INTRODUCTION

The topic of law reporting has not been the subject of much writing in South Africa. Recently, however, it has engaged some attention, more particularly in regard to the decision not to publish the heads of argument in the South African Law Reports and the question whether a supervisory body to control law reporting – such as exists in England and Wales and other Commonwealth countries – should not be considered in South Africa.

Although therefore, the issue is not an entirely forgotten one, it is to be hoped that in the future it will assume greater prominence in debate in South Africa in view of the more important role which the courts are playing. While s 35(1) of the Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution) provides that a court of law interpreting chapter 3 may have regard to comparable foreign case law, it is certain that the judiciary will increasingly draw upon its own burgeoning case law dealing with constitutional issues in order to craft legal principles suitable to the new South African environment. In this regard the role of law reporting will be of signal importance. Then too, it has been said, judicial activism creates pressure to report more decisions. Since judicial activism is undoubtedly increasingly characterising our courts, a professional and public interest in our system of law reporting should be stimulated.

In what follows it is intended to cast a comparative birds'-eye view over law reporting in three common-law jurisdictions. A brief history of South African law reporting and its current position will then be set out, and a tentative balance sheet drawn. It may be profitable initially, however, to stress the importance of proper law reporting.
THE IMPORTANCE OF LAW REPORTING

Knowing the Law

In jurisdictions where judicial decisions form an important part of the law, it goes without saying that all persons should have access to such judicial declaration of the law. It also follows that law reports, as repositories of such law, must be complete, accurate and timeous.7

While, conceivably, no-one would dispute the fact that the value of a report depends on speed and accuracy, the necessity for completeness is far more contentious. “Over-reporting is an evil”, it has been said, “but less of an evil than underreporting”8.

On the other hand, unqualified “blanket” reporting would entail the danger of the profession “drowning in a sea of precedent”.9

Some three decades ago, in a study of Appellate Courts in the United States and England, Delmar Karlen10 compared the English and American systems of law reporting. The former country’s selective method of reporting judicial decisions, according to Karlen, had considerable advantages in containing precedent within reasonable bounds. On the other hand, Karlen felt, the practice of “blanket” law reporting in the United States involved the danger of judges and lawyers easily overlooking important principle in the welter of reports on particular facts; or, as Cardozo also wrote of this scale of law reporting, of sending the lawyers scuttling after “the decision in a sea of precedent”.9

In England, the unavailability of transcripts of unreported Court of Appeal judgments increasingly proved to be a source of annoyance to some judges. Eventually, after a sharp rebuke from Lord Evershed MR in Gibson v South American Stores Ltd.,14 the Lord Chancellor ordered that official notes be taken of all Court of Appeals judgments – after some three quarters of a century. Transcripts of all unreported decisions of the Court of Appeal (Civil Division) are now retained by the Supreme Court Library.15

Apart from the concern of possible omissions of the law reporters in England and New Zealand, a further problem concerning the unreported case has been stressed. Thus it has been critically noted that despite a discernible increase in the courts’ workload, there has been no corresponding increase in the annual number of reported cases in the general series of law reports.16

The question therefore has been asked whether it is possible that the numbers of cases involving matters of law-making value have remained constant, notwithstanding the considerable increase in the caseload of the courts. Or should the explanation be sought at the publishing end; “perhaps in some maximum which the law reporters can cope with in a week; or in some limit which the publishers impose on their annual volumes”.17

These deficiencies in the official reporting system have frequently been said to have given encouragement to the multiplication of independent series to publish cases which might otherwise remain lost as unreported judgments.

Multiplicity of Law Reports

In 1885, Lord (then Lord Justice) Lindley had stated that, “[a] multiplicity of law reports is a great evil. The evil was once intolerable; it may become so again; whether it will or will not depends on the profession and on the Council. If it does, a great effort will have failed, and its failure will prove the necessity for legislative interference and for a monopoly of Law Reporting”.18

But the duplication of law reports did not abate.

