidance and advice
- Planning and co-ordination in co-operation with other library and information services
- Training
- Research and development

#### 37.3.4 **Building a knowledge society**

The National Library of South Africa works closely with international bodies and professional associations such as the International Federation of Library Associations and Institutions (IFLA). It participated in the UNESCO World Summit on the Information Society (WSIS) held in Geneva in 2003 and in Tunis in 2005 and in the Follow-up Conference on Access to Information and Knowledge for Development in Addis Ababa in 2006.

The Geneva Declaration of Principles and the Geneva Plan of Action (2003) recognise the unique role that library and information services play in promoting the development agenda by facilitating access to information and building human resource capacity, and commit participants to developing national policies and investing in library and information services so that they can play the required role. This commitment should be formalised in national library and information services policy.

#### 37.3.5 **Multilingualism**

The role of the National Library in respect of the promotion of African languages should be specified as a function in the Act and clarified in policy.

#### 37.3.6 **Lifelong learning, information literacy and a culture of reading**

The role of the National Library in respect of the formal education lifelong learning, basic and functional literacy, information literacy and a culture of reading should be promoted and acknowledged, specified as a function of the institution in the Act, clarified in policy and taken into account in allocating funds.

#### 37.3.7 **Conservation**

A policy on the conservation of the national documentary heritage should be agreed upon by the three affected institutions: the National Library, the South African Heritage Resources Agency and the National Archives and Record Service who are mandated to safeguard this. The relevant Acts should be amended in accordance with the provisions of a national documentary heritage conservation policy that

details the role and function of each institution and the mechanisms through which they engage and interact with each other and with stakeholders to deliver a national service.

#### 37.3.8 Public interest copyright exceptions

A policy on copyright exceptions proposed in Part III of this Report should be applied to the LIS sector.

### 37.4 Recommendations for legislative amendment

We recommend that the National Library of South Africa Act, 1998 be amended as follows:

#### 37.4.1 Section 2 - Definitions

The definition of “document” to be expanded to include electronic and digital documentation. Outdated definition of “Minister”.

Amendment required.

#### 37.4.2 Sections 3 and 4 - Objects and functions of national library

The Act is silent on the relationship between the national library and the libraries at provincial and local government level. Policy decisions required.

Policy decision required on appropriate institutional framework for the promotion and functioning of libraries at national, provincial and local government level.

The objects and functions of the national library should be extended to building a knowledge society, promoting multi-linguism. life long learning, information literacy and a culture of reading.

#### 37.4.3 Section 6 - Board of National Library

The provision governing the removal of members of the board, is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.

The provision governing the removal of a member of the board by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.

DAC should reconsider the composition of the council in the light of amendments to the institutions functions and mandate.

#### 37.4.4 Sections 13 and 14 - Financing of National Library, auditing and annual report

The national library is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss13 and 14 are not consistent with its provisions. In this regard, the PFMA requires:

- submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));
- submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c));
- submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).

Amendment required providing consistency with the PFMA.

#### 37.4.5 Public interest copyright exceptions

The National Library (and other libraries) have a duty to preserve and conserve library resources and services and to this end require an exception from the general copyright statutory framework.

Amendment required to provide for a public interest copyright exception for public libraries. This statutory exception should provide -

- for public libraries to make copies (including digital copies) of works in their lawful possession for purposes of preservation or replacement where it is not reasonably practicable for the library to obtain a copy (not including a second-hand copy) within a reasonable time at an ordinary commercial price;
- for public libraries to make digital copies available online to users within their premises provided that the user is prevented from making electronic copies or communicating the work using equipment supplied by the library;
- that digital copies of works subject to copyright must contain an appropriate copyright notice;
- that public libraries should be allowed to communicate digital copies for purposes of inter-library loans;
- that public libraries should be allowed to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of these exceptions, on terms determined by the NCLIS.

#### 37.4.6 Governance review of heritage institutions

- Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-
- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the board;
- remuneration of members of the board and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the board;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the board and the Minister and between the board and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;
- a board charter and appointment letters setting out the individual duties and responsibilities of members of the board.

#### 37.5 Summary of recommendations on the National Library of South Africa Act 92 of 1998

Policy recommendations	
<b>Integrated library and information services policy and delivery framework</b>	<p>The role of the National Library and the mechanisms through which it interacts with other institutions and agencies in the sector should be spelt out in an integrated policy and delivery framework for the sector. This should address <i>inter alia</i> the issues set out below:</p> <ul style="list-style-type: none"> <li>• role and function of the national library;</li> <li>• role of the national library as a national institution;</li> <li>• building a knowledge society;</li> <li>• multi-linguism;</li> <li>• conservation;</li> </ul>

		<ul style="list-style-type: none"> <li>public interest copyright exceptions</li> </ul>
<b>Legislative recommendations</b>		
<b>Section 2</b>	<b>Definitions</b>	<p>The definition of “document” to be expanded to include electronic and digital documentation. Outdated definition of “Minister”.</p> <p>Amendment required.</p>
<b>Sections 3 and 4</b>	<b>Objects and functions of national library</b>	<p>The Act is silent on the relationship between the national library and the libraries at provincial and local government level. Policy decisions required.</p> <p>Policy decision required on appropriate institutional framework for the promotion and functioning of libraries at national, provincial and local government level.</p> <p>Thereafter, amendment required to give effect to national library policy.</p> <p>The objects and functions of the national library should be extended to building a knowledge society, promoting multi-linguism. life long learning, information literacy and a culture of reading.</p>
<b>Section 6</b>	<b>Board of National Library</b>	<p>The provision governing the removal of members of the board, is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.</p> <p>The provision governing the removal of a member of the board by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.</p> <p>DAC should reconsider the composition of the council in the light of amendments to the institutions functions and mandate.</p>
<b>Sections 13 and 14</b>	<b>Financing of National Library, auditing and annual report</b>	<p>The national library is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss13 and 14 are not consistent with its provisions. In this regard, the PFMA requires:</p> <ul style="list-style-type: none"> <li>submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));</li> <li>submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c));</li> <li>submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).</li> </ul> <p>Amendment required providing consistency with the PFMA.</p>
	<b>Public interest copyright exceptions</b>	<p>The National Library (and other libraries) have a duty to preserve and conserve library resources and services and to this end require an exception from the general copyright statutory framework.</p> <p>Amendment required to provide for a public interest copyright exception for public libraries. This statutory exception should provide -</p> <ul style="list-style-type: none"> <li>for public libraries to make copies (including digital copies) of works in their lawful possession for purposes of preservation</li> </ul>



		<p>or replacement where it is not reasonably practicable for the library to obtain a copy (not including a second-hand copy) within a reasonable time at an ordinary commercial price;</p> <ul style="list-style-type: none"> <li>• for public libraries to make digital copies available online to users within their premises provided that the user is prevented from making electronic copies or communicating the work using equipment supplied by the library;</li> <li>• that digital copies of works subject to copyright must contain an appropriate copyright notice;</li> <li>• that public libraries should be allowed to communicate digital copies for purposes of inter-library loans;</li> <li>• that public libraries should be allowed to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the archive or library with copies of works in a format that ensures the effective implementation of these exceptions, on terms determined by the NCLIS.</li> </ul>
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• qualifications for and disqualifications from membership;</li> <li>• removal of members, vacancies and filling of vacancies and the dissolution of the board;</li> <li>• remuneration of members of the board and the reimbursement of their expenses;</li> <li>• quorums for meetings, manner of decision making and voting thresholds;</li> <li>• delegation of powers and functions by the board;</li> <li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the board and the Minister and between the board and its executive management);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers;</li> <li>• a board charter and appointment letters setting out the individual duties and responsibilities of members of the board.</li> </ul>

## 38 South African Library for the Blind Act 91 of 1998

*"The rights of people with disabilities are protected by the Constitution. Government departments and state bodies have a responsibility to ensure that, in each line function, concrete steps are taken to ensure that people with disabilities are able to access the same fundamental rights and responsibilities as any other South African."*

### 38.1 Introduction

There is widespread support for the rights of visually impaired or print disabled readers to access printed material. In practice, this means that existing published material needs to be republished in a format that is accessible to this constituency.

The South African Library for the Blind and associated organisations play a critical role in promoting literacy, access to publications and empowering their constituency intellectually, professionally and socially.

### 38.2 Historical background to the law

#### 38.2.1 Origins of the South African Library for the Blind

The South African Library for the Blind (Blindlib) was founded when Josephine (Josie) Wood, a Grahamstown resident who was involved in nursing invalids in her home, met up with Eleanor Comber, a British missionary who had come to work with blind people in South Africa.<sup>286</sup> When Comber was recalled to England, she persuaded Wood to take charge of her personal collection of 100 Braille books and pamphlets and to start a library service for visually impaired people. Wood housed the small library in a room in her home, mailing books to a small number of borrowers and raising funds through the sale of her own watercolours to finance this service.

Wood learnt Braille and, with her niece and a few other volunteers, launched a Braille transcription service. The demand for books soon exceeded the number that the volunteer transcribers could produce. Wood then appealed internationally for donations and in 1921 the small collection was supplemented by a stock of Braille books received from the National Institute for the Blind and the National Library for the Blind in the United Kingdom and from the American Braille Press in Paris.

In 1923, the Cape Provincial Council made the first public grant to the library, a donation of one hundred pounds, in recognition of the valuable work it had done.

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<sup>286</sup> General information pertaining to the history of the South African Library for the Blind was extracted from [www.daisy.org](http://www.daisy.org), [www.blindlib.org.za](http://www.blindlib.org.za), [www.sahistory.org.za](http://www.sahistory.org.za) and the SA Library for the Blind Second Annual Report, 1926.

Wood managed the library unaided until 1924 when staff were appointed and a Council established through a Deed of Trust. A bequest from the Rhodes University Council was used for the erection of a building to house the library – and flats, the rental from which was used to subsidise the library's running costs. The South African Library for the Blind was officially opened in 1925.

By 1926, the library had a stock of nearly 2,000 books which were circulated to approximately 150 readers, as well as to the pupils at the Worcester School (for the blind), and had established a team of volunteer transcribers and supporters around the country.<sup>287</sup> The library had also negotiated a good working relationship with the National Library for the Blind in London, who made block loans of 80 books available at a time, and had persuaded the Union Castle Shipping Company to transport loans from international institutions free of charge.

In 1968 the South African Library for the Blind was declared, subject to the provisions of the State-Aided Institutions Act 23 of 1931 and was subsequently deemed subject to the provisions of the Cultural Institutions Act 29 of 1969.<sup>288</sup>

### 38.2.2 The South African Library for the Blind Act 91 of 1998

The South African Library for the Blind Act 91 of 1998 provides for the establishment of library and information services for blind or print handicapped readers. The Act makes provision for the library to acquire, record and produce materials in appropriate formats and to safeguard the country's audio and Braille heritage. It broke new ground as the first separate piece of legislation to provide for the needs of blind and print-handicapped readers, giving effect to the provisions of the Bill of Rights and the Constitution, underscoring government's commitment to protect the rights of people with disabilities and to ensure that they have equal access to opportunities such as education and work.<sup>289</sup>

### 38.3 Key issues

The key issues identified below are drawn from our consultative meetings and submissions from stakeholders, our review of relevant documents and our comparative analysis of international practice.

Overarching policy issues affecting the libraries and information services sector are set out in Part III of this Report and aspects of these specific to the South African library for the Blind are noted below.

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<sup>287</sup> SA Library for the Blind Second Annual Report, 1926.

<sup>288</sup> The South African Library for the Blind Act, No 91 of 1998.

<sup>289</sup> The Minister of Arts, Culture, Science and Technology, Second Reading of the South African Library for the Blind Bill, 22 September 1998, 1998: 6876.

### 38.3.1 An integrated policy and delivery framework

The role of the Blindlib and the mechanisms through which it interacts with other institutions and agencies should be spelt out in an integrated policy and delivery framework for the sector. This should *inter alia* address the matters set out below.

### 38.3.2 The role of Blindlib as a national institution

It is recommended that Blindlib be constituted as a national institution in accordance with the structure proposed in Part III of this Report and required to implement national policy.

### 38.3.3 Renaming of the Act and institution

Blindlib, as a repository of knowledge, plays a vital role in empowering people socially, professionally and intellectually. This should be acknowledged in the Act.

The term *South African Library for the Blind*, is considered to be both patronizing and outdated; it should be replaced with *South African Library of the Blind*. It is important to emphasise the role of disabled people in the governance and operation of the library.

### 38.3.4 Broadening the definition of the Blindlib's constituency

The definition of the constituency of the Blindlib (blind and print-handicapped readers) is considered inadequate.

It is recommended that the definition of the libraries constituency be broadened to include all those with disabilities which negatively affect their ability to read in the usual manner.

### 38.3.5 Blindlib and NCLIS

It would be an important step towards a more inclusive approach if library and information services for people who read differently were considered to fall within the scope of work of NCLIS.

It is recommended that Blindlib be identified as a stakeholder with representation on NCLIS. This recommendation is informed by the provisions of the Constitution and national policies relating to the rights of disabled people.

### 38.3.6 Blindlib as a place of legal deposit

It is recommended that Blindlib be declared a place of legal deposit for the specific material in alternative formats.

Legal deposit of publications is an almost universally applicable obligation and should be applied to Blindlib as a re-publisher in respect of both its Braille and audio publications. It might, therefore, be appropriate for Blindlib, itself, to become a place of legal deposit in respect of publications intended for people who read differently. Blindlib should be acknowledged as a stakeholder with representation on the Legal Deposit Committee

#### 38.3.7 The provision of material in alternative formats

It is recommended that policy be formulated to make provision for access to information to ensure that print disabled readers are not excluded from social and economic life.

The right to information is recognised internationally in the International Covenant of Civil and Political Rights which states that, *“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”*<sup>290</sup> as well as in the *United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* which states that, *“States should develop strategies to make information services and documentation accessible for different groups of persons with disabilities. Braille, tape services, large print and other appropriate technologies should be used to provide access to written information and documentation for persons with visual impairments”*.<sup>291</sup>

In South Africa, this principle is entrenched in the Bill of Rights, which states that *“the state may not unfairly discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture, language and birth,”* and furthermore, states that, *“national legislation must be enacted to prevent or prohibit unfair discrimination”*.<sup>292</sup>

In practice, this means that all information aimed at the general public should be made available in alternative formats for visually impaired or print disabled readers; this includes paper based and electronic media.

#### 38.3.8 Public interest copyright exceptions

It is recommended that the public interest copyright exceptions contained in Part III of this Report be implemented in respect of Blindlib.

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<sup>290</sup> International Covenant of Civil and Political Rights, Article 19 (2).

<sup>291</sup> United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, Rule 5 (b) 6 (Access to information and communication).

<sup>292</sup> The Constitution of the Republic of South Africa, Chapter 2, Section 5.

## **38.4 Recommendations for legislative amendment**

### **38.4.1 Section 1 - Definitions**

The definition of “document” to be extended to provide for electronic and digital information. The definition of “Minister” to be updated. Offensive definitions (blind and print-handicapped readers) to be amended. Definitions of “audio document” and “form” to be updated. Amendment required.

Definitional amendment is required in order to broaden the constituency served by Blindlib to include all those disabilities which negatively affect their ability to read in the usual manner.

### **38.4.2 Section 2 - South African Library for the Blind**

Stakeholder proposals that the name of the library be changed to the National Library of the Blind. Amendment required.

### **38.4.3 Section 4 - Functions of Library for the Blind**

The functions of the Blindlib should be extended to performing the role of a place of legal deposit for material in alternative formats.

### **38.4.4 Section 6 - Board of Library for the Blind**

The provision governing the removal of members of board by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.

Amendment required ensuring broad and appropriate consistency of institutional processes and arrangements.

### **38.4.5 Sections 13 and 14 - Financing of Library for the Blind, auditing and annual report**

The National Library for the Blind is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss13 and 14 are not consistent with its provisions. In this regard, the PFMA requires:

- submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));
- submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c));
- submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).

Amendment required providing consistency with the PFMA.

#### 38.4.6 Public interest copyright exceptions

Amendment recommended to incorporate statutory copyright exceptions in accordance with Part III of the Report. This statutory copyright exception should-

- apply to people with print disabilities (defined to include persons who are blind or whose sight is severely impaired, have a physical impairment or an impairment related to comprehension);
- provide for the right to reproduce or adapt works for people with print disabilities in an alternative format which renders it accessible to them (the needs of visually impaired people vary enormously and suitable accessible formats might therefore include large print publications, audio recordings, photographic enlargements, Braille, electronic Braille, digital copies that are compatible with screen-reading software and digital talking books);
- restrict the right to reproduce or adapt works for this purpose to people with print disabilities themselves (the so called “one-for-one” or “private use” exception), the South African Library for the Blind and institutions accredited by it for this purpose (such as Blind SA and the Institute for the Blind);
- require that persons who reproduce or adapt works for this purpose must be in lawful possession of the works, and that the works must be lawfully available to the public;
- require that the reproduced or adapted work must acknowledge the origin of the work and contain a copyright warning (in a form appropriate to the format concerned);
- require persons reproducing or adapting work in terms of the exceptions to take reasonable care to prevent unauthorised distribution of the work;
- provide for the distribution (including rental and lending of works in alternative formats) and for cross-border movement of alternative formats (through institutions recognised for this purpose by the Library for the Blind);
- recognise alternative format works that are produced in terms of laws permitting such production beyond the jurisdiction of South Africa, and which are distributed on a non-profit basis in South Africa;
- require copyright owners, when requested to do so by the South African Library for the Blind, to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions (where reasonably practicable) on terms to be agreed by the parties, or failing

agreement, by the National Council of Library and Information Services (NCLIS);

- allow the South African Library for the Blind to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions, on terms determined by NCLIS.

#### 38.4.7 Governance review of heritage institutions

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the board;
- remuneration of members of the board and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the board;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the board and the Minister and between the board and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a board charter and appointment letters setting out the individual duties and responsibilities of members of the board.

#### 38.5 Conclusion

Blindlib plays an important role in providing library services to those who read differently in South Africa – and, increasingly, in sub-Saharan Africa. In so doing, it makes a contribution to countering the social marginalisation of disabled persons. As a repository of knowledge, it also plays a vital role in the ability of disabled people to become more socially, professionally and intellectually empowered. Legislation should



help, rather than hinder, Blindlib in achieving its mission and, in so doing, furthering the commitment to equality entrenched in the Bill of Rights.

### 38.6 Summary of recommendations on South African Library for the Blind Act 91 of 1998

Policy recommendations		
<b>Integrated policy and delivery framework</b>		<p>The role of the Blindlib and the mechanisms through which it interacts with other institutions and agencies should be spelt out in an integrated policy and delivery framework for the sector. This should <i>inter alia</i> address the matters set out below-</p> <ul style="list-style-type: none"> <li>the role of Blindlib as a national institution;</li> <li>renaming the Act and institution;</li> <li>broadening the definition of Blindlib's constituency;</li> <li>clarifying the relationship between Blindlib and NCLIS;</li> <li>Blindlib as a place of legal deposit;</li> <li>public interest copyright exceptions.</li> </ul>
Legislative recommendations		
<b>Section 1</b>	<b>Definitions</b>	<p>The definition of "document" to be extended to provide for electronic and digital information. The definition of "Minister" to be updated. Offensive definitions (blind and print-handicapped readers) to be amended. Definitions of "audio document" and "form" to be updated. Amendment required.</p> <p>Definitional amendment is required in order to broaden the constituency served by Blindlib to include all those disabilities which negatively affect their ability to read in the usual manner.</p>
<b>Section 2</b>	<b>South African Library for the Blind</b>	Stakeholder proposals that the name of the library be changed to the National Library for the Blind. Amendment required.
<b>Section 4</b>	<b>Functions of Library for the Blind</b>	The functions of the Blindlib should be extended to performing the role of a place of legal deposit for material in alternative formats.
<b>Section 6</b>	<b>Board of Library for the Blind</b>	<p>The provision governing the removal of members of board by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.</p> <p>Amendment required ensuring broad and appropriate consistency of institutional processes and arrangements.</p>
<b>Sections 13 and 14</b>	<b>Financing of Library for the Blind, auditing and annual report</b>	<p>The National Library for the Blind is a listed, schedule 3 public entity in terms of the Public Finance Management Act, 1999 - but ss13 and 14 are not consistent with its provisions. In this regard, the PFMA requires:</p> <ul style="list-style-type: none"> <li>submitting for approval at least 6 months before the start of a financial year, a budget of estimated revenue and expenditure (s53(1));</li> </ul>

		<ul style="list-style-type: none"> <li>submitting financial statements for each financial year to the auditors of the entity, within 2 months of the end of that financial year (s55(1)(c);</li> <li>submitting within 5 months of end of a financial year, an annual report of its activities during the year, audited financial statements for that year and a report of the auditors on those statements (s55(1)(d)).</li> </ul> <p>Amendment required providing consistency with the PFMA.</p>
	<b>Public interest copyright exceptions</b>	<p>Amendment recommended to incorporate statutory copyright exceptions in accordance with Part III of the Report. This statutory copyright exception should-</p> <ul style="list-style-type: none"> <li>apply to people with print disabilities (defined to include persons who are blind or whose sight is severely impaired, have a physical impairment or an impairment related to comprehension);</li> <li>provide for the right to reproduce or adapt works for people with print disabilities in an alternative format which renders it accessible to them (the needs of visually impaired people vary enormously and suitable accessible formats might therefore include large print publications, audio recordings, photographic enlargements, Braille, electronic Braille, digital copies that are compatible with screen-reading software and digital talking books);</li> <li>restrict the right to reproduce or adapt works for this purpose to people with print disabilities themselves (the so called "one-for-one" or "private use" exception), the South African Library for the Blind and institutions accredited by it for this purpose (such as Blind SA and the Institute for the Blind);</li> <li>require that persons who reproduce or adapt works for this purpose must be in lawful possession of the works, and that the works must be lawfully available to the public;</li> <li>require that the reproduced or adapted work must acknowledge the origin of the work and contain a copyright warning (in a form appropriate to the format concerned);</li> <li>require persons reproducing or adapting work in terms of the exceptions to take reasonable care to prevent unauthorised distribution of the work;</li> <li>provide for the distribution (including rental and lending of works in alternative formats) and for cross-border movement of alternative formats (through institutions recognised for this purpose by the Library for the Blind);</li> <li>recognise alternative format works that are produced in terms of laws permitting such production beyond the jurisdiction of South Africa, and which are distributed on a non-profit basis in South Africa;</li> <li>require copyright owners, when requested to do so by the South African Library for the Blind, to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions (where reasonably practicable) on terms to be agreed by the parties, or failing agreement, by the National</li> </ul>

		<p>Council of Library and Information Services (NCLIS);</p> <ul style="list-style-type: none"> <li>allow the South African Library for the Blind to circumvent digital rights management features of works, where copyright owners refuse or fail to provide the Library with copies of works in a format that ensures the effective implementation of the exceptions, on terms determined by NCLIS.</li> </ul>
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>qualifications for and disqualifications from membership;</li> <li>removal of members, vacancies and filling of vacancies and the dissolution of the board;</li> <li>remuneration of members of the board and the reimbursement of their expenses;</li> <li>quorums for meetings, manner of decision making and voting thresholds;</li> <li>delegation of powers and functions by the board;</li> <li>reporting, performance review and accountability mechanisms (including service level or performance agreements between the board and the Minister and between the board and its executive management);</li> <li>the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>a board charter and appointment letters setting out the individual duties and responsibilities of members of the board.</li> </ul>

## 39 Legal Deposit Act 54 of 1997

*"Legal deposit is a tried and tested method used all over the world to ensure that a nation's published documentary heritage is preserved for present and future generations."<sup>293</sup>*

### 39.1 Introduction

The Legal Deposit Act provides for the preservation of the national documentary heritage through legal deposit of published documents. The Act seeks to ensure the preservation and cataloguing of, and access to, published documents emanating from, or adapted for, South Africa. The Act provides for a Legal Deposit Committee to advise the Minister on matters related to the Act.

The primary purpose of libraries is to assemble collections of published materials and make these accessible to the public. Over the years, national libraries have been able to develop their print collections through legal deposit systems which place a legal requirement on publishers to deposit copies of publications in a designated institution. This ensures that published documentary heritage of the nation is collected, recorded, preserved and made accessible to the nation.

While legal deposit related initially to books, or works on paper, it has, over the years, been extended to include audiovisual and electronic publications.

### 39.2 Historical background to the legislation

#### 39.2.1 Origins of the legal deposit system

The principle of legal deposit, aimed at the development and preservation of a national collection of published material, dates back to 1537 when King Francois of France issued a royal decree forbidding the sale of any book before a copy had been deposited in the library of his castle. Interestingly, the legal deposit provisions were abolished under the French Revolution, in the name of liberty, and reinstated later as a formality to obtain copyright protection. Legal deposit systems were later put in place in other European countries, including Belgium (1594), Great Britain (1610), Sweden (1661), Denmark (1697), Finland (1702) and in the USA (1790).<sup>294</sup>

While the original objective of legal deposit was to facilitate the development of a royal or national collection, it was, in later years, used by some as a means of

<sup>293</sup> Deputy Minister of Arts, Culture, Science and Technology, Brigitte Mabandla, Legal Deposit Bill, Second Reading Debate, 16 September 1997.

<sup>294</sup> [www.ifla.org](http://www.ifla.org). Accessed 21 February 2007.

obtaining trading privileges and by others as a means of surveillance and to facilitate censorship.

From the 18<sup>th</sup> century, legal deposit became a formality for obtaining the legal protection of copyright. However, the Berne Convention for the Protection of Literary and Artistic Works, 1886, stated that, “*enjoyment and exercise of the right to protection of literary and artistic work shall not be subject to any formality*,”<sup>295</sup> putting an end to that, and legislation which made legal deposit a requirement to obtain copyright protection was abolished. Many countries did, however, choose to create legislation requiring the deposit of published material.<sup>296</sup>

### 39.2.2 The British Copyright Acts of 1842 and 1911

In South Africa, legal deposit can be traced back to 1842, when the British *Copyright Act* extended legal deposit arrangements to British dominions and territories, requiring publishers to deposit one copy of every book printed in the British Museum. The British *Copyright Act of 1911*<sup>297</sup> made provision for the continuation of this system in self-governing dominions, provided that it be declared in the legislature of that dominion. This led to the promulgation of the Patents, Designs, Trade Marks and Copyright Act 9 of 1916, which required publishers of every book published in the Union of South Africa to deposit one copy with the British Museum and one copy in a designated library in each of the four provincial capitals: the South African Public Library, Cape Town; the Library of the Natal Society, Pietermaritzburg; the State Library, Pretoria; and the Bloemfontein Public Library<sup>298</sup>. The Copyright Amendment Act 22 of 1950<sup>299</sup>, extended the legal deposit requirement to include the Library of Parliament, Cape Town.

### 39.2.3 The Copyright Act 63 of 1965

While Britain repealed its 1911 Copyright Act in 1956, it remained in place in South Africa, until 1965 when copyright legislation was substantially revised. In terms of the 1965 Act,<sup>300</sup> South African publishers were no longer obliged to deposit copies of every book printed in the British Museum, only in the five local institutions.

### 39.2.4 The Legal Deposit of Publications Act 17 of 1982

The Legal Deposit of Publications Act 17 of 1982, separated legal deposit from copyright legislation, provided for copies of certain publications to be supplied free of

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<sup>295</sup> Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886.

<sup>296</sup> [www.ifla.org](http://www.ifla.org). Accessed 21 February 2007.

<sup>297</sup> Patents, Designs, Trademarks and Copyright Act 9 of 1916, Third Schedule.

<sup>298</sup> Patents, Designs, Trademarks and Copyright Act 9 of 1916, Section 150.

<sup>299</sup> Copyright Amendment Act 22 of 1950, Section 1.

<sup>300</sup> Copyright Act 63 of 1965, Section 46.

charge to certain libraries,<sup>301</sup> made provisions for publishers to be exempted under certain conditions, and imposed certain obligations on the receiving institutions.

#### 39.2.5 The Legal Deposit Act 54 of 1997

The Legal Deposit Act 54 of 1997 extended the range of publications to be deposited to include audiovisual and electronic media; made provision for official publications to be deposited in each of the provinces; extended the places of legal deposit to include the National Film, Video and Sound Archives, Pretoria, as well as any other library or institution prescribed by the Minister for purposes of certain prescribed categories of documents as places of deposit or official publications depositories; detailed the duties of places of legal deposit; made provision for the establishment of the Legal Deposit Committee to coordinate and promote the implementation of the Act and to advise the Minister on any matters dealt with in the Act and made provision for remedying non-compliance.

### 39.3 Key issues

The policy issues, gaps and challenges identified below are drawn from meetings and submissions from stakeholders, a review of relevant documents and a comparative analysis of international precedents and practice.

Overarching policy issues affecting the libraries and information services sector are set out elsewhere in this Report and aspects of these specific to legal deposit have been noted below.

#### 39.3.1 An integrated policy and delivery framework

The role of the Legal Deposit Committee, places of legal deposit and official publications depositories and the mechanisms through which these interact with other institutions and agencies should be spelt out in an integrated policy and delivery framework for the sector. The policy should address *inter alia* the matters set out below.

#### 39.3.2 The role of the Legal Deposit Committee as a national institution

If the Legal Deposit Committee, places of legal deposit and official publications depositories, are to function as national institutions in accordance with the structure proposed in Part III of this Report will be required to implement national policy.

#### 39.3.3 Status and composition of the Legal Deposit Committee

The Legal Deposit Committee is constituted as an advisory body. The composition of the Committee should be reconsidered to provide for broader

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<sup>301</sup> Legal Deposit of Publications Act 17 of 1982.

representation including, for example, a representative of the South African Library for the Blind.

#### 39.3.4 Implementation and non-compliance with the provisions of the Act

There are significant gaps between the intention of the Act and its implementation. The NFVSA, for example is a place of legal deposit, but producers do not adhere to regulations to deposit material, possibly because of the high cost of doing so. Consideration should be given to implementing more punitive measures for non-compliance. The Legal Deposit Committee has initiated a process to “market” compliance.

#### 39.3.5 Places of legal deposit

There are an increasing number of places of legal deposit. A policy decision is required on this issue and criteria against which applications can be assessed should be drafted. In considering this matter, attention should be given to the issue of capacity and infrastructure. The Library of Parliament, for example, needs to cut back on its holdings as it does not have sufficient space. Attention should also be given to the particular constraints that apply to the legal deposit of alternative format publications, which are not easily manageable by places of legal deposit designed specifically to deal with paper-based materials. In our view it would be appropriate for BlindLib, to become a place of legal deposit in respect of publications intended for people who read differently.

#### 39.3.6 Public interest copyright exception

Places of legal deposit are tasked with safeguarding and conserving documents and making these accessible. These ends would be better served by introducing the public interest copyright exception contemplated in Part III of this Report.

#### 39.3.7 Legal deposit of electronic publications

Over the years, legal deposit requirements have evolved to include the development of new means and types of publishing such as audiovisual materials, and responsibility for receiving, recording and making available the deposit collections has, in some cases, shifted to other institutions.<sup>302</sup>

One of the key challenges facing the Libraries and Information Services sector is the collection and preservation of electronic publications, as noted by IFLA “*these issues represent the biggest challenge that legal deposit has ever had to face because of the incredible complexity of legal, organisational, technical and operational aspects related to the implementation of a legal deposit scheme for*

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<sup>302</sup> In South Africa, for example, the National Film, Video and Sound Archives was declared as a place of legal deposit in 1997 and is responsible for all receiving, recording and making accessible audio-visual material.

*electronic publications*.<sup>303</sup> This complex issue affects intellectual property, copyright, legal deposit, archival and other national concerns.

Policy is required to address this issue and should take into account the challenges detailed below.