The first – and the last – independent body to consider the matter of law reporting in England was the Simonds Committee appointed in 1940. In a copy of a draft of an article sent to the Committee, Goodhart had submitted certain supplementary proposals to overcome the problems of delay and lack of comprehensiveness which beset England’s general series of law reports.19

Aware that a single series could not meet all the criteria of speed, accuracy and completeness, he suggested the publication of a second series of reports, which would appear more frequently and be complete, to supplement the general series. With stenographers attached to all courts, he said, the task would not be impossible. The speed of Hansard should set an example to the printers. The satisfaction of consumer needs in such a realistic way, he concluded, would drive out the other private series of reports.20

The Committee dismissed Goodhart’s suggestion that every case be transcribed and preserved. They were of the opinion that all significant cases were reported and that the great residue of unreported cases “is less likely to be a treasure house than a rubbish heap in which a jewell will rarely, if ever, be discovered”.21

The following year, however, saw some of Goodhart’s proposals come to pass when the Weekly Law Notes ceased, to be replaced by the fuller reports of the Weekly Law Reports. The Incorporated Council of Law Reporting promised that “reports will appear within about three weeks of judgment” and that “subscribers will have a report of every reportable case, thereby saving the expense of subscribing to any other general series of reports”.22

Despite the good intentions, however, the lack of inclusion of many judgments in the Weekly Law Reports was given, some two decades later, by Karlen as “probably [the reason] why specialised reports ... flourish in England”.23

In New Zealand, the proliferation of specialist reports since the 1970s has also been attributed to the failure of the official series, the New Zealand Law Reports, to publish important decisions “timeously or at all”.24 So, in one of the few cases where the publisher of a specialist report obtained the required con-
sent of the Council of the New Zealand Law Society, that Council found that the New Zealand Council of Law Reporting had failed to publish adequate reports of the courts concerned within a reasonable time and at a reasonable cost.

Today the proliferation of overlapping law reports has raised the concern of increased costs to the practitioner and difficulties in ascertaining the relevant law. A further concern is the temptation for counsel, in the face of the increasing welter of accessible case law, to indulge in excessive citation of authorities which, at the end of the day, decide no new law. In New Zealand, this problem is said to be well-recognised by the country’s foremost judges, and may eventuate in stricter controls being placed on the time allowed for the hearing of cases, measures which, as will be seen below, have already been adopted elsewhere.

The Selection Process – who are the Law-Makers?

Perhaps because of the above deficiencies in law reporting, counsel has always been permitted to cite unreported cases in court. But the citation of unreported authority serves a further purpose: to assure that any decision incorrectly considered to be of little law-making value would be uncovered. And, as on Stevenson’s island, as we have seen, there is “treasure [still] to be lifted”. In some measure then, the citation of unreported decisions also acts as a control on what otherwise would be the reporters’ or judges’ (where judicial control in law reporting pertains) law-making monopoly.

However, in recent developments in England and the United States, the imbedded attitude that those choosing cases worthy of publication have done so correctly and consistently, has come to the fore recently.

In 1983 in Roberts Petroleum Ltd v Bernard Kenny Ltd, the House of Lords (per Lord Diplock) outlawed the citation of unreported decisions from the Civil Division of the English Court of Appeal unless counsel sought prior leave. Such leave would only be granted on counsel’s undertaking that the case stated a principle of law not found in any reported Court of Appeal case.

In making the House of Lords ruling, Lord Diplock expressed the belief that those selecting the law had done so properly. Thus after stressing that none of the transcripts cited by counsel had laid down a relevant principle of law that was not to be found in reported cases, he went on to state that if a Court of Appeal decision was unreported it was most unlikely to be of any assistance to the House of Lords.

The ruling in the Roberts Petroleum Ltd case aroused considerable criticism both in the context of the case itself and for its long-term implications. But perhaps the most significant criticism was that the ruling was objectionable because of the arbitrary distinction which it drew between reported and unreported cases, many of which in the past have been found to be of considerable law-making value.

In response to a staggering workload, a similar development had come about in the United States. Since 1972, the United States Federal Appeals Court has developed and applied rules for designating cases, which present no significant precedential value, as “not for publication”, and limiting citation of unpublished opinions. However, in direct contrast to the position in England, the function of selecting cases for “no publication” in the United States has been left to the courts themselves, and the determination is made by the judge or judges sitting on the particular case. The limited publication rule has resulted in a considerable body of decisions which are not easily accessible to the public.