IFLA Guidelines for Legal Deposit Legislation note that attention must be made to the definition of materials to be deposited and that terminology should be as inclusive as possible to ensure that electronic publications are covered regardless of the type of carrier. The Legal Deposit Act 54 of 1997 makes provision for the deposit of electronic publications, referring to *documents* to be deposited as being "*any object which is intended to store or convey information in textual, graphic, visual, auditory or other intelligible format through any medium,*" and to '*published*' as meaning "produced to be generally available in multiple copies or locations to any member of the public, whether through purchase, hire, loan, subscription, licence or free distribution."<sup>304</sup>

The IFLA Guidelines draw attention to two main categories of electronic publications that should be included in legal deposit law: offline or tangible publications which are made available on physical carriers such as CD-ROMs; and online material, characterised by the fact that it is stored in a computer system or on the world wide web (internet), which may include databases, electronic journals or books, etc. It is noted that the '*dynamic electronic publications*' are the most difficult to deal with from a legal deposit point of view because they are constantly updated. In South Africa, regulations have been promulgated for certain tangible electronic documents such as CD-ROMs, which may be handled in a manner similar to books,<sup>305</sup> but a comprehensive system for the implementation of legal deposit of electronic material has still to be developed and implemented.

Another area of concern, from a legal deposit perspective, is what IFLA defines as '*organised public communications*' sent over open networks. There is a view that these may be categorised as personal or private correspondence and so excluded from legal deposit requirements.

It is essential that places of legal deposit be in a position, both legally and technically, to store electronic publications for future use. Conservation needs may differ considerably from those associated with print publications.

From a technical point of view, users must be able to access electronic publications both currently and retrospectively. Legislation needs to take into account the collection of associated software, manuals and hardware needed to ensure access in the future. Provisions also need to be made for the conversion of materials into

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<sup>303</sup> [www.ifla.org](http://www.ifla.org), accessed on 21 February 2007.

<sup>304</sup> These definitions are quoted as an example of best practice in the IFLA Guidelines for Legal Deposit Legislation.

<sup>305</sup> Letshela P Z and Lor P J, Implementing legal deposit of electronic publications in Africa: Progress Report from South Africa and Namibia, 68<sup>th</sup> IFLA Council and General Conference, 2002.



new formats, or the migration of material into new operating systems, without infringing other laws, such as those associated with intellectual property or copyright.

Electronic publications held in places of legal deposit need to be strictly controlled to prevent unlawful reproduction or usage.

#### **39.4 Recommendations for legislative amendment**

##### **39.4.1 Section 1 - Definitions**

Definitions of “Department” and “Minister” are outdated. Also outdated references to institutions and laws require attention. The reference to the “Reporting by Public Entities Act, 1992” should be replaced by a reference to the “Public Finance Management Act, 1999”. Amendment required.

##### **39.4.2 Sections 2, 5 and 6 - Deposit of documents and information, exemptions and places of legal deposit**

Outdated references to institutions. Amendment required.

The South African Library of the Blind should be declared to be a place of legal deposit for alternative format publications.

##### **39.4.3 Section 8 - Legal deposit committee**

The provision governing the removal of members of the committee by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment recommended.

Inappropriate requirement for Minister to appoint the chairperson of the legal deposit committee in consultation with unidentified interest groups. Amendment recommended.

There is no provision for the performance of administrative and secretarial functions of the committee. Amendment required to provide for administrative support to the committee.

Membership of the committee should be amended to include a representative of the South African Library for the Blind.

##### **39.4.4 Section 10 - Action to remedy non-compliance**

Inappropriate requirement that decision to institute civil proceedings against a publisher be made in consultation with the committee.

Amendment required.

#### 39.4.5 Public interest copyright exception

Amendment required to accommodate copyright concerns regarding legal deposit, preservation and conservation. The exception should-

- allow places of legal deposit to make copies (including digital copies) of works in their lawful possession for purposes of preservation, replacement or security;
- prohibit the making of copies for commercial advantage;
- in respect of works subject to copyright, copies must contain an appropriate copyright warning and digital copies may not be made available to the public in that format outside the premises of the place of legal deposit;
- places of legal deposit should be allowed to circumvent digital rights management features of works, where copyright owners refuse or fail to provide them with copies of works in a format that ensures effective implementation of the exemptions, on terms determined by NCLIS.

#### 39.4.6 Governance review of heritage institutions

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the committee;
- remuneration of members of the committee and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the committee;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the committee and the Minister);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;

- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a committee charter and appointment letters setting out the individual duties and responsibilities of members of the committee.

### 39.5 Summary of recommendations on the Legal Deposit Act 54 of 1997

Policy recommendations		
<b>Integrated policy and delivery framework</b>		<p>The role of the Legal Deposit Committee, places of legal deposit and official publications depositories and the mechanisms through which these interact with other institutions and agencies should be spelt out in an integrated policy and delivery framework for the sector. The policy should address <i>inter alia</i> the matters set out below-</p> <ul style="list-style-type: none"> <li>• role of Legal Deposit Committee as a national institution;</li> <li>• status and composition of the Legal Deposit Committee;</li> <li>• implementation and non-compliance with the provisions of the Act;</li> <li>• places of legal deposit;</li> <li>• public interest copyright exceptions;</li> <li>• legal deposit of electronic publications.</li> </ul>
Legislative recommendations		
<b>Section 1</b>	<b>Definitions</b>	Definitions of "Department" and "Minister" are outdated. Also outdated references to institutions and laws require attention. The reference to the "Reporting by Public Entities Act, 1992" should be replaced by a reference to the "Public Finance Management Act, 1999". Amendment required.
<b>Sections 2, 5 and 6</b>	<b>Deposit of documents and information, exemptions and places of legal deposit</b>	<p>Outdated references to institutions. Amendment required.</p> <p>The South African Library of the Blind should be declared to be a place of legal deposit for alternative format publications.</p>
<b>Section 8</b>	<b>Legal deposit committee</b>	<p>The provision governing the removal of members of the committee by the Minister is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness. Amendment recommended.</p> <p>Inappropriate requirement for Minister to appoint the chairperson of the legal deposit committee in consultation with unidentified interest groups. Amendment recommended.</p> <p>There is no provision for the performance of administrative and secretarial functions of the committee. Amendment required to provide for administrative support to the committee.</p> <p>Membership of the committee should be amended to include</p>

		a representative of the South African Library for the Blind.
<b>Section 10</b>	<b>Action to remedy non-compliance</b>	Inappropriate requirement that decision to institute civil proceedings against a publisher be made in consultation with the committee. Amendment required.
	<b>Public interest copyright exception</b>	<p>Amendment required to accommodate copyright concerns regarding legal deposit, preservation and conservation. The exception should-</p> <ul style="list-style-type: none"> <li>allow places of legal deposit to make copies (including digital copies) of works in their lawful possession for purposes of preservation, replacement or security;</li> <li>prohibit the making of copies for commercial advantage;</li> <li>in respect of works subject to copyright, copies must contain an appropriate copyright warning and digital copies may not be made available to the public in that format outside the premises of the place of legal deposit;</li> <li>places of legal deposit should be allowed to circumvent digital rights management features of works, where copyright owners refuse or fail to provide them with copies of works in a format that ensures effective implementation of the exemptions, on terms determined by NCLIS.</li> </ul>
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>qualifications for and disqualifications from membership;</li> <li>removal of members, vacancies and filling of vacancies and the dissolution of the committee;</li> <li>remuneration of members of the committee and the reimbursement of their expenses;</li> <li>quorums for meetings, manner of decision making and voting thresholds;</li> <li>delegation of powers and functions by the committee;</li> <li>reporting, performance review and accountability mechanisms (including service level or performance agreements between the committee and the Minister);</li> <li>the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>a committee charter and appointment letters setting out the individual duties and responsibilities of members of the committee.</li> </ul>

## 40 National Archives and Records Service of South Africa Act 43 of 1996

*"The archives of a nation constitute its most precious treasure. The archives of a nation are its greatest monument. The archives of a nation constitute the most wonderful memory a nation can possess. That is why public documents ought to be accessible to researchers."*<sup>306</sup>

### 40.1 Introduction

The National Archives and Records Service of South Africa Act 43 of 1996 makes provision for the proper care and management of government records, the use of the national archival heritage and the establishment of a National Archives Advisory Council.

The challenges faced by the National Archives and Records Service are reflected in the following note of the International Council on Archives:

*"archives constitute the memory of nations and of societies, shape their identity, and are a cornerstone of the information society. By providing evidence of human actions and transactions, archives support administration and underlie the rights of individuals, organisations and states. By guaranteeing citizens' rights of access to official information and to knowledge of their history, archives are fundamental to democracy, accountability and good governance."*<sup>307</sup>

### 40.2 Historical background to the law

#### 40.2.1 Colonial archives

South Africa's archive of public records dates back to 1651, when Jan van Riebeeck arrived at the Cape. Van Riebeeck's flagship, the Dromedaris, was the first repository of records that formed the basis of the Cape Colony's archive.<sup>308</sup> Public records of the former provinces of Natal, the Orange Free State and the Transvaal date back to early European settlement of these areas. In 1876, the Cape Government appointed a commission to assemble and describe the public records of the Colony. Further commissions, appointed in 1909 and 1918, and a report of the Chief Archivist, appointed in 1919, laid the foundations for the control and supervision of public records in South Africa.<sup>309</sup>

<sup>306</sup> H M J van Rensburg, *Archive Amendment Bill, Second Reading Debate*, House of Assembly, 6 March 1979.

<sup>307</sup> International Council on Archives, [www.ica.org](http://www.ica.org), accessed 6 April 2007.

<sup>308</sup> George, M "Treasure House of Documentary Heritage: Cape Town Archives Repository", in *Cape Libr.*, Sept/Oct 2002.

<sup>309</sup> Botha, G C, *The Public Archives of South Africa, 1652-1910*, Cape Times Limited, 1928, page ii-v.

#### 40.2.2 Public Archives Act 6 of 1922

By 1922, the public archives comprised of the Union Archives (public records from the Union government departments) and the archives of the four provinces. The Public Archives Act 6 of 1922 established four important principles; firstly, that care for the records of the Union and provincial government departments was the responsibility of central government; secondly, that archive services should be decentralised, but placed under one central administration; thirdly, that records held by the archives should be made available to the public under certain conditions; and lastly, that a commission should be appointed by the Minister “from time to time” to advise and make recommendations regarding matters pertaining to the archives.<sup>310</sup> While this Act established a coherent framework for archives, it did not address the issue of documenting the full scope of the nation’s past.<sup>311</sup>

#### 40.2.3 Archives Act 22 of 1953

The Archives Act 22 of 1953 replaced the 1922 Act which had been outdated. Amongst other matters, this Act made provision for the Archives Depot of South West Africa to be placed under the control of the Chief Archivist of the Union.

#### 40.2.4 Archives Act 6 of 1962

The growth and expansion of the Republic, and of the Archives Service during the 1950s necessitated the revision and amendment of existing legislation.<sup>312</sup> The 1953 Act was repealed in its entirety and replaced by the Archives Act 6 of 1962, which brought the Archives Service under a single Ministry (the Ministry of Education, Arts and Science) brought under the control of the Minister, responsibility for all documents in government and local authority offices and made provision for the establishment of “interim depots.”<sup>313</sup> The Bureau of Heraldry was transferred to the Office of the Director of Archives in 1962 and the Director was mandated to liaise with the Historical Monuments Commission and the Department of Education, Arts and Science.

The Archives Act 6 of 1962 was amended on a number of occasions-

- The Archives Amendment Act 12 of 1964 introduced a number of minor administrative shortcomings;.

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<sup>310</sup> Public Archives Act, No 9 of 1922, Union of South Africa.

<sup>311</sup> Republic of South Africa, 1996, Debates of the National Assembly, *Second Reading, National Archives of South Africa Bill*, 28 August 1996: 40-46.

<sup>312</sup> Republic of South Africa, 1962, Debates of the House of Assembly, *Second Reading, Archives Bill*, 12 February 1962: 983.

<sup>313</sup> Republic of South Africa, 1962, Debates of the House of Assembly, *Second Reading, Archives Bill*, 12 February 1962: 984.

- The Archives Amendment Act 63 of 1969 amended certain administrative provisions relating to definitions, archives depots, the acquisition of documents and records, the temporary transfer of archives and access to archives;
- The Archives Amendment Act 54 of 1977 made provision for the Minister to declare a statutory body as a 'government office' in terms of the Act;
- The Archives Amendment Act 32 of 1979 gave responsibility for deciding which records should be destroyed and which permanently preserved (previously entrusted to the Archives Commission) to the Director of Archives, reduced the period of time that had to elapse before archives and accessions were made available to the public and dealt with certain administrative issues.<sup>314</sup>

#### 40.2.5 Devolution of archival functions

Until the 1980s, the Archives Service was highly centralised, with its head office in Pretoria and archive repositories in the four provincial capitals. From 1989, certain functions were devolved to the regions – the former Transvaal, Orange Free State, Natal and the Cape, with repositories in Cape Town, Pretoria, Port Elizabeth, Pietermaritzburg, Durban and Bloemfontein. The archives depots in the four former provincial capitals were kept under tight control, while the archives services in the former 'homelands', in keeping with the then government's policy of separate development, were cut loose from the State archives.

Public archival services in the former 'homelands' were provided for in terms of separate 'homeland' legislation based on the Archives Act, but these were at best rudimentary and at worst non-existent. In terms of Section 235 (9) of the Interim Constitution, all laws with regard to matters falling within the functional area of culture were assigned to the Minister of Arts, Culture, Science and Technology. This included archival legislation administered by the former 'homelands'.<sup>315</sup>

With the restructuring of government and government departments in 1994, the National Archives and Records Service became a programme of the Department of Arts, Culture, Science and Technology.<sup>316</sup>

#### 40.2.6 National Archives of South Africa Act 43 of 1996

In 1995, the Council of Culture Ministers approved a proposal that the Archives Act be repealed and replaced. The Technical Committee on Culture decided that a consultative forum should be established to determine the mechanism for the drafting of this legislation. A broadly representative Consultative Forum for Archival

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<sup>314</sup> Republic of South Africa, 1979, Debates of the House of Assembly, *Second Reading, Archives Amendment Bill*, 6 March 1979: 1905-1906.

<sup>315</sup> Arts and Culture Task Group Report, 1996: pg 77.

<sup>316</sup> About the National Archives and Records Service of South Africa, [www.national.archives.gov.za](http://www.national.archives.gov.za), accessed 12 June 2006.

Management and Legislation was established in 1995, which prepared a draft on which the Act was based.

In introducing the Act in Parliament, the Minister noted that it-

- made provision for the devolution of archival functions to the provinces in accordance with the Constitution;
- addressed the creation of a national archival service with a strong supportive role for the provinces;
- obliged the National Archives to set standards for and support provincial archival services; and
- required the National Archives to provide a full range of archival services for the provinces which were not yet in a position to sustain an archival service.<sup>317</sup>

The Act provided obligations with regard to the preservation of public and non-public records and obliged the National Archives to pay special attention to marginalised aspects of the nation's history and to prevent the alienation or destruction of non-public records of enduring value.<sup>318</sup>

The Act established the National Archives and Records Service of South Africa and stipulated its mission to foster a national identity and to protect rights by preserving a national archival heritage for use by the government and people of South Africa and by promoting efficient, accountable and transparent government through the proper management and care of government records.

#### 40.2.7 Cultural Laws Amendment Act 36 of 2001

The Cultural Laws Amendment Act 36 of 2001 renamed the 1996 Act as the National Archives and Records Service of South Africa Act and provided for the establishment of the National Archives Advisory Council (in place of the National Archives Commission).<sup>319</sup> The role of the National Archives Advisory Council was to advise the Minister and the Director-General of Arts and Culture on any matter relating to the operation of the Act, to advise the National Archivist on furthering the objects and functions of the National Archives, to advise and consult with the South African Heritage Resources Agency on the protection of records forming part of the National Estate and to consult with the Public Protector on investigations into unauthorised destruction of records otherwise protected under the Act.

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<sup>317</sup> Republic of South Africa, 1996, Debates of the National Assembly, *Second Reading, National Archives of South Africa Bill*, 28 August 1996 : 4047.

<sup>318</sup> Republic of South Africa, 1996, Debates of the National Assembly, *Second Reading, National Archives of South Africa Bill*, 28 August 1996 :4048.

<sup>319</sup> Cultural Laws Amendment Act, No 36 of 2001, Republic of South Africa.



### 40.3 Key issues

#### 40.3.1 Acquisition of and access to information

Public archives constitute a significant resource for dealing with the social memory of the nation, and have a significant role to play in promoting social cohesion. They help us to understand who we are, as individuals, organisations or as a society and where we come from. By allowing us to access information about the past, they help us to understand the present, plan for and imagine the future.

Archives, be they part of the national system, private, corporate, academic or linked to other heritage initiatives face a number of challenges relating to the processes through which decisions are made about which records are preserved and which discarded, what forms of records to keep and how to maintain and preserve these for the future and, how to determine who may access the records and under what conditions.

Archives are challenged to ensure that the documents that they collect and manage reflect the experiences of and are accessible to all South Africans. This implies 'the need to document society actively, with special emphasis on creating spaces for voices previously excluded; the need to make the process of constituting the archive both transparent and accountable; the need to open the archive according to the principles of 'freedom of information'; the need to overcome systemic barriers to accessing the archive; and the need to develop new publics for archives.'<sup>320</sup>

This presents a number of further challenges, responses to which are to be found in the manner and mechanisms through which the activities of the archive intersect with those of other organisations and institutions – including museums and libraries who share custody of the national estate. This complex interaction needs to be addressed in archival policy and legislation.

Noting that 'The records of government are a key instrument of efficient administration and planning, and the means by which citizens hold governments accountable to them,<sup>321</sup> and that these records are also essential for the effective day-to-day management of government business, another challenge relates to the nature of information to be collected in order to create an archive that reflects the full gamut of the nation's experience. While the consultative process focussed on the need to differentiate between material of 'national' and 'provincial' significance, the balance between public and non-public records also needs to be negotiated, as does the relationship between the national system and the private, academic and community based organisations and institutions whose records constitute 'non-

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<sup>320</sup> Invitation to a conference, National System, Public Interest, co-convened by the National Archives, the Nelson Mandela Foundation and the University of the Witwatersrand, April 2007.

<sup>321</sup> *Archives at the Crossroads, 2007*, open report to the Minister of Arts and Culture from the Archival Conference 'National System, Public Interest' held in April 2007 and co-convened by the National Archives, the Nelson Mandela Foundation and the Constitution of Public Intellectual Life Research Project, p 1

public records with enduring national significance' and that add value and meaning to the national collections.

A third challenge relates to the issue of including in the archives, the records of the past that reside in people's memories, stories and songs in performance and oral rather than written form. This requires that the archive interact and work with the range of cultural and scientific institutions concerned with intangible heritage and indigenous knowledge systems.

A fourth challenge relates to the issue of access to the records of archives and the mechanisms that are put in place to balance national and public interest; the right to information and the right to privacy.

The fifth challenge relates to the rapid development of information technologies which have created a new environment in which the role of traditional information services must be revised so that both the content of the document and the physical form in which this is carried are preserved for future generations.

A final critical challenge relates to using the archives proactively, not just collecting or managing them, for what use is a resource if it is not constructively employed? If archives are to play a role in nurturing and building social cohesion, the potential they have to facilitate remembering and forgetting, acknowledging and healing must be utilised. At the end of the day the critical question is not what we collect or how we manage it, but why we collect and preserve evidence of past actions for the future and how we use this material to inform the future.

Public archives constitute a significant resource for dealing with the social memory of the nation. However, they can only fulfil their potential if the documents they collect and manage reflect the experiences of, and are accessible to, all South Africans.<sup>322</sup> If archives are to play a role in nurturing and building social cohesion, the potential they have to facilitate remembering and forgetting, acknowledging and healing must be utilised. At the end of the day, the critical question is not what we collect or how we manage it, but why we collect and preserve evidence of past actions for the future.

The role and function of the archives and guidelines for access to and use of material housed in these must be informed by the broader vision and principles that underpin heritage policy.

#### **40.3.2 An integrated policy and delivery framework**

It is recommended that a national archives and records policy that addresses the roles and responsibilities of the three spheres of government (and their associated institutions) and outlines mechanisms for engagement in respect of the preservation

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<sup>322</sup> Invitation to a conference, National System, Public Interest, co-convened by the National Archives, the Nelson Mandela Foundation and the University of the Witwatersrand, April 2007.

of the country's documentary heritage be formulated. The policy should address *inter alia* the matters set out below.

#### 40.3.3 National Archives Advisory Council as a national sub-sector structure

If the National Archives Advisory Council is to function as a national sub-sector structure, in accordance with the structure proposed in Part III of this Report, its functions will need to be amended accordingly to include:

- advising the Minister on policy, legal and fiscal frameworks;
- advising the Minister on the allocation of resources;
- establishing national norms and standards .

#### 40.3.4 The National Archives and Records Service as a national institution

The National Archives and Records Service, as a national institution in terms of the structure proposed in Part III of the Report will implement national policy.

#### 40.3.5 National and provincial legislative competencies

Schedule 5 of the Constitution lists archives, other than national archives, as an area of exclusive provincial legislative competence, but the National Archives and Records Service of South Africa Act 43 of 1996 makes provision for national and provincial archives. The Act speaks only to national archives.

The critical issues to address are: the role and function of provincial and local archives: the mechanisms through which these bodies interact; and what constitutes a 'national' or 'provincial' record.

The issue of funding of provincial archives is problematic. Some of the provinces consider the establishment of provincial archives to be a national function and are not prepared to provide funds from provincial treasuries. Other provinces lack capacity and expertise to establish and operate archives. This issue requires clarification in policy and legislation.

A national strategy that incorporates the provinces is required. Provincial archives are currently independent, i.e. they do not report to the national archive, but the national archive advises and sets the systems and standards for managing the records.

#### 40.3.6 Interaction with other government departments and structures

Functions related to this Act are dealt with by one national authority but are spread across various local government departments.

All spheres of government should share functions and resources in respect of local legal records, regional offices of national government and the historical records of previous administrations.

All institutions and local government structures need to escalate the implementation of this Act through provincial speakers and city managers.

#### **40.3.7 National Film, Video and Sound Archives**

The Act does not really relate to film, video and sound archives and must be amended to include these. Institutions such as the NFVSA, while not intended to serve a national function, do so because of cost implications for the provinces. NFVSA is a place of legal deposit, there is a problem because producers do not adhere to regulations, possibly because of the high cost of doing so. While the Act may include penalties for non-compliance, it is recommended that the NFVSA continue to pursue a policy of encouraging compliance, investigate the reasons for non-compliance and work with the industry to resolve them.

#### **40.3.8 Conservation and protection of archival records**

A policy on the conservation of the national documentary heritage should be agreed upon by the three affected institutions; the National Library, the South African Heritage Resources Agency and the National Archives and Records Service who are mandated to safeguard this. The relevant Acts should be amended in accordance with the provisions of a national documentary heritage conservation policy that details the role and function of each institution and the mechanisms through which they engage and interact with each other and with stakeholders to deliver a national service.

The National Heritage Resources Act protects material by imposing certain restraints on its removal from the country. We need to be sure that this protection is extended to include documentary heritage.

#### **40.3.9 Living heritage and indigenous knowledge systems**

Oral history archives are to some extent marginalised. Many of these lie in private or corporate collections and constitute an important heritage resource. The role of archives in documenting and preserving oral histories is noted.

It is recommended that the role of archives in relation to oral histories, living heritage, intangible heritage and indigenous knowledge systems be addressed within the framework on an integrated and cohesive policy on these issues.

#### **40.3.10 Public interest copyright exception**

Copyright exceptions that enable the National Archives to fulfil its mandate should be introduced as detailed in Part III of this Report.

#### 40.3.11 Electronic records

A policy is required to address the challenges posed by acquisition and preservation of electronic records. This should make provision for the collection of materials as well as the equipment required to make this accessible.

#### 40.3.12 Digitisation

While digitisation has been welcomed, in theory, as a solution to some of the problems associated with preserving and making documents accessible it has, in practice, proved to be highly contested and problematic, raising a number of economic, political, legal and moral problems. Some commentators have likened digitisation to a form of cultural imperialism.<sup>323</sup>

A national policy that takes into account issues of control, intellectual property rights, and provides guidelines on how to control and regulate the process of digitisation is required to address current conflicts and confusion arising out of various initiatives to digitise the country's documentary and published heritage.

#### 40.3.13 Terminology and definitions

Terminology and definitions for terms such as record, document, published, publisher and free distribution should where reasonably practicable be standardised in all information service related Acts administered by DAC, including the Legal Deposit Act, the National Archives of South Africa Act. Where appropriate, harmony should also be sought with other information technology laws such as the Electronic Communication Transaction Act and the Telecommunications Act should also be explored.

### 40.4 Recommendations for legislative amendment

#### 40.4.1 Section 1 - Definitions

The body of the Act contains redundant references to the Director-General: Arts, Culture, Science and Technology. This should be remedied by introducing an appropriate and updated definition of "*Director-General*" in the definitions to the Act.

The definition of "*record*" must be broadened to incorporate electronic and digital information.

The definition of "*governmental body*" must be reviewed and updated.

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<sup>323</sup> Britz, J. and Lor, P. A Moral Reflection on the digitisation of Africa's documentary heritage. *World Library and Information Congress: 69<sup>th</sup> IFLA General Conference and Council*, Berlin, 1-9 August 2003.

#### 40.4.2 **Section 3 - Functions of National Archives Advisory Council**

The functions of the National Archives Advisory Council should be expanded to include an appeal function in relation to decisions by the National Archivist in respect of granting access to archive records.

The objects and functions of the National Archives should be extended to include reference to supporting provincial archives, interaction with other relevant government departments and structures, conservation and protection of archival records and to living heritage and indigenous knowledge systems.

#### 40.4.3 **Section 6 - Composition of National Archives Advisory Council**

In our view, the current provincial representation on the council should be reviewed. The membership of the council currently includes 9 members nominated by the provinces and we believe that this composition serves to confuse the governance and inter-governmental co-ordination functions of the council. In our view the governance functions of the council will be better served by substantially reducing provincial representation on the structure and that the cause of inter-governmental co-ordination will be better served by establishing a specific statutory structure for this purpose.

In view of the appeal function which we recommend be performed by the Council, we recommend that the composition of the council should include as a member an experienced legal practitioner or a judge of the High Court.

#### 40.4.4 **Section 6 - Dissolution of the National Archives Advisory Council**

The provisions providing for the dissolution of the Council by the Minister are vulnerable to legal challenge on the grounds that they do not satisfy the requirements of administrative fairness.

#### 40.4.5 **Section 12 - Access and use**

Section 12(1)(b) of the Archives Act provides no grounds for how the National Archivist must exercise his or her discretion in deciding whether or not to give access to public documents that are less than 20 years old. In our view, the provisions of the Promotion of Access of Information Act should be followed in this regard. A separate access regime should not be provided for under the Archives Act.

The right of appeal provided for in section 12(3) appears to refer specifically to instances where access is refused because of the fragile condition of the document. This means it is not a general right of appeal that also applies to refusal to grant access in terms of section 12(1)(b).

A general right of appeal against refusals to provide access to archival records should be provided for.

**40.4.6 Section 13 - Management of public records**

Specific reference should be made in the Act to the national film, video and sound archives.

**40.4.7 Section 16 - Offences and penalties**

The penalties provided for in these sections require revision and updating.

**40.4.8 Public interest copyright exceptions**

The Act should be amended to introduce a copyright exception to enhance the performance of the mandate of public archives. The exception should provide for-

- public archives to be allowed to make copies (including digital copies) of works in their lawful possession for purposes of preservation, replacement or security;
- a prohibition on making copies for commercial advantage;
- in respect of works subject to copyright, copies to contain an appropriate copyright warning and digital copies not to be made available to the public in that format outside the premises of the archives;
- public archives to be allowed to circumvent digital rights management features of works where copyright owners refuse or fail to provide the archive with copies of works in a format that ensures the effective implementation of these exceptions, on terms determined by the NCLIS.

**40.4.9 Intergovernmental forum**

An appropriate intergovernmental forum should be established under the Act consisting of the National Archives and Record Service, provincial archives and appropriate local government institutions.

**40.4.10 Governance review of heritage institutions**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the council;
- remuneration of members of the council and the reimbursement of their expenses;

- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;
- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

#### 40.5 Summary of recommendations on National Records and Archives of South Africa Act 43 of 1996

Policy recommendations		
<b>Integrated policy and delivery framework</b>		<p>It is recommended that a national archives and records policy that addresses the roles and responsibilities of the three spheres of government (and their associated institutions) and outlines mechanisms for engagement in respect of the preservation of the country's documentary heritage be formulated. The policy should address <i>inter alia</i> the matters set out below-</p> <ul style="list-style-type: none"> <li>• National Archives Advisory Council as a national sub-sector structure;</li> <li>• National Archives and Record Service as a national institution;</li> <li>• national and provincial legislative competencies;</li> <li>• interaction with other government departments and structures;</li> <li>• national film, video and sound archives;</li> <li>• conservation and protection of archival records;</li> <li>• living heritage and indigenous knowledge systems;</li> <li>• public interest copyright exceptions;</li> <li>• electronic records;</li> <li>• digitisation.</li> </ul>
Legislative recommendations		
<b>Section 1</b>	<b>Definitions</b>	The body of the Act contains redundant references to the Director-General: Arts, Culture, Science and Technology. This should be remedied by introducing an appropriate and updated definition of



		<p><i>"Director-General"</i> in the definitions to the Act.</p> <p>The definition of <i>"record"</i> must be broadened to incorporate electronic and digital information.</p> <p>The definition of <i>"governmental body"</i> must be reviewed and updated.</p>
<b>Section 3</b>	<b>Functions of National Archives Advisory Council</b>	<p>The functions of the National Archives Advisory Council should be expanded to include an appeal function in relation to decisions by the National Archivist in respect of granting access to archive records.</p> <p>The objects and functions of the National Archives should be extended to include reference to supporting provincial archives, interaction with other relevant government departments and structures, conservation and protection of archival records and to living heritage and indigenous knowledge systems.</p>
<b>Section 6</b>	<b>Composition of National Archives Advisory Council</b>	<p>In view of the appeal function which we recommend be performed by the Council, we recommend that the composition of the council should include as a member an experienced legal practitioner or a judge of the High Court</p>
<b>Section 6</b>	<b>Dissolution of the National Archives Advisory Council</b>	<p>In our view, the current provincial representation on the council should be reviewed. The membership of the council currently includes 9 members nominated by the provinces and we believe that this composition serves to confuse the governance and inter-governmental co-ordination functions of the council. In our view the governance functions of the council will be better served by substantially reducing provincial representation on the structure and that the cause of inter-governmental co-ordination will be better served by establishing a specific statutory structure for this purpose.</p> <p>The provisions providing for the dissolution of the Council by the Minister are vulnerable to legal challenge on the grounds that they do not satisfy the requirements of administrative fairness.</p>
<b>Section 12</b>	<b>Access and use</b>	<p>Section 12(1)(b) of the Archives Act provides no grounds for how the National Archivist must exercise his or her discretion in deciding whether or not to give access to public documents that are less than 20 years old. In our view, the provisions of the Promotion of Access of Information Act should be followed in this regard. A separate access regime should not be provided for under the Archives Act.</p> <p>The right of appeal provided for in section 12(3) appears to refer specifically to instances where access is refused because of the fragile condition of the document. This means it is not a general right of appeal that also applies to refusal to grant access in terms of section 12(1)(b).</p> <p>A general right of appeal against refusals to provide access to archival records should be provided for.</p>
<b>Section 13</b>	<b>Management of public records</b>	<p>Specific reference should be made in the Act to the national film, video and sound archives.</p>
<b>Section 16</b>	<b>Offences and penalties</b>	<p>The penalties provided for in these sections require revision and updating.</p>

	<b>Public interest copyright exceptions</b>	<p>The Act should be amended to introduce a copyright exception to enhance the performance of the mandate of public archives. The exception should provide for-</p> <ul style="list-style-type: none"> <li>• public archives to be allowed to make copies (including digital copies) of works in their lawful possession for purposes of preservation, replacement or security;</li> <li>• a prohibition on making copies for commercial advantage;</li> <li>• in respect of works subject to copyright, copies to contain an appropriate copyright warning and digital copies not to be made available to the public in that format outside the premises of the archives;</li> <li>• public archives to be allowed to circumvent digital rights management features of works where copyright owners refuse or fail to provide the archive with copies of works in a format that ensures the effective implementation of these exceptions, on terms determined by the NCLIS</li> </ul>
	<b>Inter-governmental forum</b>	<p>An appropriate intergovernmental forum should be established under the Act consisting of the National Archives and Record Service, provincial archives and appropriate local government institutions.</p>
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• qualifications for and disqualifications from membership;</li> <li>• removal of members, vacancies and filling of vacancies and the dissolution of the council;</li> <li>• remuneration of members of the council and the reimbursement of their expenses;</li> <li>• quorums for meetings, manner of decision making and voting thresholds;</li> <li>• delegation of powers and functions by the council;</li> <li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li> </ul>

## 41 The Heraldry Act 18 of 1962

*"Our generation is indeed a privileged one. We are privileged more than any other generation to be part of this historic act of conceiving and designing new National Orders and the new Coat of Arms for this new democratic country. We are privileged as a generation to be part of the conception and design of a new national flag as well as develop a new national anthem. We are privileged to be part of the process of self-creation, of defining who we are and what we want to be."*<sup>324</sup>

### 41.1 Introduction

The Heraldry Act of 1962 makes provision for the establishment of a bureau of heraldry, a heraldry committee and a heraldry council and for the registration of coats of arms, badges and emblems. While having its origins in South Africa's colonial past, it was promulgated by the Nationalist Party government of the Republic in accordance with its policy of cutting all ties with the British Commonwealth.