An argument for the limited publication rule in the United States is that a significant portion of a judge’s time is spent in judgment writing. Considerable cost-saving in judicial resources therefore result because where a determination is made that a judgment is a “no publication” one, “prose need not be polished, nor need scholarship be as thorough”.

As in England, the no-citation rule for unpublished judgments is based upon the belief that those choosing cases worthy of publication would be able to do so consistently and accurately.

In New Zealand, a classification system has been devised by the New Zealand Council of Law Reporting. Thus judges are required to designate judgments as being of “High”, “Medium” or “Low” priority or as being “Not Recommended” for publication. Although unreported cases are regularly cited in court, a recent practice note of the New Zealand High Court requires counsel to provide the court with a full copy of any unreported judgment to which counsel refers. The difficulties, however, in obtaining such copies may discourage the citation of unreported decisions. Moreover a certain reluctance to entertain unreported decisions has been noted. Thus extra-curially, Cooke P has stated: “[S]omething will have to be done to restrain [reference to unreported cases] unless addicts at the Bar reform voluntarily.” The latter two factors might then effectively make the decision as to what the law will be, the preserve of the judge.

Before discussing the position where determination of reportability is the province of the reporters and editors, it may be instructive to note the concern about the effect of such direct or indirect influence of judges on the reportability or not of their judgments.

In the first place, there is scepticism of the premise that judges can or will assess correctly which cases merit publication. Obviously, no-citation rules exacerbate the problem by removing the check on whether selection is being made properly. So, in this regard the Hon Mr Justice Jeffries, a member of the New Zealand Council of Law Reporting, has noted: “The basic premise of a judge judging his own work for the purposes of law reports is, in my view, far from ideal, but with the resources available for law reporting in New Zealand, I think unavoidable.” And in the United States, the same scepticism was expressed by Mr Justice Stevens.

In New Zealand, after interviewing the editors of both the New Zealand Law Reports and The Capital Letter, Latter noted that judges apply the designations quite differently. One editor suggested to the same author that such a designation “represents no more than the inevitable subjective (and often hasty) view of a judge about his own product, and that some judges are notoriously prone to mis-assessing the importance of their own judgments”.

Then too, in the United States, where selection lies directly in the hands of the judges, the fear has been voiced that a court may use the no-publication/no-citation rules deliberately to suppress law-making decisions. Indeed, it has been pointed out that, in some cases “it is impossible to believe that the court did not realise that it was creating law.” The House of Lords’ decision to adopt a no-citation rule does not of course have the same implications because the determination not to publish a decision is left to reporters and editors.

A further accusation has been that the unpublished decision which is robbed of its precedential value because it cannot be cited, considerably diminishes internal accountability. The inferior quality...
of the United States Circuit Courts' unpublished decisions, which are typically "truncated and elliptical", have been noted in this regard.49

While judicial modesty or vanity may lead to too few decisions of some judges becoming precedent and too many of others, is it not more invidious to leave the decision to others? In his evidence before the Simonds Committee, Goodhart had stated in this regard: "It must seem strange to anyone who has not been brought up under the present system to realise that so much of the work of the Judges depends for its permanent value on the choice of commercial firms."50

On the method of reporting in England, CG Moran, a reporter for the Law Journal Reports, had described for the Committee the circuitous path taken by a manuscript written by a Judge around the reporters: "The reporter for the Law Reports receives the manuscript first: 'he is the person entitled to have it', and then the Times Law Reports man'. The manuscript then came to Moran who would copy it for the rest.51

Clinch has added to the scenario which prevailed as follows: "Overall the picture of reporting practice in the 1930s gained from such evidence and that of others is of a small and active fraternity of information gatekeepers, seeking information on the worth of cases from whoever it could be obtained, and making decisions as to what information they will make available to the legal public in the law reports." The business of this group, Clinch has stressed, "was the selection and dissemination of large part of the law of this country".52

A natural corollary of a system of reporting is that judgments must be accessible. In a memorandum submitted to the Simonds Committee, Lord Goodhart had suggested the following points for preventing a delay in a judgment getting into the law reports or for not getting in at all: That every judgment delivered in a court of record be filed in transcript form in a central office; that an official be appointed to make a complete index of these judgments; that the revision of judgments by the judge or judges concerned be made within a week; and that any person desiring to, be entitled to purchase a copy.53

According to Goodhart the advantage of making available a transcript of every decision would be inter alia to enable the editor of the Law Reports to exercise his independent judgment as to what cases should be included. "At the present time", Goodhart stated, "the editor had to depend either on his own reporters or on such reports as the Times Law Reports".54 Although not referred to by Goodhart, it may be added that such a system would also provide a check on whether judges had correctly pruned out material which is of no law-making value.