The Bureau of Heraldry is responsible for the registration of coats of arms; badges and other emblems such as flags, seals, medals and insignia of rank and offices of order as well as the names and uniforms (colours) of associations and organisations, such as universities.<sup>325</sup>

### 41.2 Historical background to the law

#### 41.2.1 European heraldry

Heraldry is the use of designs and symbols, combined according to long-established rules (the laws of heraldry), to create a unique form of visual identification for individuals, groups, clans, association, institutions, cities, states and countries.

While the heraldic traditions and conventions referred to in the Heraldry Act have their origins in European practice, the use of visual symbols as a mark of identity has been practised throughout the world for thousands of years.

European heraldry is commonly believed to have originated in the 12<sup>th</sup> century as a means of identifying soldiers encased in armour. By the end of the 14<sup>th</sup> century, the use of coats of arms or badges had extended into civil society and had been adopted by towns, cities, craftsmen and dioceses as defining visual symbols of their identities. By the 15<sup>th</sup> century, heralds were acknowledged as the custodians of

<sup>324</sup> From the opening remarks by the Chancellor of National Orders, the Reverend Frank Chikane, at the Award Ceremony of the New National Orders, 2 December 2003.

<sup>325</sup> [www.national.archives.gov.za](http://www.national.archives.gov.za) accessed 5 February 2007.

armorial bearings and tasked with ensuring that each coat of arms remained different from all others and that armorial bearings conformed to conventions.

#### 41.2.2 Heraldry under the colonial powers

In the Cape, the early Dutch governors and commanders made use of their personal insignia. The first formal presentation of Arms was made to the City of Cape Town in 1804, even though no official body had been set up to control the use of Arms in the country.

From 1806, after the annexation of the Cape by the British, residents of the colony had access to the English and Scottish heralds. The remoteness of these heralds effectively limited the number of applications for Arms to a few leading figures and the larger civic authorities.<sup>326</sup>

#### 41.2.3 Protection of Names, Uniforms and Badges Act 23 of 1935

The Protection of Names, Uniforms and Badges Act 23 of 1935 provided for the registration of names, uniforms and badges of associations and institutions and afforded these a measure of legal protection. The Act did not provide for the registration of Arms of private individuals or local authorities - these continued to be dealt with by the British heralds.

In 1939, the Administrators of the four provinces of South Africa and South West Africa were authorised to record and protect the Arms of municipalities within their own provinces or territory. Private Arms remained unprotected, giving rise to the large-scale concoction and sale of Arms by unauthorised dealers.<sup>327</sup>

Following a recommendation of the Suid Afrikaanse Akademie vir Kuns en Wetenskap (SAAKW), the then Minister of Education, Arts and Science appointed a committee in 1955 to investigate the establishment of an Office of Heraldry in South Africa.

The committee reported in 1956 and concluded that -

*“it was inconceivable and untenable that a sovereign independent State like South Africa should be dependent on foreign channels in regard to heraldic matters.”*<sup>328</sup>

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<sup>326</sup> Information on the history of South African heraldry from Brownell F, *Heraldry in South Africa*, Optima, Volume 4 1984, pp 138-146.

<sup>327</sup> This practice is still evident today where stalls in shopping malls provide customers with a range of artefacts embellished with coats-of-arms generated from a computer database and customised for individual use.

<sup>328</sup> The Minister of Education, Arts and Science, Second Reading of the Heraldry Bill, 20 February 1962, *Assembly Debates*, 1962: 1380.

It recommended the establishment of a Bureau of Heraldry, headed by a State Herald, with a Heraldry Council as the national policy-making body.

South Africa's withdrawal from the Commonwealth in 1961 cut official links to the heralds in Britain, limiting control over heraldic representations in South Africa to five authorities – the Administrators and one central authority responsible for registering badges – none of whom were mandated or competent to judge the heraldic merits of the designs submitted to them.

#### 41.2.4 Heraldry Act 18 of 1962

The recommendations of the 1955 committee were incorporated into the Heraldry Act 18 of 1962, which came into effect in 1963. In his speech on the occasion of the second reading of this Bill, the then Minister noted that, *"before South Africa became a Republic the prerogative powers in regard to heraldry rested with Her Majesty the Queen, and such powers were exercised by Her Majesty on the advice of her Ministers in the Union through the medium of the College of Arms in London"*<sup>329</sup> and that, with the advent of the Republic, these powers had passed on to the State President. He further noted that the establishment of the Bureau of Heraldry, while serving to observe faithfully the general rules and principles of heraldic signs, would allow the country to, *"develop in a direction of our own which will breathe a genuine South African spirit."*<sup>330</sup>

The Bill was welcomed by Parliament as one that would *"have a great influence on our national life and on our awareness of nationhood."* Though it was noted that, *"there are many people in this country who say that this Bill and its aims smack of snobbery,"*<sup>331</sup> there was strong support for the notion that *"heraldry only began to be valued in Europe and in our country with the growing awareness of nationhood, and it is because we in the Republic are also beginning to realize the value of what is our own and developing the idea of honouring and retaining as a treasure everything that is our own, that this legislation is so very necessary."*<sup>332</sup>

While this was the first Act to deal with heraldry *per se*, it incorporated most of the provisions of the 1935 Act and the Bureau found itself responsible for the registration of a diverse range symbols and apparel. Five years after the Bureau was established, the Administrators relinquished their powers to record the Arms of civic authorities in the provinces and the Bureau has, ever since, been the sole heraldic registering authority in South Africa.

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<sup>329</sup> The Minister of Education, Arts and Science, Second Reading of the Heraldry Bill, 20 February 1962, *Assembly Debates*, 1962: 1382.

<sup>330</sup> The Minister of Education, Arts and Science, Second Reading of the Heraldry Bill, 20 February 1962, *Assembly Debates*, 1962: 1382.

<sup>331</sup> The Minister of Education, Arts and Science, Second Reading of the Heraldry Bill, 20 February 1962, *Assembly Debates*, 1962: 1387.

<sup>332</sup> The Minister of Education, Arts and Science, Second Reading of the Heraldry Bill, 20 February 1962, *Assembly Debates*, 1962: 1391.

The Heraldry Act has been amended several times-

- Act 54 of 1969 refined some definitions and processes and established a Heraldry Committee;
- Act 63 of 1980 was largely technical in nature, providing for amendments to certain processes and procedures;
- Act 22 of 1982 included the insertion of a penalty for the desecration of the coat of arms of the Republic.
- In his speech at the Second Reading of this Amendment Bill, the then Minister of National Education made mention of the 1981 amendment to the Constitution of the Republic which made *“malicious desecration of or display of contempt for the national flag of the Republic a punishable offence”*<sup>333</sup> and noted that the desecration of the flag during Republic Festival ceremonies that year had aroused deep feelings of indignation. He commented that *“the desecration or holding in contempt of our highest State symbols could obviously be used to promote conflict, to sow disorder and to defy and discredit the authority of the State.”*<sup>334</sup>
- In requesting that Parliament extend to the national coat of arms the same protection as afforded the national flag, the Minister noted that, *“equal protection is essential, because the effect of such desecration, in undermining the authority of the State and attacking the maiestas of the State can be equally serious. So we are not only concerned here with an emotional or sentimental matter, but also with a potential instrument for promoting chaos and conflict and undermining the authority of the State.”* In his impassioned plea, the Minister pointed out that the coat of arms of the former Boer republic and British colonies were perpetuated in the coats of arms of the four provinces which were in turn united in the coat of arms of the Republic in such a way that it *“unites the historic roots our State and the deep national sentiments on which it is built.”* The Minister noted that, while the national symbols were born out of conflicting points of view, they were prime symbols of national reconciliation and unity.<sup>335</sup> In the Third Reading of the Bill, the Minister reiterated the importance of the flag and coat of arms in national life as *“symbols that bind us together, in spite of our differences and in spite of diversity and division that may prevail in the country”,*<sup>336</sup>

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<sup>333</sup> The Minister of National Education, Second Reading of the Heraldry Amendment Bill, 9 February 1982, *Assembly Debates*, 1982: 546.

<sup>334</sup> The Minister of National Education, Second Reading of the Heraldry Amendment Bill, 9 February 1982, *Assembly Debates*, 1982: 547.

<sup>335</sup> The Minister of National Education, Second Reading of the Heraldry Amendment Bill, 9 February, *Assembly Debates*, 1982: 547.

<sup>336</sup> The Minister of National Education, Third Reading of the Heraldry Amendment Bill, 15 February 1982, *Assembly Debates*, 1982: 970.

- Act 6 of 1984 clarified the decision-making powers and functions of the Heraldry Council, the Heraldry Committee, the State Herald and the Heraldry Bureau;
- Act 49 of 1996 repealed references to South West Africa and redefined provinces and territories;
- Act 88 of 1996 repealed the provisions of the Act which restricted the jurisdiction of the courts; and
- Act 36 of 2001 updated certain definitions, provided for the vacation of office by members of the Heraldry Council as well as the dissolution of the Council, and for the deletion of obsolete terminology.

#### **41.3 Key issues**

##### **41.3.1 The role of the Heraldry Council as a national sub-sector structure**

The Heraldry Council should be recognised as the national coordinating structure in accordance with the structure proposed in Part III of this Report, and its status and mandate amended to reflect this.

##### **41.3.2 A national cultural symbols policy**

The origins and history of our national cultural symbols demonstrate the manner in which diverse influences are reflected in national identity and may promote social cohesion. It is recommended that policy be formulated to address *inter alia* the following matters.

##### **41.3.3 The role of the Bureau for Heraldry as a national institution**

If the Bureau for Heraldry is to play the role of a national institution in accordance with the structure proposed in Part III of this Report will be necessary to clarify its role and mandate in relation to:

- preserving and promotion;
- providing leadership, guidance and advice;
- training;
- research and development.

A national cultural symbols policy is required to specify the scope of activity of the Bureau for Heraldry to clarify the roles of, and to establish appropriate mechanisms

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for interaction between stakeholders in other national departments, spheres of government, the private sector and civil society.

#### 41.3.4 **Protection and use of state emblems**

The Act makes provision for the registration and protection of certain heraldic representations, including the Coat of arms. But, does not include a definition of state symbols or emblems, guidelines for the use of these or describe measures to protect the dignity of these.<sup>337</sup>

#### 41.3.5 **National emblems**

The Department of Trade and Industry has formulated a policy on the use of state emblems including the national coat of arms, the national flag, the national anthem, the maces of the National Assembly and the National Council of Provinces and national orders, coats of arms of the provinces. This provides a definition of the term, guidelines for the use of state emblems and identifies the Bureau for Heraldry as the authority designated to protect, provide guidelines and authorise the use of all state emblems.

#### 41.3.6 **National symbols**

The role of the Bureau and its relationship to the Presidency in respect of national symbols must be considered and clarified. It is recommended that the mandate of the Bureau be extended to cover national symbols and for policies for the protection and promotion of these be formulated.

#### 41.3.7 **The role of provincial and local government**

The role of provincial and local government in respect of heraldry should be set out in the policy proposed above. There is, for example confusion over the use and registration of provincial coats of arms, local government coats of arms and mayoral insignia. The role of local government as a custodian of national symbols and their responsibility for monitoring the use and abuse of these is unclear.

#### 41.3.8 **Indigenous cultural symbols**

While the practice of heraldry follows European standards and traditions in Africa, as in other parts of the world, indigenous peoples employed their own forms of heraldry. Zulu impis were, for example, distinguishable by the colour of their shields and the form of their armbands and plumes. The Tswana people have totem animals which are emblematic of a particular clan or tribe - a vervet monkey, the totem of the Bakgatla, is emblazoned on the door of the community's museum and the crocodile the totem of the Bakwena, is incorporated into the national coat of arms of Lesotho.

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<sup>337</sup> Department of Trade and Industry, *Policy on the Use of State Emblems in South Africa*, 2006



The national coat of arms and the national orders make use of a range of indigenous cultural symbols.

The Department of Trade and Industry Policy on the Use of State Emblems in South Africa assigns responsibility for the identification, registration and protection of symbols of national heritage to the Bureau of Heraldry. The policy lists Table Mountain, rooibos tea, baobab trees, aspects of Zulu culture, etc., as examples of symbols of national heritage.

The mandate of the Bureau must be amended to include indigenous cultural symbols. The modernisation of South African heraldry needs to provide for the inclusion of indigenous heraldic symbols including totems, clan symbols, and the use of typically South African heraldic devices. This will require the development of technical heraldic vocabularies to incorporate indigenous cultural symbols. The use and registration of heraldic devices by traditional leaders needs to be clarified in a policy that addresses the complexities of identifying, registering and protecting indigenous cultural symbols.

#### 41.3.9 Dti policy on use of state emblems

The Department of Trade and Industry has proposed that a State Emblems Bill be formulated to take into account the new policy and that references to state emblems be deleted from the Heraldry Act. The Act should be amended to take into account the Bureau's responsibility for identifying, registering and protecting symbols of national heritage, as defined in the DTI Policy on the Use of State Emblems, 2006.

### 41.4 Recommendations for legislative amendments

#### 41.4.1 General

The Heraldry Act is outdated and requires fundamental amendment in order to reflect a modern approach to South African heraldry. This is illustrated by:

- the failure to provide for indigenous heraldic symbols such as totems, clan symbols and typically South African heraldic devices such as flora and fauna, arrow heads, spears etc;
- the designation of heraldry institutions such as the State Herald and the Heraldry Bureau are dated;
- administrative procedures are in several respects inconsistent with the requirements of administrative justice;
- the law contains sexist rather than gender-neutral language;
- penalties and enforcement mechanisms are outdated.

Policy decisions are required of DAC on the appropriate content and institutional framework of a substantially revised cultural symbols law. Thereafter, a new Bill should be drafted to replace the Heraldry Act. The new Bill should address the following shortcomings identified in the Heraldry Act.

#### 41.4.2 **Section 1 - Definitions**

Outdated designations of bureau of heraldry, heraldry committee, heraldry council and state herald require review and amended.

Definitions of heraldic representations, coats of arms, badges and other emblems require amendment to provide for indigenous heraldic symbols such as totems, clan symbols and other typically South African heraldic devices.

#### 41.4.3 **Section 3 - Bureau of heraldry**

Designation should be changed and functions amended in accordance with a modern South African approach to heraldry.

#### 41.4.4 **Section 4 - State herald**

Designation should be changed.

#### 41.4.5 **Section 5 - Register of heraldic representations, names, special names and uniforms**

Content of register does not reflect a modern approach to South African heraldry including provision for indigenous heraldic symbols.

#### 41.4.6 **Section 6 - Heraldry council and heraldry committee**

Designations should be changed to reflect modern approach to South African heraldry.

The provision governing the removal of members of the heraldry council and heraldry committee is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.

The provision providing for the dissolution of the council or committee is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.

#### 41.4.7 **Section 7B - Objections**

The law limits the persons who are entitled to object to an application for the registration of heraldic representations, names, special names or uniforms in a manner that is vulnerable to legal challenge on the grounds that it is inconsistent with the requirements of administrative justice. The right to object should be

broadened to any person whose rights or legitimate expectations are materially and adversely affected by the granting of an application.