It may be useful in what follows to turn to the history of law reporting in South Africa before attempting to suggest tentative proposals in regard to law reporting in South Africa.

THE HISTORY OF SOUTH AFRICAN LAW REPORTING

South Africa's general law consists of the received Roman–Dutch and English Common law, supplemented and amended by statutory law and case law. The authors, Hahlo and Kahn, have described the invocation of the doctrine of precedent in South Africa. As in other jurisdictions, these authors comment, the doctrine was given the judicial nod, despite voices of dissent, without much supporting reasoning.35 "The need for legal certainty, the protection of vested rights and the upholding of the dignity of the court", seemed to be obvious enough reasons for its adoption.56

Other reasons were the English background of many of the early judges and the fact that civil and criminal procedure was based on English law; and, not unexpectedly in these days too, case law provided "a safe anchorage amid a welter of frequently conflicting old authorities written in a foreign language and often difficult of access".57

South African cases have been regularly reported only since 1910 following a relatively long history of selective and sporadic reporting by individual judges or members of the Bar.58

In the Cape, such early collections included Watermeyer's Reports of the Cape Supreme Court for 1857 which was the first publication, and the only one for nine years thereafter; Buchanan's Reports, reported by James Buchanan (later Mr Justice) and Mr Justice EJ Buchanan (1868-9; 1873-9); and Menzies Reports of the same court for 1870, twenty years later. Menzies death. Hahlo and Kahn quote Professor Lee as stating that although Menzies Reports "are held in great esteem [they do not] have the formal perfection of reports prepared for contemporary publication".59

Other early series covering the Cape Supreme Court were Searle's Reports (1850-67), compiled from newspaper reports, the notes of CJ Wylde and records of the Supreme Court, by Mr Justice MW Searle (as he later became in 1910); Roscoe's Reports (1861-1867; 1871-1872; 1877-1878); and Foord's Reports (1880), which were revised by Sir JH de Villiers (then Chief Justice) who also delivered the judgments. Reports of cases decided in the Cape Supreme Court between the years 1880-94 were reported by Henry Juta.

The Cape Times, the first daily newspaper in the country, published reports of cases decided in the Cape Supreme Court between the years 1891-1910. Hahlo and Kahn state that the series contain many decisions not reported elsewhere at the time, but quote from the South African Law Journal of a "falling-off in standard" and cite a number of deficiencies. So, judges were not always afforded the opportunity of revision; they were often taken down by lay shorthand writers, sometimes inaccurately; lengthy judgments were given too cryptically.60 Other series were Juta's Weekly Reporter (1912-1914) and Juta's Daily Reporter (1916-1925).

For well over a decade from the time of their establishment, the Eastern Districts Court and Griqualand (Northern Cape) had no reports.

Reports of cases decided in the High Court of the Orange Free State, established in 1874, were compiled by AP de Villiers and edited by JN Eagle (1874-78). Between 1879 and 1887 decisions of the Orange Free State High Court, including those of Mr Justice Gregorowski, were reported in Dutch. No reports were published from 1888-1902. No doubt the war preoccupied people's minds at this time. Some cases of the late 1890s, however, are published in the Cape Law Journal. Reports of cases decided in the High Court of the Orange River Colony (1903-1909) were reported by SJ de Jager and RC Streeton.