**41.4.8 Section 9 - Appeal against decision of state herald or committee**

The law limits the persons who are entitled to appeal against decisions of the state herald or committee regarding the registration of heraldic representations, names, special names or uniforms in a manner that is vulnerable to legal challenge on the grounds that it is inconsistent with the requirements of administrative justice. The right should be broadened to extend to any person whose rights or legitimate expectations are materially and adversely affected by the granting of an application.

**41.4.9 Section 20 - Savings**

The provision prohibiting the use of heraldic representations, names, special names or uniforms in a manner or under such circumstances as to bring it into ridicule or contempt requires amendment in order to satisfy the requirements of freedom of expression.

**41.4.10 Section 21 and 22 – Damages and penalties for unlawful use of symbols**

41.4.11 The provisions dealing with damages and penalties for unlawful use of registered symbols are outdated and in our view inappropriate. The new law should not provide for a special civil remedy nor should it provide for criminal sanctions except in **respect of official symbols.**

**41.4.12 Section 22A - Offence in respect of coat of arms of the Republic**

The Act provides no similar protection in respect of the national flag

**41.4.13 Governance review of heritage institutions**

Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-

- qualifications for and disqualifications from membership;
- removal of members, vacancies and filling of vacancies and the dissolution of the council;
- remuneration of members of the council and the reimbursement of their expenses;
- quorums for meetings, manner of decision making and voting thresholds;
- delegation of powers and functions by the council;

- reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);
- the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;
- a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and
- a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.

#### 41.5 Summary of recommendations on the Heraldry Act 18 of 1962

Policy recommendations		
National cultural symbols policy	The origins and history of our national cultural symbols demonstrate the manner in which diverse influences are reflected in national identity and may promote social cohesion. It is recommended that policy be formulated to address <i>inter alia</i> the following matters- <ul style="list-style-type: none"><li>the role of the Bureau for Heraldry as a national institution;</li><li>protection and use of state emblems;</li><li>the role of provincial and local government;</li><li>indigenous cultural symbols.</li></ul>	
New cultural symbols law	A new Bill should be drafted to replace the Heraldry Act. The new Bill should address the shortcomings identified in the Heraldry Act/	
Legislative recommendations		
	General	<p>The Heraldry Act is outdated and requires fundamental amendment in order to reflect a modern approach to South African heraldry. This is illustrated by:</p> <ul style="list-style-type: none"><li>the failure to provide for indigenous heraldic symbols such as totems, clan symbols and typically South African heraldic devices such as flora and fauna, arrow heads, spears etc;</li><li>the designation of heraldry institutions such as the State Herald and the Heraldry Bureau are dated;</li><li>administrative procedures are in several respects inconsistent with the requirements of administrative justice;</li><li>the law contains sexist rather than gender-neutral language;</li><li>penalties and enforcement mechanisms are outdated.</li></ul> <p>Policy decisions are required of DAC on the appropriate content and institutional framework of a substantially revised cultural symbols law. Thereafter, a new Bill should be drafted to replace the Heraldry Act. The new Bill should address the following shortcomings</p>

		identified in the Heraldry Act.
<b>Section 1</b>	<b>Definitions</b>	<p>Outdated designations of bureau of heraldry, heraldry committee, heraldry council and state herald require review and amended.</p> <p>Definitions of heraldic representations, coats of arms, badges and other emblems require amendment to provide for indigenous heraldic symbols such as totems, clan symbols and other typically South African heraldic devices</p>
<b>Section 3</b>	<b>Bureau of heraldry</b>	Designation should be changed and functions amended in accordance with a modern South African approach to heraldry.
<b>Section 4</b>	<b>State herald</b>	Designation should be changed.
<b>Section 5</b>	<b>Register of heraldic representations, names, special names and uniforms</b>	Content of register does not reflect a modern approach to South African heraldry including provision for indigenous heraldic symbols
<b>Section 6</b>	<b>Heraldry council and heraldry committee</b>	<p>Designations should be changed to reflect modern approach to South African heraldry.</p> <p>The provision governing the removal of members of the heraldry council and heraldry committee is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.</p> <p>The provision providing for the dissolution of the council or committee is vulnerable to legal challenge on the grounds that it does not satisfy the requirements of administrative fairness.</p>
<b>Section 7B</b>	<b>Objections</b>	The law limits the persons who are entitled to object to an application for the registration of heraldic representations, names, special names or uniforms in a manner that is vulnerable to legal challenge on the grounds that it is inconsistent with the requirements of administrative justice. The right to object should be broadened to any person whose rights or legitimate expectations are materially and adversely affected by the granting of an application.
<b>Section 9</b>	<b>Appeal against decision of state herald or committee</b>	The law limits the persons who are entitled to appeal against decisions of the state herald or committee regarding the registration of heraldic representations, names, special names or uniforms in a manner that is vulnerable to legal challenge on the grounds that it is inconsistent with the requirements of administrative justice. The right should be broadened to extend to any person whose rights or legitimate expectations are materially and adversely affected by the granting of an application.
<b>Section 20</b>	<b>Savings</b>	The provision prohibiting the use of heraldic representations, names, special names or uniforms in a manner or under such circumstances as to bring it into ridicule or contempt requires amendment in order to satisfy the requirements of freedom of expression.
<b>Sections 21 and 22</b>	<b>Damages and penalties for unlawful</b>	The provisions dealing with damages and penalties for unlawful use of registered symbols are outdated and in our view inappropriate. The new law should not provide for a special civil remedy nor should it provide for criminal sanctions except in respect of official symbols.

	<b>use of symbols</b>	
<b>Section 22A</b>	<b>Offence in respect of coat of arms of the Republic</b>	The Act provides no similar protection in respect of the national flag
	<b>Governance review of heritage institutions</b>	<p>Arising from our governance review of heritage institutions, the Act should be amended to provide for harmonised provisions governing-</p> <ul style="list-style-type: none"> <li>• qualifications for and disqualifications from membership;</li> <li>• removal of members, vacancies and filling of vacancies and the dissolution of the council;</li> <li>• remuneration of members of the council and the reimbursement of their expenses;</li> <li>• quorums for meetings, manner of decision making and voting thresholds;</li> <li>• delegation of powers and functions by the council;</li> <li>• reporting, performance review and accountability mechanisms (including service level or performance agreements between the council and the Minister and between the council and its executive management);</li> <li>• the appointment of executive management and other members of staff where applicable and the determination of terms and conditions of their employment;</li> <li>• a common code of conduct to encourage high standards of ethical conduct and provisions for registers of members' interests and rules for governing public access to these registers; and</li> <li>• a council charter and appointment letters setting out the individual duties and responsibilities of members of the council.</li> </ul>

#### 41.6 Conclusion

Cultural symbols cut to the core of a nation's expression of its identity. Our history shows that these have been appropriated and contested as different interests conflict for power and control. The symbols adopted since 1994 embrace the collective history of all South Africans, correct the distortions of the past, embody a truly African aesthetic and play a critical role in social cohesion by defining and expressing a shared national identity.

## **Part VI : International conventions**

### **42 Introduction**

South Africa has ratified a number of international conventions related to the protection, documentation and conservation of cultural heritage and heritage resources.

#### **42.1 Ratified international conventions**

South Africa has ratified the following international conventions:

- UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (16 November 1972)
- UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954)
- UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, (14 November 1970)

#### **42.2 International conventions under consideration**

The Minister has granted approval for the ratification of a further three conventions and a protocol. These are:

- UNESCO Convention on the Protection of the Underwater Cultural Heritage (2 November 2001)
- UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (17 October 2003)
- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995)
- Second Protocol to The Hague Convention of 1954 for the protection of cultural property in the event of armed conflict (26 March 1999)

#### **42.3 Other relevant international conventions and guidelines**

- UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (20 October 2005)
- UNESCO Charter on the Preservation of the Digital Heritage (17 October 2003)
- UNESCO Memory of the World: General Guidelines to Safeguard Documentary Heritage

These Conventions, in general, spell out the State's obligations and responsibilities and commit it to certain actions and programmes. The detailed provisions of these Conventions provide a checklist for national policy and legislation and should be taken into account when developing or amending these.

Information pertaining to these conventions is summarised below. Please see Volume 2 of this Report for a fuller description and analysis of these conventions and agreements.

**43 UNESCO convention concerning the protection of the world cultural and natural heritage, 16 November 1972**

**43.1 Introduction**

This Convention, adopted in 1972, is aimed at preserving and protecting cultural and natural heritage sites considered to be of outstanding universal value, i.e. properties of significance considered to be so exceptional as to transcend national boundaries and to be of common importance to present and future generations. The Convention entered into force on 17 December 1975, in accordance with Article 33.

South Africa ratified the Convention on 10 July 1997, and it entered into force for South Africa on 10 October 1997.

**43.2 Overview**

The *Convention Concerning the Protection of the World Cultural and Natural Heritage* defines the kinds of natural or cultural sites that can be considered for inscription on the World Heritage List.

It sets out the duties of State Parties in identifying potential sites and their role in protecting and preserving them. By signing the Convention, each country pledges to conserve not only the World Heritage Sites situated on its territory, but also to protect its national heritage. The State Parties are encouraged to integrate the protection of the cultural and natural heritage into regional planning programmes, set up staff and services at their sites, undertake scientific and technical conservation research and adopt measures which give this heritage a function in the day-to-day life of the community.

It explains how the World Heritage Fund is to be used and managed and under what conditions international financial assistance may be provided.

The Convention stipulates the obligation of State Parties to report regularly to the World Heritage Committee on the state of conservation of their World Heritage properties. These reports are crucial to the work of the Committee as they enable it to assess the conditions of the sites, decide on specific programme needs and resolve recurrent problems.



It also encourages State Parties to strengthen the appreciation of the public for World Heritage properties and to enhance their protection through educational and information programmes.

The World Heritage Committee, has developed precise criteria for the inscription of properties on the World Heritage List as well as mechanisms for monitoring and reporting on the state of World Heritage Properties. These are included in the *Operational Guidelines for the Implementation of the World Heritage Convention*. This document is regularly revised and updated to reflect new concepts, knowledge or experiences.

#### 43.3 Application of the Convention in South Africa

This Convention was ratified by South Africa in 1997, the year after the White Paper on Arts, Culture and Heritage was published. The White Paper makes no reference to World Heritage Sites except to say that, “the National Heritage Council will liaise with international heritage organisations regarding cultural sites for the World Heritage list, and other matters regarding heritage conservation.”

To date, seven World Heritage Sites have been declared in South Africa: Robben Island Museum, the Cradle of Humankind and Mapungubwe are inscribed as cultural properties; the Vredefort Dome, Greater St Lucia Wetland Park and the Cape Floral Kingdom are inscribed as natural properties; the Ukhahlamba-Drakensberg Park, the only site with both natural and cultural significance, is listed as a mixed property. A tentative list of ten additional sites, still to be nominated, includes six cultural properties, three natural properties and one mixed property.

The *World Heritage Convention Act* 49 of 1999, developed in accordance with the provisions of the World Heritage Convention and the *Operational Guidelines for the Implementation of the World Heritage Convention* provides for the incorporation of the World Heritage Convention into South African law. The Act makes provision for: the enforcement and implementation of the World Heritage Convention in South Africa; the recognition and establishment of World Heritage Sites; the establishment of authorities and; the granting of additional powers to existing organs of State, among other provisions.

In terms of the *World Heritage Convention Act*, South African World Heritage Sites are administered by the Department of Environmental Affairs and Tourism (DEAT). Negotiations are in process to amend the Act to provide for the administration of the Act by the Minister of Arts and Culture, effectively transferring control of South African World Heritage Sites to the Department of Arts and Culture (DAC).

The transfer of the *World Heritage Convention Act* from DEAT to DAC implies that the latter will have the following roles:

- Evaluating and preparing annual nominations of potential sites to the World Heritage Committee as World Heritage Sites

- Chairing the South African World Heritage Committee sessions and preparing South African positions in this regard
- Performing functions with respect to monitoring, management and regulation of heritage in South Africa as set out in the World Heritage Convention Act.

In terms of a draft Bill prepared by DEAT, DAC will assume responsibility for the administration and coordination of World Heritage Sites, but the Minister will be required to discharge this responsibility in accordance with a written agreement or implementation protocol with the Minister of Environmental Affairs and Tourism, in terms of the *Intergovernmental Relations Framework Act, 2005*. The draft Bill recognises the provisions of the *Protected Areas Act* and that the Minister of Environmental Affairs and Tourism will administer the *World Heritage Convention Act* in all respects concerning those sites inscribed as natural properties.

#### 43.4 Key policy issues and recommendations arising from the consultative process

##### 43.4.1 Administration of the World Heritage Convention Act

Sites may be inscribed on the World Heritage List as cultural, natural or mixed properties, depending on the particular components defined as being of 'outstanding universal value' in accordance with the World Heritage Convention. But in reality most sites include both natural and cultural components. Mapungubwe, for example, is inscribed as a 'cultural' site despite its setting in a National Park. Robben Island, though also an inscribed 'cultural property', faces significant challenges in respect of environmental management. Conversely, the Cape Floral Kingdom, an inscribed 'natural' property, includes significant cultural resources.

The heritage sector has noted its concern that responsibility for World Heritage Sites, which include significant cultural heritage resources, lies with DEAT. Those concerned with the management of the natural environment are similarly concerned that administrative responsibility for World Heritage Sites with a significant natural environment component may be transferred to DAC.

It is recommended that responsibility for World Heritage Sites be transferred to DAC, providing that an appropriate mechanism be established to address the concerns raised above.

##### 43.4.2 SAHRA's role in the management of South African World Heritage Sites

SAHRA has expressed concern that it should be more closely involved with World Heritage Sites, particularly in respect of management plans and notes that conservation management plans for these sites are submitted directly by the relevant management authorities to the World Heritage Committee, bypassing both SAHRA and DAC.

It is recommended that SAHRA, as the national statutory body responsible for heritage resource management, play a more active role in the oversight and monitoring of the management of South African World Heritage Sites and that the necessary mechanisms be established to facilitate interaction with the relevant environmental authorities.

#### 43.4.3 **Complex reporting and accountability mechanisms**

South African World Heritage Sites are subject to the provisions of various pieces of national heritage and environmental legislation including: National Environmental Management: Protected Areas Act 57 of 2003; National Heritage Resources Act 25 of 1999; Cultural Institutions Act 119 of 1998; National Environmental Management: Biodiversity Act 10 of 2004; and the National Heritage Council Act 49 of 1999. It has been suggested that certain World Heritage Sites might require their own customised Acts in order to streamline the complex reporting and accountability procedures and requirements.

The National Heritage Resources Act makes provision for two instruments which could be used to coordinate legislation: SAHRA is empowered to promulgate regulations for a particular site; and institutions can enter into Heritage Agreements with relevant bodies. It is recommended that these mechanisms be utilised.

#### 43.5 **Recommendations for legislative amendment**

Chapter IV of the World Heritage Convention Act 49 of 1999 provides for the preparation of integrated management plans which must be integrated and harmonised with applicable plans under the National Heritage Resources Act, 1999 and the Cultural Institutions Act, 1998.

In terms of section 25(4) the Minister of Environment and Tourism must consult the Minister of Arts and Culture and if applicable the SAHRA Council before approving an integrated management plan.

Section 43 provides that the Minister of Environment and Tourism may delegate powers, duties and functions under the Act to a number of structures including an organ of state and the Director-General may delegate any of his or her powers or functions to, amongst others, a statutory body primarily involved in cultural matters.

In our view there is no requirement for further legislative amendment arising from the convention.

#### 44 **UNESCO convention for the protection of cultural property in the event of armed conflict, 14 May 1954**

##### 44.1 **Introduction**

The *Convention for the Protection of Cultural Property in the Event of Armed Conflict* was adopted at The Hague (Netherlands) in 1954 in the wake of massive destruction of the cultural heritage during the Second World War. It is the first international treaty focussing exclusively on the protection of cultural heritage in the event of armed conflict.

South Africa ratified the Convention on 18 December 2003, and it entered into force for South Africa on 18 March 2004.

##### 44.2 **Overview**

In terms of this Convention State Parties undertake to lessen the consequences of armed conflict for cultural heritage and to take preventive measures for such protection not only in time of hostility (when it is usually too late), but also in time of peace. The *Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict* define the detailed procedure by which the Convention is to be applied, including organisational matters, the appointment and functions of key role players, the registration of cultural property, the transport of cultural property, and the use of the distinctive emblem for identification of protected property and persons engaged in its protection.

The Convention was adopted together with a Protocol<sup>338</sup> aimed at preventing the export of cultural property from occupied territory, and requiring the return of such property to the territory of the State from which it was removed. The destruction of cultural property in the course of the conflicts that took place at the end of the 1980s and the beginning of the 1990s highlighted the necessity for a number of improvements to be addressed in the implementation of the Convention and resulted in the adoption of a Second Protocol.<sup>339</sup>

##### 44.3 **Application of the convention and protocols in South Africa**

South Africa is in the process of ratifying the Second Protocol. The State Law Adviser is of the opinion that no provision of the Protocol is in conflict with domestic law but notes that: Articles 15 and 16 create new offences which do not currently exist in our law and that Article 15(2) creates an obligation for each Party to adopt measures to establish the aforementioned offences as criminal offences and to make them punishable by appropriate penalties; Article 18 provides that certain offences in Article

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<sup>338</sup> UNESCO (1954) Protocol to the Convention for the protection of Cultural Property in the Event of Armed Conflict. The Hague: UNESCO.

<sup>339</sup> UNESCO (1999) Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague: UNESCO.

15 must be deemed as extraditable offences and that inclusion of these as such in agreements with countries with whom bilateral extradition agreements have been entered into will have to be negotiated; Article 21 obliges States to adopt certain legislative, disciplinary or administrative measures; and Article 30 should be brought to the attention of the office of the Secretary for Defence.

#### **44.4 Key policy issues and recommendations arising from the consultative process**

##### **44.4.1 Cooperation with other national government departments and agencies**

In terms of this Convention, the State Party is required to introduce provisions ensuring the observance of the Convention into military regulations; foster a spirit of respect for the culture and cultural property of all peoples amongst members of the armed forces and; establish services or specialist personnel within the armed forces whose purpose will be to secure respect for cultural property and to cooperate with the civilian authorities responsible for guarding it.

Given the scope and nature of the State's obligations, compliance with this Convention implies close cooperation with the South African National Defence Force, amongst other national government agencies. The role of DAC and its associated institutions and agencies in respect of this Convention should be clarified and, where necessary, incorporated in relevant legislation.

#### **44.5 Recommendations for legislative amendments**

##### **44.5.1 Articles 15 and 16 of the Second Protocol oblige state parties to take the necessary legislative measures to establish jurisdiction over the following offences-**

- making cultural property under enhanced protection the object of attack;
- using cultural property under enhanced protection or its immediate surroundings in support of military action;
- extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol;
- making cultural property protected under the Convention and the Second Protocol the object of attack;
- theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

##### **44.5.2 These necessary legislative measures must establish State jurisdiction-**

- when an offence is committed in the territory of that State;
- when the alleged offender is a national of that State;

- when the alleged offender is present in its territory.

44.5.3 Article 18 requires that State parties include these offences in their extradition agreements with other countries.

44.5.4 We recommend that DAC –

- liaise with the Department of Justice and Constitutional Development regarding the appropriate statutory location of these offences, which should include consideration of incorporation under the National Heritage Resources Act 25 of 1999;
- liaise with the Department of Defence about amendments to the military regulations.

#### 45 **UNESCO convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, 14 November 1970**

##### 45.1 **Introduction**

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property was signed in Paris on 14 November 1970. Together with the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) and the First Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954).

South Africa accepted to the Convention on 18 December 2003, and it entered into force for South Africa on 18 March 2004.

##### 45.2 **Overview**

This Convention, aimed at preventing the looting of cultural property from graves, palaces, villages, temples, and other sites is based on the principle that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation and illicit transport, as well as to respect the cultural property of other States in, for example, the building up of collections of cultural institutions, museums, libraries and archives.

##### 45.3 **Application of the Convention in South Africa**

While DAC and associated heritage institutions, agencies and bodies are implementing the provisions of this Convention through interactions with local and international agencies, certain issues still have to be addressed. These include the application of standardised systems for the descriptions of heritage objects.

#### 45.4 Key policy issues and recommendations

##### *Policy statement*

A clear policy statement acknowledging South Africa's commitment to meeting its obligations in respect of this convention should be developed.

#### 45.5 Recommendations for legislative amendments

45.5.1 Article 17 of the Convention requires state parties to impose sanctions for violations of measures it has taken to implement the Convention. These sanctions should be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activity. The Convention also makes provision for authorisations, notifications and seizures.

45.5.2 These requirements are substantially met by the provisions of the National Heritage Resources Act 25 of 1999. We accordingly recommend that no further amendments are required to implement the Convention.

### 46 UNESCO convention on the protection of the underwater cultural heritage, 2 November 2001

#### 46.1 Introduction

The UNESCO Convention on the Protection of the Underwater Cultural Heritage was adopted on 2 November 2001. The Convention recognises the importance of underwater cultural heritage as an integral part of humanity's cultural heritage and aims to protect this treasure of humanity and preserve it for future generations.

South Africa is in the process of ratifying this Convention. If it does so after the general entry into force, the Convention will enter into force with respect to South Africa three months after the deposit of its instrument of ratification, acceptance, approval or accession.

#### 46.2 Overview

Underwater cultural heritage is under serious threat as technological developments allow increasing access to the ocean floor by commercial salvors. The Convention gives priority to the *in situ* preservation of heritage that has been underwater for at least 100 years, and aims to ban looting for commercial exploitation. Where underwater cultural heritage is recovered, it must be deposited, conserved and managed in a manner that ensures its long-term preservation.

As noted, South Africa is in the process of ratifying this Convention. The State Law Adviser is of the opinion that the Convention is not in conflict with South African domestic law or with South Africa's international obligations but notes that certain



amendments may be necessary to domestic laws to ensure that the State can meet compliance requirements.

#### **46.3 Key policy issues and recommendations**

##### **46.3.1 Commercial salvage operations**

There is a difference of opinion amongst DAC and SAHRA staff regarding commercial salvage and the UNESCO Convention. The view of SAHRA staff and ASAPA is that commercial salvage should not be permitted on historical wrecks, and SAHRA has adhered to this policy for the past few years. DAC, however, is of the opinion that commercial salvage should be permitted and has requested SAHRA to reassess their position and accept applications from commercial salvors.

##### **46.3.2 Underwater heritage policy**

It is recommended that a policy on underwater heritage be developed and that this take into account South Africa's obligations in respect of this Convention.

#### **46.4 Recommendations for legislative amendments**

No legislative amendments are required at this stage in order to implement the Convention.

### **47 UNESCO convention for the safeguarding of the intangible cultural heritage, 17 October 2003**

#### **47.1 Introduction**

The Convention for the Safeguarding of the Intangible Cultural Heritage was adopted by UNESCO's General Conference on 17 October 2003.

South Africa is in the process of ratifying this Convention. If it does so, the Convention will enter into force with respect to South Africa three months after the deposit of its instrument of ratification, acceptance, approval or accession.

#### **47.2 Overview**

The Convention is aimed at: safeguarding the intangible cultural heritage; ensuring respect for the intangible cultural heritage of the communities, groups and individuals concerned; raising awareness at the local, national and international levels of the importance of the intangible cultural heritage and its appreciation; and providing for international cooperation and assistance.

South Africa is in the process of ratifying this Convention. The State Law Adviser is of the opinion that this Convention is not in conflict with domestic law or international obligations and points out that many of the provisions of the Convention are not legally



binding and create non-binding “obligations” by utilising language such as “shall endeavour.”

#### 47.3 Application of the Convention in South Africa

In South Africa, decades of heritage and conservation practice have focussed on ‘tangible’ heritage including “colonial monuments, statues and architecture, while intangible heritage in the form of indigenous knowledge systems, oral traditions, folklore, popular memory” has been neglected.<sup>340</sup>

Defined by UNESCO as “the practices, representations, expressions, knowledge skills – as well as the objects, artefacts and cultural spaces associated therewith – that communities, groups and in some cases individuals recognize as part of their cultural heritage,”<sup>341</sup> intangible heritage is manifest in oral traditions and expressions, the performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship. It is also generally considered to:

- be transmitted from generation to generation.
- be constantly recreated by communities and groups, in response to their environment, their interaction with nature, and their history.
- provide communities and groups with a sense of identity and continuity.
- promote respect for cultural diversity and human creativity.
- be compatible with international human rights instruments.
- comply with the requirements of mutual respect among communities, and of sustainable development.

Intangible cultural heritage is traditional and living at the same time. It is constantly recreated and mainly transmitted orally<sup>342</sup>.

Intangible or living heritage has been recognised as an issue to be addressed in the transformation of the South African heritage sector.

The ACTAG Report makes mention of *amasiko*, which encompasses “culture with specific emphasis on living tradition, customs and oral history that carries valuable messages from the past.”<sup>343</sup> The Report notes that the majority of South Africans have

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<sup>340</sup> SAHRA, Living Heritage Chapter: Policy and Guideline Principles for Management, page 9.

<sup>341</sup> UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage: Article 2.

<sup>342</sup> United Nations Educational, Scientific and Cultural Organization, <http://www.unesco.org> accessed April 2007.

<sup>343</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 66.

been excluded from "our history books"<sup>344</sup> and recommends that a national *amasiko* commission be established to make proposals to redress this imbalance. The Report recommends that, in principle, heritage institutions should be 'suffused' with *amasiko*, stating that, "for example, an understanding of and respect for sacred sites should be integrated into the heritage resources legislation and practice; people should want to visit archives to research the history of their ancestors; and traditional performances such as praise poems and story-telling should draw the community to museums."<sup>345</sup>

The White Paper on Arts, Culture and Heritage notes that, "the promotion of living heritage is one of the most vital aspects of the Ministry's arts, culture and heritage policy"<sup>346</sup> and that "means must be found to enable song, dance, story-telling and oral history to be permanently recorded and conserved in the formal heritage structure."<sup>347</sup> It commits the Department to: establishing "a national initiative to facilitate and empower the development of living heritage projects in provinces and local communities;"<sup>348</sup> suffusing "institutions responsible for the promotion and conservation of our cultural heritage with the full range and wealth of South African customs;"<sup>349</sup> liaising with the Department of Education and provincial departments responsible for cultural affairs to develop information for heritage education so that the youth are "encouraged to take pride in their own living heritage;"<sup>350</sup> and, with the practitioners, provincial heritage services, SATOUR and the Department of Environmental Affairs, developing a code of ethics for the use of living heritage resources for cultural tourism<sup>351</sup>.

South Africa is in the process of ratifying UNESCO's *Convention for the Safeguarding of the Intangible Cultural Heritage*. This Convention requires States Parties to take the measures necessary to safeguard intangible cultural heritage by: identifying and defining elements and drawing up an inventory; adopting a policy aimed at promoting the function of intangible cultural heritage in society; designating or establishing a competent body for the safeguarding of intangible heritage; fostering research; adopting appropriate legal, technical, administrative and financial measures to foster training, transmission, access and documentation of intangible cultural heritage; and ensuring recognition of, respect for and enhancement of intangible heritage in society through educational and awareness programmes<sup>352</sup>.

A Human Sciences Research Council Social Cohesion and Integration Project paper, presented by Harriet Deacon at the International Network on Cultural Policy meeting in

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<sup>344</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 76.

<sup>345</sup> ACTAG, Second Draft Report prepared by the Arts and Culture Task Group for the Ministry of Arts, Culture, Science and Technology, South Africa, 1995, page 77.

<sup>346</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.

<sup>347</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:2.

<sup>348</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.

<sup>349</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:28.

<sup>350</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:31.

<sup>351</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 5:32.

<sup>352</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Paris, 2003, pages 5-7.

Croatia in 2003, suggests that, "intangible heritage is an important concept because it allows us to expand the concept of heritage beyond buildings, places and objects and to correct an earlier bias towards Western buildings in heritage lists."<sup>353</sup> A second publication by the same authors concludes that, "safeguarding intangible heritage will also have to become a part of the broader strategy on community development since the safeguarding of transmission mechanisms will be inseparable from national debates around development, land rights and identity policies."<sup>354</sup>

The documents referred to above include detailed information on and analyses of various international, national and regional initiatives and instruments aimed at safeguarding intangible cultural heritage, and conclude that this may be achieved by establishing a government agency or agencies to do the following:

- maintain and administer the listing and information management process for registers of intangible heritage.
- proactively seek listings of threatened resources and ensure the implementation of management plans for them.
- make independent decisions about the compatibility of intangible resources with human rights codes.
- assist communities to list resources and, where necessary, also to manage them after listing.
- help to document and address disputes arising over ownership and management of intangible heritage.
- help to protect community rights and to channel benefits related to intangible heritage back into communities.
- develop funding strategies for community-based management of the resource.
- engage with other government and non-governmental agencies.<sup>355</sup>

In conclusion, the document argues that one of the biggest challenges for the safeguarding of heritage, particularly its intangible elements, is not just the development of national cultural policies and legislation but also the better integration

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<sup>353</sup> Deacon, H, Legal and Financial Instruments for Safeguarding our Intangible Heritage presented at ICOMOS 14<sup>th</sup> General Assembly and Scientific Symposium, 27-31 October 2003, (pages not numbered, see Summary).

<sup>354</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage, Social Cohesion and Integration Programme, HSRC, Cape Town, 2004, page 67.

<sup>355</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage, Social Cohesion and Integration Programme, HSRC, Cape Town, 2004, page 65.

of the functions of government departments responsible for culture, heritage and social development.<sup>356</sup>

National heritage institutions have acted on the injunction of the White Paper that means must be found to incorporate living heritage into formal heritage structures.<sup>357</sup>

The National Heritage Resources Act 25 of 1999 defines living heritage as the intangible aspects of inherited culture, which may include: cultural tradition; oral history; performance; ritual; popular memory; skills and techniques; indigenous knowledge systems; and the holistic approach to nature, society and social relationships.<sup>358</sup> It mandates SAHRA to promote the identification and recording of aspects of living heritage associated with heritage resources,<sup>359</sup> and to protect places and objects to which oral traditions are attached and which are associated with living heritage.<sup>360</sup>

SAHRA, in accordance with the mandate described above, has prepared policy and guidelines principles for the management of living heritage.<sup>361</sup> This document notes that, “the official recognition of living heritage is a great accomplishment in the South African heritage fraternity,” and that “integrating living heritage into the ambit of heritage resource management serves as a commitment towards making a meaningful contribution to the transformation of the heritage sector and redress to the past imbalances in heritage resources management.”<sup>362</sup> While this document, to some extent, sets out the requirements, the mechanisms, roles and responsibilities of other heritage agencies in the broader protection and promotion of intangible cultural heritage are not addressed.

The Cultural Institutions Act 119 of 1998 makes no mention of living or intangible cultural heritage. Nevertheless, museums have taken cognisance of the call to address the issue of intangible heritage, particularly in relation to their collections. Iziko Museums, for example, have acknowledged the role of indigenous knowledge systems and intangible heritage in interpreting collections, the need to make use of new technologies to give tangible form to intangible aspects of heritage and the need to

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<sup>356</sup> Deacon, H, Dondolo, L, Mrubata, M and Prosalendis, S, *The Subtle Power of Intangible Heritage: Legal and Financial Instruments for Safeguarding Intangible Heritage, Social Cohesion and Integration Programme*, HSRC, Cape Town, 2004, page 67.

<sup>357</sup> White Paper on Arts, Culture and Heritage, 1996, Chapter 3:2.

<sup>358</sup> National Heritage Resources Act 25 of 1999, page 10.

<sup>359</sup> National Heritage Resources Act 25 of 1999, page 15.

<sup>360</sup> National Heritage Resources Act 25 of 1999, pages 7 and 52.

<sup>361</sup> South African Heritage Resources Agency, *Living Heritage Chapter: Policy and Guideline Principles for Management*, Cape Town, undated.

<sup>362</sup> South African Heritage Resources Agency, *Living Heritage Chapter: Policy and Guideline Principles for Management*, Cape Town, undated, page 9.

engage with local communities, the keepers of cultural knowledge, to research, present and preserve intangible heritage.<sup>363</sup>

While the National Archives and Record Service of South Africa Act 43 of 1996 makes no mention of living or intangible cultural heritage, it does determine one of NARS's primary objects as the collection of "non-public records with enduring value of national significance ... with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past."<sup>364</sup> NARS has identified oral history as a significant mechanism for addressing this and has initiated a National Oral History Programme and developed a National Register of Oral Sources (NAROS).