In the Transvaal Colony, Mr Justice JG Kotze's High Court Reports covered cases during the period 1877-1881. Later, Kotze, as Chief Justice, continued to publish reports of the High Court of the South African Republic together with SH Barber and WA MacFadyen (1881-1892). Volume 1 (reported by Kotze) originally appeared in Dutch. Reports of the same court for 1893 were reported by Mr Justice JBM Hertzog (as he became in 1895) and translated from Dutch into English by JWS Leonard. Official Reports of the High Court of the South African Republic cover the years 1894-1899. However, the practice of
paid official reporters lasted only for this brief period, and as Hahlo and Kahn point out, volumes 5 and 6 are not "Official Reports" in the strict sense, being compiled from various sources by B de Korte. The first four volumes, which were in Dutch, were translated into English by WS Webber and Kotzé. In the Transvaal also, no reports appeared during the war years. The Leader Law Reports (1909-1910) published by the Transvaal Leader, a Johannesburg morning newspaper which merged with the Rand Daily Mail in 1915, contained reports of all cases decided in the Transvaal Supreme Court, Witwatersrand High Court, Transvaal Provincial Division and Witwatersrand Local Division.

The Natal Supreme Court, established in 1857, was served by the following series of reports: Phispson's Reports (1858-1859), Finnenmore's Notes and Digest of Natal Cases (1860-1867); and the Natal Law Reports (Old Series) (1867-1879) reported by WB Morcom; and the bridging series (1873-1879) between the old and the new series by RJ Finnenmore and AL Dulcken. The volumes of reports from the establishment of the court up until 1879 are scarce and seldom cited.

Specialised Reports included those covering decisions of the Black Appeal Courts, special Income Tax Courts and the Commissioner of Patents, and Water Courts.

In 1910 a single Supreme Court for South Africa, consisting of provincial and local divisions came into being together with the Appellate Division and law reporting in South Africa was placed on a surer footing. Reports of the decisions of the various divisions of the Supreme Court were contained in annual volumes. In 1947, the combined series of South African Law Reports commenced. In the same year, the comprehensive All South African Law Reports were published but after the appearance of the first quarterly part, the series was amalgamated with the South African Law Reports.

During these early years a number of digests of and indexes to the general series of Law Reports were commenced; Bisset and Smith's Digest of South African Case Law; Butterworths Permanent Index to SALR and Butterworths Index and Noter-Up to SALR (which was a companion to the Permanent Index) and the Prentice-Hall Consolidated Index.

Since the report of a decision published in the South African Law Reports appeared some six weeks to four months after it was delivered, the Prentice-Hall Weekly Legal Service appearing in weekly loose-leaf issues, arranged according to subject matter, was a useful tool. In addition to covering decisions reported in the Law Reports, it contained more decisions than the latter reports. However, according to Hahlo and Kahn, most of these additional reports were on insignificant points, or were merely illustrative of a settled legal rule.

Today the most important cases continue to be published in the general series. All judgments on constitutional issues are also reported in this series. Juta's Supreme Court Digest which appears within weeks of the delivery of a judgment fills the gap between new developments in the law and the publication of the general series. The high technical quality and comprehensiveness of the 1910-46 reports, as indeed, the present general series, should not be under-estimated. The same may also be said of the early, pre-1910 reports of individual judges and practitioners.

Our law reporting tradition is probably based on the English view of reporting which seeks only to report decisions which enunciate new principles of law, materially modify existing principles, settle doubtful ones or for some other reason are particularly instructive.

There has been no objection in South Africa to counsel invoking an unreported judgment. Of unreported cases in an earlier era, Hahlo and Kahn have written that most of the cases which were cited in court had been decided recently and were remembered because the judge or counsel had been involved in them. And speaking – also of this early period – of the decisions which went unreported in the South African Law Reports but which had found their way into the capacious Prentice-Hall series, these authors stated: "It must not be thought ... that in the view of most judges and practitioners all these decisions should have been reported in the Law Reports. They would say that a number of them should have been, but that the bulk can safely lie in the bosom of Prentice-Hall. Indeed, many private practitioners complain that the Law Reports contain too many cases that are of no use to them in their work." Today, unreported cases are often included in specialised textbooks, and a request for a case, which has gone unreported, to be published, or an expression of regret that a particular case has not been published, is frequently made by judges, practitioners and academicians.

As has been the case elsewhere, the dramatic increase in the courts' workload has not led to a significant increase in the number of decisions which are reported in the general series in South Africa. So, in 1968, the four volumes of the South African Law Reports contained 3072 pages. In 1994, the four volumes contained 3470 pages. Criminal law decisions which, since 1990, have been contained separately in the South African Criminal Law Reports made up a mere additional 1472 pages during the year 1990.