The National Heritage Council Act 11 of 1999's definition of living heritage<sup>365</sup> is consistent with that included in the National Heritage Resources Act 25 of 1999. The objects of the NHC, as outlined in this Act, include, *inter alia*: "to protect, preserve and promote the content and heritage which reside in orature in order to make it accessible and dynamic; to integrate living heritage with the functions and activities of the Council and all other heritage authorities and institutions at national, provincial and local level; and to promote and protect indigenous knowledge systems, including but not limited to enterprise and industry, social upliftment, institutional framework and liberatory processes"<sup>366</sup>. It describes one of the functions, duties and powers of the Council as being to "monitor and co-ordinate the transformation of the heritage sector, with special emphasis on the development of living heritage projects."<sup>367</sup>

The NHC mission includes, amongst other objectives, to, "promote, mainstream and foreground living heritage with particular emphasis on Ubuntu as a resource for nation building."<sup>368</sup>

An internal Discussion Document prepared by the DAC for the purposes of the Review of Heritage Legislation<sup>369</sup> notes that living or intangible heritage is still at the periphery of the South African national consciousness. While a pilot programme, the National Indigenous Music and Oral History Programme (NIMOHP) is being piloted at a number of universities, the Document notes that, given the debates around intellectual property rights, it is untenable that government proceeds with the research and collection of vulnerable cultural property and that public intellectuals, the custodians of living or

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<sup>363</sup> Bredekamp, HCJ, Transforming Representations of Intangible Heritage at Iziko Museums, SA, paper presented at the Concurrent Session 'Museums and Living Heritage', ICOM General Conference, Seoul, 2-8 October 2004.

<sup>364</sup> National Archives and Record Service Act of South Africa, No 43 of 1996, page 2.

<sup>365</sup> National Heritage Council Act 11 of 1999, page 3.

<sup>366</sup> National Heritage Council Act 11 of 1999, page 4.

<sup>367</sup> National Heritage Council Act 11 of 1999, page 6.

<sup>368</sup> National Heritage Council, <http://www.nhc.org.za> accessed 22 April 2007.

<sup>369</sup> Department of Arts and Culture, Some Reflections on Policy and Legislative Issues from the Heritage Perspective, Internal Discussion Document, December 2006, page 10.

intangible heritage, continue to be exploited by unscrupulous researchers in the absence of appropriate policy and legislative frameworks<sup>370</sup>.

#### 47.4 Policy issues and recommendations

##### *Intangible heritage policy*

A policy on intangible heritage must be developed. This must be: aligned to the UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage*; articulate the relationship between intangible heritage and indigenous knowledge; indicate who will take primary responsibility for the promotion and protection of intangible heritage; outline institutional arrangements; clarify the role of DAC and its associated institutions and agencies as well as other bodies including, for example, the House of Traditional Leaders and; spell out mechanisms for engagement with relevant entities.

It is essential that this policy be finalised so that they can be integrated into broader heritage, archives and library policies.

##### *An institutional framework for intangible heritage*

One of the key issues to be addressed in the development in an intangible or living heritage policy is that of an appropriate institutional framework. There are two clear options. Either a single institution should be established to take responsibility for intangible heritage OR responsibility should suffuse the policies and programmes of all heritage institutions and agencies. The answer to this dilemma is that one entity should drive the process and work with appropriate institutions to ensure that intangible heritage. This recommendation was endorsed by the Reference Group who agreed that a holistic approach to intangible heritage (i.e. one that does not separate it from the forms through which it is manifest) is appropriate but noted that special attention is required to raise the profile of living heritage because it has been marginalised in the past.

It is noted that the Minister is in the process of constituting a panel of advisors to assist DAC to deal with the development of a policy for living heritage.

#### 47.5 Recommendations for legislative amendments

There is no requirement for legislative amendment at this stage, although legislative amendments may arise once the policy referred to above has been finalised.

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<sup>370</sup> Department of Arts and Culture, Some Reflections on Policy and Legislative Issues from the Heritage Perspective, Internal Discussion Document, December 2006, page 11.

**48 UNIDROIT convention on stolen or illegally exported cultural objects, 24 June 1995****48.1 Introduction**

The International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects (24 June 1995) aims to address the illicit trade in cultural objects by establishing common minimal rules for the restitution and return of objects between Contracting States.

South Africa is in the process of ratifying this Convention. If it does so, the Convention will enter into force with respect to South Africa six months after the deposit of its instrument of ratification, acceptance, approval or accession.

**48.2 Overview**

It has many points of congruity with the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of ownership of Cultural Property. A UNESCO Information Note<sup>371</sup> discusses the complementary philosophy of the two and recommends that States should consider ratifying both Conventions at the same time to optimise political momentum in the fight against illicit traffic and the legal and the practical implementation of the two Conventions at national level.

**48.3 Application of the Convention in South Africa**

South Africa is in the process of ratifying this Convention. The State Law Adviser is of the opinion that this Convention is not in conflict with domestic law and comments that: in respect of Article 3 of the Convention, it is not clear to whom or which institution the claim for restitution must be brought and notes that the provisions of section 34 of the Constitution should be borne in mind in applying this clause; in respect of Article 4 it is not clear who shall ascertain what “a fair and reasonable compensation” is; in respect of Article 5(1) that a normal application would have to be lodged at a relevant court, bringing aspects with regard to jurisdiction into play; and notes that the provisions of section 231 of the Constitution must be complied with.

**48.4 Key policy issues and recommendations*****Policy statement on the return of stolen or illegally exported items***

A clear policy statement outlining and acknowledging South Africa’s commitment to meeting its obligations in respect of this convention should be developed.

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<sup>371</sup> UNESCO (2005) Information Note, UNESCO AND UNIDROIT cooperation in the fight against illicit traffic in cultural property. Paris: UNESCO.



#### 48.5 Recommendations for legislative amendments

There are no legislative amendments required at this stage.

### 49 UNESCO convention on the protection and promotion of the diversity of cultural expressions, 20 October 2005

#### 49.1 Introduction

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted by the UNESCO General Conference in Paris on 20 October 2005.

South Africa has not yet ratified, accepted, acceded to or approved the Convention.

#### 49.2 Overview

UNESCO's *Universal Declaration on Cultural Diversity* (2001) states that cultural diversity must be recognised as "the common heritage of humanity" and that its defence "is an ethical imperative, inseparable from respect for human dignity". The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, along with the 1972 *Convention concerning the Protection of the World Cultural and Natural Heritage* and the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*, preserves and promotes creative diversity. The objective of the Convention is primarily the creation of an enabling environment in which the rich creative diversity of cultural expressions is acknowledged and made accessible to all. The Convention provides a platform for international cultural cooperation, with particular emphasis on developing countries, reaffirming the links between culture, development and dialogue, and promoting mutual understanding.

#### 49.3 Application of the Convention in South Africa

Delegates from 16 countries throughout Africa and its Diaspora met in September 2006 to discuss the UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expression* and ensure it remains relevant to Africa and the Diaspora.

The conference reached consensus on the need to:

- encourage Member States in Africa to ratify the Convention, and integrate it in local policies and legislation
- develop an action plan to ensure delivery at local level
- implement practical programmes in research, curriculum development, cultural tourism and artistic exchange



- reaffirm the role and significance of African consciousness, African-centred education, women, youth and elders in the promotion of cultural diversity.

The conference adopted a plan of action which outlines roles and responsibilities of the State, civil society, cultural practitioners and inter-regional and intra-regional bodies. These are summarised below:

- States are tasked with: ratifying the Convention and integrating its content into local laws; developing policies and strategies based on inclusion, sustainability and building cross-sectoral partnerships; allocating resources and establishing mechanisms to protect and promote cultural diversity.
- Civil society is tasked with: compiling cultural statistics, encouraging partnerships, forming pressure groups to monitor and evaluate impact and strategies, raising funds; and revitalising the role of indigenous knowledge and traditional leadership.
- Cultural practitioners are tasked with: setting and maintaining standards of excellence; forming structures for monitoring, evaluation and lobbying; developing and maintaining skills databases; and developing and implementing inter- and intra-regional research programs.
- Inter- and intra-regional bodies are tasked with: developing best practice models, fostering awareness, recognition and cooperation through collaboration between governments and communities, encouraging discussion and exchange around policy-making, establishing a Working Group on Cultural Policies, creating awareness programs about links and synergies between Africa and its Diaspora; and creating platforms, programmes and resources to bridge inter-generational gaps.

#### 49.4 Key policy issues and recommendations

##### *Ratification of the convention*

It is assumed that South Africa's response to this convention will be informed by the resolutions and plan of action described above.

##### *Diversity and social cohesion*

Ratification of this convention will require the development of policies that promote cultural diversity in accordance with the provisions outlined in the Constitution and within the context of DAC's mandate to nurture social cohesion.<sup>372</sup>

#### 49.5 Recommendations for legislative amendment

No legislative amendments are required at this stage.

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<sup>372</sup> See, Statement by the Minister on The Role of Culture in Social Cohesion and Social Justice, August 2005.

## 50 UNESCO Charter on the preservation of the digital heritage, 17 October 2003

### 50.1 Overview

The UNESCO Charter on the Preservation of the Digital Heritage was adopted on 17 October 2003, and presents a compelling case for digital preservation in the context where more and more of the world's cultural and educational resources are being produced, distributed and accessed in digital form rather than on paper. The Charter is concerned not only with preservation issues, but also with issues of accessibility, protection of privacy and copyright, criteria for selection for preservation, and international cooperation.

### 50.2 Key policy issues and recommendations

#### *Digital Heritage Policy*

One of the critical gaps identified in various library and information service acts is that they do not take cognisance of the need to safeguard electronic documents for the future – even though this is technically provided for in the extended definition of materials to be deposited. A national policy is required to provide appropriate guidelines.

### 50.3 Recommendations for legislative amendments

On finalisation of the policy referred to above, amendments should be considered for all LIS legislation in order to safeguard electronic documents.

## 51 UNESCO memory of the world: general guidelines to safeguard documentary heritage, February 2002

### 51.1 Overview

Approximately 120 documentary collections in 59 countries have been inscribed on UNESCO's Memory of the World Register, which was established to preserve and raise awareness of documentary heritage, as well as to assist universal access to documentary heritage. The *General Guidelines to Safeguard the Documentary Heritage* provides general guidelines, including those concerning objectives, ethical issues, definitions, preservation, access, nomination to the register, programme structure and management, and funding and marketing.

### 51.2 Recommendations for legislative amendment

No legislative amendment is required in respect of this guideline.

## 52 Summary of recommendations on International Conventions

Convention	Policy recommendations	Legislative recommendations
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Convention	Policy recommendations	Legislative recommendations
UNESCO convention concerning the protection of the world cultural and natural heritage, 16 November 1972	<p>Administration of the World Heritage Convention Act should be transferred to DAC, subject to appropriate mechanism to address concerns regarding the management of the natural environment</p> <p>SAHRA as the national statutory body responsible for heritage resource management should play a more active role in the oversight and monitoring of the management of South African world heritage sites and must establish the mechanisms necessary to facilitate interaction with the relevant environmental authorities</p> <p>Two specific instruments under the National Heritage Resources Act should be utilised in order to co-ordinate legislation applicable to world heritage sites. These are SAHRA's power to promulgate regulations for a particular site and the provision for heritage agreements to be entered into by relevant bodies</p>	<p>Chapter IV of the World Heritage Convention Act 49 of 1999 provides for the preparation of integrated management plans which must be integrated and harmonised with applicable plans under the National Heritage Resources Act, 1999 and the Cultural Institutions Act, 1998.</p> <p>In terms of section 25(4) the Minister of Environment and Tourism must consult the Minister of Arts and Culture and if applicable the SAHRA Council before approving an integrated management plan.</p> <p>Section 43 provides that the Minister of Environment and Tourism may delegate powers, duties and functions under the Act to a number of structures including an organ of state and the Director-General may delegate any of his or her powers or functions to, amongst others, a statutory body primarily involved in cultural matters.</p> <p>In our view there is no requirement for further legislative amendment arising from the convention.</p>
UNESCO convention for the protection of cultural property in the event of armed conflict, 14 May 1954	<p>Given the scope and nature of the State's obligations, compliance with this convention implies close co-operation with the SANDF, amongst other national government agencies. The role of DAC and its associated institutions and agencies in respect of this convention should be clarified and, where necessary, incorporated within relevant legislation</p>	<p>Liaise with the Department of Justice and Constitutional Development regarding the appropriate statutory location of these offences, which should include consideration of incorporation under the National Heritage Resources Act 25 of 1999;</p> <p>Liaise with the Department of Defence about amendments to the military regulations.</p>
UNESCO convention on the means of prohibiting and preventing illicit import, export and transfer of ownership of cultural property, 14 November 1970	<p>A clear policy statement acknowledging South Africa's commitment to meeting its obligations in respect of this convention should be developed.</p>	<p>Articles 15 and 16 of the Second Protocol oblige state parties to take the necessary legislative measures to establish jurisdiction over the following offences-</p> <ul style="list-style-type: none"> <li>making cultural property under enhanced protection the object of attack;</li> <li>using cultural property under enhanced protection or its immediate surroundings in support of military action;</li> <li>extensive destruction or</li> </ul>

Convention	Policy recommendations	Legislative recommendations
		<p>appropriation of cultural property protected under the Convention and the Second Protocol;</p> <ul style="list-style-type: none"> <li>making cultural property protected under the Convention and the Second Protocol the object of attack;</li> <li>theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.</li> </ul> <p>These necessary legislative measures must establish State jurisdiction-</p> <ul style="list-style-type: none"> <li>when an offence is committed in the territory of that State;</li> <li>when the alleged offender is a national of that State;</li> <li>when the alleged offender is present in its territory.</li> </ul>
UNESCO convention on the protection of the underwater cultural heritage, 2 November 2001	It is recommended that a policy on underwater heritage be developed and that this take into account South Africa's obligations in respect of this Convention.	No legislative amendments are required at this stage in order to implement the Convention.
UNESCO convention for the safeguarding of the intangible cultural heritage, 17 October 2003	<p>A policy on intangible heritage must be developed. This must be: aligned to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage; articulate the relationship between intangible heritage and indigenous knowledge; indicate who will take primary responsibility for the promotion and protection of intangible heritage; outline institutional arrangements; clarify the role of DAC and its associated institutions and agencies as well as other bodies including, for example, the House of Traditional Leaders and; spell out mechanisms for engagement with relevant entities.</p> <p>It is essential that this policy be finalised so that they can be integrated into broader heritage, archives and library policies.</p>	There is no requirement for legislative amendment at this stage, although legislative amendments may arise once the policy referred to above has been finalised.
UNIDROIT convention on stolen or illegally exported objects, 24 June 1995	A clear policy statement outlining and acknowledging South Africa's commitment to meeting its obligations in respect of this convention should be	There are no legislative amendments required at this stage.

Convention	Policy recommendations	Legislative recommendations
	developed.	
UNESCO convention on the protection and promotion of the diversity of cultural expressions, 20 October 2005	Ratification of this convention will require the development of policies that promote cultural diversity in accordance with the provisions outlined in the Constitution and within the context of DAC's mandate to nurture social cohesion.	No legislative amendments are required at this stage.
UNESCO Charter on the preservation of the digital heritage, 17 October 2003	One of the critical gaps identified in various library and information service acts is that they do not take cognisance of the need to safeguard electronic documents for the future even though this is technically provided for in the extended definition of materials to be deposited. A national policy is required to provide appropriate guidelines.	On finalisation of the policy referred to above, amendments should be considered for all LIS legislation in order to safeguard electronic documents.
UNESCO Memory of the World, General guidelines to safeguard documentary heritage, February 2002	None	No legislative amendment is required in respect of this guideline.

## 53 Conclusion

South Africa has, since 1994, entered into a number of conventions and agreements, making good the commitment noted in the White Paper to regain its place on the world stage. While all international conventions and agreements are assessed by the State Legal Adviser to ensure they accord with domestic law. It is important in considering amendments to ensure that the country's international obligations are echoed in or resonate with domestic arrangements.