In South Africa, there is a trend towards the publication of specialised reports (or reports of special courts) although it has not been as substantial as in other jurisdictions. Such specialised reports, like that of the general series are commercial ventures. At present these include the South African Criminal Law Reports; the Industrial Law Reports, the Commercial Law Digest (purporting to be the "Reporter of the Unreported Judgment"); Current Commercial Cases; the South African Labour Law Reports; the South African Constitutional Law Reports; Butterworths Constitutional Law Reports; Burrell's Patent Law Reports and the South African Tax Cases Reports. In addition a well-known publisher is considering a new series of reports to contain cases of importance to the proposed family courts.

Counsel's well-established duty – and inclination – to cite all relevant authorities, including the unreported case, as a potential precedent, has fortunately not resulted in no-citation rules for South Africa. The fact that a judicial decision which is not reported does not affect its value as a precedent, has been stressed again and again.

In 1968, Hahlo and Kahn had complained of the difficulties encountered by reporters in obtaining copies of cases. So, according to these authors, "[i]t happens at times that after a copy for the records has been filed and the demands of the litigants have been satisfied, no copies are available for the proprietors of the law reports. In that event delays may occur in obtaining further copies for them. Why this difficulty cannot be ironed out by a direction by the judiciary that copies must always be available for the law reporters, is not clear.

It seems that today these difficulties have not been entirely surmounted and problems are still encountered by reporters in obtaining copies of judgments in some divisions.

A judge, or judges as the case may be, is required to advise on the reportability or not of their decisions. As elsewhere, it
A BALANCE SHEET

Mention has been made of the fact that despite the South African courts' increased caseload, there has been no corresponding increase in the annual number of reported cases in the general series. Consequently, there must be a considerable increase in the number of cases which are going unreported. Does this mean that there is a place for specialist reports in South Africa? Although it is clear that many judgments will appear in more than one of the above specialised series, for example, judgments on constitutional issues are being published by three publishing houses at present, the appearance of specialised series is preferable to important decisions remaining unreported. The ability to define a specialised subject area, with a readership sufficiently large to make the publication a commercial success, appears to be the main reason for initiating such a service today. For this reason then, in South Africa, where over-proliferation of reports has not occurred to the extent encountered in other jurisdictions, it seems that the publication of case law can safely be continued to be based on consumer needs.

An essential requirement of a system of reporting in which judges prune out material as being of no precedential value is that such material should nevertheless remain accessible; otherwise there may be no other practical way of becoming aware of it.

It seems therefore that there is a need for a central office in each division to provide reporters with copies of all decisions. In New Zealand, the Law Reporting Council has sought to remedy a similar deficiency by requiring that the Court of Appeal and High Court registrars send the editor of the New Zealand Law Reports a copy of every judgment of which a transcript is made, irrespective of whether the judge has designated it as not reportable. The publication of a general index to decisions, including those not reported would facilitate decisions being available to researchers, practitioners and the general public.

South Africa does not have a body with semi-official or official status to supervise law reporting such as the Council of Law Reporting for England and Wales or New Zealand. Would South Africa benefit by the creation of such a supervisory body, consisting of members of the bench, practitioners and academics?

As a result of access for the first time to the unpublished records of the Simonds Committee, Clinch has recounted an episode which does not reflect well on England’s Council of Law Reporting at a particular time in that body’s long history.

The Committee’s brief was to investigate law reporting in England. But the documents reveal that despite the vague appeals of members of the Council that law reporting be carried on in the interests of the profession, the real concern of the Council was in fact the “new and threatening competition” to the Law Reports by the publication of the All England Law Reports by Butterworths. The “confused establishment view” of the Council that the Law Reports had in some way become “official reports” and ought to be maintained at all costs, dominates the exchanges between members of the Council and Butterworths. Clinch shows how Butterworths came out of the pithy exchanges on the question of competition with the more coherent argument. So, according to the Chairman of the Committee, “[w]hat is going to happen if the result of your under-selling and competing with the Law Reports is disaster to them? It does concern you I suppose that an organization built up in 1865 might, if you competed with it too successfully be brought to a disastrous end”. The Butterworths reply is “Is it our fault?”

Should a body to supervise and advise on reporting of law be appointed in South Africa, it is to be hoped that it would do so in a more impartial and realistic manner than that revealed by the Incorporated Council of Law Reporting in England. The suggestion of Laster that s 12(3) of the New Zealand Council of Reporting Act of 1938 which gives the Council of Law Reporting in that country a monopoly in law reporting, be repealed, also sounds as a warning. According to Laster, while such repeal may have several disadvantages, including a proliferation of specialist series, this would be preferable to the present inadequate system of law reporting. In the United States, deregulation of law reporting has frequently been suggested. Perhaps at the end of the day, the only very considerable advantage of the appointment of such a body would be in relation to its supervision of copies of judgments being made easily accessible.

It could criticise and probe in those areas where reporters and editors may be loath to do so. Another advantage is of course that the Chief Justice would presumably be chairman of such a body rather than being linked to a particular law reporting agency.

Note:

This matter was previously raised in Consultus and we are greatly indebted to Prof Van Blerk for the meticulous research carried out and the extremely interesting and informative article produced by her. We suggest that she has laid a firm basis for further debate on this subject. As far as we are concerned, it is still considered desirable that a body to supervise and advise on law reporting and law reports be established. It is therefore suggested that this matter be taken further by the Minister of Justice. Meanwhile, readers are invited to make use of Consultus to air their views on this very important topic.

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Footnotes


2 For the most comprehensive exposition of law reporting in this country, see HR Hahlo and Ellison Kahn South African Legal System and Its Background (1968) at 282ff.


4 Ibid at 9.

5 The question is entirely separate from a further important question, namely, whether in the new South Africa, there should be a binding system of precedent at all.

6 Certain provisions in chapter 3 were consciously modelled on examples from other jurisdictions.

7 A natural corollary is that reporters and editors of law reports should also have unhindered access to judge-made law. In this regard, see further below.


9 See Hahlo and Kahn op cit at 283.


12 English cases have been “officially” report­ed only since 1865, following a long history of whimsical and haphazard reporting by legal entrepreneurs. For a short history of English law reporting, see inter alia Showell Rogers “On the Study of Law Reports” (1897) 13 Law Quarterly Review 250ff.


16 The President of the Court of Appeal in New Zealand has expressed this concern as follows: “The basic problem is that the output of judgments from all Courts has increased enormously, far out of proportion to the limited increased space allowed by the division of the New Zealand Law Reports into two annual volumes”: see Laster op cit at 563 n 4.

17 See Tunkel op cit at 1046.

18 See Daniel Laster Goodhart op cit at 29.

19 The article was subsequently published in (1939) 217 Law Quarterly Review 29. The hitherto unpublished documents of the Committee and its proceedings are dealt with by Peter Clinch in “The Establishment v Butterworths” (1990) 19 Anglo-American Law Review 209.

20 It ought to be noted that Goodhart was pleading for greater rationalisation and not for limited publication of reports.

21 See Clinch op cit at 236.

22 ibid at 238; 236.

23 Karlen op cit at 88.

24 See Laster op cit at 577.

25 The New Zealand Council of Reporting Act 1938 (s 12(3)) effectively gives the New Zealand Council of Law Reporting a monopoly on publishing by providing that “no person, firm or company other than the Council shall publish a new series of reports of decisions of the Supreme Court or Court of Appeal without the consent of the Council”: see Laster op cit 574 and n 72. See Laster op cit at 577.


28 Spiller op cit at 79.

29 This quotation is used by Tunkel op cit at 1048.

30 See Roderick Munday “The Limits of Citation Determined” (1983) Law Society’s Gazette 1337 at 1337.

31 (1983) 2 AC 192; 1 All ER 564.

32 The idea of a ban on the citation of unreported cases in England is not new. Thus Monday (op cit at 1338) has written of Sir Frederick Pollock’s allusion to this possibility and of Professor Gower’s blunt suggestion that “the rule should be that no unpublished judgment is authoritative and quotable and the transcripts should be destroyed... there are quite enough reported cases without our having to concern ourselves with unreported ones”. There had also previously been judicial warnings over extensive citation of unreported judgments.

33 Roberts Petroleum Ltd at 567.


35 See Harrison op cit at 168. The suspicion was also that the House of Lords’ “testiness on being asked to read unreported judgments was its alarm at the overwhelming possibilities of data retrieval systems. While expressly singling out for criticism the needless citation of unreported cases, Lord Diplock had noted also that “unreported judgments which have been delivered since the beginning of 1980 are now also included in the computerised data base known as Lexis”: Tunkel op cit at 1048.

36 This practice has been followed in many Supreme Courts as well.


38 See Reynolds and Richman “Non-Precedent­ial Precedent” at 1188. In this regard the Fifth Circuit has adopted the most radical approach: In certain circumstances, this circuit can decide many of its cases without any judgment at all. Thus “not only is no opinion reported, none is even authored”: Dunn op cit at 130. The rules have been challenged as a violation of the United States Equal Protection and Due Process clause but with no success to date: Dunn op cit at 143.

39 An argument for the prohibition of citation of unpublished decisions is that cost-savings associated with limited publication would be lost if the no-citation rule did not go hand in hand with the no-publication rule. Thus savings in judicial resources would vanish because judges would feel obliged to draft more extensive judgments if unpublished decisions could be cited: Reynolds and Richman “Non-Precedential Precedent” at 1180.

40 See Laster op cit at 581.

41 Although copies can be obtained from the respective court registries, the difficulty and increasing costs in obtaining such copies – should the case have been heard of through the grapevine – leaves counsel in a quandary: See Laster op cit 585.

42 Cited in Laster op cit at 580 n 108.

43 Ibid at 581 n 120.

44 “[A] rule which authorises any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product”: Cited in Reynolds and Richman “Non-Precedential Precedent” at 1192.

45 See Laster op cit at 579 n 105.

46 Ibid at 581 n 119.

47 Reynolds and Richman “Non-Precedential Precedent” at 1201.

48 Ibid at 1204.

49 See Reynolds and Richman “An Evaluation” at 601.

50 Cited in Clinch op cit at 234-235.

51 Ibid at 227.

52 Ibid at 228.

53 See Clinch op cit at 234.

54 Ibid.

55 Hahlo and Kahn op cit at 242.

56 Ibid at 243.

57 Ibid at 243-244.

58 See The Table of Law Reports in Hahlo and Kahn op cit at 293-300 and Hosten, Edwards, Nathan and Bosman Introduction to South African Law and Legal Theory at 873-879.

59 Hahlo and Kahn op cit 293.

60 Ibid at 294.

61 Ibid at 297.

62 Ibid at 285.

63 Ibid at 286-287.

64 Ibid at 285. These complaints turned mainly on criminal appeals and reviews from magistrates’ courts’ verdicts.

65 So, according to Lord Guthrie in Leighton v Harland & Wolff Ltd: “The authority of a case depends not upon whether it is to be found in a series of reports but upon the fact that it is a judicial decision”: (Cited in Laster op cit at 578).

66 Hahlo an Kahn op cit at 286.

67 See above at 16. On the other hand, there is a need for the decisions of the proposed family courts to be reported. A further consideration in this regard is whether there is not also a need for other lower court decisions to be reported.
The problems which specialised reports present in countries where a plethora of overlapping decisions has appeared, have frequently been pointed out. The following have been noted by Laster op cit at 577-578: Where specialised reports contain decisions which have not been reported in the general series, counsel who do not have access, or can only obtain access at extra cost, are disad ventaged. This problem is exacerbated when the inclusion of certain types of decisions in a specialised series weighs against their inclusion in the general reports. In such a case, practitioners may find that increasingly more decisions are only included in specialised series. Obviously, duplication and unnecessary expense is incurred where the general reports and one or more specialised reports contain the same decision. Additional research is also required since the various reports must be compared for fear that there might be a divergence between them. Then too, it has been noted, important aspects of a case, for example, one which is of precedential value both for procedural law and company law, may be lost where the case is published only in a specialised series on company law. Laster (op cit at 578 n 93) states that this problem is less likely to occur in a general series, where headnotes, catchlines and indexes are given the greatest attention.

See above.

The strength of judicial precedent

I have never felt the tyranny of precedent. It is a tie, certainly, but so is the rope that mountaineers use so that each gives strength and support to the others. The proper handling of precedent is part of judicial craftsmanship; the judge must learn how to use it and in particular how to identify the rare occasions when it is necessary to say that what judges have put together they can also put asunder. (Lord Devlin in The Judge)